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

REPORT OF THE PANEL

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

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS513/R.

LIST OF ANNEXES

ANNEX A

WORKING DOCUMENTS OF THE PANEL

Contents		Page
Annex A-1	Working Procedures of the Panel	4
Annex A-2	Additional Working Procedures on Business Confidential Information	9
Annex A-3	Interim Review	11

ANNEX B

ARGUMENTS OF THE PARTIES

Contents		Page
Annex B-1	Integrated executive summary of the arguments of Turkey	20
Annex B-2	Integrated executive summary of the arguments of Morocco	42

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

Contents		Page
Annex C-1	Integrated executive summary of the arguments of the European Union	59
Annex C-2	Integrated executive summary of the arguments of Japan	61
Annex C-3	Integrated executive summary of the arguments of the United States	64

ANNEX A

WORKING DOCUMENTS OF THE PANEL

Contents		Page
Annex A-1	Working Procedures of the Panel	4
Annex A-2	Additional Working Procedures on Business Confidential Information	9
Annex A-3	Interim Review	11

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 22 August 2017

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

General

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

3. The parties and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panel Concerning Business Confidential Information adopted by the Panel.

4. The Panel shall meet in closed session. The parties and third parties shall be present at the meetings only when invited by the Panel to appear before it.

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

Submissions

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

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

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

9. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

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

Questions

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

Substantive meetings

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

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

a. The Panel shall invite Turkey to make an opening statement to present its case first. Subsequently, the Panel shall invite Morocco to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the last day of the meeting.

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

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

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

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

a. The Panel shall ask Morocco if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite Morocco to present its opening statement, followed by Turkey. If Morocco chooses not to avail itself of that right, the Panel shall invite Turkey to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party

the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the last day of the meeting.

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

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

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

Third parties

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

16. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

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

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

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

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

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

Descriptive part

18. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve

as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

19. Each party shall submit an integrated executive summary of the facts and arguments as presented to the Panel in its written submissions, oral statements and, where relevant, responses to questions, in accordance with the timetable adopted by the Panel. Each integrated executive summary shall be limited to no more than 30 pages. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

20. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

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

Interim review

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

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

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

Service of documents

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

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

b. Each party and third party shall file 2 paper copies of all documents it submits to the Panel. Two paper copies of all exhibits shall be filed. If, instead, Exhibits are submitted on CD-ROM, DVD, or USB stick, 4 copies shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD, a USB stick, or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to XXX@wto.org and XXX@wto.org and such other WTO Secretariat staff notified to the parties and third parties in the course of the proceedings. If a CD-ROM, DVD, or USB stick is provided, it shall be filed with the DS Registry. In addition, each party and third party is invited to submit all documents through the Digital Dispute Settlement Registry (DDSR) within 24 hours following the deadline for the filing of the paper versions.

d. Each party shall serve only electronic copies of any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties, only electronic copies of its written submissions in advance of the substantive meeting with the Panel, unless a third party requests service of a paper copy. Each third party shall serve on all other parties and third parties only electronic copies of any document submitted to the Panel, unless another third party requests service of a paper copy. Each party and third party

shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

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

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

ANNEX A-2

ADDITIONAL WORKING PROCEDURES ON BUSINESS CONFIDENTIAL INFORMATION

Adopted on 22 August 2017

The following procedures apply to any business confidential information (BCI) submitted in the course of the Panel proceedings in DS513.

1. For the purposes of these Panel proceedings, BCI includes
 - a. any information designated as such by the party submitting it that was previously treated as confidential by the investigating authority in the anti-dumping investigation at issue in this dispute unless the Panel decides it should not be treated as BCI for purposes of these Panel proceedings based on an objection by a party pursuant to paragraph 3 below.
 - b. any other information designated as such by the party submitting it, unless the Panel decides it should not be treated as BCI for purposes of these Panel proceedings based on an objection by a party pursuant to paragraph 3 below.
2. Any information that is available in the public domain may not be designated as BCI. In addition, information previously treated as confidential by the investigating authority in the anti-dumping investigation at issue in this dispute may not be designated as BCI if the person who provided the information in the course of that investigation agrees in writing to make the information publicly available.
3. If a party or third party considers that information submitted by the other party or a third party should have been designated as BCI and objects to its submission without such designation, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, together with the reasons for the objection. Similarly, if a party or third party considers that the other party or a third party designated information as BCI which should not be so designated, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, together with the reasons for the objection. The Panel, in deciding whether information subject to an objection should be treated as BCI for purposes of these Panel proceedings, will consider whether disclosure of the information in question could cause serious harm to the interests of the originator(s) of the information.
4. No person may have access to BCI except a member of the Secretariat assisting the Panel or the Panel, an employee of a party or third party, or an outside advisor to a party or third party for the purposes of this dispute.
5. A party or third party having access to BCI in these Panel proceedings shall not disclose that information other than to persons authorized to have access to it pursuant to these procedures. Any information designated as BCI under these procedures shall only be used for the purposes of this dispute. Each party and third party is responsible for ensuring that its employees and/or outside advisors comply with these procedures to protect BCI.
6. An outside advisor of a party or third party is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the product(s) that was/were the subject of the investigation at issue in this dispute, or an officer or employee of an association of such enterprises. All third party access to BCI shall be subject to the terms of these working procedures.
7. The party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains Business Confidential Information", and each

page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page. In case of exhibits, the party submitting BCI in the form of an Exhibit shall mark it as (BCI) next to the exhibit number (e.g. Exhibit TUR-1 (BCI)). Should the party submit specific BCI within a document which is considered to be public, the specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]".

8. Any BCI that is submitted in binary-encoded form shall be clearly marked with the statement "Business Confidential Information" on a label of the storage medium, and clearly marked with the statement "Business Confidential Information" in the binary-encoded files.

9. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. The versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 7.

10. Any person authorized to have access to BCI under the terms of these procedures shall store all documents containing BCI in such a manner as to prevent unauthorized access to such information.

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

12. Submissions containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

ANNEX A-3

INTERIM REVIEW

1 INTRODUCTION

1.1. In accordance with Article 15.3 of the DSU, this section of the Panel Report sets out our response to the parties' requests made at the Interim Review stage. Our assessment of the parties' requests and comments is informed by the following considerations:

- a. The Interim Review stage is not an opportunity for parties to reargue the case or to "introduce new legal issues and evidence or to enter into a debate with the Panel".¹
- b. The descriptions of the arguments of the parties in our Report are not meant to and do not reflect the entirety of the parties' arguments. Rather, they highlight the principal points of those arguments that we considered relevant to our resolution of the issues in dispute and addressed in our findings.² Finally, we note that the executive summaries of the arguments of the parties, set out in Annexes B1-B2, were prepared by the parties themselves, and reflect, or should reflect, the judgement of each party as to its main arguments.
- c. A panel may develop its own reasoning in reaching its findings, provided that it does so consistently with the requirements of due process. A panel is not required to "test" its intended reasoning with the parties in advance.³

1.2. Where appropriate, we have modified aspects of the Report in the light of the parties' requests and comments. Due to changes as a result of our review, the numbering of paragraphs and footnotes in the Final Report has changed from the Interim Report. The text below refers to the numbers in the Interim Report, with the numbers in the Final Report in parentheses for ease of reference, if different.

1.3. In addition to the modifications specified below, the Panel also corrected a number of typographical and other non-substantive errors throughout the Report, including some identified by the parties.

2 TURKEY'S SPECIFIC REQUESTS FOR REVIEW

2.1 Paragraph 7.64

2.1. Turkey asks the Panel to clarify that Morocco did not raise due process concerns with respect to Turkey's claim under Article VI:6(a) of the GATT 1994 and to add a new footnote in this regard.⁴ Morocco opposes the request. Should the Panel accede to the request, Morocco asks the Panel to also add that Morocco argued throughout the proceedings that the Article VI:6(a) claim is outside the Panel's terms of reference.⁵ We decline Turkey's request. Paragraph 6 of our Working Procedures does not require that a party object to the late submission on due process grounds. The requested modification is therefore not necessary for our findings.

¹ Panel Report, *India – Quantitative Restrictions*, para. 4.2.

² A panel has "the discretion to address explicitly in [its] reasoning only the arguments and evidence [it] deem[s] necessary to resolve a particular claim and support the reasoning [it is] required to provide". (Panel Report, *India – Agricultural Products*, para. 6.7 (referring to Appellate Body Reports, *EC – Poultry*, para. 135; and *US – COOL*, para. 414)).

³ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 177.

⁴ Turkey's request for interim review, para. 2.1.

⁵ Morocco's comments on Turkey's request for interim review, para. 3.

2.2 Paragraph 7.94 (7.96)

2.2. Turkey asks the Panel to clarify this paragraph and proposes two modifications.⁶ Turkey suggests referring to "a certain" instead of "an increasing" number of alleged differences. It also requests adding a reference to its explanations, made before us, as to why those differences did not demonstrate that the documents at issue pertained to unreported export sales. Morocco disagrees with both requests.⁷

2.3. We made the linguistic change proposed by Turkey, but otherwise decline Turkey's request. The paragraph at issue addresses Morocco's arguments. We therefore do not see any need to also include a reference to Turkey's arguments. In any event, we recall paragraph 1.1(b) above. Any references to the arguments of the parties in our Report are not meant to and do not duplicate the parties' executive summaries. Rather, it is for Turkey to include in its executive summary any arguments that it wishes the Panel Report to reflect.

2.3 Paragraph 7.98 (7.100)

2.4. Turkey requests that the Panel clarify this paragraph and proposes a modification.⁸ Morocco does not consider the proposed change to be necessary and proposes an additional modification, should the Panel accede to Turkey's request.⁹ Turkey's proposed language more clearly reflects our intent; we therefore modified the paragraph accordingly. We reject Morocco's contingent request as it would effectively undo the clarification that Turkey seeks.

2.4 Paragraph 7.117 (7.119)

2.5. Turkey refers to the Panel's reference to "a number of concerns" that Morocco's assertion raised and invites the Panel to elaborate on these "concerns" in order to facilitate Morocco's implementation.¹⁰ Morocco disagrees.¹¹ We do not consider that our findings need further elaboration with a view to implementation. As we found, "in any event", the disclosure of the names at issue would not, in and of itself, have been sufficient for purposes of Morocco's compliance with its Article 6.9 obligation.

2.5 Footnote 217 (224) and paragraph 7.150 (7.152)

2.6. Turkey requests that the Panel add a few words to footnote 217 (224) to capture fully the basis for Turkey's interpretation of the term "establishment" in footnote 9 to Article 3 of the Anti-Dumping Agreement and Article VI:6(a) of the GATT 1994.¹² Morocco makes no comment on Turkey's request. We have decided to accommodate Turkey's request.

2.7. Turkey also requests the Panel to refer in footnote 217 (224) to the arguments that Turkey made in paragraph 8.27, rather than in paragraph 8.26, of its first written submission.¹³ Morocco makes no comment on Turkey's request. We consider that Turkey's arguments set out in both paragraph 8.26 and paragraph 8.27 of its first written submission are relevant to the content of footnote 217 (224). We therefore accept Turkey's request to add a reference to paragraph 8.26 in that footnote but decline Turkey's request to delete the reference to paragraph 8.27.

2.6 Paragraph 7.258 (7.260)

2.8. Turkey requests the Panel to amend this paragraph by adding to it the basis for Turkey's argument that "if the authority is not aware of other relevant factors affecting prices, it must say so explicitly in its published report". In particular, Turkey asks us to add a reference to the Panel Report in *EC – Bed Linen (Article 21.5 – EC)* that Turkey made in paragraph 9.10 of its first

⁶ Turkey's request for interim review, paras. 2.3-2.5.

⁷ Morocco's comments on Turkey's request for interim review, paras. 4-7.

⁸ Turkey's request for interim review, para. 2.6

⁹ Morocco's comments on Turkey's request for interim review, para. 8.

¹⁰ Turkey's request for interim review, para. 2.8.

¹¹ Morocco's comments on Turkey's request for interim review, para. 9.

¹² Turkey's request for interim review, paras. 2.9-2.10.

¹³ Turkey's request for interim review, paras. 2.9-2.10.

written submission.¹⁴ Morocco objects to Turkey's request, arguing that Turkey's citation to that case was not made in the context of its claims regarding the relevant factors affecting prices under Article 3.4. Morocco contends that paragraph 9.10 of Turkey's first written submission discusses not this issue but the requirement to assess all factors listed in Article 3.4 in general.¹⁵

2.9. We consider that this paragraph adequately reflects Turkey's argument at issue, and therefore reject Turkey's request.

2.7 Paragraph 8.8

2.10. Turkey requests us to reconsider our decision to deny Turkey's request to suggest to Morocco that it should revoke its measure.¹⁶ In any event, Turkey requests the Panel to modify the first sentence of that paragraph to reflect more accurately the basis for its request.¹⁷ In addition, should the Panel maintain its decision to refrain from making a suggestion, Turkey asks the Panel to indicate the grounds for rejecting Turkey's request. Morocco disagrees with Turkey's requests.¹⁸ In its view, the Panel's explanation of the discretionary nature of Article 19.1 of the DSU already sets out the reason for rejecting Turkey's request. Moreover, it is for the implementing Member to choose the means of implementation and any suggestions would, in any case, not be binding.

2.11. We have modified the text of paragraph 8.8 to better reflect Turkey's position. Nevertheless, we maintain our decision to deny Turkey's request for a suggestion, as elaborated further in paragraphs 8.8 and 8.9.

3 MOROCCO'S SPECIFIC REQUESTS FOR REVIEW

3.1 Paragraph 7.21

3.1. Morocco asks the Panel to supplement its description of Morocco's arguments.¹⁹ Turkey argues that these arguments were made too late in the proceedings but does not oppose the request.²⁰ We recall paragraph 1.1(b) above and on this basis decline Morocco's request.

3.2 Paragraph 7.70

3.2. Morocco states that it has never used the word "aspirational" in its argumentation regarding Article 5.10, and requests the Panel to modify this paragraph to reflect the language used by Morocco.²¹ Turkey does not oppose Morocco's request.²² We note that Morocco stated that the term "shall" in Article 5.10 can denote an intention or "aspiration" as opposed to a rigid obligation.²³ We have, however, decided to accommodate Morocco's request, and made a corresponding modification in paragraph 7.74 of the Report.

3.3 Paragraph 7.76

3.3. Morocco requests the Panel to include in this paragraph certain additional arguments Morocco has made.²⁴ Turkey does not oppose Morocco's request.²⁵ We consider that the arguments that Morocco asks us to include are not relevant to our evaluation and findings and therefore decline Morocco's request.

¹⁴ Turkey's request for interim review, para. 2.11.

¹⁵ Morocco's comments on Turkey's request for interim review, para. 10.

¹⁶ Turkey's request for interim review, para. 2.13.

¹⁷ Turkey's request for interim review, para. 2.14.

¹⁸ Morocco's comments on Turkey's request for interim review, paras. 12-17.

¹⁹ Morocco's request for interim review, para. 3.

²⁰ Turkey's comments on Morocco's request for interim review, paras. 2.1-2.2.

²¹ Morocco's request for interim review, para. 5.

²² Turkey's comments on Morocco's request for interim review, para. 2.3.

²³ Morocco's first written submission, paras. 42-43.

²⁴ Morocco's request for interim review, para. 4.

²⁵ Turkey's comments on Morocco's request for interim review, paras. 2.4-2.5.

3.4 Paragraph 7.80

3.4. Morocco requests us to supplement the factual description by adding that in the preliminary determination the MDCCE (i) had noticed a discrepancy of 10,000 tonnes between the sales reported by the Turkish producers and the official import statistics, (ii) considered that these missing sales could originate from non-participating Turkish producers, and (iii) thus established an "all others" anti-dumping rate on Turkish producers other than Erdemir Group and Colagoklu.²⁶ Turkey opposes Morocco's request.²⁷

3.5. We decline Morocco's request. In the preliminary determination, the MDCCE simply listed 29,028 tonnes of import volume from Turkey for 2012 and established an "all others" rate for exporters from the European Union and Turkey.²⁸ The preliminary determination does not demonstrate that the MDCCE specifically "noticed" the discrepancy at issue, linked it to unknown Turkish producers and "therefore" imposed an "all others" rate on them. Rather, apart from merely listing the total import volume, the preliminary determination is silent on the issue of the discrepancy, its origin and the reason for generally imposing an "all others" rate on Turkish and European Union producers.

3.5 Paragraph 7.83

3.6. Morocco requests the Panel to also refer to the MDCCE's visit to the Moroccan Customs authority to investigate the issue of unreported sales during the investigation.²⁹ Turkey opposes Morocco's request.³⁰ As Turkey observes, in paragraph 7.83 we specifically refer to the MDCCE's lack of engagement with the Turkish producers. We have, nonetheless, added a footnote to reflect the MDCCE's description of the conduct of the investigation.

3.6 Paragraph 7.84

3.7. Morocco requests the Panel to correct the date of the issuance of the draft final determination from 21 June 2014 to 20 June 2014.³¹ It refers to Exhibit MAR-3 that contains emails indicating that the disclosure was sent to several interested parties on 20 June 2014. Turkey refers to Exhibit TUR-27 and observes that the disclosure was sent to another recipient on 21 June 2014.³² The MDCCE therefore sent the disclosure to different interested parties on different dates. Turkey suggests that the Panel clarify this point, or at least refer to both dates.

3.8. We are not persuaded by Turkey's arguments. In our view, Exhibit MAR-3 demonstrates that the MDCCE made the disclosure on 20 June 2014 to four interested parties, including to the CIB (through its external legal advisors)³³, through four separate emails. Exhibit TUR-27 contains an email to the same external legal advisors of the CIB, dated 21 June 2014. Its text is identical to the email of the previous day with the exception that it does not indicate any attachment. We are not convinced that the email of 21 June 2014 constituted any disclosure, much less one to a different interested party. We have therefore made the change requested by Morocco, as well as consequential changes in the table of "exhibits referred to in this report" and paragraphs 7.58 and 7.93.

3.7 Paragraph 7.91

3.9. In respect of the Panel's finding that the MDCCE did not affirmatively determine that the Turkish producers had failed to report the allegedly missing export sales at issue, Morocco requests us to essentially reverse our findings.³⁴ Morocco argues that we "misinterpret[] both the MDCCE's statement in the final determination and Morocco's arguments in these proceedings" as to

²⁶ Morocco's request for interim review, para. 6.

²⁷ Turkey's comments on Morocco's request for interim review, paras. 2.6-2.9.

²⁸ Preliminary determination, (Exhibit TUR-6), tables 4 and 17-18.

²⁹ Morocco's request for interim review, para. 6.

³⁰ Turkey's comments on Morocco's request for interim review, paras. 2.10-2.14.

³¹ Morocco's request for interim review, para. 8.

³² Turkey's comments on Morocco's request for interim review, para. 2.15.

³³ The recipients of that email are [[***]] and [[***]], the subject line reads "Détermination final-ADP tôles laminées à chaud ([[***]])/CIB)" and as attachment it indicates "Rapport final-tôles-VNC.pdf".

³⁴ Morocco's request for interim review, paras. 9-11.

whether or not the MDCCE affirmatively found that the Turkish producers had failed to report these sales at issue.³⁵ Turkey opposes Morocco's request.³⁶

3.10. As Morocco argues in its request for interim review, and as already reflected in our findings in paragraph 7.91, the MDCCE made an affirmative finding that the producers had failed to report the export sales at issue in its draft final determination. The MDCCE repeated that statement in paragraph 58 of the final determination, but in paragraph 59 went on to address the Turkish producers' explanations and evidence provided in response to the draft final determination.

3.11. On this basis, the MDCCE concluded in paragraphs 60 and 61 of its final determination:

Concernant cet aspect et au vu des renseignements dont il dispose, le MDCCE estime que les renseignements fournis par les exportateurs turcs ne permettent pas de démontrer clairement si ces transactions correspondent bien à celles déclarées par les exportateurs turcs ou s'il s'agit d'opérations d'exportation vers le Maroc distinctes par rapport à celles rapportées dans leurs réponses aux questionnaires d'enquête.

Face à cette situation de doute et d'incertitude sur cette question, le MDCCE maintient sa décision d'établir ses conclusions sur la base des meilleurs renseignements disponibles.³⁷

3.12. We disagree with Morocco that the MDCCE's statements at paragraphs 60 and 61 of its final determination are "not to be read to mean that there was uncertainty as to whether the MDCCE considered that the Turkish producers had reported all their sales or not".³⁸ The MDCCE's "doubt and uncertainty" did not concern the "evidence", or its "credibility and relevance", as Morocco appears to suggest.³⁹ The MDCCE's determination cannot be clearer: The "doubt and uncertainty" concerned the "question" whether the export sales at issue had been reported or not. Given its "doubt and uncertainty" in this regard, the MDCCE decided to continue resorting to facts available. We therefore decline Morocco's invitation to read the MDCCE's determination in any other way than according to its express terms.

3.13. Morocco also considers that our findings misinterpret its arguments in these proceedings as to whether the MDCCE had made the affirmative determination in question. Morocco relies on its statements that the MDCCE "was unable to conclude" that certain sales had been made, that the explanations given by the producers "did not explain away the discrepancy", that "the MDCCE could not conclude" that Erdemir Group and Colakoglu had in fact "reported all of their sales to Morocco", that "the evidence before the MDCCE supported the conclusion that they had not" done so, and that "the MDCCE properly considered that the Turkish producers had not cooperated".⁴⁰ None of these statements, however, demonstrates that Morocco had in fact argued that the MDCCE had affirmatively determined that the producers had failed to report the export sales at issue. On this basis, we therefore consider our finding that Morocco did not argue "that the MDCCE made any such determination" to be factually correct. This notwithstanding, we have slightly modified the sentence at issue.

3.8 Paragraph 7.93

3.14. Morocco observes that its arguments in respect of the verifications are not reflected in our description or analysis and asks us to include certain of its arguments in this regard.⁴¹ Turkey disagrees with Morocco's request.⁴² On reflection, we have decided to address Morocco's arguments concerning the issue of verifications, adding paragraphs 7.94 and 7.95 in the Final Report.

³⁵ Morocco's request for interim review, para. 9.

³⁶ Turkey's comments on Morocco's request for interim review, paras. 2.16-2.20.

³⁷ Final determination, (Exhibit TUR-11), paras. 60-61. (emphasis added)

³⁸ Morocco's request for interim review, para. 9. (emphasis added)

³⁹ Morocco's request for interim review, para. 9.

⁴⁰ Morocco's request for interim review, para. 10.

⁴¹ Morocco's request for interim review, para. 12.

⁴² Turkey's comments on Morocco's request for interim review, paras. 2.21-2.25.

3.9 Paragraph 7.99 (7.101)

3.15. Morocco requests the Panel to make a factual correction.⁴³ Turkey agrees with Morocco's request.⁴⁴ We have made the requested change.

3.10 Paragraph 7.100 (7.102)

3.16. Morocco requests the Panel to supplement additional factual information and a reference to the "understanding" that the MDCCE, in Morocco's view, derived from the CIB's submissions during the investigation.⁴⁵ Turkey does not object to the first but to the second part of the request.⁴⁶ We decline to make any of the proposed changes, as they are not necessary for our findings. The latter part of this request in any event concerns additional arguments of Morocco; in this regard, we recall paragraph 1.1(b) above.

3.11 Paragraph 7.116 (7.118)

3.17. Morocco asks us to add the term "draft" when referring to the "final determination" in the first sentence of that paragraph.⁴⁷ Morocco submits that it relied on the final determination in its arguments to us "only to explain the MDCCE's views on the disclosure comments and ... its decision to continue relying on facts available", rather than to suggest that the final determination itself (also) disclosed the essential facts at issue.⁴⁸ Turkey disagrees with Morocco's request.⁴⁹

3.18. We are not persuaded by Morocco's characterization of its arguments. Morocco expressly and repeatedly relied on the final determination in arguing that it had disclosed the essential facts at issue, for example – and as referenced in footnote 169 (176) of our report – in paragraphs 137-139 of its first written submission⁵⁰ and in paragraphs 102-105 of its second written submission.⁵¹ Other parts in its first and second written submission further confirm our understanding that Morocco referred to the draft final determination and the final determination as the means through which the MDCCE had allegedly disclosed the essential facts.⁵² We therefore decline Morocco's request and do not modify the text as indeed we mean to address Morocco's arguments pertaining to the MDCCE's final determination. We have, however, underlined certain words to clarify which arguments of Morocco we address.

3.12 Footnote 206 (213) to paragraph 7.146 (7.148)

3.19. Morocco requests that the Panel move the text in this footnote to the main body of the Report as Morocco considers that text to form an important part of the Panel's reasoning.⁵³ Turkey disagrees

⁴³ Morocco's request for interim review, para. 13.

⁴⁴ Turkey's comments on Morocco's request for interim review, para. 2.27.

⁴⁵ Morocco's request for interim review, para. 14.

⁴⁶ Turkey's comments on Morocco's request for interim review, paras. 2.28-2.30.

⁴⁷ Morocco's request for interim review, paras. 15-17.

⁴⁸ Morocco's request for interim review, para. 35. (emphasis omitted)

⁴⁹ Turkey's comments on Morocco's request for interim review, paras. 2.31-2.33.

⁵⁰ In paragraph 137 of its first written submission, Morocco argued that it had disclosed the precise basis for its decision to resort to facts available in the draft final determination. In paragraph 138, Morocco then continued that "[t]he MDCCE further clarified its position in the Final Determination", citing paragraphs 60 and 61 of the final determination, before concluding in the following paragraph that "[i]t is thus clear that the MDCCE disclosed the precise basis for its decision to resort to facts available".

⁵¹ In paragraphs 102-105 of its second written submission, Morocco argued that it disclosed the essential facts through a summary. In this regard, Morocco quotes first from the draft final determination, then from the final determination and concludes that "[t]his disclosure provided a summary of the missing sales for purposes of Article 6.9". Referring to the same paragraphs, Morocco reiterated in paragraph 68 of its opening statement at the second meeting of the Panel: "[a]s Morocco explained, the Ministry provided such a summary of the missing sales in the Draft and Final Determination". (fns omitted)

⁵² In paragraph 141 of its first written submission, Morocco argued that "the MDCCE disclosed the essential facts which it used to replace the missing information. In the Final Determination, the MDCCE stated that ...". (We did not include a reference to paragraph 141 in the footnote 169 (176) of our Report, as this paragraph refers to a set of essential facts that was not at issue in Turkey's claim.) Similarly, at paragraphs 97 and 98 of its second written submission, Morocco relied on and quotes from the final determination to argue that it "complied fully with the requirement of Article 6.9".

⁵³ Morocco's request for interim review, para. 19.

arguing that Morocco's requested change would disrupt the flow of the Panel's analysis.⁵⁴ We consider that as the footnote itself mentions, the issue described in the footnote is one that the Panel does not need to address in this dispute and is thus suitably placed in a footnote. We therefore reject Morocco's request.

3.13 Paragraph 7.158 (7.160)

3.20. Morocco requests that the Panel include in this paragraph certain additional arguments Morocco had made.⁵⁵ Turkey partly objects to Morocco's request.⁵⁶ We do not consider it necessary to reflect these arguments in this paragraph as these arguments are not integral to our evaluation and findings. The parties are free to reflect their arguments in their executive summaries, annexed to the final Report, as they deem fit (see paragraph 1.1(b) above). We therefore decline to make the additions proposed by Morocco.

3.14 Paragraph 7.182 (7.184)

3.21. Morocco requests the Panel to delete the following sentence in this paragraph: "[w]e 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." According to Morocco, this sentence is contradicted by the MDCCE's finding that "Maghreb Steel's production in 2012 amounts to barely 63% of its break-even point under normal market conditions, which leaves the company a long way from a level of production where it would at least not be making a loss".⁵⁷ Turkey strongly objects to Morocco's request asserting that the alleged contradiction to which Morocco alludes does not exist. Turkey argues that the Panel took account of the statement that, in 2012, Maghreb Steel did not reach the break-even point but considered that the record did not contain any elements to support it. Further, the first sentence of paragraph 7.182 (7.184) informs the remainder of that paragraph, which states that the MDCCE did not explain, either in its determination or elsewhere in the record, how it arrived at Maghreb Steel's break-even point.⁵⁸

3.22. As paragraph 7.182 of our Report explains, we consider that without information in the record of the underlying investigation on how Maghreb Steel arrived at its break-even threshold, we have no basis to conclude that Maghreb Steel's failure to meet the break-even threshold meant that the company had incurred losses. We therefore reject Morocco's request to modify this paragraph.

3.15 Paragraph 7.183 (7.185)

3.23. Morocco requests the Panel to delete the following sentence in this paragraph: "[h]owever, in Maghreb Steel's case, the MDCCE had found that at least part of the company's production of hot-rolled steel did not bring revenue because it was transferred to the captive market free of charge". Morocco argues that the MDCCE did not make a finding that Maghreb Steel's production of hot-rolled steel "did not bring revenue".⁵⁹ Turkey objects to Morocco's request. Turkey argues that certain statements made by the MDCCE in its determination and arguments made by Morocco before the Panel make it clear that there was no price, no sale and no invoice with respect to the internal transfers. Moreover, there was no evidence that any revenue was attributed to these transfers in Maghreb Steel's books. Turkey contends that this can only mean that "hot-rolled steel did not bring revenue" to Maghreb Steel in relation to those transfers.⁶⁰

3.24. While we do not consider it necessary to delete the sentence that Morocco refers to, we have decided to accommodate Morocco's request by modifying that sentence and its footnote.

⁵⁴ Turkey's comments on Morocco's request for interim review, paras. 2.35-2.36.

⁵⁵ Morocco's request for interim review, para. 20.

⁵⁶ Turkey's comments on Morocco's request for interim review, paras. 2.38-2.39.

⁵⁷ Morocco's request for interim review, para. 21 (referring to Preliminary determination, (Exhibit TUR-6), para. 87). The MDCCE's original statement in French is as follows: "[l]a production réalisée par MAGHREB STEEL au cours de l'année 2012 représente à peine les 63% de son seuil de rentabilité dans une conjoncture normale de marché, ce qui laisse l'entreprise loin d'un niveau de production où au moins elle ne réaliserait pas de perte." (Preliminary determination, (Exhibit TUR-6), para. 87).

⁵⁸ Turkey's comments on Morocco's request for interim review, paras. 2.45-2.47.

⁵⁹ Morocco's request for interim review, para. 22.

⁶⁰ Turkey's comments on Morocco's request for interim review, paras. 2.49-2.51.

3.16 Paragraph 7.197 (7.199)

3.25. Morocco requests the Panel to amend a sentence in this paragraph to make it clearer that Maghreb Steel's production had increased "from 2010 to 2012".⁶¹ Turkey does not object to Morocco's request provided that the Panel makes clear that it was not conducting an end-point-to-end-point analysis.⁶² We have modified the sentence in question and have added a footnote to the sentence to address Turkey's concerns.

3.17 Paragraph 7.248 (7.250)

3.26. Morocco requests the Panel to amend this paragraph by adding certain arguments that Morocco had made.⁶³ Turkey argues that these arguments were made too late in the proceedings but does not oppose the request.⁶⁴ We decline Morocco's request. The arguments that Morocco requests us to include are adequately reflected in paragraphs 7.244 and 7.246 of the Report.

3.18 Paragraph 7.251 (7.253)

3.27. Morocco requests the Panel to modify this paragraph to more accurately reflect the MDCCE's statement.⁶⁵ Turkey agrees that Morocco's suggested change would more accurately reflect the MDCCE's statement but asks the Panel to reflect in the Report that the MDCCE failed to substantiate this statement.⁶⁶ We have revised the sentence that Morocco asks us to amend.

⁶¹ Morocco's request for interim review, para. 23.

⁶² Turkey's comments on Morocco's request for interim review, para. 2.54.

⁶³ Morocco's request for interim review, para. 24.

⁶⁴ Turkey's comments on Morocco's request for interim review, paras. 2.1-2.2.

⁶⁵ Morocco's request for interim review, para. 25.

⁶⁶ Turkey's comments on Morocco's request for interim review, para. 2.55.

ANNEX B

ARGUMENTS OF THE PARTIES

Contents		Page
Annex B-1	Integrated executive summary of the arguments of Turkey	20
Annex B-2	Integrated executive summary of the arguments of Morocco	42

ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF TURKEY

1 INTRODUCTION

1.1. This integrated executive summary contains the arguments presented by the Republic of Turkey (Turkey) in its written submissions, oral statements, responses to questions and comments thereto.

1.2. In this dispute, Turkey challenges certain anti-dumping measures imposed by the Kingdom of Morocco (Morocco) on hot-rolled steel plates from Turkey, which fall under HS codes 7208 (except 7208.10 and 7208.40), 7211.13, 7211.14 and 7211.19.

1.3. Morocco's investigation and determinations underlying the anti-dumping duties at issue are beset by a series of inconsistencies with the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement).

1.4. First, the duration of Morocco's investigation exceeded the maximum time limit envisaged in Article 5.10 of the Anti-Dumping Agreement.

1.5. Second, Morocco acted inconsistently with Article 6.8 and Annex II to the Anti-Dumping Agreement by rejecting verified data submitted by the Turkish exporters and determining their dumping margins based on "facts available". The premise on which the verified data were rejected – that the Turkish exporters had underreported their export sales – lacked any factual basis in the record of the investigation. In addition, the use of "facts available" was fraught with numerous procedural deficiencies, which impaired the due process rights of the Turkish exporters.

1.6. Third, Morocco 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 the Turkish exporters in sufficient time for these parties to defend their interests.

1.7. Fourth, Morocco acted inconsistently with Article 3.1 and Footnote 9 to the Anti-Dumping Agreement in its determination that the Moroccan domestic industry (Maghreb Steel) was not "established". In addition, Morocco's determination that the domestic industry had suffered injury in the form of material retardation is inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement because the investigating authority failed to analyze all the relevant economic factors; did not properly analyse captive consumption (which accounted for half of the production) in its injury assessment; and did not provide a reasoned and adequate analysis of serious shortcomings in the report of a private consultant on which the Maghreb Steel based its projections.

1.8. Finally, Morocco acted inconsistently with Articles 6.9 and 6.5 of the Anti-Dumping Agreement by failing to disclose essential facts relating to its determination of material retardation and injury.

1.9. Turkey requests that the Panel recommend Morocco to bring its measures into conformity with WTO law. Given the nature and number of the violations at issue, Turkey requests the Panel to suggest that Morocco withdraws the measure at issue, pursuant to Article 19.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

2 MOROCCO ACTED INCONSISTENTLY WITH ARTICLE 5.10 OF THE ANTI-DUMPING AGREEMENT

2.1. The Moroccan authorities failed to conclude the investigation leading to the imposition of the definitive anti-dumping duties at issue within the deadlines contained in Article 5.10 of the Anti-Dumping Agreement.

2.2. Under Article 5.10, investigating authorities must conclude the anti-dumping investigation within a timeframe of 12 months, and in any event no more than 18 months. An investigating authority must conclude the investigation and issue its decision on whether the conditions to impose an anti-dumping measure exist within these deadlines.¹

¹ Turkey's first written submission, paras. 5.3-5.5.

2.3. This is a "strict"² requirement. The panel in *Mexico — Olive Oil* found that a similar provision in the Agreement on Subsidies and Countervailing Measures (SCM Agreement) was "clear and unequivocal", and that there was "no basis in this provision ... to prolong an investigation beyond 18 months *for any reason*".³ Moreover, the Appellate Body has made clear that, pursuant to Article 5.10, the investigation must normally be completed within 12 months and, "in special circumstances", within 18 months.⁴ Thus, it must "*in any event*"⁵ not exceed 18 months.⁶

2.4. In previous disputes, the overall time limit imposed under Article 5.10 has been balanced against other obligations such as the due process obligation under Article 6.1.1 to provide the interested parties at least 30 days to reply to the questionnaires sent by the investigating authority. The Appellate Body found that the due process rights to which interested parties are entitled under Article 6 are limited by the investigating authority's need to complete the investigation in a timely manner. In particular, the Appellate Body explained that the time limits to complete an investigation circumscribe the due process obligations under Article 6.1.^{7, 8}

2.5. In the present dispute, the Moroccan investigating authority (MDCCE) initiated an investigation of imports of certain hot-rolled steel from the EU and Turkey on 21 January 2013.⁹ Thus, according to the rule in Article 5.10 of the Anti-Dumping Agreement, the investigation should have been concluded on 21 January 2014 (12 months after the initiation) and in any event no later than 21 July 2014 (18 months after the initiation).¹⁰

2.6. However, the MDCCE concluded its investigation on 12 August 2014. On that date, the MDCCE published on its website a notice presenting the MDCCE's final conclusions and the Final Determination. This document states that "the anti-dumping investigation on imports of hot-rolled steel from the European Union and Turkey, initiated on 21 January 2013, is concluded by the publication of this notice".^{11, 12}

2.7. This is six months and 22 days after the 12-month timeframe had expired, and 22 days after the 18-month timeframe had expired.¹³

2.8. It is clear, therefore, that the MDCCE failed to conclude its investigation within the deadline of 12 months provided for in Article 5.10 because the investigation exceeded the 12-month deadline by six months and 22 days. The MDCCE also failed to explain in its Final Determination whether "special circumstances" warranted the extension of this deadline. Moreover, even assuming that special circumstances existed, the MDCCE failed to conclude the investigation at issue within the strict 18-month deadline contained under Article 5.10, because it exceeded that deadline by 22 days.¹⁴

2.9. Morocco did not dispute that the investigation exceeded the 18-month deadline.¹⁵

2.10. Rather, Morocco argues that the deadlines contained in Article 5.10 should not be interpreted as a rigid obligation, because the term "shall" can instead be interpreted as a "strong assertion or

² Panel Report, *US – Softwood Lumber V*, para. 7.333.

³ Panel Report, *Mexico — Olive Oil*, para. 7.121. (emphasis added)

⁴ Appellate Body Report, *EC – Fasteners (China)*, para. 611.

⁵ Appellate Body Report, *US – Hot-Rolled Steel*, para. 73. (emphasis added)

⁶ Turkey's first written submission, paras. 5.4, 5.7.

⁷ Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 282. See also Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 241 and 242; Appellate Body Report, *US – Hot-Rolled Steel*, para. 73; and Appellate Body Report, *EC – Fasteners*, para. 611.

⁸ Turkey's first written submission, para. 5.8.

⁹ See Public Notice 01/13 relating to the initiation of an investigation, 22 January 2013, Exhibit TUR-1; WTO Committee on Anti-Dumping Practices, Semi-Annual Report under Article 16.4 of the Agreement, Morocco, G/ADP/N/244/MAR, 30 September 2013, p. 3.

¹⁰ Turkey's first written submission, paras. 5.11-5.12.

¹¹ Public Notice Number 16/14 delivering the final results of the investigation, 12 August 2014, Exhibit TUR-12, p. 3 (underlining added). (In French: "*L'enquête antidumping sur les importations de tôles d'acier laminées à chaud originaires de l'Union Européenne et de la Turquie, initiée en date du 21 janvier 2013, est clôturée par la publication du présent avis*")

¹² Turkey's first written submission, para. 5.13.

¹³ Turkey's first written submission, para. 5.16.

¹⁴ Turkey's first written submission, para. 5.19.

¹⁵ Morocco's first written submission, para. 50.

intention".¹⁶ However, several panels and the Appellate Body have consistently interpreted the term "shall" as conveying an obligation.¹⁷ Moreover, the panel in *US – Softwood Lumber V* made clear that the deadline in Article 5.10 is a "strict" requirement and constitutes a "fundamental principle".¹⁸ Previous panels and the Appellate Body have also confirmed the mandatory nature of the obligation in Article 5.10 by stating that it "mandates" certain time limits¹⁹ "requires" or "imposes" deadlines²⁰ and that the investigating authority "must" complete the investigation within those deadlines.^{21, 22}

2.11. Morocco also argues that panels and the Appellate Body have regularly exceeded the deadlines contained in Articles 12.8, 12.9 and 17.5 of the DSU in issuing their reports. In Morocco's view, this means that the Panel should understand the deadlines in Article 5.10 in a flexible manner, because it is drafted similarly to these provisions of the DSU. However, Morocco's reliance on these DSU provisions is inapposite.²³ The obligations in the DSU are very different than those in the Anti-Dumping Agreement. They regulate disputes between Members subject to the supervision of the Dispute Settlement Body. In contrast, Article 5.10 of the Anti-Dumping Agreement imposes obligations on investigating authorities to protect the rights of other Members' exporters. How the rules on the settlement of disputes are interpreted and applied as between Members is simply irrelevant to the interpretation of a provision that sets out deadlines for Members' administrative bodies to complete anti-dumping investigations.²⁴

2.12. Morocco submits that any delay in the investigation process was the result of requests from interested parties for additional time or additional meetings.²⁵ However, the Appellate Body has explained that the strict deadlines in Article 5.10 circumscribe any extension accorded to interested parties by the investigating authority.²⁶ In response to an argument similar to Morocco's argument, in the context of Article 11.11 of the SCM Agreement, the panel in *Mexico – Olive Oil* clearly stated that there is "no basis ... to prolong an investigation beyond 18 months for any reason, including requests from interested parties".²⁷ Put differently, when granting an extension to interested parties may result in the investigation exceeding the deadlines in Article 5.10, an investigating authority must refrain from granting such extension. In any event, Morocco has not explained why extensions of only several days resulted in exceeding the 12-month deadline by 6 months and 22 days, and the 18-month deadline by 22 days. Moreover, while it could be argued that requests for extensions from interested parties could qualify as special circumstances that would justify exceeding the 12-month deadline, an investigating authority may *in no case* exceed the 18-months deadline. In any event, the MDCCE did not explain why such requests constituted special circumstances that warranted exceeding the 12 months deadline.²⁸

2.13. Morocco also argues that the investigating authority needed additional time to analyse information that was submitted by the interested parties in their comments on the Disclosure. To recall, the MDCCE published the Disclosure at a rather late stage in the investigation, only a month before the end of the 18-month deadline. Therefore, the MDCCE allowed itself only a month to receive comments, take into account those comments, and finalize the investigation within the 18-month deadline. Since the exporters complied fully with the deadline to provide comments on the Disclosure²⁹ it can hardly be said that any delay in the investigation was the result of the

¹⁶ Morocco's first written submission, para. 43.

¹⁷ See for example Appellate Body Report, *EC – Fasteners (China)*, para. 316.

¹⁸ Panel Report, *US – Softwood Lumber V*, para. 7.333.

¹⁹ Appellate Body Report, *US – Hot-Rolled Steel*, para. 73.

²⁰ Appellate Body Report, *EC – Fasteners (China)*, paras. 611, 613.

²¹ Panel Report, *EC – Salmon (Norway)*, para. 7.802; Panel Report, *EU – Footwear (China)*, para. 7.832; Panel Report, *Ukraine – Passenger Cars*, footnote 227.

²² Turkey's opening statement at the first meeting with the Panel, para. 2.2; Turkey's second written submission, para. 3.3.

²³ See also European Union's third party submission, para. 10.

²⁴ Turkey's opening statement at the first meeting with the Panel, para. 2.3; Turkey's second written submission, para. 3.4.

²⁵ Morocco's first written submission, paras. 49, 51-52; Morocco's opening statement at the first meeting of the Panel, para. 13.

²⁶ Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 282.

²⁷ Panel Report, *Mexico – Olive Oil*, para. 7.121.

²⁸ Turkey's opening statement at the first meeting with the Panel, para. 2.4; Turkey's second written submission, paras. 3.5-3.6.

²⁹ Exhibits TUR-29 (BCI) and TUK-30 (BCI); Exhibit TUR-27; Exhibit TUR-27.

interested parties' actions. Again, the burden is on the investigating authority to ensure that it complies with the deadlines in Article 5.10.³⁰

2.14. In light of the foregoing, Morocco clearly acted inconsistently with its obligation under Article 5.10 of the Anti-Dumping Agreement. As a result, the anti-dumping duties imposed by Morocco lack any legal basis.

3 MOROCCO ACTED INCONSISTENTLY WITH ARTICLE 6.8 AND PARAGRAPHS 1, 3, 5, 6, AND 7 OF ANNEX II TO THE ANTI-DUMPING AGREEMENT

3.1 Introduction

3.1. In its Final Determination, the MDCCE decided to reject all sales data submitted by the two Turkish exporters under investigation, Erdemir Group and Colakoglu. Instead, the MDCCE determined the dumping margins for these exporters by relying solely on "facts available" within the meaning of Article 6.8 and Annex II to the Anti-Dumping Agreement (i.e. information provided by the petitioner). The MDCCE reached its decision based on the following allegations in its Final Determination:

- The MDCCE stated that, according to the sales data provided by Erdemir Group and Colakoglu, the exports of the subject product by these companies to Morocco in 2012 (PoI) amounted to 18'800 metric tons, whereas the official Moroccan import statistics for the subject product (provided by "l'Office des Changes") ("official statistics") allegedly indicated another figure of 29'000 metric tons. Thus, according to the MDCCE, there was a discrepancy of 10'200 metric tons between the data provided in the official statistics and the sales reported by the two exporters.
- The MDCCE further claimed that the "missing sales" were executed by third companies (traders) that were not reported by the Turkish exporters.

3.2. On this basis, the MDCCE determined that the Turkish exporters had failed to cooperate in the investigation. Thus, the MDCCE determined a non-cooperation rate of 11% (the dumping margin alleged by the petitioner) for both Erdemir Group and Colakoglu, compared to 0% margin for Erdemir Group and *de minimis* margin for Colakoglu in the preliminary determination.³¹

3.3. For the reasons explained in the following sections, Turkey submits that the MDCCE's use of facts available to determine dumping margins for Erdemir Group and Colakoglu is inconsistent with Article 6.8 and paragraphs 1, 3, 5, 6, and 7 of Annex II to the Anti-Dumping Agreement.

3.2 Morocco acted inconsistently with Article 6.8

3.4. Pursuant to Article 6.8 and Annex II to the Anti-Dumping Agreement, an investigating authority may use facts available only in circumstances in which an interested party: (i) refuses access to necessary information within a reasonable period; (ii) otherwise does not provide this information; or (iii) significantly impedes the investigation.³² None of these circumstances was present in the investigation at issue.³³

3.5. Based on the evidence before it, the MDCCE had no factual basis whatsoever for resorting to facts available as Erdemir Group and Colakoglu had cooperated fully with the investigating authority throughout the investigation, and reported all their domestic and export sales. The MDCCE verified the export sales and domestic sales data reported by the Turkish exporters during its on-site verification visits to these companies and did not find any discrepancies in these data. In particular, the MDCCE did not raise any further concerns regarding the manner in which the Turkish exporters identified sales to different markets, including Morocco, or handled sales to third parties.³⁴

³⁰ Turkey's opening statement at the first meeting with the Panel, para. 2.5.

³¹ See Final Determination, Exhibit TUR-11, paras. 52-65. See also Preliminary Determination, Exhibit TUR-6, Table 18, p. 31.

³² Turkey's first written submission, paras. 6.7-6.14, 6.38.

³³ See, *inter alia*, Turkey's first written submission, paras. 6.1-6.5, 6.78-6.79, 6.84; Turkey's opening statement at the first meeting of the Panel with the parties, paras. 3.1-3.12.

³⁴ Turkey's first written submission, paras. 6.3-6.4.

3.6. Following the Disclosure of essential facts, the MDCCE provided sales/shipment documents (i.e. movement certificates and commercial invoices) that it had obtained from the Moroccan Customs and relied upon in reaching its finding of non-cooperation to the Turkish exporters. These purported to demonstrate the basis for approximately half of the alleged discrepancy of 10'200 metric tons. No documents were provided pertaining to the remaining portion of the alleged discrepancy. In their comments on the Disclosure, Erdemir Group and Colakoglu explained fully to the MDCCE that they had duly reported the allegedly missing sales in their original questionnaire responses to the MDCCE. Furthermore, they presented a reconciliation showing that all of the sales that the MDCCE relied upon in reaching its finding of non-cooperation and for which the MDCCE provided details had actually been included in the exporters' questionnaire responses.³⁵ A similar reconciliation was also provided by Turkey to the Panel in Exhibit TUR-24 (BCI). Moreover, some of the transactions that the MDCCE alleged had not been reported had actually already been verified by the MDCCE and were included in the sample of "verified transactions", annexed to the Verification Report for Erdemir Group.³⁶ Thus, based on the evidence available, there was no basis to suggest that *any* sales had been left unreported by the exporters.³⁷

3.7. During the Panel proceedings, Turkey demonstrated that the MDCCE's finding of the alleged discrepancy was premised on its erroneous understanding that Erdemir Group and Colakoglu exported approximately 29'000 metric tons to Morocco during the PoI.³⁸ There is no reasonable evidence to support either this alleged total volume of sales or the alleged failure to report 10'200 metric tons of sales. The MDCCE's finding was based entirely on: (i) its own summary of the allegedly unreported sales derived from Morocco's official import statistics, submitted to the Panel as Exhibit MAR-11 (BCI); (ii) the movement certificates and commercial invoices for less than half of the alleged discrepancy; and (iii) a letter submitted to the MDCCE by the Turkish Steel Exporter's Association (CIB), which the MDCCE either misunderstood or represented inaccurately. These materials do not establish that any sales were not reported or link any of the allegedly unreported sales to the investigated Turkish exporters.³⁹

3.8. Turkey notes that the table in Exhibit MAR-11 (BCI) is not in itself a credible piece of evidence on which a diligent and objective investigating authority could rely in reaching its finding of non-cooperation. This table is merely a summary of the information that the MDCCE allegedly obtained from the "Office des Changes". Without supporting documents, such as movement certificates and commercial invoices corresponding to each allegedly unreported transaction, this table does not shed any light on the sources of the alleged discrepancy, and it certainly does not prove that the import statistics were accurate or that the allegedly unreported sales were produced by Erdemir Group and Colakoglu. The table does not show that the listed sales were not reported, as Morocco did not provide a complete list of the transactions that make up the alleged total imports of 29'000 metric tons, or even a reconciliation to the sales in the movements certificates and commercial invoices on which the MDCCE had relied.⁴⁰

3.9. Moreover, Turkey has demonstrated that most of the sales listed in the MDCCE's summary involved products that were outside the scope of the investigation and that were not even produced by Erdemir Group and Colakoglu.⁴¹ The remaining line items in the summary are documented in the movement certificates and commercial invoices that the MDCCE obtained from the Customs and had been duly reported in the Turkish exporters' questionnaire responses.⁴² Moreover, the total of the allegedly unreported sales in the MDCCE's summary does not even match the figure of 10'200 metric tons.⁴³

3.10. Morocco further refers to the CIB's letter and alleges that "it is uncontested that the only Turkish producers that exported to Morocco during the period of investigation were Erdemir Group

³⁵ Erdemir Group's comments on the Draft Final Determination, 10 July 2014, Exhibit TUR-19 (BCI); Colakoglu's comments on the Draft Final Determination, 11 July 2014, Exhibit TUR-20 (BCI).

³⁶ MDCCE's Verification Report for Erdemir Group, Exhibit TUR-8 (BCI), pp. 3, 5.

³⁷ Turkey's first written submission, paras. 6.41-6.84.

³⁸ Final Determination, Exhibit TUR-11, paras. 52-63.

³⁹ Turkey's second written submission, paras. 4.5-4.22; Turkey's opening statement at the second meeting with the Panel, para. 3.2.

⁴⁰ Turkey requested this information in Question I.1 of Turkey's questions to Morocco. See also Turkey's second written submission, paras. 4.11-4.12.

⁴¹ Turkey's second written submission, paras. 4.18-4.21; Exhibits TUR-57 (BCI) and TUR-58 (BCI).

⁴² Turkey's second written submission, paras. 4.13-4.17.

⁴³ Turkey's opening statement at the second meeting of the Panel with the parties, para. 3.3.

and Colakoglu".⁴⁴ The MDCCE and Morocco have relied on this statement to argue that the entirety of the alleged 29'000 metric tons of imports from Turkey must have been produced by the investigated Turkish exporters.⁴⁵ However, the CIB never stated that Erdemir Group and Colakoglu exported 29'000 metric tons to Morocco. To the contrary, the CIB made it clear that the total exports of the subject product by these companies to Morocco "amounted to approximately 19'000 tons in 2012".⁴⁶ There was no objective basis for the MDCCE to interpret this statement as implying that Erdemir Group and Colakoglu actually exported 29'000 metric tons.⁴⁷

3.11. Morocco's strategy in this dispute has been twofold: first, Morocco tries to shift to the Turkish exporters the entire responsibility for the MDCCE's failure to investigate the discrepancy in a diligent and objective manner; and, second, it tries to convince the Panel that, in light of the alleged shortcomings in the information provided by the exporters, the MDCCE had no practical means to investigate the discrepancy until the very late phases of the investigation.

3.12. For example, Morocco argues that, during its verification visits to the Turkish exporters, "the MDCCE only looked into the sales and other information the producers had reported, which does not mean that it did not consider there to be unreported sales".⁴⁸ This does not make sense, as one of the primary purposes of a verification visit is to verify the *completeness* of an exporter's sales reporting. Moreover, this argument is an impermissible *ex post* rationalisation of the MDCCE's finding, which is, in any event, contradicted by the record evidence.⁴⁹ The Verification Reports for both Erdemir Group and Colakoglu state that the MDCCE examined the completeness of the sales data ("exhaustivité des données"). The word "exhaustivité" means in French: "that exhausts a subject, a matter", or "that includes all the possible elements of a list, that deals completely with a subject". Thus, the MDCCE's use of this word makes it clear that it examined the completeness of the sales data, and not some portion of the data. The tests used by the MDCCE and the documents analysed in this regard also show that, contrary to Morocco's explanation, this examination concerned *all sales*, and not only the sales that were reported.⁵⁰

3.13. Morocco suggests that, during its verification visits, it was impossible for the MDCCE to identify the data that were not reported, as this "would unreasonably expand the scope of verification to essentially proving any negative". This is incorrect. 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.⁵¹

3.14. In addition, Morocco contends that the reconciliations presented by the Turkish exporters in their comments on the Disclosure showing that all of the allegedly unreported sales had in fact been reported were rejected because they contained deficiencies. Morocco states that the Turkish exporters attached to their comments the movement certificates and commercial invoices that were different from those the MDCCE had obtained from the Moroccan Customs.⁵² However, as a matter of fact, nothing in the Final Determination suggests that the exporters' reconciliations contained deficiencies, let alone that these alleged deficiencies were the real reason for the MDCCE's decision to disregard the exporters' comments. Morocco's *ex post* rationalisation must, therefore, be rejected. Moreover, Turkey has shown that these reconciliations demonstrated beyond any reasonable doubt that the sales at issue had been properly reported.⁵³

3.15. The fact that the MDCCE had two different versions of a movement certificate does not in itself mean that these certificates documented different transactions, or that the information in these documents was not reported in the exporters' responses to questionnaires. What matters is whether the sales recorded in these documents can be linked to the sales reported in the investigated

⁴⁴ See Morocco's second written submission, para. 65 (referring to Final Determination, Exhibit TUR-11, para. 54, which, in turn, cites the CIB's letter); Morocco's answer to Panel question 2.5.f(iii), para. 77 (see also paras. 40, 41 and 42).

⁴⁵ Morocco's second written submission, para. 65.

⁴⁶ Letter by Turkish Steel, 6 March 2014, Exhibit TUR-28 (BCI), p. 1, emphasis added.

⁴⁷ See Turkey's comment on Morocco's response to Panel's question 7.1.

⁴⁸ Morocco's second written submission, para. 66.

⁴⁹ Turkey's opening statement at the second meeting of the Panel with the parties, para. 3.6.

⁵⁰ Turkey's comment on Morocco's response to Panel's question 7.5.

⁵¹ Turkey's comment on Morocco's response to Panel's question 7.5.

⁵² Morocco's second written submission, paras. 67-71; Morocco's answer to Panel question 2.3.

⁵³ Turkey's second written submission, paras. 4.31-4.37; Turkey's opening statement at the second meeting of the Panel with the parties, para. 3.7.

exporter's questionnaire responses. Similarly, the same transaction may be reflected in two different commercial invoices, recording sales and resales of the same goods between different entities, such as a Turkish producer and its customer, and then the customer and a third-party trading company. The MDCCE's Final Determination does not contain any analysis of whether the sales listed in the movement certificates and commercial invoices at issue relate to the sales in Erdemir Group's and Colakoglu's questionnaire responses.⁵⁴

3.16. Morocco further claims that the MDCCE took certain steps to obtain information about the missing sales allegedly executed by certain third-party traders directly from those companies, but that these efforts were unsuccessful. For example, Morocco argues that, in its public notice on the initiation of the investigation, "the MDCCE invited all unknown exporters of the subject product to participate".⁵⁵ The MDCCE's public notice on the initiation of the investigation, however, contained very basic information about the investigation and could not inform properly the third-party traders in question of the specific information that the MDCCE required regarding the missing sales. In particular, neither the public notice, nor the MDCCE's website contained a link to the exporter questionnaire. As the initiation notice makes clear, this questionnaire was sent only to exporters that were *known*.⁵⁶ Thus, contrary to Morocco's allegations, there is no record evidence suggesting that the MDCCE took any steps to request information regarding export sales from Turkey to Morocco directly from third-party traders. However, even assuming for the sake of argument that the MDCCE asked those traders, either directly or through its public notice, for information about the allegedly missing sales, Turkey fails to see how the failure of these companies to provide information would justify the MDCCE's use of facts available to determine dumping margins for *Erdemir Group and Colakoglu*. Turkey recalls that these companies are required only to provide information about the sales they know to have been made to Morocco. They cannot be responsible for knowing whether unrelated trading companies would make resales.⁵⁷

3.17. Finally, Morocco faults the Turkish exporters for not making any effort to contact unrelated third parties, even though the MDCCE itself took no steps to obtain the information it required from those parties directly. Moreover, the MDCCE did not even disclose to the Turkish exporters and the Government of Turkey the summary of Morocco's import statistics, submitted as Exhibit MAR-11 (BCI). Without that summary, the Turkish exporters had no knowledge of the specific transactions that the MDCCE considered as being left unreported.⁵⁸

3.18. In *US – Hot-Rolled Steel*, the Appellate Body explained that the "adverse facts available" can be resorted to only in limited circumstances in which an exporter fails to *cooperate to the best of its ability*. The Appellate Body found that the USDOC applied adverse facts available in a manner inconsistent with Article 6.8 and Annex II, because it insisted on an exporter furnishing information that that party did not possess and could not obtain without significant difficulties, ignored that party's explanations of these difficulties, and itself took no steps to secure the required information.⁵⁹ That is exactly what happened in this case.⁶⁰

3.19. In light of the foregoing, there was no basis for the MDCCE to use facts available to determine dumping margins for Erdemir Group and Colakoglu. In these circumstances, the MDCCE, when applying facts available, acted inconsistently with Article 6.8 and Annex II to the Anti-Dumping Agreement.

3.3 Morocco acted inconsistently with Annex II

3.20. At each step of its analysis of the alleged discrepancy, the MDCCE failed to follow the procedural steps required in order to use facts available under Article 6.8 and Annex II to the Anti-Dumping Agreement. The MDCCE failed to observe the following requirements set out in paragraphs 1, 3, 5, 6 and 7 of Annex II: (i) it failed to specify in detail, and as soon as possible, the information it required from the Turkish exporters; (ii) there was no parallel between the scope of

⁵⁴ Turkey's comment on Morocco's response to Panel's question 7.3.

⁵⁵ Morocco's second written submission, para. 75.

⁵⁶ Public Notice No. 01/13 relating to the initiation of an investigation, 22 January 2013, Exhibit TUR-1, p. 2.

⁵⁷ Turkey's opening statement at the second meeting of the Panel with the parties, paras. 3.8-3.10.

⁵⁸ Turkey's opening statement at the second meeting of the Panel with the parties, paras. 3.13-3.14.

⁵⁹ Appellate Body Report, *US – Hot-Rolled Steel*, paras. 105-110.

⁶⁰ Turkey's opening statement at the first meeting of the Panel with the parties, para. 3.11; Turkey's opening statement at the second meeting of the Panel with the parties, para. 3.12.

the information the MDCCE requested and that was allegedly not provided by the Turkish exporters and the scope of facts available used by the MDCCE; (iii) the MDCCE failed to take into account all information provided by the Turkish exporters that was: (a) verifiable, (b) appropriately submitted, and (c) supplied in a timely fashion; (iv) the MDCCE made no active efforts to use the information submitted by the Turkish exporters, even though it considered that the information was not "ideal"; (v) in rejecting the exporters' information, the MDCCE failed to (a) inform the Turkish exporters of the reasons that the information they supplied was not accepted, (b) give to these parties an opportunity to provide further explanations, and (c) give, in the Final Determination, the reasons for the rejection of the information; and (vi) the MDCCE did not use "special circumspection" in selecting the "best" evidence on the record to replace the allegedly missing information. The MDCCE's failure to observe these additional requirements further confirms that it had no basis in both Article 6.8 and Annex II to use facts available.⁶¹

3.21. With respect to Turkey's claim under Annex II, paragraph 1, the MDCCE failed to specify, in sufficient detail and in a timely manner, the information it required of Erdemir Group and Colakoglu, including information about unrelated "third-party trading companies", mentioned in the MDCCE's email to Erdemir Group, dated 31 December 2013.⁶² According to Morocco, the MDCCE "specified the information required [of the Turkish exporters] in the email sent to ERDEMIR GROUP in December 2013".⁶³ Morocco, however, further acknowledged that an email with the same information request was not sent to Colakoglu.⁶⁴ Thus, the MDCCE never requested this information from this company, contrary to the clear requirements of Annex II, paragraph 1.⁶⁵

3.22. Morocco states that "Colakoglu was less active throughout the proceedings than Erdemir Group".⁶⁶ First, this assertion is incorrect. As demonstrated by record evidence, Colakoglu took active part in all phases of the investigation, providing comprehensive and timely responses to the MDCCE's questions and commenting on the Disclosure. Thus, Morocco's suggestion that Colakoglu was "less active" is not substantiated by the facts. In any event, this characterization does not exonerate the investigating authority from its obligations under Annex II, paragraph 1.⁶⁷

3.23. Furthermore, it is also clear that the MDCCE did not explain to the Turkish exporters the specific sales that it considered were not reported. In other words, the MDCCE's requests for information pertaining to the allegedly missing sales, such as its 31 December email, were vague and unspecific. According to Morocco, the MDCCE prepared a table summarising transactions that the MDCCE considered were not reported (Exhibit MAR-11 (BCI)), after the public hearing, held on 4 February 2014.⁶⁸ There was no reason for the MDCCE not to disclose this table to the Turkish exporters and the Government of Turkey at that time with a view to clarifying which of the sales listed in the table were reported. To recall, the Turkish exporters learnt about the sales that, according to the MDCCE, made up merely a half of the alleged discrepancy only at the very end of the investigation, following the issuance of the Disclosure. In these circumstances, Turkey submits that the MDCCE's failed to "specify in detail" and "[a]s soon as possible" the information it required from the Turkish exporters within the meaning of Annex II, paragraph 1.⁶⁹

3.24. Turkey made two additional claims under Annex II, paragraph 1, in particular that the MDCCE failed to use facts available: (i) in the limited circumstances specified in Article 6.8 (*inter alia*, when an interested party refuses access to the required information); and (ii) with a limited purpose of replacing the information that, in the MDCCE's view, was not provided.⁷⁰ Morocco's general response to both of these claims is that they fall outside the scope of Annex II, paragraph 1, as this provision does not regulate circumstances in which an authority may use facts available, and does not prescribe how investigating authorities should treat the information provided by the interested parties.⁷¹

⁶¹ Turkey's first written submission, paras. 6.16-6.39, 6.92-6.129; Turkey's second written submission, para. 4.2.

⁶² Turkey's first written submission, paras. 6.92-6.97.

⁶³ Morocco's first written submission, para. 95.

⁶⁴ Morocco's answer to Panel question 2.4.

⁶⁵ Turkey's second written submission, para. 4.43.

⁶⁶ Morocco's answer to Panel question 2.4.

⁶⁷ Turkey's second written submission, para. 4.45.

⁶⁸ See Morocco's answer to Panel question 2.1, para. 39.

⁶⁹ See also Turkey's opening statement at the second meeting of the Panel with the parties, paras. 3.16-3.18.

⁷⁰ Turkey's first written submission, paras. 6.98-6.108.

⁷¹ Morocco's first written submission, paras. 99-102.

3.25. In *US – Hot-Rolled Steel*, the Appellate Body stated that "[a]lthough ... paragraph [1] is specifically concerned with ensuring that respondents receive proper notice of the rights of the investigating authorities to use facts available, it underscores that resort may be had to facts available only 'if information is not supplied within a reasonable time'".⁷² Furthermore, in *China – Autos (US)*, the panel found that China's investigating authority acted inconsistently with paragraph 1 of Annex II, because "the scope of facts available used by [the authority] was much wider than the scope of the information [the authority] requested".⁷³ Thus, Morocco's allegations are unfounded.⁷⁴

3.26. With respect to the second claim, Morocco admits that "[t]he MDCCE relied on facts available with regard to the entirety of the Turkish producers export sales data".⁷⁵ Morocco alleges that the discrepancy was substantial "as the unreported sales constituted 50% of those reported and 30% of total sales".⁷⁶ Thus, in Morocco's view, "[t]he MDCCE was ... justified in questioning the reliability of the whole dataset submitted by the Turkish producers".⁷⁷ Turkey does not dispute that, in certain factual circumstances, a large amount of unreported sales may taint the reliability of the reported data. However, the MDCCE had failed to show that any of the sales of the Turkish exporters were left unreported. Furthermore, even assuming for the sake of argument that certain sales were missing, consistent with Annex II, paragraph 6, and the applicable standard of review, the MDCCE had an obligation to explain in a reasoned and adequate manner how exactly the discrepancy at issue made all of the sales reported by Erdemir Group and Colakoglu unreliable, and why it decided to replace all these sales. The MDCCE failed to provide this explanation.⁷⁸

3.27. With respect to Turkey's claims under Annex II, paragraph 3, the MDCCE, when reaching its conclusion on non-cooperation, did not provide a reasoned and adequate explanation for rejecting all of the data furnished by the Turkish exporters. In particular, the MDCCE did not explain whether any, or all, of the criteria set out in Annex II(3) – i.e. the information must be (i) verifiable; (ii) appropriately submitted; and (iii) supplied in a timely fashion – had not been met. If, in the MDCCE's view, one or all of these criteria were not met, the MDCCE should have provided its reasoning for reaching this finding, which it failed to do.⁷⁹

3.28. Turkey has also claimed that the MDCCE acted inconsistently with Annex II, paragraph 5, for the following reasons: (i) it imposed an unreasonable burden upon the Turkish exporters to provide information on third-party sales, which was in the possession of unaffiliated third-party intermediaries; (ii) the MDCCE made no active efforts to contact these third parties directly or to obtain the information it required through other means (*inter alia*, by requesting the assistance of the Government of Turkey); and (iii) it failed to use the information submitted by the Turkish producers, which acted to the best of their ability, even though the MDCCE did not explain in a reasoned and adequate manner why that information did not satisfy the criteria in Annex II, paragraph 3.⁸⁰

3.29. Morocco's main response to these claims is that the volume of the allegedly unreported sales was substantial, which justified the MDCCE's decision to reject the entirety of the exporters' information.⁸¹ However, as explained, the MDCCE never substantiated the figure of 10'200 metric tons of the alleged discrepancy. In addition, nowhere in its Final Determination did the MDCCE set out reasons for replacing the entirety of the Turkish producers' reported data, because of that alleged deficiency in reporting the export sales. Thus, Morocco's responses are impermissible *ex post* rationalisations of the MDCCE's decision.⁸²

⁷² Appellate Body Report, *US – Hot-Rolled Steel*, para. 79.

⁷³ Panel Report, *China – Autos (US)*, para. 7.136.

⁷⁴ Turkey's second written submission, para. 4.48.

⁷⁵ In fact, the MDCCE replaced all data provided by the Turkish exporters (on both domestic and exports sales) with facts available. Morocco's answer to Panel question 2.8, para. 92.

⁷⁶ Morocco's answer to Panel question 2.7, para. 90.

⁷⁷ Morocco's answer to Panel question 2.7, para. 90, emphasis added.

⁷⁸ Turkey's second written submission, paras. 4.49-4.50; Turkey's comment on Morocco's response to Panel's question 7.6.

⁷⁹ Turkey's first written submission, paras. 6.110-6.111; Turkey's second written submission, paras. 4.51-4.55.

⁸⁰ Turkey's first written submission, paras. 6.112-6.117; Turkey's opening statement at the first meeting of the Panel with the parties, paras. 3.9-3.11; Turkey's second written submission, para. 4.56.

⁸¹ Morocco emphasises this point in Morocco's first written submission, paras. 112 and 115. See also Morocco's answer to Panel question 2.7, para. 90.

⁸² Turkey's second written submission, para. 4.57.

3.30. Turkey made two claims under Annex II, paragraph 6, first and second sentences. Turkey's first claim is that the MDCCE failed to provide a meaningful opportunity to the Turkish companies to give "further explanations within a reasonable period" in the sense of Annex II, paragraph 6 (first sentence), because (i) the Turkish exporters were in effect given a very limited period (i.e. 5 working days) to comment on the MDCCE's Disclosure, and, in any event, (ii) the opportunity to comment on the Disclosure was a mere formality rather than a substantive opportunity to engage with the MDCCE. Turkey's second claim is that, contrary to the requirements of Annex II, paragraph 6 (second sentence), the MDCCE failed to provide reasons for the rejection of evidence and information provided by the Turkish exporters, including in their comments on the Disclosure.⁸³

3.31. With respect to the first claim, under Annex II, paragraph 6 (first sentence), Morocco maintains that, the MDCCE gave the Turkish exporters a short time-period for submitting comments, because, following the issuance of the Disclosure, the MDCCE had very little time to complete the investigation, and, at that stage, therefore, "there was not much time to provide for comments".⁸⁴ However, the fact that the MDCCE issued the Disclosure at a very late stage of the investigation does not, and cannot, release it from obligations under Annex II, paragraph 6, or any other provision of the Anti-Dumping Agreement, such as Article 5.10. Neither the MDCCE, nor Morocco in its submissions, explained reasons for issuing the Disclosure at such a late stage of the investigation. Indeed, the Disclosure was issued on 20 June 2014, 17 months after the date of the initiation of the investigation, on 21 January 2013, and 1 month before the end of the compulsory 18-months deadline under Article 5.10. It must also be recalled, that the only opportunity that the MDCCE gave to the Turkish exporters to comment on its use of facts available was after the MDCCE's 7 July emails to these companies, in which it disclosed for the first time some supporting documents for approximately half of the alleged discrepancy of 10'200 metric tons. It was thus crucial for the Turkish exporters to have a reasonable period, and not merely 5 days, for comments on the Disclosure.⁸⁵ Furthermore, the MDCCE's summary dismissal of the comments provided by the Turkish companies, without reasoned and adequate explanation, reveals that the so-called opportunity to give "further explanations" was a mere formality, which could not have affected the MDCCE's decision to use facts available.⁸⁶

3.32. With respect to Turkey's claim under Annex II, paragraph 6 (second sentence), Morocco states that "the reason for rejecting the exporters' information was that it did not fulfill the criteria for 'verifiable information' and did not satisfactorily explain the discrepancy in the sales data".⁸⁷ This is an impermissible *ex post* rationalization, which is not supported by the record evidence. The MDCCE's Final Determination neither states clearly that the information submitted was not "verifiable", nor explains the reasons for this alleged finding.⁸⁸

3.33. Finally, the MDCCE's use of facts available is inconsistent with Annex II, paragraph 7, because the MDCCE failed to explain in a reasoned and adequate manner: (i) how it cross-checked the accuracy of the non-cooperation rate of 11% proposed by the petitioner; and (ii) why it was appropriate to reject *all* of the data provided by the Turkish exporters, even though these data were verified as accurate.⁸⁹

3.34. Morocco refers to the "Report on the initiation of an investigation" (Exhibit TUR-2), which, in its view, explains how the MDCCE cross-checked the accuracy of the 11% rate.⁹⁰ Turkey considers that the MDCCE's explanation in Exhibit TUR-2 falls short of the standard of a reasoned and adequate explanation. For example, in its response to Panel question 3.1, Turkey explained that the MDCCE failed to disclose the initial "C&F-based prices" that the petitioner had derived from various specialized sources to calculate the Turkish exporters' export price, nor did it disclose the specific adjustments made in this calculation, including the underlying data. Without this information, one cannot assess whether the MDCCE actually cross-checked the accuracy of the information provided

⁸³ Turkey's first written submission, paras. 6.118-6.123.

⁸⁴ Morocco's first written submission, para. 120.

⁸⁵ Turkey's second written submission, paras. 4.61-4.62.

⁸⁶ Turkey's first written submission, para. 6.121.

⁸⁷ Morocco's first written submission, para. 121 (quoting Final Determination, Exhibit TUR-11, paras. 58-61).

⁸⁸ Turkey's second written submission, para. 4.65.

⁸⁹ Turkey's first written submission, para.6.124-6.128; Turkey's second written submission, para. 4.66.

⁹⁰ Morocco's first written submission, paras. 128-129.

by the petitioner, and whether this cross-checking amounted to the "special circumspection" required under Annex II, paragraph 7.⁹¹

3.35. Similarly, the MDCCE failed to explain why it was appropriate to reject *all* of the data provided by the Turkish exporters, even though these data were verified as accurate. Indeed, the MDCCE could have used facts available to replace only the data that it considered had not been provided.⁹² In these circumstances, the MDCCE acted inconsistently with Annex II, paragraph 7.

3.4 Conclusion

3.36. In light of the foregoing, the MDCCE's use of facts available is inconsistent with Article 6.8 and paragraphs 1, 3, 5, 6, and 7 of Annex II to the Anti-Dumping Agreement. As demonstrated, Erdemir Group and Colakoglu duly reported all of their export sales to Morocco, and the MDCCE, therefore, had no basis to use facts available to determine dumping margins for these companies. Moreover, the MDCCE's investigation of the allegedly "missing sales" was fraught with many procedural deficiencies. These deficiencies undermine further the MDCCE's finding of the lack of cooperation on the part of the Turkish exporters.

4 MOROCCO ACTED INCONSISTENTLY WITH ARTICLE 6.9 OF THE ANTI-DUMPING AGREEMENT

4.1. Turkey made two claims under Article 6.9 (first and second sentences) with respect to the MDCCE's disclosure of "essential facts" underlying its decision to use facts available to determine dumping margins for Erdemir Group and Colakoglu. With regard to its first claim under Article 6.9 (first sentence), Turkey explained that the MDCCE failed to disclose the following "essential facts": (i) the facts underlying the MDCCE's finding of the alleged discrepancy in reported sales, amounting to approximately 10'200 metric tons; and (ii) the facts showing how precisely the MDCCE cross-checked the accuracy of the non-cooperation rate of 11%.⁹³

4.2. Turkey provided the following examples of the first set of "essential facts" that the MDCCE failed to disclose: (i) the precise transactions that, in the MDCCE's view, belonged to the Turkish exporters and had not been reported; (ii) the movement certificates and commercial invoices listing the 10'200 metric tons of missing sales; and (iii) the names of third parties that had executed the allegedly unreported sales. Without these documents and facts, the Turkish exporters were deprived of the ability to provide any meaningful comments on the MDCCE's finding of an alleged discrepancy and, in this way, to defend their interests within the meaning of the second sentence of Article 6.9.⁹⁴

4.3. As to the second set of "essential facts", the MDCCE did not explain sufficiently either the methodology it employed to cross-check the accuracy of the non-cooperation rate of 11%, determined for Erdemir Group and Colakoglu, or the data it used for this cross-check. For example, the MDCCE should have disclosed the following data: (i) the "C&F-based prices" that the petitioner collected from intermediaries operating in the steel sector and a specialized magazine in the steel sector to construct the export price of the Turkish exporters; (ii) the data the petitioner used to net these prices back to the ex-factory level in Turkey; and (iii) the data the MDCCE used to cross-check the petitioner's data on export prices, including the values of specific transactions in Morocco's import statistics that were allegedly used for this purpose.⁹⁵

4.4. In response to Turkey's first claim, Morocco, referring to vague and conclusory statements in the Disclosure, the Final Determination and the "Report on the initiation of an investigation", alleges that the MDCCE disclosed all of the "essential facts" pertaining to its decision to use facts available, as well as the facts that the MDCCE had used to replace the allegedly missing information.⁹⁶ However, based on these conclusory statements alone, and without the supporting information explained earlier – e.g. the movement certificates / commercial invoices listing the 10'200 metric

⁹¹ Turkey's second written submission, paras. 4.67-4.68.

⁹² Turkey's opening statement at the first meeting of the Panel with the parties, para. 3.19.

⁹³ See Turkey's first written submission, paras. 7.12-7.17; Turkey's answer to Panel question 3.1(a); Turkey's second written submission, paras. 5.1-5.6.

⁹⁴ Turkey's first written submission, para. 7.13; Turkey's answer to Panel question 3.1(a), para. 56.

⁹⁵ Turkey's first written submission, para. 7.16; Turkey's answers to Panel question 3.1(a), para. 59, and Panel question 3.3, para. 71.

⁹⁶ Morocco's first written submission, paras. 137-142, 147 (quoting Draft Final Determination, Exhibit TUR-10, paras. 51, 55-56; and Final Determination, Exhibit TUR-11, paras. 60-61).

tons of missing sales, and the precise data and methodology the MDCCE used to cross-check the accuracy of the 11% rate – one cannot verify their accuracy.⁹⁷

4.5. In addition, Morocco stated that the movement certificates and commercial invoices that were not disclosed, documenting the remaining portion of the alleged discrepancy, constituted confidential information within the meaning of Article 6.5 of the Anti-Dumping Agreement.⁹⁸ Morocco alleges that the MDCCE provided a non-confidential summary of this information in the Disclosure, consistent with Article 6.5.⁹⁹ Turkey has explained that for information to be treated as confidential under Article 6.5, there must be: (i) a showing of good cause; (ii) a non-confidential summary of the information submitted in confidence that permits a reasonable understanding of the substance of that information; or (iii), in exceptional circumstances, a statement of reasons why the summarisation of that information is not possible.¹⁰⁰ Even assuming that the documents at issue fall within the scope of Article 6.5, the plain reading of the Disclosure shows that the MDCCE failed to meet any of these requirements.¹⁰¹ Moreover, Morocco's argument is not substantially different from those made in *China – GOES* and *China – Broiler Products*, which the panels and the Appellate Body squarely rejected.¹⁰²

4.6. Turkey's second claim under Article 6.9 (second sentence) is that the MDCCE's Disclosure did not take place in sufficient time for the Turkish companies to defend their interests. The "essential facts" that were disclosed too late are the movement certificates and commercial invoices covering a portion of the allegedly unreported sales. In Turkey's view, the fact that the investigation at issue exceeded the deadlines set out in Article 5.10, and that the MDCCE did not assess in a meaningful manner the comments of the Turkish exporters on the Disclosure shows clearly that the MDCCE's Disclosure did not take place *in sufficient time* for the Turkish companies to defend themselves. Moreover, the extremely limited deadline of 5 working days that the Turkish exporters were effectively given to comment on the Disclosure was much shorter than the 21-days period established under Morocco's domestic law.¹⁰³

4.7. In response to this claim, Morocco refers to the fact that the Turkish exporters were able to comment on the Disclosure as proof that this document was issued "in sufficient time" for the exporters to defend their interests.¹⁰⁴ However, Turkey recalls that the underlying purpose of the Disclosure was to allow the interested parties, including the Turkish exporters, to defend their interests by, *inter alia*, commenting on the completeness and correctness of the facts being considered by the MDCCE.¹⁰⁵ This means in practice that the Disclosure should have been issued sufficiently early in the investigation to permit the MDCCE to receive comments, take them into account, and to finalise the investigation within the timeframes in Article 5.10. The MDCCE failed to fulfill any of these tasks.¹⁰⁶

4.8. In light of the foregoing, the MDCCE's disclosure of "essential facts" is inconsistent with Article 6.9, first and second sentences.

5 THE MDCCE'S INJURY ANALYSIS IS INCONSISTENT WITH ARTICLE VI:6(A) OF THE GATT 1994, AND ARTICLES 3.1, 3.4 AND FOOTNOTE 9 OF THE ANTI-DUMPING AGREEMENT

5.1 Morocco's terms of reference objections should fail

5.1. In its consultations request, Turkey added under the title "injury/causation determination", the claims under Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement.¹⁰⁷ In its panel request,

⁹⁷ Turkey's second written submission, paras. 5.7-5.8.

⁹⁸ Morocco's second written submission, paras. 102-108.

⁹⁹ Morocco's second written submission, para. 103 (referring to the Draft Final Determination, Exhibit TUR-10, paras. 51 and 55).

¹⁰⁰ Turkey's first written submission, para. 10.3; Turkey's second written submission, paras. 8.4-8.12.

¹⁰¹ Turkey's opening statement at the second meeting of the Panel with the parties, paras. 3.26-3.27.

¹⁰² Turkey's opening statement at the second meeting of the Panel with the parties, paras. 3.28-3.29 (referring to Appellate Body Report, *China – GOES*, para. 247; Panel Report, *China – GOES*, paras. 7.399, 7.410, 7.562, 7.571; and Panel Report, *China – Broiler Products*, paras. 7.288, 7.321).

¹⁰³ Turkey's first written submission, paras. 7.18-7.19; Turkey's answer to Panel question 3.1.b, paras. 67-69; Turkey's second written submission, paras. 3.33-3.35.

¹⁰⁴ Morocco's second written submission, para. 121.

¹⁰⁵ Appellate Body Report, *China – GOES*, footnote 390.

¹⁰⁶ Turkey's opening statement at the second meeting of the Panel with the parties, paras. 3.33-3.34.

¹⁰⁷ WT/DS513/1.

Turkey made claims with respect to the "injury determination" under Articles 3.1, 3.4, 6.5, 6.5.1 and 6.9 of the same agreement, and Article VI:6(a) of the General Agreement on Tariffs and Trade 1994 (GATT 1994).¹⁰⁸ Morocco raises four objections to the Panel's terms of reference.

5.2. First, Morocco argues that the reference in the consultations request to Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement "does not indicate the legal basis for the complaint".¹⁰⁹ Obviously, the consultations request clearly indicated the legal basis: Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement. Morocco is incorrect in suggesting that the consultations request should have been more precise or provided further explanations.

5.3. Article 4.4 of the DSU requires that a consultations request provide "an indication of the legal basis of the complaint". Turkey plainly did so by referring to Articles 3.1 and 3.4 of the Anti-Dumping Agreement. Morocco suggests that, in addition, Turkey was required to submit its "arguments" as to why the MDCCE's injury analysis is inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement. But "arguments" are not required to be set out in a consultations request under Article 4.4 of the DSU or even in panel requests under Article 6.2 of the DSU.¹¹⁰ Thus, Morocco's objection is at odds with the correct legal standard under Article 4.4 of the DSU.

5.4. Moreover, WTO panels have consistently ruled that the term "indication" of the legal basis in Article 4.4 of the DSU is "something less than a summary sufficient to present the problem clearly" as required in Article 6.2 of the DSU.¹¹¹ Thus, it is inappropriate for Morocco to suggest that the Panel should import the stricter and more precise legal standard for Article 6.2 into Article 4.4 of the DSU.

5.5. In any event, in its request for consultations Turkey complained about the MDCCE's injury analysis. In the challenged investigation, there was only one injury analysis – i.e. whether the establishment of the domestic industry was retarded. Thus, by referring to "injury", Turkey unequivocally referred to the *only* injury analysis conducted by the MDCCE – that of material retardation. The Panel's terms of reference are established in the panel request, which makes clear that Turkey made claims under Articles 3.1 and 3.4 regarding the determination whether the domestic industry was "established" and whether its establishment was materially "retarded".

5.6. Second, Morocco claims that Turkey's consultations request does not contain a reference to Footnote 9 to Article 3 of the Anti-Dumping Agreement. However, Footnote 9 defines the term "injury" and thus informs the remainder of Article 3. By referring to several paragraphs of Article 3, the consultations request included, by implication, Footnote 9. Accordingly, Morocco's objection regarding Footnote 9 is without merit.

5.7. Third, regarding the objection to Turkey's claim under Article VI:6(a) of the GATT 1994, Morocco recognizes that there were a number of references to Article VI in Turkey's consultations request.¹¹² It contends, however, that these were not made in connection with the injury analysis. This objection should fail. Article VI is the relevant provision in the GATT 1994 concerning anti-dumping duties. Article 1 of the Anti-Dumping Agreement recognizes that the provisions of this Agreement "govern the application of Article VI of GATT 1994". Thus, the reference to Article 3.1 and 3.4 of the Anti-Dumping Agreement in Turkey's consultations request entails a reference to Article VI:6(a) of the GATT 1994. In fact, Morocco does not – *and cannot* – argue that the claim under Article VI:6(a) expanded the scope, or change the essence, of Turkey's injury claims.

5.8. Fourth, regarding the objection to Turkey's claims under Articles 6.5 and 6.5.1, Morocco argues that these provisions do not relate to the "Injury/Causation Determination" referred to in the consultations request. This argument is incorrect because the consultations request took issue with the MDCCE's failure to "provide a reasoned and adequate explanation" of its injury analysis. It is undisputed that the MDCCE accorded great significance to the (redacted) break-even threshold in critical parts of its "establishment" analysis.¹¹³ How could the MDCCE have provided "a reasoned and adequate explanation" for the "establishment" analysis if it unduly redacted critical information

¹⁰⁸ WT/DS513/2.

¹⁰⁹ Morocco's first written submission, para. 32.

¹¹⁰ See, for instance, Appellate Body Report, *EC – Selected Customs Matters*, para. 153.

¹¹¹ Panel Report, *US – Poultry (China)*, para. 7.45.

¹¹² Morocco's second written submission, para. 24.

¹¹³ Preliminary Determination, Exhibit TUR-6, para. 83; and Morocco's second written submission, para. 148.

on the break-even threshold? Accordingly, the claims under Articles 6.5 and 6.5.1 concerning the analysis of the break-even threshold were a natural evolution of Turkey's consultations request, which explicitly took issue with the MDCCE's failure to "provide a reasoned and adequate explanation" for the injury analysis. Moreover, the claims under Article 6.5 and 6.5.1 did not expand the scope or change the essence of the dispute.

5.9. Fifth, regarding the objection to Turkey's claim under Article 6.9 of the Anti-Dumping Agreement, Turkey's consultations request took issue with the fact that the MDCCE failed to provide a "reasoned and adequate explanation" of its injury finding. Specifically, the MDCCE failed to give proper account of the facts that it considered essential to find that the domestic industry was "unestablished". The appropriate document in which to explain those facts was the disclosure letter governed by Article 6.9. Thus, the claim under Article 6.9 was a natural evolution of Turkey's complaint and this claim did not expand the scope or change the essence of the dispute.

5.10. Sixth, regarding the objection to Turkey's "good cause" argument under Article 6.5 of the Anti-Dumping Agreement, Turkey recalls that both Article 6.5 and 6.5.1 form a balance between, on the one hand, confidentiality, and on the other hand, transparency and due process. As Turkey has stated in its submissions, Article 6.5 contains a single obligation with respect to the first leg of the balance relating to confidentiality. This obligation consists in treating certain information as confidential and not to disclose it without the permission of the party claiming confidentiality. As Article 6.5 contains one single obligation regarding confidentiality, Turkey was not required to state its argument that Maghreb Steel failed to provide "good cause" for seeking confidential treatment for its information on the break-even point. This "argument" had to be included in Turkey's submissions to the Panel – not in the panel request.¹¹⁴

5.2 The MDCCE's analysis of "establishment" of the domestic industry is inconsistent with Article 3.1 and Footnote 9 of the Anti-Dumping Agreement and Article VI:6(a) of the GATT 1994

5.11. Turning to Turkey's claims regarding the analysis of "establishment" of an industry, Morocco argues that there was "no obligation to assess whether the domestic industry was established in the investigation at issue".¹¹⁵ This is incorrect. Under Article VI:6(a) of the GATT 1994 and Footnote 9 of the Anti-Dumping Agreement, the determination of whether an industry is "established" is a threshold question. If the industry is not established, the authority may conduct its injury analysis on the basis of whether there was "material retardation". If, on the contrary, the industry is already established, there is nothing to retard anymore and the relevant analysis would be whether there was material injury or threat thereof. The third parties agree with this approach¹¹⁶ as did the MDCCE itself in the challenged determinations.¹¹⁷

5.12. The MDCCE found that the domestic industry was "unestablished" for purposes of Footnote 9 to Article 3 of the Anti-Dumping Agreement, and Article VI:6(a) of the Anti-Dumping Agreement, based on a five-tiered legal test it borrowed from the practice of the United States' authorities. However, the MDCCE failed to conduct an objective examination of each of the elements of that legal test.

5.13. *First*, the MDCCE incorrectly stated that a period greater than three years was required to conduct a traditional analysis of material or threat of material injury.¹¹⁸ The Recommendations Concerning the Periods of Data Collection for Anti-Dumping Investigations (Committee Guidelines) indicate that injury periods may cover a period shorter than three years, especially in those cases in which the domestic industry, or a part thereof, "has existed for a lesser period".¹¹⁹ Turkey is not asking the Panel to apply the Committee Guidelines as binding law. Rather, Turkey refers to these Committee Guidelines as evidence of the recognition by a WTO body, composed of all WTO Members, that injury periods may effectively be shorter than three years. Moreover, the practice of investigating authorities of several WTO Members further attests to the fact that injury periods may cover less than three years.

¹¹⁴ See, for instance, Appellate Body Report, *EC – Selected Customs Matters*, para. 153.

¹¹⁵ Morocco's second written submission, para. 133.

¹¹⁶ See EU's answer to Panel Question No. 1.1, paras. 1-2; Japan's answer to Panel Question No. 1.1, paras 1-3; and US' answer to Panel Question No. 1.1, paras. 1-3.

¹¹⁷ See Final Determination, Exhibit TUR-11, para. 80.

¹¹⁸ Preliminary Determination, Exhibit TUR-6, para. 76.

¹¹⁹ Turkey's first written submission, paras. 8.38-8.46.

5.14. Morocco contends that the Committee Guidelines allow collection of data for less than three years from "parties" rather than the "domestic industry" as a whole.¹²⁰ An injury analysis must be conducted with respect to the totality of the domestic industry (as defined in Article 4.1 of the Anti-Dumping Agreement) and not with respect to a few companies within the domestic industry. Thus, the domestic industry as a whole is an interested party in an anti-dumping investigation. But more importantly, Morocco's argument fails because, in this dispute, there is only one producer of hot-rolled steel in Morocco: Maghreb Steel. Therefore, whether the Committee Guidelines refer to a party and not to the domestic industry as a whole is irrelevant. In this dispute, there is only one company that constitutes the domestic industry. Accordingly, the Committee Guidelines provide a useful understanding that, contrary to the MDCCE's assertion, the injury period may be shorter than three years if "a party from whom data is being gathered has existed for a lesser period".¹²¹ This is confirmed by the practice of several investigating authorities around the world, which have relied on injury periods shorter than three years.¹²² Thus, the MDCCE's statement that an injury analysis requires a period of three years at a minimum¹²³ is incorrect as a matter of law and practice.

5.15. *Second*, the MDCCE dismissed the significance of the high market share levels that Maghreb Steel secured during the injury period on the grounds that sales in 2012 were made at a loss. It is undisputed between the parties that Maghreb Steel supplied almost 70% of the total hot-rolled steel consumed in Morocco (both captive and merchant markets). Moreover, Maghreb Steel supplied 40% of all hot-rolled steel sold in the merchant market. These figures show that the domestic production of hot-rolled steel was well established in the Moroccan market. Indeed, Maghreb Steel had been producing cold-rolled steel for several years before it decided in 2009 to produce the upstream product (i.e. hot-rolled steel). Its position as the dominant producer of cold-rolled steel explains why it was able, in only 2.5 years to secure over 40% of the merchant market.

5.16. Morocco argues that the MDCCE correctly dismissed the significance of the 40% market share secured by Maghreb Steel in 2012 because sales were made at a loss. It bears recalling that the MDCCE found that sales were made at a loss in 2012 *only* – and not during the full injury period.¹²⁴ In rejecting the high market share as relevant to the analysis of "establishment", the MDCCE erroneously extrapolated its finding for 2012 to the full period of investigation¹²⁵ without allowing for the possibility that a further analysis of the cost/price levels in 2010 and 2011 compelled a different conclusion. In fact, evidence on the record suggests that prices for hot-rolled steel in 2011 were significantly higher than in 2012.¹²⁶ Thus, the MDCCE's finding that Maghreb Steel made sales at a loss during the injury period was based on 2012 data only, and is therefore not a finding that "an unbiased and objective investigating authority could have concluded".¹²⁷

5.17. *Third*, the MDCCE erroneously concluded that Maghreb Steel had not reached the break-even threshold in 2012 and that this was an indication that the company was not "established". the MDCCE calculated the break-even threshold as the difference between two variables: the "totality of the revenues" and the "totality of the costs".¹²⁸ However, the "totality of the revenues" represented the proceeds obtained from the merchant sales only – 50% of production. The "totality of the costs" was the totality of the costs incurred for the entire production – that is, both the merchant and the captive production. This is an incomplete or inaccurate calculation. The MDCCE could not reasonably determine a break-even threshold on the basis of a calculation that reflects the costs of all sales but the revenues from only a portion of those sales.

5.18. Morocco refers to only one sentence of Maghreb Steel's questionnaire responses to argue that the MDCCE took the captive market into consideration in calculating the break-even threshold. That sentence states, in French, that "the break-even point in tonnes in 2012 amounts to [[]] T against

¹²⁰ Morocco's second written submission, paras. 143-145.

¹²¹ Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations, G/ADP/6, 16 May 2000, para. 1(c).

¹²² Turkey's second written submission, para. 6.30.

¹²³ Preliminary Determination, Exhibit TUR-6, para. 76.

¹²⁴ Preliminary Determination, Exhibit TUR-6, para. 109; and Final Determination, Exhibit TUR-11, para. 176.

¹²⁵ Final Determination, Exhibit TUR-11, para. 95.

¹²⁶ *Maghreb Steel Mise à Jour du dossier relatif à l'exercice 2012*, Exhibit TUR-51.

¹²⁷ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.504.

¹²⁸ Preliminary Determination, Exhibit TUR-6, para. 83. See also Morocco's first written submission, para. 229.

real sales (including captive sales) for an additional necessary tonnage of [[]] T".¹²⁹ This sentence, however, is contained in Maghreb Steel's questionnaire responses, not in the MDCCE's published report. One cannot lightly assume that the MDCCE took into account something just because it was stated in one of the parties' questionnaire responses.

5.19. But more importantly, the sentence in Maghreb Steel's questionnaire responses on which Morocco relies actually contradicts the MDCCE's findings. That sentence assumes that there were "*ventes intersites*" (captive sales). However, both the MDCCE's determinations and Morocco's first written submission confirmed that, with respect to the captive production, there were "no sale[s]" as there were no invoices".¹³⁰ Therefore, Morocco cannot rely on the domestic industry's assertion that there were captive sales because, as the MDCCE admitted, there were no such sales.

5.20. Furthermore, it is perplexing that Morocco refers in its first written submission to the existence of a "hypothetical price" for the captive production.¹³¹ In fact, in another part of its submission, Morocco quotes the MDCCE's determination that Maghreb Steel "physically transferred, without any sales transactions or price, the hot-rolled steel for the captive market".¹³² Thus, there is no basis on the record to argue that Maghreb Steel assigned a hypothetical price to the captive production. At any rate, Morocco's assertion that the break-even threshold took captive production into account is *ex post* rationalization and is not supported by positive evidence.

5.21. Accordingly, by not ensuring that the break-even threshold included the captive production, the MDCCE's finding that Maghreb Steel did not reach that threshold in 2012 is not a finding that "an unbiased and objective investigating authority could have concluded".¹³³

5.22. *Fourth*, the MDCCE stated that there were abrupt changes in production during the period of investigation, and that this was an indication that Maghreb Steel was not established. Morocco dwells upon the variations between months to argue that production "fluctuated significantly".¹³⁴ However, the ranges within which Maghreb Steel produced from February 2011 to December 2012, with the exception of two months, were reasonable in view of the nature of the product under consideration. Hot-rolled steel is mostly used for large infrastructure projects and the demand for this product is a function of the number and size of the specific projects at a given point in time.¹³⁵ For this reason, some monthly variations in the production of hot-rolled steel are expected. This is further confirmed by the variations in the levels of imports of the same product, which increased from 2010 to 2011 by 9.5% and then decreased from 2011 to 2012 by 21%. These variations show that hot-rolled steel is subject to certain fluctuations regardless of whether it is imported or produced domestically. The MDCCE could not assume that these variations in production levels were a function of the industry not being established, especially since relevant record evidence showed that in 2012, both local and international demand, prices and imports into Morocco declined significantly.¹³⁶

5.23. *Fifth*, Turkey challenged the MDCCE's finding that the production of hot-rolled steel constituted a new industry in itself.¹³⁷ Morocco responded that large investments were required by Maghreb Steel.¹³⁸ But investments are required every time a company adds a new production line. That a company invests to produce a different product line should not automatically lead to the conclusion that this company is creating "a new industry". As the dominant producer of cold-rolled steel, Maghreb Steel decided to start producing the upstream product in 2010 – i.e. hot-rolled steel. As such, Maghreb Steel was able to use its knowledge of the distribution channels, as well as the buyers and consumers of hot-rolled steel in the Moroccan market, to secure over 40% of the merchant market in only 2.5 years. It is therefore inaccurate to assert that Maghreb Steel sought to

¹²⁹ Maghreb Steel's questionnaire response, Exhibit MOR-8, p. 9.

¹³⁰ Morocco's first written submission, para. 191. (underlining added) See also Final Determination, Exhibit TUR-11, para. 138.

¹³¹ Morocco's first written submission, para. 191.

¹³² Morocco's first written submission, para. 186, quoting also Final Determination, Exhibit TUR-11, para. 138. (underlining added)

¹³³ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.504.

¹³⁴ Morocco's first written submission, para. 200.

¹³⁵ Turkey's first written submission, para. 8.48.

¹³⁶ *Maghreb Steel Mise à Jour du dossier relatif à l'exercice 2012*, Exhibit TUR-51.

¹³⁷ Turkey's first written submission, paras. 8.77-8.80.

¹³⁸ Morocco's first written submission, para. 206.

establish a new industry. Rather, by embarking on the production of the upstream product, Maghreb Steel incorporated "a new product line of an established firm" instead of "a new industry".¹³⁹

5.24. Morocco argues that the hot-rolled steel production is a new industry because the MDCCE defined the product under consideration as "hot-rolled steel".¹⁴⁰ The question, however, is not whether it is a new domestic industry under Article 4.1 of the Anti-Dumping Agreement. This proposition would create the anomalous result that, every time an industry produces a variation of a product that changes its tariff classification, the domestic industry could request an analysis of "material retardation" in a trade remedies investigation. Instead, the relevant question is whether the domestic industry faced barriers typical of a start-up business entering the domestic market.¹⁴¹ In this dispute, had the MDCCE undertaken this analysis, it would have found that, as the predominant steel supplier in Morocco, Maghreb Steel was fully familiar with, and benefitted from, the distribution chains and users of hot-rolled steel within Morocco.

5.25. Accordingly, it is clear that a domestic industry that has operated for over 2.5 years, that has secured over 40% of the merchant market, and supplies almost 70% of the total consumption of hot-rolled steel in Morocco can hardly be said to be "unestablished". Moreover, the MDCCE's analysis of the break-even point, the stabilization of production and the entry barriers for Maghreb Steel's hot-rolled steel production line are fraught with deficiencies. For these reasons, the MDCCE's finding that the domestic industry was "unestablished" is not one that "an unbiased and objective investigating authority could have concluded"¹⁴² and is therefore inconsistent with Article VI:6(a) of the GATT 1994, and Article 3.1 and Footnote 9 to the Anti-Dumping Agreement.

5.3 The MDCCE's analysis of "retardation" of the establishment of a domestic industry is inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement

5.3.1 The MDCCE failed to analyze all 15 factors listed in Article 3.4

5.26. Turkey argues that the MDCCE failed to analyse six of the 15 factors listed in Article 3.4. Morocco agrees that an investigating authority is required to assess all of these factors in cases of material retardation.¹⁴³ However, Morocco argues that the MDCCE did analyze all such factors. This is incorrect.

5.27. For certain factors, (i.e. return on investments, negative effects on cash flow, and ability to raise capital or investments), Morocco provides *ex post* explanations of what the MDCCE "meant".¹⁴⁴ Turkey recalls in this regard that a panel may not accept *ex post* rationalizations, that is, explanations not contained in the investigating authority's explanation in the published report.¹⁴⁵

5.28. For other factors, Morocco seeks to piece together certain assertions scattered throughout the challenged determinations to assert that the MDCCE did analyse the missing factors. In the case of wages, for example, Morocco relies on a statement in another part of the MDCCE's final determination to assert that there was a "massive layoff" that had a downward effect on wages.¹⁴⁶ Article 3.4, however, lists employment and wages separately. A decrease in employment levels does not necessarily entail that wages declined. For instance, government-set minimum wages or agreed minimum wages with the labour unions may prevent a company from decreasing wages even in dire economic conditions. Therefore, Morocco cannot assume that because the MDCCE addressed employment it implicitly provided an analysis of wages within the meaning of Article 3.4.

5.29. Moreover, in the case of factors affecting domestic prices, Morocco relies on statements made in different sections of the MDCCE's determination to assert that the MDCCE did address these factors. For instance, Morocco relies on a statement made in the price effects analysis under

¹³⁹ Judith Czako *et al.*, *A Handbook on Anti-Dumping Investigations*, (Cambridge University Press: Cambridge, 2002), at 276. Exhibit TUR-38.

¹⁴⁰ Morocco's second written submission, para. 170.

¹⁴¹ See Dong Woo Seo, *Material Retardation Standard in the U.S. Antidumping Law*, 24 LAW & POL'Y INT'L Bus. 835 (1993), Exhibit TUR-52, p. 100.

¹⁴² Panel Report, *EU – Biodiesel (Argentina)*, para. 7.504.

¹⁴³ Morocco's first written submission, para. 221.

¹⁴⁴ Morocco's first written submission, paras. 229-233.

¹⁴⁵ Appellate Body Report, *EC – Fasteners (China)* (Article 21.5 – China), paras. 5.53 and 5.59. See also Appellate Body Report, *US – Tyres (China)*, para. 329.

¹⁴⁶ Morocco's first written submission, para. 234.

Article 3.2 of the Anti-Dumping Agreement that imports had a "non-negligible effect on the price undercutting".¹⁴⁷ Morocco also relies on a statement made in the causation analysis under Article 3.5 regarding the prices of raw materials. These statements were made in different parts of the challenged determinations and in different contexts. The fact remains that the MDCCE did not address factors affecting domestic prices in its analysis under Article 3.4 of the Anti-Dumping Agreement, which requires an analytical inquiry different from that required in Articles 3.2 and 3.5 of the Anti-Dumping Agreement.¹⁴⁸ Morocco cannot argue that the authority assessed certain factors based on statements made in separate, unrelated sections.

5.30. In the case of growth, Morocco relies on the panel report in *Egypt – Steel Rebar* to suggest that an investigating authority is not required to assess growth in its injury determination since growth can be derived from "sales volume and market share".¹⁴⁹ Turkey agrees that growth may potentially be a function of other factors, some of which are listed in Article 3.4.¹⁵⁰ However, this does not free an investigating authority from the obligation to address growth as part of its Article 3.4 analysis. As the Appellate Body and several panels have recently held, Article 3.4 lists certain factors that "are deemed to be relevant in every investigation and which must always be evaluated by the investigating authorities".¹⁵¹ If some of them are irrelevant to the analysis, the authority must explain the reasons why.¹⁵²

5.3.2 The MDCCE failed to assess the captive production in its "retardation" analysis

5.31. The MDCCE decided to exclude the captive production from its analysis of the impact of imports on the domestic industry. In particular, the MDCCE noted that this exclusion was "perfectly justified to the extent that the relevant market is characterized by a clear separation between the 'captive market' and the 'merchant market' and by the fact that the Maghreb Steel's captive sales are not in direct competition with imports".¹⁵³ The MDCCE's injury analysis was selective, one-sided and therefore lacked objectivity – inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement – because: (1) the MDCCE failed to provide data concerning the performance of the captive market, and more importantly, failed to conduct an "analysis of the significance of the data for the captive market"¹⁵⁴ which the Appellate Body has considered to be "highly pertinent"; and (2) the MDCCE failed to provide a "sufficient explanation as to why it [wa]s not necessary to examine directly or specifically the other parts of the domestic industry".¹⁵⁵

5.32. With respect to Turkey's argument that the MDCCE ignored the captive production in its analysis of the relevant factors, Morocco responds that the MDCCE "did also take the captive market into consideration".¹⁵⁶ Morocco's position belies the very words of the challenged determinations that state that the exclusion of the captive market from the assessment of the economic factors was "perfectly justified".¹⁵⁷ Thus, it is clear that the captive production was not taken into consideration by the MDCCE when assessing the economic factors listed in Article 3.4.

5.33. Morocco further argues that the MDCCE provided a "satisfactory explanation" for excluding the captive production from its injury analysis: i.e. that the "captive market does not function according to the market conditions".¹⁵⁸ The MDCCE's "explanation", however, has been explicitly rejected in at least two analogous disputes. As the Appellate Body stated in *US – Hot-Rolled Steel*, it is "highly pertinent" in an injury analysis that "a significant proportion of the domestic production ... [be] shielded from direct competition with imports", because imports may be affecting only the

¹⁴⁷ Morocco's first written submission, para. 235, quoting Final Determination, Exhibit TUR-11, para. 145.

¹⁴⁸ Appellate Body Report, *China – GOES*, para. 149.

¹⁴⁹ Morocco's first written submission, para. 236.

¹⁵⁰ Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 162.

¹⁵¹ Appellate Body Reports, *China – HP-SSST*, para. 5.203; *US – Hot-Rolled Steel*, para. 194; and *Thailand – H-Beams*, para. 125. See also Panel Reports, *Russia – Commercial Vehicles*, para. 7.111 (unadopted); *China – Cellulose Pulp*, para. 7.117; *EU – Biodiesel (Argentina)*, para. 7.396; *China – X-Ray Equipment*, para. 7.180; and *EC – Bed Linen (Article 21.5 – India)*, para. 6.162.

¹⁵² Panel Report, *China – X-Ray Equipment*, para. 7.180.

¹⁵³ Final Determination, Exhibit TUR-11, para. 137.

¹⁵⁴ Appellate Body Report, *US – Hot-Rolled Steel*, para. 213.

¹⁵⁵ Appellate Body Report, *US – Hot-Rolled Steel*, para. 204.

¹⁵⁶ Morocco's first written submission, para. 245.

¹⁵⁷ Final Determination, Exhibit TUR-11, para. 137.

¹⁵⁸ Morocco's second written submission, para. 189.

part of the domestic industry destined for the merchant market.¹⁵⁹ Thus, the statement that the captive production was excluded because it was not "in competition" with imports is not a "satisfactory explanation".

5.3.3 The MDCCE used the McLellan Report despite fundamental errors

5.34. The MDCCE unduly relied on the MCLELLAN report, which contained at least three critical errors: the miscalculation of the domestic demand/consumption; the sales of downstream products; and the prices of key raw materials.¹⁶⁰ It is clear that the miscalculations that the MDCCE found in the MCLELLAN report have potential significant consequences for the analysis of most, if not all, of the injury factors. At a minimum, the MDCCE should have sought to update the projections provided by the MCLELLAN report/Business Plan by, for instance, verifying projected trends in world market prices against actual developments. However, the MDCCE did not do so. Rather, the MDCCE dismissed the significance of these miscalculations by providing explanations that are not "reasoned and adequate", that is, explanations that could not be provided "by an unbiased and objective investigating authority in light of the facts and arguments before it".¹⁶¹ Since the MDCCE failed properly to assess the relevance and consequences of these miscalculations, the MDCCE's reliance on the MCLELLAN report was incorrect and therefore its overall injury analysis, which was largely based on that study, is inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

5.4 Conclusion

5.35. In the light of the foregoing, Turkey requests the Panel to find that the MDCCE's conclusion that the Moroccan domestic industry was "unestablished" is inconsistent with Article 3.1 and Footnote 9 of the Anti-Dumping Agreement and Article VI:6(a) of the GATT 1994. As a consequence, Turkey requests the Panel to find that the WTO-inconsistent finding that the industry was "unestablished" rendered the MDCCE's overall analysis of injury inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

5.36. In addition, Turkey requests the Panel to find that, even under the assumption that the domestic industry was unestablished, the MDCCE's assessment of the relevant injury factors is inconsistent with Article 3.4 because the MDCCE only assessed nine of the 15 factors listed in Article 3.4; the MDCCE did not provide data concerning the performance of the captive market, and more critically, failed to conduct an "*analysis* of the significance of the data for the captive market"; and the MDCCE's reliance on the MCLELLAN report was inappropriate in the light of the important miscalculations that the MDCCE itself found. For all those reasons, the MDCCE's injury analysis is inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

6 MOROCCO ACTED INCONSISTENTLY WITH ARTICLES 6.5, 6.5.1 AND 6.9 OF THE ANTI-DUMPING AGREEMENT

6.1. Morocco acted inconsistently with its obligations under Articles 6.5, 6.5.1 and 6.9 of the Anti-Dumping Agreement by failing to disclose the break-even threshold.

6.2. Article 6.5 allows investigating authorities to treat certain information as confidential. However, this requirement is subject to several conditions. First, the labelling of information as confidential must be preceded by a showing of good cause—that is, "a reason sufficient to justify withholding information from both the public and the other parties to the investigation" (Article 6.5).¹⁶² The "good cause" obligation requires investigating authorities to "assess those reasons and determine, objectively, whether the submitting party has shown 'good cause'".¹⁶³ Second, the authority must require the party submitting the information to "furnish non-confidential summaries thereof", which "shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence" (Article 6.5.1). Alternatively, in "exceptional circumstances", the party may indicate that summarization is not possible in which case it will be required to provide "a statement of the reasons why summarization is not possible" (Article 6.5.1).¹⁶⁴

¹⁵⁹ Appellate Body Report, *US – Hot-Rolled Steel*, para. 198; see also Appellate Body Report, *US – Cotton Yarn*, para. 102.

¹⁶⁰ Turkey's first written submission, paras. 9.30-9.38.

¹⁶¹ Panel Report, *China – Cellulose Pulp*, para. 7.142.

¹⁶² Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.37.

¹⁶³ Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.39.

¹⁶⁴ Turkey's first written submission, para. 10.3.

6.3. The MDCCE did not discuss in its Preliminary Determination, the Disclosure or its Final Determination the "good cause" that warranted treating the break-even threshold as confidential. Moreover, the MDCCE did not appear to have required a summary of the information treated as confidential or alternatively the statement of the reasons why summarization was not possible. Accordingly, the MDCCE had no basis to treat the break-even threshold as confidential and thereby acted inconsistently with Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement by redacting that information in its Preliminary Determination.¹⁶⁵

6.4. In addition, Article 6.9 of the Anti-Dumping Agreement states: "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". Turkey has explained that Article 6.9 is a due process provision that enables interested parties "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".¹⁶⁶ The essential facts that must be disclosed are "those facts that are significant in the process of reaching a decision as to whether or not to apply definitive measures."^{167, 168}

6.5. The break-even threshold was an "essential" or "significant" fact in the process of reaching the decision that the domestic industry was "unestablished". In fact, the MDCCE explicitly recognized in both its preliminary and final determinations that this criterion is "no doubt the criterion that is most commonly used in international practice in ascertaining whether an enterprise is established under Article 3 of the Anti-Dumping Agreement".¹⁶⁹ However, in its Disclosure (which Turkey understands is the document where the MDCCE disclosed the essential facts) it did not include information on the break-even threshold. Although the Disclosure made a reference to the preliminary determination, the latter unduly redacted the information concerning the break-even threshold. It follows, therefore, that the Disclosure did not provide information that was essential or significant to the MDCCE's finding that the domestic industry was "unestablished".¹⁷⁰

6.6. In response, Morocco argues that Turkey's claims under Articles 6.5, 6.5.1, and 6.9 fall outside the terms of reference of this Panel. Turkey refers to section 5.1 above where Turkey explains why this argument is misplaced.

6.7. Morocco argues that, in any event, the fact that the MDCCE redacted and replaced the confidential information by "XXXX" in its Preliminary Determination clearly meant that the information was not provided because it was confidential.¹⁷¹ However, simply to redact information does not amount to showing a good cause for treating that information as confidential, as required under Article 6.5. Morocco also argues that the information was business confidential information¹⁷² and that since it is by nature confidential, it was not necessary for the MDCCE to show "good cause" for treating it as confidential.¹⁷³ However, the Appellate Body explained that such *ex post* explanations cannot be put forward by the defendant to show good cause within the meaning of Article 6.5.¹⁷⁴ Moreover, the Appellate Body also explained that good cause must be shown whether the information is by nature confidential or provided on a confidential basis.^{175, 176}

¹⁶⁵ Turkey's first written submission, para. 10.4.

¹⁶⁶ Appellate Body Report, *China – GOES*, footnote 390 (quoting Panel Report, *EC – Salmon (Norway)*, para. 7.805).

¹⁶⁷ Appellate Body Report, *China – GOES*, para. 241.

¹⁶⁸ Turkey's first written submission, para. 10.5.

¹⁶⁹ Preliminary Determination, Exhibit TUR-6, para. 82. This was confirmed in the Final Determination, Exhibit TUR-11, para. 97.

¹⁷⁰ Turkey's first written submission, para. 10.6.

¹⁷¹ Morocco's second written submission, paras. 198-199.

¹⁷² Morocco's first written submission, para. 296; Morocco's opening statement at the first meeting of the Panel, para. 75.

¹⁷³ Morocco's first written submission, para. 268.

¹⁷⁴ Appellate Body Report, *EC – Fasteners (Article 21.5 – China)*, para. 5.53.

¹⁷⁵ Appellate Body Report, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.95, citing Appellate Body Report, *EC – Fasteners (China)*, paras. 536-537.

¹⁷⁶ Turkey's second written submission, paras. 8.7-8.9; Turkey's opening statement at the second meeting with the Panel, para. 4.23.

6.8. Moreover, Morocco submits that the information in Maghreb Steel's questionnaire responses, the Preliminary Determination, the Disclosure and the Final Determination about the break-even threshold is sufficient to satisfy the requirements under Articles 6.5.1, and 6.9.¹⁷⁷ With respect to Maghreb Steel's questionnaire responses, Turkey explained that critical information is redacted on pages 8 and 9.¹⁷⁸ For instance, the break-even threshold was redacted for 2012, as well as the detail of the calculation for the break-even threshold for the 2010-2012 period, and the actual data in the explanation on page 9. With respect to the Preliminary Determination, Morocco explains that in its view, it was sufficient for the MDCCE to indicate that the break-even threshold related to volume of production, and that Maghreb Steel's production had reached 63% of its break-even threshold in 2012.¹⁷⁹ With respect to the Disclosure and the Final Determination, Morocco explains that they include arguments made about the profitability threshold, with the exception of the precise figure.¹⁸⁰ However, none of these documents contains the actual break-even threshold or an indication of how it was calculated. Moreover, the MDCCE failed to request Maghreb Steel to provide either a non-confidential summary (such as indexed data) or an explanation why summarization was not possible within the meaning of Article 6.5.1. This cannot be considered as "sufficient detail to permit a reasonable understanding of the substance of the information" within the meaning of Article 6.5.1, or a disclosure of the essential facts forming the basis of the investigating authority's decision, within the meaning of Article 6.9.¹⁸¹

6.9. Morocco also argues that the MDCCE could not have been required to disclose confidential information to the interested parties under Article 6.9, because it would contradict the prohibition in Article 6.5 to disclose such information.¹⁸² This argument cannot stand, because the MDCCE could have easily complied with both provisions. The MDCCE could have required Maghreb Steel to provide a non-confidential summary of the information at issue, e.g. by submitting indexed data. This would have satisfied the requirement under Article 6.9 to provide interested parties with the essential facts under consideration, so as to enable them to defend their interests. At the same time, this would also have satisfied the requirements under Article 6.5.1 to request a non-confidential summary where information is confidential.^{183, 184}

6.10. Finally, Morocco argues that the Turkish exporters "never objected" to the treatment of the break-even threshold as confidential¹⁸⁵, and "never requested"¹⁸⁶ access to the information that was, according to Turkey, "accessible"¹⁸⁷ to them because it was "on the administrative record" of the investigation.¹⁸⁸ Under Article 6.9, the investigating authority must inform the interested parties of the essential facts under consideration. The fact that the interested parties did not object to the treatment of certain information as confidential and did not request it is irrelevant to determining whether the MDCCE *informed* the interested parties of the essential facts, in accordance with Article 6.9. The burden was on the MDCCE to inform the interested parties, not on the interested parties to request the information at issue.^{189, 190}

6.11. In light of the foregoing, Morocco acted inconsistently with Article 6.5, 6.5.1, and 6.9 with respect to the non-disclosure of the break-even threshold.

¹⁷⁷ Morocco's first written submission, paras. 264-268; Morocco's first written submission, paras. 272-273; Morocco's response to Panel question No. 6.5, para. 160.

¹⁷⁸ Maghreb Steel's questionnaire responses, Exhibit MOR-8, pp. 8 and 9. See Turkey's response to Panel question 6.1.

¹⁷⁹ Morocco's first written submission, paras. 264-265; Morocco's response to Panel question No. 6.5, para. 160.

¹⁸⁰ Morocco's first written submission, paras. 266-268.

¹⁸¹ Turkey's second written submission, para. 8.6; Turkey's opening statement at the second meeting with the Panel, para. 4.24.

¹⁸² Morocco's first written submission, para. 276; Morocco's opening statement at the first meeting of the Panel, para. 77.

¹⁸³ See Panel Report, *China – GOES*, para. 7.410.

¹⁸⁴ Turkey's second written submission, para. 8.10.

¹⁸⁵ Morocco's first written submission, para. 274.

¹⁸⁶ Morocco's first written submission, para. 279.

¹⁸⁷ Morocco's first written submission, para. 263.

¹⁸⁸ Morocco's response to the Panel's question No. 6.5., para. 159.

¹⁸⁹ Panel Report, *EU – Fatty Alcohols (Indonesia)*, para. 7.229. The Appellate Body did not address this particular argument but upheld the Panel's finding under Article 6.7. Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, paras. 5.116 - 5.165.

¹⁹⁰ Turkey's second written submission, paras. 8.11-8.12.

7 REQUEST FOR FINDINGS AND A SUGGESTION

7.1. Turkey requests the Panel to find that:

- 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;
- The MDCCE used facts available to determine dumping margins for Erdemir Group and 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;
- 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;
- The MDCCE's determination that the domestic industry (Maghreb Steel) was "unestablished" is inconsistent with Footnote 9 to Article 3 and Articles 3.1 and 3.4 of the Anti-Dumping Agreement;
- 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
- 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".¹⁹¹

7.2. Turkey also requests the Panel to exercise the discretion accorded to it by 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. In several anti-dumping disputes where the violations at issue were of a "fundamental and pervasive"¹⁹² nature, or the extent and nature of the violation were such that the only appropriate and effective way of implementation was to repeal it¹⁹³, panels made such a suggestion. In this dispute, the measures at issue contain multiple inconsistencies with Morocco's obligations under the WTO Anti-Dumping Agreement. Turkey considers that these inconsistencies are of a fundamental and pervasive nature. Therefore, Turkey considers that the only appropriate and effective way for Morocco to bring its measure into conformity is by revoking the measure forthwith.¹⁹⁴

7.3. Furthermore, the MDCCE's finding of dumping rests entirely on its WTO-inconsistent application of facts available. Had the MDCCE conducted its investigation consistently with the Anti-Dumping Agreement, it would have found no or only a *de minimis* dumping margin for the Turkish exporters.¹⁹⁵ Turkey has also demonstrated that the MDCCE's determination of injury by relying on the finding of material retardation was misplaced and lacked any factual support. Finally, Turkey notes that next year, Morocco will have to decide whether to initiate a sunset review of this measure. Should the Panel uphold Turkey's claims, it would not appear to be appropriate for Morocco to try to implement findings relating to the original investigation and, at the same time, conduct a sunset review with a view to continuing a measure that would have been found to be WTO-inconsistent.¹⁹⁶

7.4. Therefore, if the Panel were to uphold Turkey's claims, the only appropriate way for Morocco to comply with the Panel's findings of inconsistency would be by repealing the measure at issue.

¹⁹¹ Turkey's first written submission, para. 11.1.

¹⁹² Panel Report, *Mexico – Steel Pipes and Tubes*, para. 8.12.

¹⁹³ Panel Report, *Guatemala – Cement I*, para. 8.6; Panel Report, *Guatemala – Cement II*, paras. 9.5-9.6; Panel Report, *US – Offset Act (Byrd Amendment)*, para. 8.6; Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 8.7.

¹⁹⁴ Turkey's first written submission, paras. 11.2-11.4.

¹⁹⁵ Preliminary Determination, Exhibit TUR-6, para. 50.

¹⁹⁶ Turkey's opening statement at the second meeting with the Panel, para. 5.2; Turkey's closing statement at the second meeting with the Panel, para. 1.17.

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF MOROCCO

I. INTRODUCTION

1. Morocco's investigating authority conducted the investigation and applied the anti-dumping duties in full conformity with Morocco's obligations under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") and the General Agreement on Tariffs and Trade 1994 ("GATT 1994"). Turkey's claims therefore have not merit and should be rejected.

II. FACTUAL BACKGROUND

2. On 21 January 2013, the Ministry of Industry, Commerce, Investment and Digital Economy in charge of External Trade ("MDCCE") of Morocco initiated an investigation on imports of certain hot-rolled steel from the European Union and Turkey, falling under HS codes 7208 (except 7208.10 and 7208.40), 7211.13, 7211.14, and 7211.19.

3. The investigation was initiated following receipt of a petition from Maghreb Steel on 20 November 2012. The MDCCE reviewed the consistency and adequacy of the information contained in the application, and concluded that the evidence presented in the application regarding the existence of dumping of imports of hot-rolled steel plates originating in the European Union and Turkey and the injury caused to Maghreb Steel by these dumped imports was sufficient to justify the initiation of an anti-dumping investigation.

4. The MDCCE notified the interested parties of the opening of the investigation and gave them an opportunity to participate in the proceedings. The MDCCE also sent questionnaires to the interested parties. Colakoglu and Erdemir Group, both of which are Turkish producers of hot-rolled steel exporting to Morocco, participated as interested parties and submitted questionnaire responses. The MDCCE accepted all requests from interested parties for the extension of time for the questionnaire responses.¹

5. The period of investigation for the dumping analysis was determined to be 1 January 2012 to 31 December 2012. The period of investigation for the injury analysis was determined to be 1 January 2009 to 31 December 2012.² Maghreb Steel, the petitioner, is the sole producer of hot-rolled steel plates in Morocco. Thus, for the purposes of the investigation, the MDCCE considered Maghreb Steel to constitute the domestic industry.³

6. On 29 October 2013, the MDCCE issued a Preliminary Determination on the existence of dumping, injury, and causal link, and imposed provisional anti-dumping duties on the products at issue. On 20 June 2014, the MDCCE sent the Draft Final Determination on the existence of dumping, injury and causal link to the interested parties.⁴

7. The MDCCE organized a meeting on 15 July 2014 at the request of the Turkish exporters.⁵ On 12 August 2014, the MDCCE published the Final Determination on the existence of dumping, injury, and causal link, recommending the imposition of definitive anti-dumping duties on imports of certain hot-rolled steel from Turkey and the European Union. The anti-dumping duties went into effect on 26 September 2014 for a duration of five years.⁶

¹ Preliminary Determination, Exhibit TUR-6, para. 7.

² Preliminary Determination, Exhibit TUR-6, para. 9.

³ Preliminary Determination, Exhibit TUR-6, para. 22.

⁴ See Emails from the MDCCE to the interested parties regarding the Draft Final Determination, Exhibit MAR-3.

⁵ See Final Determination, Exhibit TUR-11, para. 17.

⁶ Arrêté conjoint de 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)

III. STANDARD OF REVIEW

8. The standard of review set out in Articles 11 and 17.6 of the DSU requires a panel to determine whether the investigating authority's evaluation of the facts was unbiased and objective. A panel, in making its determinations, must not assume the role of the initial trier of fact⁷, and may not conduct a *de novo* review.⁸ This means that a panel may not substitute its own conclusion for those of the investigating authority⁹, but must focus on whether the conclusions reached by the investigating authority are "reasoned and adequate".¹⁰ The Appellate Body has indicated that a panel may not reject an investigating authority's conclusions simply because the panel would have arrived at a different outcome if it were making the determination itself.¹¹

9. Thus, the investigating authority has discretion in weighing and considering conflicting arguments and factual evidence. As long as the investigating authority's establishment of the facts was unbiased and objective, the panel may not substitute its own judgment for that of the investigating authority, even if the panel disagrees with the investigating authority's determinations.¹²

10. Article 17.6(ii) provides that where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel must find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations. Thus, if the panel reviewing an anti-dumping measure finds more than one permissible interpretation of a provision of the Anti-Dumping Agreement, the panel may uphold a measure that rests on one of those interpretations.¹³

IV. BURDEN OF PROOF

11. The burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.¹⁴ The complaining party in any given case must establish a *prima facie* case of inconsistency of a measure with a provision of the WTO covered agreements, before the burden of showing consistency with that provision shifts to the defending party.¹⁵ The Appellate Body has explained that, to make a *prima facie* case of breach of a WTO Agreement, the complaining party must provide both adequate evidence and legal argument tying the alleged facts to a legal claim.¹⁶

12. Accordingly, Turkey, as the complaining party, bears the burden of demonstrating the claimed inconsistencies with the Anti-Dumping Agreement and the GATT 1994. Failure of Turkey to make out a *prima facie* case must lead to the dismissal of its claims.

V. ARGUMENTS

A. Turkey's claims under Articles 3.1, 3.4, 6.5, 6.5.1, 6.9 (in relation to the break-even threshold), and Footnote 9 of the Anti-Dumping Agreement and Article VI:6(a) of the GATT1994 are not within the Panel's terms of reference

13. Article 4.4 provides that consultations must be requested in writing and "shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint". Although Article 4.4 does not require a "summary sufficient to present the problem clearly", it does require the complaining party to indicate the legal basis for the complaint.

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), Exhibit TUR-13.

⁷ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 188.

⁸ Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

⁹ Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 99.

¹⁰ Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

¹¹ Appellate Body Reports, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 99; and *US – Countervailing Duty Investigation on DRAMs*, para. 187.

¹² Panel Report, *EU – Footwear (China)*, para. 7.7.

¹³ Panel Report, *EU – Footwear (China)*, para. 7.9.

¹⁴ Appellate Body Report, *US – Wool Shirts and Blouses*, at p. 14; see also Panel Report, *China – Autos (US)*, para. 7.6.

¹⁵ Appellate Body Report, *EC – Hormones*, para. 104.

¹⁶ Appellate Body Report, *US – Gambling*, para. 140 (quoting Appellate Body Report, *US – Wool Shirts and Blouses*, at p. 16).

Turkey's claims challenging various aspects of the MDCCE's injury analysis were not included in the request for consultations and thus fall outside of the Panel's terms of reference.

14. Turkey's request provides an overly generic reference to the "injury/causation determination" (in the singular) followed by the overly general statement that the "Moroccan authorities failed to provide a reasoned and adequate explanation of their finding of injury and causation". It then lists Articles 3.1, 3.2, 3.4, and 3.5 – four different provisions each of which includes multiple obligations – without providing any specification or basis for any inconsistencies. The generic reference to "injury" and the listing of four different provisions of the Anti-Dumping Agreement is not sufficient to indicate the legal basis of the complaint.

15. Turkey is also asserting that Footnote 9 of the Anti-Dumping Agreement and Article VI:6(a) of the GATT 1994 "require that an investigating authority ascertain whether an industry is 'unestablished' before it analyzes whether the establishment of an industry has been materially retarded".¹⁷ However, Footnote 9 and Article VI:6 are not mentioned in the consultations request. Furthermore, Turkey failed to include a claim under Footnote 9 in its panel request. The Appellate Body has stated that, in the context of a panel request, "[i]dentification of the treaty provisions claimed to have been violated ... is a minimum prerequisite if the legal basis of the complaint is to be presented at all".¹⁸ Turkey should thus have referred to Footnote 9 explicitly. Thus, Turkey's claims under Footnote 9 and Article VI:6(a) are not within the Panel's terms of reference.

16. Turkey's claims under Articles 3.1 and 3.4 focus specifically on establishment and material retardation. However, the consultations request makes no mention of either establishment or retardation. Neither Article 3.1 nor Article 3.4 refers to material retardation or establishment. A reference to Article 3.1, without more, in no way indicates a claim under Footnote 9. The mere listing of these provisions without more is insufficient to give an indication of the legal basis of Turkey's claims, particularly in this case where establishment and retardation are not even mentioned in the provisions.

17. Furthermore, Turkey's consultations request did not indicate that Turkey took issue with the alleged failure by the investigating authority to assess all relevant factors or to conduct an appropriate examination of each factor under Article 3.4. Again, a mere listing of the provision without more is insufficient to indicate the legal basis of Turkey's complaint.

18. The reference in the consultations request to the MDCCE's failure to provide a reasoned and adequate explanation refers to a panel's standard of review, not to a specific obligation imposed on investigating authorities in the Anti-Dumping Agreement. It is too vague to comply with the requirement to indicate the legal basis of the complaints subsequently raised in Turkey's panel request and to have given any meaningful notice to Morocco of those claims for purposes of the consultations. The claims put forward by Turkey in its panel request and first written submission are not limited to the alleged failure to provide a reasonable and adequate explanation.

19. For these reasons, Turkey's claims regarding establishment and retardation under Articles 3.1, 3.4, Footnote 9, and Article VI:6(a) are not within the scope of the Panel's terms of reference.

20. Turkey's claims regarding the break-even threshold under Articles 6.9, 6.5, and 6.5.1 are not mentioned in the consultations request. Articles 6.5 and 6.5.1 are not mentioned in the request for consultations at all and Article 6.9 is only mentioned in connection with the use of facts available. Neither confidentiality nor the break-even threshold is mentioned in the consultations request.

21. Articles 6.5, 6.5.1, and 6.9 are independent of the injury/causation obligations in the Anti-Dumping Agreement.¹⁹ There is therefore nothing in the reference to "Injury Determination" that anticipates claims under Articles 6.9, 6.5, or 6.5.1.²⁰ The reference in the consultations request to Article 6.9 was expressly tied to the use of facts available, and thus cannot indicate a claim under Article 6.9 with regard to the Ministry's injury analysis. Furthermore, a reference to Article 3.1 does not indicate a claim under Articles 6.5 or 6.5.1, as the designation of information as confidential

¹⁷ Turkey's rebuttal submission, para. 6.8.

¹⁸ Appellate Body Report, *Korea – Dairy*, para. 124. See also Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.17.

¹⁹ See Morocco's second written submission, para. 29.

²⁰ See Turkey's rebuttal submission, para. 2.21.

does not make an examination unobjective. Nor does the mere fact that information is not designated confidential make the examination objective.

22. Contrary to Turkey's assertions, the statement in the consultations request about the alleged failure "to provide a reasoned and adequate explanation of [the] finding of injury and causation" does not indicate a claim under Article 6.9. The requirement to provide a reasoned and adequate explanation is a general obligation to set out the rationale for the decision in the determination.²¹ A claim under Article 6.9 is a claim that the investigating authority failed to disclose information "before a final determination is made". Thus, an allegation about a failure to properly explain the findings in the final determination does not anticipate a claim of lack of disclosure "before [the] final determination [was] made".

23. Furthermore, there is no basis for Turkey to say that it learned new information during the consultations and that it added the new claims on this basis as Turkey already had the Final Determination in its possession when it requested consultations.

24. For these reasons, Turkey's claims under Articles 6.5, 6.5.1, and 6.9 (regarding the break-even threshold) are not within the Panel's terms of reference.

25. Lastly, Turkey's claim regarding "good cause" was not included in the panel request and, therefore, it is not within the Panel's terms of reference. By its plain terms, the claim in Turkey's panel request concerns the alleged failure to require a non-confidential summary of the profitability threshold or an explanation of why it could not be summarized. There is nothing in the panel request that anticipates a claim regarding the alleged failure to assess good cause.

26. There are at least two separate obligations in Article 6.5 irrespective of its relationship with Article 6.5.1. The first obligation concerns the requirements that must be fulfilled for the information in question to be treated as confidential, including the assessment of good cause. As the Appellate Body has noted, under this first obligation, "the authority must objectively assess the 'good cause' alleged for confidential treatment, and scrutinize the party's showing in order to determine whether the submitting party has sufficiently substantiated its request".²² The second sentence provides that the investigating authority cannot disclose such information without permission.

27. Turkey's theory of a "balance" between Articles 6.5 and 6.5.1 is equally unconvincing and, in fact, is inconsistent with the approach Turkey has taken in its written submissions. Turkey is not making a challenge regarding the MDCCE's acts with regard to the "balance" between the two provisions, but is making two separate claims under the two provisions. In any event, many provisions of the WTO agreement seek to establish a balance between various interests.²³ Indeed, each WTO agreement can be said to reflect a balance. Thus, under Turkey's theory, mere mention in the panel request of one provision of an agreement would allow the complaining party to raise claims under any other provision of the same agreement since such provisions establish a balance between various interests. This is not consistent with Article 6.2 of the DSU.

28. In sum, Turkey's panel request does not include a claim regarding good cause under Article 6.5.²⁴ The mere reference to Article 6.5 is insufficient in this case to present the problem clearly, and thus does not satisfy the requirements of Article 6.2 of the DSU. For this reason, Morocco requests that the Panel find that Turkey's claim regarding "good cause" is not within the Panel's terms of reference.

²¹ Appellate Body Report, *China – HP-SSST (Japan)*, para. 5.255.

²² Appellate Body Report, *EC – Fasteners*, para. 539.

²³ See, for example, Appellate Body Report, *EC – Fasteners (China)*, paras. 611-612; and Panel Report, *Guatemala – Cement I*, para. 7.52.

²⁴ Appellate Body Report, *EC – Selected Customs Matters*, para. 130; and Panel Report, *US – OCTG (Korea)*, para. 7.82.

B. The MDCCE's use of facts available was consistent with Article 6.8 and Annex II to the Anti-Dumping Agreement

29. The MDCCE's reliance on facts available was fully consistent with Article 6.8 and Annex II to the Anti-Dumping Agreement. The Turkish producers reported 19,000 metric tonnes of sales to Morocco.²⁵ However, the MDCCE found a discrepancy of about 10,000 metric tonnes between the disclosed sales from Turkey and Morocco's official import statistics.²⁶ This was a significant discrepancy, as the unreported sales constituted 50% of those reported and 30% of total sales. This discrepancy had to belong to Erdemir Group and Colakoglu because they were the only Turkish producers exporting to Morocco during the period of investigation.²⁷

30. The Turkish producers were fully aware of all the information they were required to submit to the MDCCE, which included *all* the export sales of products produced by them, as this information had already been specified in the questionnaire.²⁸ Furthermore, the MDCCE requested information regarding the discrepancy from Erdemir Group in an email sent in December 2013²⁹, and the matter was discussed in the public hearing in February 2014.³⁰ The hearing was attended also by Colakoglu.³¹

31. Although the Turkish producers argued that the documents provided by the MDCCE corresponded to sales already disclosed³², it was not possible for the MDCCE to confirm this assertion on the basis of the information provided by the Turkish exporters. Both producers provided different movement certificates and different invoices from different traders that they claimed showed that the unreported sales were included within the reported sales.³³ Even if the weight in the documents submitted by the producers is the same as in the documents obtained by the MDCCE from the Customs, this does not prove that the transactions were the same, as a company can make two different export transactions for the same amount of product at an identical price.

32. The movement certificates from the unreported sales obtained from the Customs showed that the shipments were destined to Morocco and were signed by the producer/exporter, Erdemir Group or Colakoglu. This shows that the Turkish producers were aware of the transactions and of the fact that Morocco was the final destination of the exports. The movement certificates were all accompanied by a commercial invoice from a non-reported trader.³⁴ This further suggested that the transactions did not correspond to the reported sales that were accompanied by a different invoice. The Turkish producers did not provide an explanation as to the existence of two valid movement certificates, neither of which indicated that it was an amendment of the other. Nor did the Turkish producers provide evidence that one of the movement certificates had been cancelled. This undermined the Turkish exporters' allegation that the documents referred to the same sales that had been reported.

33. Thus, the MDCCE considered that the information provided by the Turkish exporters did not establish that these unreported transactions indeed corresponded to those reported by the Turkish

²⁵ Final Determination, Exhibit TUR-11, para. 54.

²⁶ Final Determination, Exhibit TUR-11, para. 53; See also Preliminary Determination, Exhibit TUR-6, Tableau n°4 : Volume (en tonnes) des importations de tôles d'acier laminées à chaud originaires de l'Union Européenne et de la Turquie au cours de la période 2009 à 2012.

²⁷ Final Determination, Exhibit TUR-11, para. 54; Letter by Turkish Steel, 6 March 2014, Exhibit TUR-28 (BCI).

²⁸ Questionnaire d'enquête pour la mise en œuvre des mesures antidumping, questionnaire destiné aux producteurs / exportateurs vers le Maroc, Exhibit MAR-7.

²⁹ Final Determination, Exhibit TUR-11, para. 55.

³⁰ Final Determination, Exhibit TUR-11, para. 54.

³¹ Final Determination, Exhibit TUR-11, paras. 18-19, and 54.

³² See Email from Erdemir Group to the MDCCE, 24 June 2014; email response from the MDCCE to Erdemir Group, 7 July 2014, Exhibit TUR-29 (BCI); Erdemir Group's comments on the Draft Final Determination, 10 July 2014, Exhibit TUR-19 (BCI); Movement certificate, Exhibit MAR-12 (BCI); Colakoglu's comments on the Draft Final Determination, 11 July 2014, Exhibit TUR-20 (BCI); Email from Colakoglu to the MDCCE, 24 June 2014; and email response from the MDCCE to Colakoglu, 7 July 2014, Exhibit TUR-30 (BCI).

³³ Erdemir Group's comments on the Draft Final Determination, 10 July 2014, Exhibit TUR-19 (BCI); and Colakoglu's comments on the Draft Final Determination, 11 July 2014, Exhibit TUR-20 (BCI); and Email from Colakoglu to the MDCCE, 24 June 2014 and email response from the MDCCE to Colakoglu, 7 July 2014, Exhibit TUR-30 (BCI).

³⁴ See MDCCE's emails to Erdemir Group and Colakoglu, 7 July 2014, Exhibit TUR-29 (BCI) and Exhibit TUR-30 (BCI).

exporters or whether they were export operations to Morocco distinct from those reported in their questionnaire responses.³⁵

34. Under such circumstances, it was reasonable for the MDCCE to conclude that the Turkish producers had not cooperated and decide to resort to facts available in calculating the dumping margin.³⁶ In resorting to facts available, the MDCCE acted consistently with Article 6.8 of the Anti-Dumping Agreement.

35. The MDCCE's reliance on facts available was also fully consistent with Annex II to the Anti-Dumping Agreement. Pursuant to Annex II:1, the use of facts available is subject to the investigating authority having "specif[ied] in detail the information required".³⁷ In its questionnaire, the MDCCE requested the exporters to disclose all their sales to Morocco.³⁸ The MDCCE also requested information regarding the unreported transactions and the non-reported traders from Erdemir Group during the investigation³⁹, and the matter was discussed in a public hearing.⁴⁰ Thus, the MDCCE acted consistently with Annex II:1.

36. Contrary to Turkey's allegations, the MDCCE acted consistently with Annex II:3, 5, and 6 as it properly addressed the comments provided by Erdemir Group and Colakoglu to the Draft Final Determination.⁴¹ In the Final Determination, the MDCCE first explained the position of the producers⁴², and explained that the additional information provided by the Turkish producers after the Draft Final Determination did not establish that the unreported sales were included within the reported sales.⁴³ Thus, the MDCCE sufficiently addressed the Turkish producers' comments in the Final Determination, and gave reasons for the rejection of the information provided, consistently with Annex II.

37. The obligation under Annex II:5 to make active efforts to use the information provided by the interested parties does not establish an obligation on the investigating authority to accept information that does not fulfill the requirements under Annex II:3.⁴⁴ Furthermore, the panel in *US – Steel Plate* recognized that flaws or gaps in parts of a dataset may taint other parts of it or make them unreliable or unusable, and that in such cases, the other parts can be discarded as well.⁴⁵ If a significant amount of data is missing, this brings into question the reliability of the data that has been submitted.⁴⁶ The unreported sales constituted 50% of those reported and 30% of total sales, and therefore the distortion in the data set was substantial. The significant insufficiencies in the Turkish producers' reported data called into question the integrity of the entirety of the data submitted by these parties.⁴⁷ Thus, the information rejected by the MDCCE was unreliable, contained serious flaws, did not fulfill the requirements under Annex II:3, and was far from "ideal".

38. The period of time afforded to the interested parties to provide comments under Annex II:6 must be evaluated in the light of the circumstances of the case. The comment period was at the very end of the investigation. Furthermore, the interested parties never requested an extension or complained about the time limit provided for them. What is more, the interested parties were able to provide comments and documentation, which undermines the claim that the time period was insufficient.⁴⁸

39. Turkey has also failed to establish that the MDCCE acted inconsistently with Annex II:7 because it failed to explain in a reasoned and adequate manner how it calculated the non-cooperation

³⁵ Final Determination, TUR-11, para. 60.

³⁶ Final Determination, Exhibit TUR-11, paras. 58 and 61.

³⁷ Panel Report, *Canada – Welded Pipe*, para. 7.170.

³⁸ Questionnaire d'enquête pour la mise en œuvre des mesures antidumping, questionnaire destiné aux producteurs / exportateurs vers le Maroc, Exhibit MAR-7, pp. 13-14.

³⁹ Email correspondence between the MDCCE and Erdemir Group, from 31 December 2013 to 10 January 2014, Exhibit TUR-25.

⁴⁰ Final Determination, Exhibit TUR-11, para. 54.

⁴¹ Turkey's oral statement at the first substantive meeting of the Panel, paras. 3.16 and 3.18.

⁴² Final Determination, Exhibit TUR-11, para. 59.

⁴³ Final Determination, Exhibit TUR-11, para. 60.

⁴⁴ Panel Report, *US – Steel Plate*, para. 7.65.

⁴⁵ Panel Report, *US – Steel Plate*, paras. 7.60-7.62.

⁴⁶ Morocco's responses to the Panel's questions after the first substantive meeting, para. 90.

⁴⁷ See Morocco's responses to the Panel's questions after the second substantive meeting, paras. 21-22.

⁴⁸ See Morocco's first written submission, paras. 87-88.

rate of 11%.⁴⁹ In the Final Determination, the MDCCE stated that it relied on the information provided in the petition in determining the non-cooperation rate as there were no other Turkish producers that could have served as a point of reference for the determination of the dumping margin for Erdemir Group and Colakoglu.⁵⁰ Paragraph 7 expressly recognizes that the petition is a legitimate source of information where an investigating authority relies on facts available. The MDCCE had already verified the information provided by the domestic industry and considered that the allegations were sufficiently documented.⁵¹ In sum, the MDCCE explained in a reasoned and adequate manner how it derived the 11% non-cooperation rate.

40. Based on the foregoing, it is clear that there were no procedural deficiencies in the MDCCE's decision to rely on facts available. Morocco therefore requests the Panel to reject Turkey's claims under Article 6.8 and Annex II.

C. The MDCCE informed the interested parties of the essential facts consistently with Article 6.9 of the Anti-Dumping Agreement

41. When applying Article 6.9 in the context of Article 6.8, the essential facts that the investigating authority is expected to disclose are: (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.⁵² The MDCCE disclosed this information to the interested parties.⁵³

42. First, the MDCCE disclosed that it resorted to facts available because there was a significant discrepancy in the sales of about 10,000 metric tonnes originating from the Turkish producers, conducted by traders not reported by the producers in their questionnaire responses⁵⁴ that the Turkish producers were not able to sufficiently explain.⁵⁵ Second, the information which was requested from the Turkish producers consisted of *all* of their export sales to Morocco.⁵⁶ This was specified in the questionnaire sent to the exporters.⁵⁷ The MDCCE found that this information was not provided by the Turkish producers as they had not disclosed all their sales to Morocco.⁵⁸ Both Erdemir Group and Colakoglu were made aware of the fact that there was a significant discrepancy between the official import statistics and their disclosed sales at the latest in February 2014 after the public hearing.⁵⁹ The MDCCE had already sent an email about the matter to Erdemir Group in December 2013.⁶⁰ Third, the facts used to replace the missing information consisted of information provided by the petitioner.⁶¹

43. The requirement to disclose the "essential facts under consideration" may be met by disclosing a document summarizing the essential facts under consideration by the investigating authority or through the inclusion in the record of documents – such as verification reports, a preliminary determination, or correspondence.⁶² An investigating authority is not required to disclose the record documents if it provides a document summarizing the information. The MDCCE fulfilled this obligation as it provided a summary of the unreported transactions in the Draft Final

⁴⁹ Turkey's oral statement at the first substantive meeting of the Panel, para. 3.19.

⁵⁰ Final Determination, Exhibit TUR-11, para. 63.

⁵¹ Report on the initiation of an investigation, Exhibit TUR-2, pp. 4-5.

⁵² Panel Report, *China – Broiler Products*, para. 7.317.

⁵³ See Morocco's first written submission, paras. 137-142.

⁵⁴ Draft Final Determination, Exhibit TUR-10, paras. 51 and 55-56.

⁵⁵ Final Determination, Exhibit TUR-11, paras. 60-61.

⁵⁶ Questionnaire d'enquête pour la mise en œuvre des mesures antidumping, questionnaire destine aux producteurs / exportateurs vers le Maroc, Exhibit MAR-7, and Draft Final Determination, Exhibit TUR-10, para.56.

⁵⁷ Questionnaire d'enquête pour la mise en oeuvre des mesures antidumping, questionnaire destine aux producteurs / exportateurs vers le Maroc, Exhibit MAR-7, pp. 13-14.

⁵⁸ Draft Final Determination, Exhibit TUR-10, para. 56.

⁵⁹ Draft Final Determination, Exhibit TUR-10, para. 52.

⁶⁰ Email correspondence between the MDCCE and Erdemir Group, from 31 December 2013 to 10 January 2014, Exhibit TUR-25.

⁶¹ Draft Final Determination, Exhibit TUR-10, para. 58.

⁶² Panel Report, *Argentina – Ceramic Tiles*, para. 6.125.

Determination.⁶³ What is more, the MDCCE disclosed to the Turkish producers the part of the sales and missing documentation it was allowed to disclose under Morocco's Customs Code.⁶⁴

44. As to the essential facts regarding the anti-dumping duty rate, the MDCCE disclosed to the parties that it was imposing on the Turkish exporters the dumping margin contained in the domestic industry's application and which included information that it had already verified against official import statistics in the initial phase before opening the investigation.⁶⁵ The MDCCE explained that the allegations in the petition were sufficiently documented.⁶⁶ The Report on the initiation of an investigation discloses the specialized trade publication from which the information was derived from⁶⁷, and the MDCCE also provided a table with all of the information used in the dumping calculation.⁶⁸ The MDCCE thus provided the "methodology employed to arrive at the [anti-dumping] rate".⁶⁹

45. Thus, the MDCCE disclosed the essential facts regarding the anti-dumping rate imposed on Turkish producers, including the data used in the calculation, the sources of data, and the method used to calculate the margin of dumping.

46. Lastly, The MDCCE informed the interested parties of the essential facts in sufficient time. The MDCCE circulated the Draft Final Determination on 20 June 2014, and requested comments by 11 July 2014.⁷⁰ There were thus 15 working days from the disclosure of the essential facts to the deadline to submit comments. This constituted sufficient time within the meaning of Article 6.9 of the Anti-Dumping Agreement. The Turkish producers submitted comments and additional documentation within the timeframe provided. Furthermore, the interested parties did not request an extension for the deadline, which again confirms that the Turkish producers considered the time provided sufficient to defend their interests. Thus, Turkey has failed to establish, based on the particular circumstances of the investigation, that the MDCCE acted inconsistently with Article 6.9.

47. For these reasons, Morocco respectfully requests that the Panel dismiss Turkey's claims under Article 6.9 of the Anti-Dumping Agreement.

D. The MDCCE's finding of material retardation of the establishment of the industry was fully consistent with Footnote 9 and Articles 3.1 and 3.4 of the Anti-Dumping Agreement, and Article VI:6(a) of the GATT 1994

1. The MDCCE's finding of "establishment" was consistent with Article 3.1, Footnote 9, and Article VI:6(a)

48. Turkey makes its claims regarding "establishment" under Footnote 9 to the Anti-Dumping Agreement and Article VI:6(a) of the GATT 1994. However, there is no requirement under Footnote 9 or Article VI:6(a) that an investigating authority must determine that the industry in question is unestablished. Footnote 9 is a definitional provision and does not provide any obligations as to the application of the three forms of injury. Even if Footnote 9 did establish obligations, there is nevertheless no obligation under the Footnote or under Article VI:6(a) that an investigating authority must determine that the industry in question is unestablished.

49. The operative part of Footnote 9 and Article VI:6(a) is material retardation. Morocco does not see either provision as setting out establishment as a involving a binary state (established or unestablished) and requiring the investigating authority to determine whether the domestic industry

⁶³ Draft Final Determination, Exhibit TUR-10, paras. 51 and 55; and Final Determination, Exhibit TUR-11, para. 60.

⁶⁴ Email from Erdemir Group to the MDCCE, 24 June 2014 and email response from the MDCCE to Erdemir Group, 7 July 2014, Exhibit TUR-29 (BCI); Article 45 ter 3° of Chapter V of Morocco's Customs Code, Exhibit MAR-13; and Morocco's responses to the Panel's questions after the first substantive meeting, paras. 54-55.

⁶⁵ Draft Final Determination, Exhibit TUR-10, para. 58 and Report on the initiation of an investigation, Exhibit TUR-2, p. 5.

⁶⁶ Draft Final Determination, Exhibit TUR-10, para. 58; and Report on the initiation of an investigation, Exhibit TUR-2, p. 5.

⁶⁷ Report on the initiation of an investigation, Exhibit TUR-2, pp. 4-5.

⁶⁸ Report on the initiation of an investigation, Exhibit TUR-2, p. 5.

⁶⁹ Turkey's responses to the Panel's questions after the first substantive meeting, para. 59.

⁷⁰ Emails from the MDCCE to the interested parties regarding the Draft Final Determination (20 June 2013), Exhibit MAR-3.

is in state 1 (established) or state 2 (unestablished). Instead, establishment seems to be a process without a clear dividing line between two states and the relevant question would be whether the process has been slowed down, delayed, or held back. Thus, the test for material retardation looks into the progression of the domestic industry, and does not require the investigating authority to assess as a threshold matter whether the domestic industry has failed to reach a specific point (establishment).

50. According to Turkey, the obligations in Article 3.1 also apply to the determination of establishment.⁷¹ Turkey's argument under Article 3.1 is necessarily predicted on the existence of an obligation to determine establishment flowing from a separate provision. Turkey seems to acknowledge that Article 3.1, by itself, does not create that obligation.⁷²

51. Morocco therefore submits that the MDCCE was not under an obligation to assess whether the domestic industry was established in the investigation at issue. For this reason, Turkey's claims under Footnote 9, Article 3.1, and Article VI:6(a) should be dismissed.

52. Even if the Panel finds that an investigating authority is required to make a determination that the domestic industry is not "established" before assessing retardation, the MDCCE conducted this analysis in accordance with Article VI:6(a) of the GATT 1994, and Article 3.1 and Footnote 9 to the Anti-Dumping Agreement.

53. In assessing whether the domestic industry was established, the MDCCE analyzed five factors derived from U.S. anti-dumping practice: (1) when domestic industry began production; (2) whether the production has been steady or start-and-stop; (3) the size of domestic production compared to the size of the domestic market as a whole; (4) whether the domestic industry has reached a reasonable "break-even" point; and (5) whether the activities are truly a new industry or merely a new product line of an established industry.⁷³ Based on both an individual assessment of each factor and an analysis of the factors as a whole, the MDCCE considered that Maghreb Steel was not an established industry.⁷⁴

54. First, the MDCCE considered that data from a time period of at least three years was required for an analysis of material injury based on international practice and the nature of the industry in question, including the significant start-up costs and the size of the investment.⁷⁵ Such data did not exist for the domestic industry, which had existed for less than three years.⁷⁶

55. The Guidelines from the WTO Committee on Anti-Dumping Practices ("Committee Guidelines") referred to by Turkey support the MDCCE's analysis in the challenged investigation. The Committee Guidelines specifically recognize that, as a general rule, the period of data collection for injury investigations normally should be *at least three years*.⁷⁷ The Committee Guidelines therefore recognize an exception for when *a party* from whom data is being gathered has existed for a lesser period.⁷⁸ This situation involving a single party among several parties that constitute the domestic industry must be distinguished from the situation where the domestic industry as a whole has existed for a shorter period. Additionally, the Committee itself recognized that the "guidelines do not preclude investigating authorities from taking account of the particular circumstances of a given investigation in setting the periods of data collection for both dumping and injury, to ensure that they are appropriate in each case". In its analysis, the MDCCE specifically referred to the nature of the hot-rolled steel industry, and therefore made an objective and unbiased determination that there was not sufficient data from Maghreb Steel to conduct an analysis of material injury.⁷⁹

⁷¹ Turkey's responses to the Panel's questions after the first substantive meeting, para. 99.

⁷² Furthermore, it has already been determined that Article 3.1 does not establish independent obligations which can be judged in the abstract, or in isolation and separately from the substantive requirements set out in the remainder of Article 3. (Panel Report, *China – Cellulose Pulp*, para. 7.13)

⁷³ Final Determination, Exhibit TUR-11, paras. 81-110.

⁷⁴ Final Determination, Exhibit TUR-11, para. 111.

⁷⁵ Final Determination, Exhibit TUR-11, paras. 87 and 90; and Report on the Initiation of the Investigation, Exhibit TUR-2, pp. 5 and 11.

⁷⁶ Preliminary Determination, Exhibit TUR-6, paras. 74-76.

⁷⁷ Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations, 16 May 2000, G/ADP/6, para. 1(c).

⁷⁸ Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations, 16 May 2000, G/ADP/6, para. 1(c).

⁷⁹ Final Determination, Exhibit TUR-11, para. 91; and Report on the Initiation of the Investigation, Exhibit TUR-2, pp. 5 and 11.

56. Second, the MDCCE noted that Maghreb Steel's market share in the merchant market had been obtained due to its sales at a loss, and therefore was not reflective of the industry being "established".⁸⁰ The MDCCE then observed that Maghreb Steel was far from reaching its break-even threshold⁸¹, which demonstrates that its sales were made at a loss all three years.⁸² In order for an industry to be considered to be "set up on a permanent or secure basis" and to be "stable", it must have achieved production and sales sufficient to produce a profit. Any market share initially achieved with losses necessarily reveals only a temporary state and not sustainability. Those sales will necessarily cease unless they can be made at a profit.

57. Third, the MDCCE observed that Maghreb Steel was far from reaching its break-even threshold.⁸³ Turkey's claim that the MDCCE determined the break-even threshold on the basis of a calculation that reflects the costs of all sales but the revenues from only a portion of the sales is incorrect.⁸⁴ The break-even threshold took into consideration both the captive transfers and merchant market sales.⁸⁵ In calculating the break-even threshold, account was taken of the quantities to be sold on the merchant market (based on market price) and of the quantities intended for Maghreb Steel's own consumption (based on a hypothetical price that was equivalent to the market price). Thus, the break-even threshold did consider the "revenues" from the entire output of Maghreb Steel, even if in commercial terms there were no "sales" between the hot-rolled and cold-rolled steel units in Maghreb Steel.⁸⁶ For these reasons, the MDCCE appropriately relied on the break-even threshold in analyzing whether the domestic industry was established.

58. Fourth, the MDCCE considered that Maghreb Steel had experienced abrupt and significant changes in its production volumes, which suggested that its production had not been stabilized.⁸⁷ The MDCCE presented the indexed data on the basis of which the determination was made in the Preliminary Determination⁸⁸, and further analyzed the data in the Final Determination.⁸⁹ In the Final Determination, the MDCCE considered, based on the monthly data, that there were abrupt and significant changes in the production volumes from one month to the next, and a sudden interruption of production in February 2012.⁹⁰ The MDCCE's determination of the stability of Maghreb Steel's production was based on its unbiased and objective analysis of the monthly production volumes. The Panel should decline Turkey's attempt to have it substitute its own judgment for that of the investigating authority in this matter.

59. Turkey's claims regarding the possible reasons behind the rise and decline in Maghreb Steel's production are to be assessed in the context of causation under Article 3.5 as such a requirement is not found in the claims actually raised by Turkey in these proceedings.⁹¹ Turkey's arguments regarding the effects of the "economic crisis and the drop in the world prices" and "trends in the volume of imports" concern non-attribution factors, that is, alleged known factors other than the dumped imports that may be contributing to injury. In fact, the MDCCE analyzed both issues as part of its causation analysis.⁹² In the same vein, the relationship between domestic demand and the fluctuations in the domestic industry's production is an issue to be considered in the context of causation under Article 3.5, and is not a requirement under "establishment". Indeed, the MDCCE considered the effects of domestic demand in the context of its causation analysis⁹³, and found that there was no correlation between domestic demand and the retardation suffered by Maghreb Steel.⁹⁴ Turkey has not raised a claim under Article 3.5.

⁸⁰ Final Determination, Exhibit TUR-11, para. 95.

⁸¹ Final Determination, Exhibit TUR-11, para. 100.

⁸² See Morocco's responses to the Panel's questions after the second substantive meeting, paras. 48-49.

⁸³ Final Determination, Exhibit TUR-11, para. 100.

⁸⁴ Turkey's oral statement at the first substantive meeting of the Panel, para. 4.5.

⁸⁵ MAGHREB STEEL's Questionnaire Response, Section G, Exhibit MAR-8, p. 9; and Preliminary Determination, Exhibit TUR-6, Tableau n°2: Seuil de rentabilité de l'activité LAC de MAGHREB STEEL.

⁸⁶ Final Determination, Exhibit TUR-11, para. 138.

⁸⁷ Final Determination, Exhibit TUR-11, para. 103.

⁸⁸ Preliminary Determination, Exhibit TUR-6, Tableau n°3: Production mensuelle de MAGHREB STEEL en LAC entre 2010 et 2012 (en milliers de tonnes).

⁸⁹ Final Determination, Exhibit TUR-11, para. 103.

⁹⁰ Final Determination, Exhibit TUR-11, para. 103.

⁹¹ See Morocco's responses to the Panel's questions after the second substantive meeting, paras. 42-44.

⁹² Preliminary Determination, Exhibit TUR-6, paras. 168-177 and 190-194; and Final Determination, Exhibit TUR-11, paras. 203, 207, and 209.

⁹³ Preliminary Determination, Exhibit TUR-6, para. 175; Final Determination, Exhibit TUR-11, para. 206.

⁹⁴ Final Determination, Exhibit TUR-11, paras. 203 and 209.

60. Fifth, the MDCCE's finding that the domestic industry constituted a new industry was based on a collective assessment of various factors. The MDCCE noted that there was no prior production of hot-rolled steel in Morocco. The MDCCE also noted the physical separation of production facilities, the size of the investment undertaken, and different customer networks and distribution channels between Maghreb Steel's hot-rolled and cold-rolled steel production.⁹⁵ After considering these factors, the MDCCE concluded that the starting of hot-rolled steel production constituted a new industry.⁹⁶

61. The terms "domestic industry" and "such industry" must be understood to refer to the domestic industry as defined by the investigating authority pursuant to Article 4.1. 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. However, Turkey has not raised such a claim and thus it would be inappropriate for the Panel to second-guess the MDCCE's definition of the domestic industry.

62. For the reasons addressed above, Morocco respectfully requests the Panel to find that the MDCCE's establishment of the facts was proper and their evaluation was unbiased and objective. Consequently, the Panel should dismiss Turkey's claims under Footnote 9 and Article 3.1 of the Anti-Dumping Agreement, and Article VI:6(a) of the GATT 1994.

2. The MDCCE's determination of retardation was fully consistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement

63. Turkey's allegation that the MDCCE failed to analyze 6 of the 15 factors listed in Article 3.4 is unfounded.⁹⁷ In fact, the MDCCE analyzed each of the 15 factors listed in Article 3.4 of the Anti-Dumping Agreement, including return on investments, factors affecting domestic prices, actual and potential negative effects on cash flow, wages, growth, and the ability to raise capital or investments.

64. 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 documents.⁹⁸ In general, Article 3 does not provide a "prescribed template or format that an investigating authority must adhere to in making its determination of injury".⁹⁹ A panel conducting an assessment of an anti-dumping measure may find in the record sufficient evidence to satisfy itself that a factor has been evaluated, even in cases where a separate record of the evaluation of that factor has not been made.¹⁰⁰ For example, the analysis of growth has been found to necessarily entail an analysis of certain other factors listed in Article 3.4 and, *vice versa*, the evaluation of those other factors could cover also the evaluation of the factor growth.¹⁰¹

65. The precise location of the analysis is also not determinative of the issue of whether a certain factor has been analyzed. For example, the panel in *China – Cellulose Pulp* did not consider it problematic that certain parts of the examination of the impact of the dumped imports on the state of the domestic industry were included in the causation analysis.¹⁰²

66. Because the break-even threshold is the point where the totality of the company's revenue equals the totality of its costs¹⁰³, the discussion of the break-even threshold also addressed return on investment, actual and potential negative effects on cash flow, and the ability to raise capital or investments.¹⁰⁴ Failure to meet the break-even threshold means that sales are made at a loss. Sales made at a loss mean negative cash flow during the same period. This is because the industry is spending more paying for its costs than it is receiving in sales revenues. Thus, the finding that the

⁹⁵ See Preliminary Determination, Exhibit TUR-6, paras. 120-121.

⁹⁶ Final Determination, Exhibit TUR-11, paras. 108-109.

⁹⁷ Turkey's first written submission, para. 9.16.

⁹⁸ Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 161.

⁹⁹ Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.141.

¹⁰⁰ Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 161.

¹⁰¹ Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 162.

¹⁰² Panel Report, *China – Cellulose Pulp*, para. 7.136 (quoting Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.141).

¹⁰³ Preliminary Determination, Exhibit TUR-6, para. 83.

¹⁰⁴ See Morocco's first written submission, para. 229; Morocco's responses to the Panel's questions after the first substantive meeting, para. 131; and Morocco's second written submission, paras. 180-183.

domestic industry did not meet the break-even threshold also addresses the actual and potential negative effects on cash flow. It also means that the return on investments was negative. This is because the fact that production had not achieved the break-even threshold means that the gains from the investment were less than the cost of the investment. The ability to raise capital or investments depends on cash flow and return on investments. Negative cash flow and return on investment would make it exceedingly difficult for the domestic industry to attract capital or investment. Thus, the assessment of the break-even threshold provides sufficient evidence that the return on investments, the effects on cash flow, and the ability to raise capital or investments were evaluated.¹⁰⁵

67. As to the factor "wages", the MDCCE noted that Maghreb Steel announced a layoff of 400 employees in 2012¹⁰⁶ and a "massive layoff" of 300 employees in 2013.¹⁰⁷ Even though the layoffs took place only in 2013, it was clear already after the 2012 announcement that a significant number of employees would lose their jobs. The announcement of layoffs in 2012 would already exert downward pressure on wages or would have had, at the very least, a "chilling effect" on them. Thus, by addressing employment, the MDCCE also addressed wages.

68. As to growth, in *EC – Tube or Pipe Fittings*, the Appellate Body found 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 analyze growth.¹⁰⁸ The panel in *Egypt – Steel Rebar* also found that the investigating authority had addressed the "growth" factor by addressing sales volume and market share.¹⁰⁹

69. Given that it was undertaking a material retardation analysis, the MDCCE examined certain factors in the light of reasonably anticipated levels. In particular, the MDCCE noted that Maghreb Steel's sales levels remained well below projections, recording differences of up to -74%, -71%, -67% for the years 2010, 2011, and 2012 respectively.¹¹⁰ Additionally, it found that Maghreb Steel had not reached its projected level of market share, and in any case almost all its sales were made at a loss.¹¹¹ Additionally, Maghreb Steel had experienced negative trends in all the other factors evaluated. The MDCCE concluded in the investigation that Maghreb Steel did not reach its reasonably anticipated production levels in 2010-2012¹¹²; that its actual capacity utilization rates were significantly lower than those projected in the business plan and that the rates were much lower than those reasonably anticipated¹¹³; that it had already announced the layoff of 300 employees¹¹⁴ and was anticipating having to lay off at least 400 employees¹¹⁵ and that it had experienced a sharp decline in productivity measured in annual production per person employed¹¹⁶; that its stocks had increased between 2009 and 2011, and had a significant remaining stock still in 2012¹¹⁷; and that it had experienced a deterioration in the profitability of its production activities.¹¹⁸ The factor "growth" is reflected in the performance of all these factors combined. That the MDCCE considered all of these factors and found that Maghreb Steel had not reached its reasonably anticipated levels with regard to any of them sufficiently establishes that the MDCCE considered "growth" under the standard set out by the Appellate Body in *EC – Tube or Pipe Fittings* and the panel in *Egypt – Steel Rebar*.

¹⁰⁵ See Morocco's first written submission, paras. 229-233.

¹⁰⁶ Preliminary Determination, Exhibit TUR-6, para. 150.

¹⁰⁷ Final Determination, Exhibit TUR-11, para. 183.

¹⁰⁸ Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 165.

¹⁰⁹ Panel Report, *Egypt – Steel Rebar*, para. 7.37.

¹¹⁰ Final Determination, Exhibit TUR-11, para. 175.

¹¹¹ Preliminary Determination, Exhibit TUR-6, para. 148; and Final Determination, Exhibit TUR-11, paras. 178-180.

¹¹² Preliminary Determination, Exhibit TUR-6, paras. 134-136; and Final Determination, Exhibit TUR-11, para. 167.

¹¹³ Preliminary Determination, Exhibit TUR-6, paras. 139 and 143; and Final Determination, Exhibit TUR-11, paras. 168 and 172.

¹¹⁴ Final Determination, Exhibit TUR-11, para. 182.

¹¹⁵ Preliminary Determination, Exhibit TUR-6, para. 150.

¹¹⁶ Preliminary Determination, Exhibit TUR-6, para. 151.

¹¹⁷ Preliminary Determination, Exhibit TUR-6, paras. 153-154; and Final Determination, Exhibit TUR-11, para. 187.

¹¹⁸ Preliminary Determination, Exhibit TUR-6, para. 157; and Final Determination, Exhibit TUR-11, para. 194.

70. As to the factors affecting domestic prices, Morocco notes that the MDCCE explicitly assessed this factor.¹¹⁹ For example in its causation analysis, the MDCCE analyzed the alleged increase in the price of raw materials.¹²⁰ Accordingly, the MDCCE did address the factors affecting domestic prices. As Morocco has noted, the precise location of the analysis is not determinative of the issue of whether a certain factor has been analyzed.¹²¹

71. The MDCCE thus did not fail to consider these factors in its assessment. As the MDCCE noted, the relevance of the factors listed in Article 3.4 will vary between an ordinary injury analysis and an analysis of material retardation. At the very least, the analysis of all of the Article 3.4 factors is made more difficult in a material retardation analysis given the absence of historical data.¹²² To require an investigating authority to address the Article 3.4 factors with the same rigor in a material retardation analysis than in an ordinary injury analysis would blur the distinction between the two concepts and would ignore the practical limitations that confront an investigating authority where it is analyzing material retardation.

72. It is important to underscore that the respondents did not challenge the MDCCE's analysis of these factors during the investigation. Nor did they ever submit evidence that trends in these factors undermined the MDCCE's conclusion of retardation. Turkey has also failed to demonstrate in these proceedings that respondents provided any evidence relating to these factors that would undermine the MDCCE's conclusion. For all these reasons, the MDCCE correctly analyzed all 15 factors listed in Article 3.4.

73. Turkey's claim that the MDCCE acted inconsistently with Article 3.4 because it "failed to assess the relevance of the captive market in its injury determination"¹²³ is also unfounded.

74. The Appellate Body in *US – Hot-Rolled Steel* found it permissible for an investigating authority to take a fragmented approach to the domestic industry by looking at particular parts, sectors, or segments within a domestic industry. The Appellate Body said 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.¹²⁴ The MDCCE explained why it focused on the merchant market in its injury analysis.

75. The domestic market is characterized by a clear separation between the "captive market" and the "merchant market", and Maghreb Steel's captive sales are not in direct competition with imports.¹²⁵ Furthermore, the MDCCE clarified that there is no competition because, first, the domestic producer physically transfers, without creating an invoice, the hot-rolled for the captive market, i.e. for its own use. Secondly, the downstream industry has made virtually no purchases from independent suppliers as Maghreb Steel can produce hot-rolled steel by itself.¹²⁶ For these reasons, the MDCCE considered that it was not relevant to consider the captive market in the retardation analysis. Thus, the MDCCE acted consistently with the approach outlined in *US – Hot-Rolled Steel* as it provided an explanation as to why it was not necessary to examine the captive market specifically.¹²⁷

76. The captive market does not function according to the market conditions. When transferring hot-rolled steel to its cold-rolled steel production, Maghreb Steel does not decide between the use of its own hot-rolled steel and imported hot-rolled steel based on their prices. There is therefore no competition in the captive market.¹²⁸ Intra-company transfers of hot-rolled steel are a function of cold-rolled steel production and sales. This is in no way an indication as to how Maghreb Steel is doing in its hot-rolled steel production.

¹¹⁹ Final Determination, Exhibit TUR-11, para. 145; Final Determination, Exhibit TUR-11, paras 221-225.

¹²⁰ Final Determination, Exhibit TUR-11, paras 221-225.

¹²¹ Panel Report, *China – Cellulose Pulp*, para. 7.136 (quoting Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.141).

¹²² Preliminary Determination, Exhibit TUR-6, para. 126.

¹²³ Turkey's first written submission, heading 9.2.

¹²⁴ Appellate Body Report, *US – Hot-Rolled Steel*, para. 204.

¹²⁵ Final Determination, Exhibit TUR-11, para. 137.

¹²⁶ Final Determination, Exhibit TUR-11, para. 138.

¹²⁷ Appellate Body Report, *US – Hot-Rolled Steel*, para. 204.

¹²⁸ Final Determination, Exhibit TUR-11, para. 137.

77. Nonetheless, the captive market was not entirely ignored in the retardation analysis. The MDCCE took the captive market into consideration in its analysis of the break-even threshold.¹²⁹ Therefore, the captive market was necessarily also taken into consideration in the analysis on the return on investment, actual and potential negative effects on cash flow, and the ability to raise capital or investments.¹³⁰ In addition, the MDCCE's analysis of employment (and thereby also wages) or output did not distinguish between the two markets.¹³¹ Accordingly, Morocco requests the Panel to dismiss Turkey's claims regarding the MDCCE's treatment of the captive market.

78. Turkey errs in arguing that the MDCCE's reliance on the McLellan report was inappropriate. The MDCCE properly recognized that there were certain shortcomings in the McLellan report, but based on its assessment of the projections in the report in light of what actually happened, the MDCCE came to the conclusion that the McLellan report, and the business plan which was based on the report, were appropriate reference points for its assessment of retardation.¹³² The MDCCE thus did not simply accept the projections, but rather assessed them in light of what actually happened and analyzed their appropriateness based on the facts before it. Therefore, the MDCCE reached its conclusion on the appropriateness of the McLellan report based on an unbiased and objective assessment of the facts. For these reasons, Turkey's claims regarding the MDCCE's use of the McLellan report should be rejected.

79. In sum, the MDCCE's determination of material retardation was based on positive evidence and involved an objective examination consistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement. Thus, Morocco requests the Panel to reject Turkey's claims under Articles 3.1 and 3.4.

E. The MDCCE acted consistently with Articles 6.5, 6.5.1, and 6.9 of the Anti-Dumping Agreement with respect to the disclosure of the break-even threshold

80. Turkey's claims under Articles 6.5, 6.5.1, and 6.9 are unfounded. Maghreb Steel provided the data regarding the break-even threshold as confidential information¹³³ and on this basis the MDCCE treated the data, and the figure itself, as confidential.¹³⁴ In the Preliminary Determination, the MDCCE provided information regarding the break-even threshold, but redacted the actual number. The redaction indicates that the figure was not provided because it was confidential information.¹³⁵

81. Article 6.5.1 requires interested parties that provide confidential information to furnish non-confidential summaries that are in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. Maghreb Steel's confidential questionnaire response fulfills these requirements by indicating the factors that were taken into consideration in the calculation of the break-even threshold.¹³⁶ The questionnaire response also provides information on the more detailed variables behind these factors, and for example the components of the fixed costs.¹³⁷ Maghreb Steel also explained that the break-even threshold corresponds to the local sales volume that is required to obtain a zero overall margin in the absence of significant export sales, as originally predicted in the investment plans.¹³⁸

82. The MDCCE based its calculations of the break-even threshold on the information obtained from Maghreb Steel.¹³⁹ The MDCCE disclosed what it understood to be the break-even threshold, noting that "[u]ne entreprise atteint son seuil de rentabilité lorsque la totalité de ses recettes est égale à la totalité de ses coûts",¹⁴⁰ and also that the break-even threshold refers to a volume of

¹²⁹ Morocco's first written submission, para. 191; and Morocco's oral statement at the first substantive meeting of the Panel, para. 55.

¹³⁰ See Morocco's first written submission, para. 229.

¹³¹ Preliminary Determination, Exhibit TUR-6, para. 135.

¹³² Final Determination, Exhibit TUR-11, paras. 159-163.

¹³³ See MAGHREB STEEL's Questionnaire Response, Section G, Exhibit MAR-8.

¹³⁴ Preliminary Determination, Exhibit TUR-6, Tableau n°2: Seuil de rentabilité de l'activité LAC de MAGHREB STEEL and para. 87.

¹³⁵ See, for example, Panel Reports, *China – GOES*, *China – Autos (US)*, and *China – Broiler Products*.

¹³⁶ MAGHREB STEEL's Questionnaire Response, Section G, Exhibit MAR-8, p. 8.

¹³⁷ MAGHREB STEEL's Questionnaire Response, Section G, Exhibit MAR-8, p. 6.

¹³⁸ MAGHREB STEEL's Questionnaire Response, Section G, Exhibit MAR-8, pp. 8-9.

¹³⁹ Preliminary Determination, Exhibit TUR-6, Tableau n°2: Seuil de rentabilité de l'activité LAC de MAGHREB STEEL.

¹⁴⁰ Preliminary Determination, Exhibit TUR-6, para. 83.

production.¹⁴¹ The MDCCE also disclosed the percentage of the break-even level that had been achieved by Maghreb Steel, noting that "la production réalisée par MAGHREB STEEL au cours de l'année 2012 représente à peine les 63% de son seuil de rentabilité dans une conjoncture normale de marché".¹⁴²

83. Morocco recalls that the Turkish respondents never objected to the treatment of the break-even threshold as confidential during the course of the investigation, nor did the Turkish respondents request the disclosure of additional information.¹⁴³ In fact, the Turkish respondents did not even request access to the administrative record containing the non-confidential version of Maghreb Steel's questionnaire response.

84. Thus, Maghreb Steel's non-confidential questionnaire response provided a summary of the data pertaining to the break-even threshold in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. Therefore, the MDCCE acted consistently with Articles 6.5 and 6.5.1.

85. As to Turkey's claim under 6.9, Morocco notes that Article 6.9 must be interpreted coherently with Article 6.5, which recognizes that confidential information cannot be disclosed. To interpret the requirement under Article 6.9 to require a disclosure of confidential information would create a conflict between Articles 6.5 and 6.9. Compelling an investigating authority to disclose confidential information as part of the "essential facts" would contradict the clear prohibition in Article 6.5 against disclosure of confidential information. Maghreb Steel provided a non-confidential summary of the break-even threshold, and thus the MDCCE acted consistently also with Article 6.9.

86. Accordingly, Morocco respectfully requests the Panel to dismiss Turkey's claims under Articles 6.5, 6.5.1, and 6.9.

F. The MDCCE conducted the investigation consistently with Article 5.10 of the Anti-Dumping Agreement

87. Morocco's investigating authority conducted the anti-dumping investigation in an efficient, orderly and fair manner. Turkey has not identified any delays that were due to inaction by the investigating authority.

88. The language of Article 5.10 is similar to the language used in Articles 12.8, 12.9, and 17.5 of the DSU.¹⁴⁴ The timeframes in these DSU provisions have not been interpreted as rigid deadlines that can never be exceeded. Given the similarities in language, the timeframe in Article 5.10 should be interpreted similarly. This approach would also take into consideration the significant differences in resources between Members, especially in the case of developing and least-developed Members.¹⁴⁵ DSU disputes, like anti-dumping investigations, involve competing interests and are subject to similar due process considerations. The differences between the two processes are artificial. Most WTO disputes are initiated to secure the rights of exporters. Thus, there is no convincing reason why the flexibility with which the timeframes under Articles 12.8, 12.9, and 17.5 of the DSU have been interpreted should not apply under Article 5.10 of the Anti-Dumping Agreement.

89. Turkey's approach under Article 5.10 is too rigid and may in fact harm the due process rights of interested parties in cases where the investigating authority would otherwise not have time to properly investigate the matter due to, for example, late submission of documentation or comments. With regard to the challenged investigation, Morocco notes that Turkey has argued in these proceedings that the MDCCE did not give sufficient time for the interested parties to respond to the Draft Final Determination. Had the MDCCE finished the investigation within the 18-month timeframe, it could have given even less time for the interested parties, in addition to which it would not have had sufficient time to review the comments provided by the Turkish producers. Thus, in the interest of ensuring the due process rights of interested parties, it may in some cases be necessary to exceed the 18-month timeframe. Such was the case in the challenged investigation.

¹⁴¹ Preliminary Determination, Exhibit TUR-6, Tableau n°2: Seuil de rentabilité de l'activité LAC de MAGHREB STEEL.

¹⁴² Preliminary Determination, Exhibit TUR-6, para. 87.

¹⁴³ See Morocco's first written submission, para. 274.

¹⁴⁴ See Morocco's first written submission, paras. 44-48.

¹⁴⁵ See Morocco's first written submission, paras. 42-49.

90. In the light of the above considerations, Morocco requests the Panel to find that the MDCCE did not act inconsistently with Article 5.10 of the Anti-Dumping Agreement.

VI. THE PANEL SHOULD REJECT TURKEY'S REQUEST FOR A RECOMMENDATION

91. The Panel should reject Turkey's request to make a suggestion under Article 19.1 of the DSU.¹⁴⁶ It is a well-established principle that it is for the implementing Member to choose the means of implementation.¹⁴⁷ Furthermore, suggestions made pursuant to Article 19.1 are not binding on the implementing Member and do not determine compliance with the DSB's recommendations and ruling. Given these well-established principles, it would be inappropriate for the Panel to make a suggestion in this case pursuant to Article 19.1 of the DSU even if it found that Morocco has acted inconsistently with its obligations under the Anti-Dumping Agreement.

VII. CONCLUSION

92. For these reasons, Morocco respectfully requests that the Panel reject Turkey's claims in their entirety.

¹⁴⁶ Turkey's first written submission, para. 11.2; and Turkey's oral statement at the first substantive meeting of the Panel, para. 5.2.

¹⁴⁷ Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 184.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

	Contents	Page
Annex C-1	Integrated executive summary of the arguments of the European Union	59
Annex C-2	Integrated executive summary of the arguments of Japan	61
Annex C-3	Integrated executive summary of the arguments of the United States	64

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. This executive summary integrates comments made by the European Union at the Third Party Hearing on 30 November and its replies to the Panel's questions to Third Parties of 19 December 2017. The European Union considers that the present case raises important systemic questions on the interpretation and application of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement", "ADA"). Its submissions focussed on those systemic questions, without taking a definitive position on the facts of the case.

I. ARTICLE 5.10 OF THE ANTI-DUMPING AGREEMENT

2. The European Union considers that antidumping investigations cannot be prolonged, for any reason, beyond 18 months after their initiation. This flows from the clear wording of Article 5.10 of the ADA and was confirmed by the Panels in *Mexico — Olive Oil* and *Ukraine - Definitive Safeguard Measures on Certain Passenger Cars*.

3. One can wonder what should be the consequences for implementation where a measure is defective exclusively because the investigation exceeded the time limit set in Article 5.10 ADA. In the present case, this question seems likely to remain hypothetical, as the measure at issue seems to suffer also from defects on substance. Should the question arise, the European Union considers that the exceeding of the 18 months deadline to conclude the investigation vitiated the entire investigation. This is a fundamental and pervasive violation and it seems difficult to the European Union to correct this effectively without revoking the measure.

II. FACTS AVAILABLE PURSUANT TO ARTICLE 6.8 AND ANNEX II TO THE ANTI-DUMPING AGREEMENT

4. Annex II.6 to the ADA provides clear guidance on the authorities' obligations in case of defective initial submissions. Whilst not obliging investigating authorities to tell interested parties how to cure defects in their initial submissions, this provision does, however, state a clear obligation for investigating authorities to describe precisely the defects identified, and give interested parties an opportunity to provide further explanations within a reasonable period. In the present case, this involved the disclosure of all information in MDCCE's possession that was necessary or helpful in identifying precisely the origin and trajectory of the missing sales, in particular the relevant certificates of origin, subject to Article 6.5 ADA.

5. Furthermore, the Panel should consider very carefully the issue of use of partial datasets. In this regard, the European Union points in particular to the findings of the Panel in *US – Steel Plate* which explain that flaws or gaps of part(s) of a dataset may taint other parts of it or make them unreliable or unusable, and that in such cases, the other parts can be discarded as well. This is not a "punitive" use of facts available (which is rightly prohibited), but logical and coherent. Where only part of overall sales data is reported, the omission on the other part(s) may, and will often, cast legitimate doubts on the data that has been selectively submitted, or will simply make reconciliation impossible. Artificially separating "good" parts from "bad" or missing parts, and obliging authorities to use the former without regard to the overall impact of the flaws or omissions, would lead to absurd results and have as its only effect to give a prime to those who "game the system".

III. MATERIAL RETARDATION OF ESTABLISHMENT

6. According to footnote 9 to Article 3 ADA, "material retardation" is simply one of the three possible forms of injury contemplated by the Anti-Dumping Agreement. Thus, whenever a determination of "injury", in whatever form, is made, the rules for determinations of injury in Article 3 ADA must apply.

7. Injury in the form of "material retardation of establishment" can by definition only occur when the industry in question is not yet established. This flows from the wording of footnote 9 to Article 3 ADA itself.

8. The subsequent question is the question of when an industry should be considered as having completed its establishment: Already when it has taken up its production (i.e., is not embryonic any more), or only when it has stabilised its commercial production (i.e., has moved from being a nascent industry to a "normal" one). In any event, the ultimate end point for considering an industry as still being in the course of establishment must be when it has stabilised commercial production and has thereby ended the start-up phase. The question of whether or not this is the case, must be examined in a holistic assessment of all relevant factors, taking into account the specificities of the product, the market (in particular its structure and the conditions of competition), and the industry in question. Any finding in this regard must, pursuant to Article 3.1 ADA, be "based on positive evidence", i.e. evidence of an affirmative, objective and verifiable character, that is credible.

9. The determination of the relevant domestic industry for the injury test (i.e., in retardation cases, the retardation of establishment test) follows Article 4.1 ADA, namely, the producers of the like product, including future producers of products that will be considered "like" once they are established in the market. However, when looking at this industry, it can be relevant, for the test whether this industry is established, to look at the overall set-up and configuration of the firms in question. The fact that they had already been acting on the market, producing and supplying related products (even though not "like" pursuant to Article 4.1 ADA), can, depending on the circumstances of each case, be an indicator that establishment of the industry (i.e., relating to the production of the current and future "like product") might have been quicker than if the whole firm(s) had to be created from scratch.

10. The rules applicable to the retardation test include the obligation to examine all mandatory injury factors listed in Article 3.4 ADA. In light of the standards of "positive evidence" and "objective examination" set out in Article 3.1 ADA, investigating authorities must provide a persuasive explanation as to how the evaluation of relevant factors led to the determination of injury. Economic projections, such as feasibility studies, can – and will, most often in retardation cases – play an important role in the analysis of the injury factors. However, projections can only be relevant to the extent they are realistic and themselves grounded in positive evidence. Assumptions made in studies must undergo thorough "reality checks" if they are relied on in the injury test.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. INTRODUCTION

1. The Government of Japan has joined as a Third Party in this dispute to address four issues: (i) whether the consultation process may shape a Panel's terms of reference; (ii) whether an investigating authority must consider all of the factors specified by Article 3.4 of the Anti-Dumping Agreement in determining "material retardation"; (iii) whether and how an investigating authority should assess the establishment of an industry in a determination of "material retardation" under Article 3 of the Anti-Dumping Agreement; and (iv) how an investigating authority should apply "facts available" in determining dumping margins.

II. THE CLAIMS SET OUT IN A CONSULTATION REQUEST MAY EVOLVE DURING THE CONSULTATIONS, WHICH IN TURN MAY INFLUENCE A PANEL'S TERMS OF REFERENCE

2. The claims that form the basis for consultations held under Article 4.4 of the DSU does not necessarily limit the scope of a request for the establishment of a Panel under Article 6.2. One of the functions of the consultation process is to define the scope of the dispute through the parties' exchange of information, which necessarily means that claims set out in a consultation request may evolve during the consultations. The consultations therefore may influence a Panel's terms of reference.

3. Appellate Body jurisprudence supports this conclusion. The Appellate Body has stated that "consultations provide the parties an opportunity to define and delimit the scope of the dispute between them".¹ Therefore the Appellate Body would "hesitate to impose too rigid a standard for the 'precise and exact identity' between the scope of consultations and the request for the establishment of a panel".² It follows then that "the claims set out in a panel request may thus be expected to be shaped by, and thereby constitute a natural evolution of, the consultation process".³

4. It is therefore inappropriate to treat the scope of the request for consultations as limiting the scope of the mandate for a Panel. The Panel should examine whether the scope of the panel request "constitute[d] a natural evolution" from the scope of the consultations request.⁴

III. ALL OF THE FACTORS SPECIFIED BY ARTICLE 3.4 OF THE ANTI-DUMPING AGREEMENT MUST BE CONSIDERED WHEN MAKING A DETERMINATION OF "MATERIAL RETARDATION"

5. The fifteen factors specified in Article 3.4 are a mandatory minimum basis for an evaluation by investigating authorities of the impact of dumped imports on a domestic industry. Investigating authorities must therefore collect and analyse data relating to each of these fifteen enumerated factors, along with any others that are relevant, in making any determination under Article 3, including a determination of "material retardation".

6. The Appellate Body has confirmed that "Article 3.4 lists certain factors which are deemed to be relevant in every investigation and which must always be evaluated by the investigating authorities".⁵

7. Furthermore, the investigating authorities must have in its record that they have examined and evaluated all of the fifteen factors listed in Article 3.4. Although each factor need not be

¹ Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 US)*, para. 54.

² Appellate Body Report, *US – Upland Cotton*, para. 293.

³ Appellate Body Report, *Mexico – Definitive Anti-dumping Measures on Beef and Rice*, para. 138.

⁴ *Idem*.

⁵ Appellate Body Report, *US – Hot Rolled Steel*, para. 194.

dispositive or relevant in every investigation, "[w]here an investigating authority concludes that a particular factor listed in Article 3.4 is not relevant, this conclusion must be explained".⁶

8. Article 3.4 of the Anti-Dumping Agreement is a core element for the determination of injury, whatever form that injury might take. That includes injury in the form of "the material retardation of the establishment of [a domestic] industry" as specified in footnote 9 to Article 3 of the Anti-Dumping Agreement. This was confirmed by the Panel in *Egypt – Steel Rebar*, which stated: "[I]n short, 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".⁷

9. The Panel should therefore examine whether the investigating authority properly assessed all of the factors listed in Article 3.4 when determining the "material retardation of the establishment" of the domestic industry.

IV. IN ASSESSING MATERIAL RETARDATION, AN INVESTIGATING AUTHORITY IS OBLIGED TO DETERMINE WHETHER A DOMESTIC INDUSTRY IS ESTABLISHED

10. In response to the Panel's questions, Japan offered its additional views on an authority's determination of material retardation of establishment of industry.

11. A determination of material retardation of establishment of a domestic industry can be made only in respect of a domestic industry that is not yet established. This conclusion follows from the plain meaning of the texts of Article VI.1 and VI.6 of the GATT 1994 and footnote 9 to Article 3 of the Anti-Dumping Agreement. There, a distinction is made between "an established industry" and "the establishment of a domestic industry". The circumstances of material injury or threat of material injury are limited explicitly to "an established industry", and equally explicitly material retardation is limited to "the establishment of a domestic industry". In order for dumped imports to retard the establishment of an industry, logic dictates that establishment of the industry cannot already have occurred. Applying the standard of material retardation to an established industry would therefore be inconsistent with the covered agreements.

12. An investigating authority is obliged to find that an industry is unestablished in the context of making a determination that the establishment of the industry is materially retarded. Although there is no express obligation in the covered agreements to make such a finding, there is an implicit requirement to do so because the plain meaning of the covered agreements limits a determination of material retardation only to an unestablished industry. Therefore, an investigating authority cannot avoid making the threshold determination that an industry is unestablished before determining that the industry's establishment is materially retarded.

13. The panel's conclusions on Article 3.1 of the Anti-Dumping Agreement in *China – Cellulose Pulp* have no bearing on "a determination that the domestic industry is unestablished". Article 3.1 and Article 3 generally pertain to the determinations of injury, threat of injury, material retardation and causation.

14. Footnote 9 to Article 3, Article 4.1 and Article 2.6 of the Anti-Dumping Agreement are all linked and must be taken into account when making a determination of "material retardation of the establishment of a domestic industry".

V. "FACTS AVAILABLE" SHOULD BE LIMITED TO MISSING INFORMATION, AND SHOULD NOT PUNISH THE FAILURE TO PROVIDE REQUESTED INFORMATION

15. Article 6.8 and Annex II of the Anti-Dumping Agreement allow an investigating authority to make determinations on the basis of the "facts available" if information that has been requested from an "interested party" is not supplied within a reasonable time. These provisions do not sanction the intentional use of adverse facts or arbitrary data to punish a non-cooperating "interested party".

16. Annex II is the basis for the application of Article 6.8. The title of Annex II makes it clear that the "Best Information Available" should be used by an investigating authority. Moreover, a Panel has concluded that Article 6.8 and Annex II are meant to ensure that "even where the investigating

⁶ Panel Report, *Russia – Commercial Vehicles*, para. 7.111.

⁷ Panel Report, *Egypt – Steel Rebar*, para. 7.93.

authority is unable to obtain the 'first best' information as the basis of its decision, it will nonetheless base its decision on facts, albeit perhaps 'second-best' facts".⁸

17. The Appellate Body has noted that Article 12.7 of the Agreement on Subsidies and Countervailing Measures "is almost identically worded to Article 6.8 of the Anti-Dumping Agreement" and that Annex II of the Anti-Dumping Agreement is "relevant context" for the interpretation of Article 12.7.⁹ The Appellate Body has stated that Article 12.7 "should not be used to punish non-cooperating parties by intentionally choosing adverse facts for that purpose".¹⁰ Rather, this provision "permits the use of facts on record solely for the purpose of replacing information that may be missing, in order to arrive at an accurate subsidization or injury determination".¹¹

18. Paragraph 7 of Annex II of the Anti-Dumping Agreement acknowledges that secondary sources of information used by an investigating authority in the event of non-cooperation by an interested party "could lead to a result that is less favourable to the party than if the party did cooperate". It does not, however, justify the arbitrary selection of the data to be used in place of the missing data. Nor does it permit the investigating authority to bring about an outcome that is punitive and does not reflect a determination that is based on the available facts of the case.

19. The Panel should examine carefully whether the determination of the dumping margin by the investigating authority was properly based on the available facts, as required under Article 6.8 and Annex II.

VI. CONCLUSION

20. Japan respectfully requests the Panel to consider Japan's positions on the interpretive issues set out above.

⁸ Panel Report, *US – Hot-Rolled Steel*, para. 7.55.

⁹ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.423.

¹⁰ Appellate Body Report, *US – Countervailing Measures (China)*, fn. 738 to para. 4.179.

¹¹ Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, para. 293.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

I. CLAIMS REGARDING ARTICLE 4.4 AND ARTICLE 6.2 OF THE DSU

1. Morocco claims that Turkey breached Articles 4.4 and 6.2 of the DSU because it improperly expanded the scope of the dispute when: (1) Turkey added certain claims to its panel request that were not previously listed in the consultation request; and (2) Turkey added claims in its first written submission that were not contained in its panel request.

2. Articles 4.4 and 6.2 set out the requirements for a consultations request and a panel request, respectively, and contain different obligations with respect to the identification of the measures and the legal basis of the claims at issue. Article 4.4 requires "identification of the measures at issue" and "an indication of the legal basis for the complaint," while Article 6.2 requires that a complainant "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". The text of Articles 4.4 and 6.2 suggests that the claims set out in each of the consultation request and panel request may not be identical.

3. There may be some circumstances in which the legal claims are so different as between the panel and consultations requests that questions could be raised whether the dispute has been subject to consultations (DSU Article 4.7). Here, it could be relevant to the Panel's consideration that consultations had been requested pursuant to the AD Agreement and claims under Articles 3 and 6 had been raised in the consultations request.

4. With respect to Article 6.2, a deficient summary of the legal basis of the complaint means that a claim will not fall within a panel's terms of reference. Where an article in a covered agreement contains several distinct legal obligations, each capable of being breached, a cursory reference to such an article in a panel request does not reveal which one, or more, of those obligations is at issue. In that circumstance, a complaining party may not have provided the brief summary of the legal basis sufficient to present the problem clearly.

5. However, Article 6.2 does not require a complaining party to explain in its panel request all the reasons why it considers the measure to have breached the legal provisions at issue. In this respect, the Appellate Body has distinguished between "claims" and "arguments" for purposes of reviewing a panel request in light of the terms of Article 6.2 of the DSU, and has found that Article 6.2 requires claims, but not arguments, to be set forth in the panel request.

6. Therefore, the Panel should examine whether Turkey's consultation request is in accordance with Article 4.4 of the DSU, and whether Turkey's panel request is in accordance with Article 6.2 of the DSU.

II. CLAIMS REGARDING FOOTNOTE 9 OF ARTICLE 3 OF THE AD AGREEMENT

7. Turkey argues that the "establishment" of a domestic industry "alludes to an industry being brought into existence, rather than an already producing industry being stable or firm". For Turkey, "material retardation of the establishment of an industry" could also occur in circumstances "where there has been some production of the like product, but such production has not reached a sufficient level to allow consideration of injury or threat of injury to an existing domestic industry".

8. Footnote 9 is appended to Article 3, and provides the definition of "injury". Specifically, footnote 9 defines injury to encompass three situations: (1) material injury to a domestic industry; (2) threat of material injury to a domestic industry; or (3) material retardation of the establishment of such an industry.

9. Article 4.1 of the AD Agreement generally defines a "domestic industry" as referring to "the domestic producers as a whole of the like products or to those of them whose collective output of the products constitute a major proportion of the total domestic production of those products".

Article 4.1, however, does not indicate what level of production or other factors an industry must evince to have achieved "establishment" for purposes of Article 3.

10. Turning to the text of footnote 9, the ordinary meaning of the term "establishment" is "[t]he action of establishing; the fact of being established". The verb to "establish" means to "set up on a permanent secure basis; bring into being, found, (a government, institution, business, etc.)" or to "make stable or firm; strengthen (*lit & fig*)". Therefore, establishment refers to the point at which an industry is set up on a secure basis, brought into being, or made stable or firm.

11. With respect to the phrase "material retardation", the ordinary meaning of the verb to "retard" means "keep back, delay, hinder; make slow or late; delay the progress, development, or accomplishment of", "defer, postpone, put off", "be or become delayed; come, appear, or happen later; undergo retardation". The ordinary meaning of "material" is "serious, important; of consequence". Therefore, "material retardation" means a consequential or important delay or hindrance of the development or accomplishment of something.

12. Read together, the ordinary meaning of the terms "material retardation of the establishment of ... an industry" would suggest a [*material*] consequential or important [*retardation*] hindrance or delay of the accomplishment of the [*establishment*] bringing into being, or setting up on a secure basis, of an industry. This reading is consistent with the findings of the panel in *Mexico – Olive Oil*, which considered the issue in the context of Article 16.1 of the SCM Agreement.

13. Therefore, the "establishment" of a domestic industry can occur either at the point an industry comes into being (for example, by commencing production), or at which it achieves stability. If an investigating authority determines that the domestic industry has not been established, then it may consider whether the performance of the industry reflects normal start-up difficulties or whether the imports of the subject merchandise have materially retarded the establishment of the domestic industry. The United States considers that each of the factors used by the Ministry of Industry, Commerce, Investment and Digital Economy in Charge of External Trade ("MDCCE") in the underlying investigation may be relevant to an investigating authority's analysis in making findings regarding the "establishment" of a domestic industry.

III. CLAIMS REGARDING ARTICLES 3.1 AND 3.4 OF THE AD AGREEMENT

14. Turkey claims that the analysis of the MDCCE was inconsistent with Articles 3.1 and 3.4 of the AD Agreement because MDCCE failed to assess all the factors listed in Article 3.4.

15. Article 3.1 informs the obligations of Article 3.4. Article 3.1 of the AD Agreement sets forth two overarching obligations that apply to multiple aspects of an authority's injury determination. The first overarching obligation is that the injury determination be based on "positive evidence". The second obligation is that the injury determination involves an "objective examination" of the volume of the dumped imports, their price effects, and their impact on the domestic industry. Accordingly, any determinations or findings made in connection with Article 3.4 must be based on "positive evidence" and "involve an objective examination", as required by Article 3.1 of the AD Agreement.

16. Article 3.4 of the AD Agreement sets out an authority's obligation to ascertain the impact of dumped imports on the domestic industry. The United States observes that Article 3.4 imposes an obligation on the authority to conduct an "examination" of the impact of the dumped imports on the domestic industry. And the text of Article 3.4 expressly requires investigating authorities to examine the "impact" of subject imports on a domestic industry, and not just the state of the industry.

17. As recognized by Article 3.1 of the AD Agreement, subject imports can influence a domestic industry's performance through volume and price effects. Thus, to examine the impact of subject imports on a domestic industry, an authority would need to consider the relationship between subject imports – including subject import price undercutting, and the price depressing or suppressing effects of subject imports – and the domestic industry's performance during the period of investigation. The "examination" contemplated by Article 3.4 must be based on a "thorough evaluation of the state of the industry" and it must "contain a persuasive explanation as to how the evaluation of relevant factors led to the determination of injury".

18. Article 3.4 does not dictate the methodology that should be employed by the authority, or the manner in which the results of this evaluation are to be set out. The United States observes that the

Panel must be able to discern that the authority's examination of the impact on the domestic industry – an examination that necessarily includes an evaluation of relevant economic factors – is based on positive evidence and an objective examination. If the investigating authority's factual evaluation was one an unbiased and objective authority could have reached, the Panel should find no breach under the standard of review articulated in Article 17.6(i) of the AD Agreement.

IV. TURKEY'S CLAIMS REGARDING ARTICLES 6.5 AND 6.5.1 OF THE AD AGREEMENT

19. Turkey claims that MDCCE acted inconsistently with Articles 6.5 and 6.5.1 of the AD Agreement when: (1) it treated the break-even threshold as confidential and failed to "discuss" the "good cause" that warranted treating such information confidential; and (2) it did not require the party to submit a non-confidential summary of the information, or to explain why such summary would not be possible.

20. Articles 6.5 and 6.5.1 balance the protection of confidential information with the right of parties to be given a full and fair opportunity to see relevant information and defend their interests. The United States considers that Article 6.5 requires that investigating authorities ensure the confidential treatment of information. Article 6.5.1 then balances the need to protect confidential information against the disclosure requirements of other Article 6 provisions by requiring that, if an investigating authority accepts confidential information, it shall require that confidential information is summarized in sufficient detail to permit a reasonable understanding of the substance of the information.

21. The Panel should first determine if an interested party designated information as confidential. The Panel should then determine whether an investigating authority that accepted confidential information ensured that a summary of that confidential information was provided to other parties in sufficient detail to permit a reasonable understanding of the substance of the information and allow such parties the ability to adequately defend their interests.

V. TURKEY'S CLAIMS REGARDING ARTICLE 6.8 AND ANNEX II OF THE AD AGREEMENT

22. Turkey claims that MDCCE breached Article 6.8 and paragraphs 1, 3, 5, 6, and 7 of Annex II of the AD Agreement by improperly resorting to facts available, rather than relying on the information provided pertaining to the exporters' sales information.

23. Article 6.8 permits investigating authorities to apply facts otherwise available in cases where an interested party refuses access to, or otherwise does not provide, information that is necessary to the investigation within a reasonable period of time, or significantly impedes the investigation.

24. The provisions of Annex II of the AD Agreement are relevant to the proper interpretation of Article 6.8. Annex II has been interpreted to mean that "all the information provided by the parties, even if not ideal in all respects, should to the extent possible be used by the authorities and in case secondary source information is to be used, the authorities should do so with special circumspection". Moreover, Article 6.8 applies exclusively to interested parties from whom information is required by competent authorities, and both Article 6.8 and Annex II establish the expectation that competent authorities will use that information to the extent that it can be used. In this way, Annex II reflects that an investigating authority's ability to rely on facts potentially less favorable to the interests of a non-cooperating interested party is inherent in the authority's role in conducting an investigation in accordance with the AD Agreement, provided certain conditions are met.

25. In the United States' view, it may be appropriate for an investigating authority to fill gaps in the record, if the record otherwise contains usable data and is incomplete with respect to only a discrete category of information. Substitution with respect to all data from the non-cooperating party may be appropriate if, for instance, none of the reported data is reliable or usable because the data contains pervasive and persistent deficiencies, or is unverifiable. This is a determination that will depend on the specific facts and circumstances of a case.

26. With respect to all uses of facts available, the investigating authority must provide a sufficient basis for its application. To the extent that Turkey is alleging that Morocco has insufficiently explained the basis for its application of the facts available, the sufficiency of an investigating authority's explanations is dealt with under the procedural obligations of Article 12 of the AD Agreement, and not Article 6.8.

VI. TURKEY'S CLAIMS REGARDING ARTICLE 6.9 OF THE AD AGREEMENT

27. Turkey alleges that MDCCE acted inconsistently with Article 6.9 of the AD Agreement by failing to disclose all "essential facts", and with respect to the "essential facts" that were disclosed, by failing to provide "sufficient time" to the Turkish exporters to comment on the disclosures and defend their interests.

28. The ability of interested parties to defend their interests lies at the heart of the disclosure obligation of Article 6.9. Absent a full disclosure of the "essential facts" forming the basis for consideration of an underlying dumping determination, it might not be possible for an interested party to identify whether the investigating authority properly considered the factual information before it. In short, failure to provide this information could result in an interested party being unable to defend its interests within the meaning of Article 6.9 because it would not be able to sufficiently identify which issues, if any, are adverse to its interests.

29. Thus, in considering whether the obligation in Article 6.9 has been breached, the analysis should turn on whether, under the specific facts of the dispute, the objective set out in Article 6.9 has been met. Specifically, whether interested parties were able to defend their interests.

VII. TURKEY'S REQUEST UNDER ARTICLE 19.1 OF THE DSU

30. In the event that the Panel finds Morocco to have acted inconsistently with the AD Agreement, Turkey argues that "the only appropriate and effective way for Morocco to bring its measure into conformity is by revoking the measure forthwith". Turkey requests the Panel to exercise its authority under Article 19.1 of the DSU to this effect.

31. Article 19.1 of the DSU provides that when a panel finds a measure to be inconsistent, it "shall" recommend that the Member bring the measure into conformity. A panel also has the authority, but not the obligation ("may"), to "suggest ways in which the Member could implement the recommendations."

32. Panels have seldom chosen to make suggestions to Members regarding their implementation of recommendations of the DSB. Under the DSU, a Member retains flexibility with respect to how that Member implements the DSB recommendations. To the extent the Panel finds that any challenged measure by Morocco is inconsistent with the AD Agreement, however, the Panel must make the mandatory recommendation indicated in Article 19.1, *i.e.*, that the Member concerned bring its measure into conformity with the relevant covered agreement.

EXECUTIVE SUMMARY OF THE U.S. RESPONSES TO PANEL QUESTIONS TO THIRD PARTIES

33. Response to Question 1.1: With respect to the third form of injury, "material retardation of the establishment of such an industry," the text of footnote 9 of Article 3 links the "material retardation" finding to the "establishment" of a domestic industry. The ordinary meaning of the terms "material retardation of the establishment of ... an industry" would suggest a [*material*] consequential or important [*retardation*] hindrance or delay of the accomplishment of the [*establishment*] bringing into being, or setting up on a secure basis, of an industry.

34. Response to Question 1.2: The text of footnote 9 of Article 3 links a "material retardation" finding with "establishment" of a domestic industry. Therefore, an investigating authority cannot make a material retardation finding without first ascertaining whether the industry is already established. However, the "establishment" of a domestic industry can occur either at the point an industry comes into being (for example, by commencing production), or at which it achieves stability.

35. Response to Question 1.3: Article 3.1 sets forth overarching obligations that apply to multiple aspects of an investigating authority's injury determinations. However, nothing in the text of Article 3.1 suggests that its obligations are only consequentially based on the breach of another provision of Article 3 because the term "shall" reflects a mandatory obligation. Thus, a panel may consider whether an investigating authority's determination was consistent with the obligations set forth under Article 3.1 independent of other provisions.

36. Response to Question 1.4: The United States agrees that the terms "such an industry" in footnote 9 of Article 3 are informed by Article 4.1 of the AD Agreement, which generally defines a "domestic industry" as referring to "the domestic producers as a whole of the like products or to those of them whose collective output of the products constitute a major proportion of the total domestic production of those products".

37. Article 2.6 of the AD Agreement then defines the term "like product" "to mean a product which is identical, i.e., alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration". Therefore, pursuant to Article 2.6, the "like product" is defined based on the "product under consideration."

38. In determining whether "such an industry" is established, an investigating authority may examine several or all of the following criteria: (1) when the domestic industry began production; (2) whether the production has been steady or start-and-stop; (3) the size of domestic production compared to the size of the domestic market as a whole; (4) whether the industry has reached a reasonable "break-even point"; and (5) whether the activities are truly a new industry or merely a new product line of an established industry.
