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

REPORT OF THE PANEL

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US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
US – Zeroing (Japan) (Article 21.5 – Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW, adopted 31 August 2009, DSR 2009:VIII, p. 3441

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TUR-1	Notice of initiation	Ministère marocain de l'industrie, du commerce et des nouvelles technologies, Avis public n° 01/13, Relatif à l'ouverture d'une enquête antidumping sur les importations de tôles d'acier laminées à chaud originaires ou exportés des pays de l'Union Européenne et de la Turquie (22 janvier 2013) (Moroccan Ministry of Industry, Trade and New Technologies, Public Notice No. 01/13, concerning the initiation of an anti-dumping investigation on imports of hot-rolled steel sheet originating in or exported from countries of the European Union and Turkey (22 January 2013))
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TUR-5	Joint decision No. 2986-13 imposing provisional anti-dumping duties	Arrêté conjoint du ministre de l'industrie, du commerce, de l'investissement et de l'économie numérique et du ministre de l'économie et des finances n° 2986-13 du 23 hija 1434 (29 octobre 2013) soumettant à un droit antidumping provisoire les importations de tôles d'acier laminées à chaud originaires de l'Union européenne et de la Turquie, Bulletin Officiel, n° 6206 (21 novembre 2013) (Joint Order of the Minister of Industry, Trade, Investment and the Digital Economy and the Minister of the Economy and Finance No. 2986-13 of 23 Hijjah 1434 (29 October 2013) imposing a provisional anti-dumping duty on imports of hot-rolled steel sheet originating in the European Union and Turkey, Official Journal No. 6206 (21 November 2013))
TUR-6	Preliminary determination	Ministère marocain de l'industrie, du commerce et des nouvelles technologies, Rapport préliminaire de l'enquête antidumping sur les importations de tôles d'acier laminées à chaud originaires de l'Union Européenne et de la Turquie, Détermination préliminaire de l'existence du dumping, du dommage et du lien de causalité (Moroccan Ministry of Industry, Trade and New Technologies, Preliminary report of the anti-dumping investigation on imports of hot-rolled steel sheet originating in the European Union and Turkey, Preliminary determination of dumping, injury and causal link)
TUR-7	Public notice of the preliminary determination	Ministère marocain de l'industrie, du commerce et des nouvelles technologies, Avis public n° 12/13, Enquête antidumping sur les importations de tôles d'acier laminées à chaud originaires de l'Union Européenne et de la Turquie, Détermination préliminaire de l'existence du dumping, du dommage et du lien de causalité (30 octobre 2013) (Moroccan Ministry of Industry, Trade and New Technologies, Public Notice No. 12/13, Anti-dumping investigation on imports of hot-rolled steel sheet originating in the European Union and Turkey, Preliminary determination on the existence of dumping, injury and causal link (30 October 2013))
TUR-8 (BCI)	Verification Report for Erdermir Group/Isdemir	Ministère marocain de l'industrie, du commerce et des nouvelles technologies, Mission de vérification dans le cadre de l'enquête anti-dumping sur les importations de tôles d'acier laminées à chaud originaires de l'Union européenne et de la Turquie, Rapport de mission, Erdemir Group/Isdemir (22 avril 2014) (Moroccan Ministry of Industry, Trade and New Technologies, Verification mission as part of the anti-dumping investigation on imports of hot-rolled steel sheet originating in the European Union and Turkey, Mission Report, Erdemir Group/Isdemir (22 April 2014))

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

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

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
BCI	Business Confidential Information
C&F	cost and freight
CIB	Turkish Steel Exporters' Association
Colakoglu	Çolakoğlu Metalurji and Çolakoğlu Dis Ticaret A.S
DCE	Ministère de l'Industrie, du Commerce et des Nouvelles Technologies, Département du Commerce Extérieur
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
Erdemir Group	Ereğli Demir ve Çelik Fabrikaları T.A.Ş and İskenderun Demir ve Çelik A.Ş (İSDEMİR)
GATT 1994	General Agreement on Tariffs and Trade 1994
Hot-rolled steel products	hot-rolled steel
MDCCE	Ministère délégué auprès du Ministre de l'Industrie, du Commerce, de l'Investissement et de l'Économie Numérique chargé du Commerce Extérieur
SCM Agreement	Agreement on Subsidies and Countervailing Measures
USITC	United States International Trade Commission
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by Turkey

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

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

1.2 Panel establishment and composition

1.3. On 12 January 2017, Turkey requested the establishment of a panel pursuant to Articles 4.7 and 6 of the DSU with standard terms of reference.[2] At its meeting on 20 February 2017, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Turkey, in accordance with Article 6 of the DSU.[3]

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

> To examine, in the light of the relevant provisions of the covered Agreements cited by the parties to the dispute, the matter referred to the DSB by Turkey in document WT/DS513/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those Agreements.[4]

1.5. On 8 May 2017, Turkey requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 17 May 2017, the Director-General accordingly composed the Panel as follows:

Chairperson: Ms Usha Dwarka-Canabady

Members: Mr Gustav Brink
Mr Renê Guilherme da Silva Medrado

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

1.3 Panel proceedings

1.7. After consulting the parties, the Panel:

a. adopted its Working Procedures[5] and timetable on 22 August 2017;

b. revised the timetable on 4 December 2017, on 15 May 2018, and on 4 July 2018; and

c. adopted, on 22 August 2017, additional procedures for the protection of Business Confidential Information (BCI).[6]

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

[1] Request for consultations by Turkey, WT/DS513/1, G/ADP/D114/1, G/L/1152, G/LIC/D/51.
[2] Request for the establishment of a panel by Turkey, WT/DS513/2.
[3] DSB, Minutes of the meeting held on 20 February 2017 (5 April 2017), WT/DSB/M/392.
[4] Constitution note of the Panel, WT/DS513/3.
[5] See the Panel's Working Procedures in Annex A-1.
[6] See the Additional Working Procedures of the Panel concerning Business Confidential Information in Annex A-2.

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

2 FACTUAL ASPECTS

2.1 The measures at issue

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

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

2.3. Morocco imposed provisional anti-dumping duties on the imported products at issue[8], following the preliminary affirmative determination by the "Ministère délégué auprès du Ministre de l'Industrie, du Commerce, de l'Investissement et de l'Économie Numérique chargé du Commerce Extérieur" (MDCCE) of dumping, injury and causation, dated 29 October 2013.[9]

2.4. On 12 August 2014, the MDCCE published the final affirmative determination of dumping, injury, and causation.[10] The definitive measure came into force on 26 September 2014.[11]

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATION

3.1. Turkey requests the Panel to find that[12]:

a. the MDCCE acted inconsistently with Article 5.10 of the Anti-Dumping Agreement, because the duration of the investigation at issue exceeded the maximum time limit envisaged in this provision;

b. the MDCCE used facts available to determine dumping margins for Ereğli Demir ve Çelik Fabrikaları T.A.Ş and İskenderun Demir ve Çelik A.Ş (İSDEMİR) (Erdemir Group) and Çolakoğlu Metalurji and Çolakoğlu Dis Ticaret A.S (Colakoglu) in a manner inconsistent with Article 6.8 and paragraphs 1, 3, 5, 6, and 7 of Annex II to the Anti-Dumping Agreement;

c. the MDCCE acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to disclose all "essential facts" with respect to its decision to use facts available to determine dumping margins for Erdemir Group and Colakoglu in a timely manner;

d. the MDCCE's determination that the domestic industry (Maghreb Steel) was "unestablished" is inconsistent with Article VI:6(a) of the GATT 1994 as well as footnote 9 to Article 3 and Articles 3.1 and 3.4 of the Anti-Dumping Agreement;

e. the MDCCE's determination that the domestic industry (Maghreb Steel) suffered injury in the form of material retardation is inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement; and

f. the MDCCE acted inconsistently with Articles 6.5, 6.5.1, and 6.9 of the Anti-Dumping Agreement by failing to disclose information concerning the break-even threshold in its analysis of whether the domestic industry was "established".

[7] Notice of initiation, (Exhibit TUR-1); Initiation report, (Exhibit TUR-2).
[8] Joint decision No. 2986-13 imposing provisional anti-dumping duties, (Exhibit TUR-5).
[9] Preliminary determination, (Exhibit TUR-6); Public notice of the preliminary determination, (Exhibit TUR-7).
[10] Final determination, (Exhibit TUR-11); Public notice of the final determination, (Exhibit TUR-12).
[11] Joint decision No. 3024-14 imposing definitive anti-dumping duties, (Exhibit TUR-13).
[12] Turkey's first written submission, paras. 11.1-11.2.

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

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

4 ARGUMENTS OF THE PARTIES

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

5 ARGUMENTS OF THE THIRD PARTIES

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

6 INTERIM REVIEW

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

7 FINDINGS

7.1 General principles

7.1.1 Treaty interpretation

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

7.1.2 Standard of review

7.2. Article 11 of the DSU provides that:

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

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

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

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

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

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

a. examine whether the authority has provided a reasoned[14] and adequate[15] explanation as to:

   i. how the evidence on the record supported its factual findings[16]; and

   ii. how those factual findings support the overall determination[17];

b. not conduct a *de novo* review of the evidence or substitute our judgment for that of the investigating authority;

c. limit our examination to the evidence that was before the investigating authority during the investigation[18];

d. take into account all such evidence submitted by the parties to the dispute[19]; and

e. not simply defer to the conclusions of the investigating authority; our examination of those conclusions must be "in-depth" and "critical and searching".[20]

7.1.3 Burden of proof

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

[14] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93: "[t]he panel's scrutiny should test whether the reasoning of the authority is coherent and internally consistent".
[15] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93: "[w]hat is 'adequate' will inevitably depend on the facts and circumstances of the case and the particular claims made, but several general lines of inquiry are likely to be relevant".
[16] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93: "[t]he panel must undertake an in-depth examination of whether the explanations given disclose how the investigating authority treated the facts and evidence in the record and whether there was positive evidence before it to support the inferences made and conclusions reached by it".
[17] Appellate Body Reports, *US – Countervailing Duty Investigation on DRAMS*, para. 186; *US – Lamb*, para. 103. See also Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93: "[t]he panel must examine whether the explanations provided demonstrate that the investigating authority took proper account of the complexities of the data before it, and that it explained why it rejected or discounted alternative explanations and interpretations of the record evidence".
[18] Anti-Dumping Agreement, Article 17.5(ii); Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 187.
[19] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 187.
[20] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.
[21] Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:I, p. 335.
[22] Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:I, p. 335.
[23] Appellate Body Report, *EC – Hormones*, paras. 98 and 104.

7.2 Terms of reference

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

a. the claims under footnote 9 to Article 3 of the Anti-Dumping Agreement, Articles 3.1 and 3.4 of the Anti-Dumping Agreement[24], and Article VI:6(a) of the GATT 1994 in respect of the MDCCE's finding that the domestic industry was not "established";

b. the claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement in respect of the MDCCE's finding of "material retardation" of the establishment of the domestic industry;

c. the claims under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement in respect of the confidential treatment of the domestic industry's (Maghreb Steel) break-even threshold; and

d. the claim under Article 6.9 of the Anti-Dumping Agreement in respect of the alleged failure to disclose the essential facts pertaining to the domestic industry's (Maghreb Steel) break-even threshold.

7.2.1 Evaluation

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

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

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

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

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

a. Footnote 9 is a "definitional provision" and, as such, applies to all instances where the Anti-Dumping Agreement references the term "injury". Therefore, by citing Articles 3.1 and 3.4 in the panel request, Turkey also referred to footnote 9.[28]

b. In the panel request, Turkey used the language of footnote 9 when referring to the MDCCE's determination that the domestic industry was not "established" and that the establishment of the domestic industry was "retarded".[29] It was thus clear that Turkey

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

[25] Fn omitted.

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

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

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

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

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

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

7.8. Article 6.2 of the DSU provides, in relevant part:

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

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

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

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

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

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

[30] Turkey's response to Panel question No. 1.4(a), para. 41.
[31] Turkey's response to Panel question No. 1.4(a), paras. 42-44 (referring to Appellate Body Report, *Thailand – H-Beams*, para. 90).
[32] Turkey's response to Panel question No. 1.4(a), paras. 46 and 48.
[33] See Article 7.1 of the DSU.
[34] Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 639 (referring to Appellate Body Reports, *Guatemala – Cement I*, paras. 72-73; *US – Carbon Steel*, para. 125; *US – Continued Zeroing*, para. 160; *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 107; and *Australia – Apples*, para. 416); *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.6.
[35] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, paras. 4.8 (referring to Appellate Body Reports, *Korea – Dairy*, paras. 123-124, in turn referring to *Brazil – Desiccated Coconut*, DSR 1997:I, p. 186; *EC – Bananas III*, paras. 145 and 147; *India – Patents (US)*, paras. 89 and 92-93; and *US – Carbon Steel*, para. 130), 4.17, and 4.31.
[36] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.33.
[37] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162.
[38] Appellate Body Report, *US – Carbon Steel*, para. 127.

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

7.14. Turkey asserts that footnote 9 contains a substantive obligation that Morocco violated. In the jurisdictional context, however, Turkey argues that footnote 9 serves as a "definitional provision" in determining the meaning of "injury" and thus "is an integral part of the claims under Articles 3.1 and 3.4".[39] Turkey is correct in pointing out that the "determination of injury must be made in accordance with the definition of 'injury' provided in Footnote 9".[40] Yet, it does not follow from Turkey's jurisdictional arguments that an independent claim of violation of an obligation in footnote 9 was identifiable from the panel request when it referred to Articles 3.1 and 3.4. In Turkey's own words, footnote 9 was only "part of the claims under Articles 3.1 and 3.4", not a separate and independent claim. However, Turkey has clearly and repeatedly claimed that the MDCCE's determination that the industry was not "established" was inconsistent with Morocco's obligations set forth in footnote 9, among other provisions.[41] It has also requested us to "find" that the MDCCE's determination that the domestic industry was not "established" is inconsistent with footnote 9.[42] To pursue a substantive claim under footnote 9, Turkey had to include that claim in its panel request.

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

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

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

[39] Turkey's response to Panel question No. 1.4(a), paras. 38, 40, and 45.
[40] Turkey's second written submission, para. 2.15.
[41] Turkey's first written submission, paras. 1.2, 1.4, 8.1-8.85, and 11.1; opening statement at the first meeting of the Panel, paras. 4.1-4.13; and response to Panel's question No. 4.3(a), para. 92.
[42] Turkey's first written submission, para. 11.1.
[43] Turkey's response to Panel question No. 1.4(a), paras. 40-41 and 44-45; second written submission, paras. 2.16-2.17.
[44] Turkey's second written submission, para. 2.16 (quoting Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.169).
[45] Turkey's second written submission, para. 2.17. (emphasis added)

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

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

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

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

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

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

> The Investigating Authority acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement and Article VI:6(a) of the GATT 1994 by finding that the domestic industry was not "established", and by determining that the establishment of that industry was retarded[.][47]
>
> The Investigating Authority acted inconsistently with Article 3.4 of the Anti-Dumping Agreement by failing to assess all the relevant injury factors set out in that provision. Moreover, the Investigating Authority failed to conduct an appropriate examination of each of the factors it analysed, as well as an objective and unbiased assessment of all these factors collectively.

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

a. Compared to the panel request, the request for consultations merely referred to Articles 3.1 and 3.4, which is insufficient for an "indication of the legal basis" of the claims at issue. The request for consultations did not mention the issues of "establishment" and "material retardation" of the domestic industry.[49] It also did not mention the MDCCE's findings in relation to the injury factors.[50]

b. The reference in the request for consultations to a "failure to provide a reasoned and adequate explanation" is overly generic and, in any event, refers to the standard of review of the Panel, not to an obligation of the MDCCE.[51]

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

[46] Emphasis original.
[47] Fns omitted.
[48] Morocco's second written submission, para. 17.
[49] Morocco's responses to Panel question No. 1.1, para. 2, and No. 1.2(a), para. 14; second written submission, paras. 17 and 19.
[50] Morocco's responses to Panel question No. 1.1, para. 3, and No. 1.2(a), para. 15; second written submission, para. 21.
[51] Morocco's responses to Panel question No. 1.1, para. 4, and No. 1.2(a), paras. 13 and 16; second written submission, paras. 13 and 22.

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

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

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

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

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

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

[52] Morocco's response to Panel question No. 1.2(a), paras. 12-17; second written submission, para. 23.
[53] Turkey's response to Panel question No. 1.2(a), para. 11; second written submission, para. 2.9.
[54] Turkey's opening statement at the first meeting of the Panel, para. 4.27; response to Panel question No. 1.2(a), paras. 8-10.
[55] Panel Reports, *US – Poultry (China)*, para. 7.43; *EC – Fasteners (China)*, para. 7.206; see also Appellate Body Report, *Argentina – Import Measures*, para. 5.9.
[56] Appellate Body Reports, *Brazil – Aircraft*, para. 132; *US – Upland Cotton*, para. 293; and *Mexico – Anti-Dumping Measures on Rice*, paras. 137-138. This applies to the extent that the panel request does not expand the scope of the dispute, or change its essence.
[57] Panel Report, *EC – Fasteners (China)*, paras. 7.207 and 7.322; see also ibid. para. 7.206, and Panel Report, *US – Poultry (China)*, para. 7.43.
[58] Morocco's opening statement at the second meeting of the Panel, para. 15.
[59] Appellate Body Reports, *EC – Selected Customs Matters*, para. 130; *China – Raw Materials*, para. 226; and *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.26.

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

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

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

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

7.2.1.3.1 Factual background

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

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

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

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

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

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

a. The confidential treatment of the break-even threshold was inconsistent with Articles 6.5 and 6.5.1, such that the MDCCE did not act in accordance with the basic principle of fundamental fairness and thereby did not conduct an "objective examination" within the meaning of Article 3.1.[62] A close connection thus existed between, on the one hand, the

[60] Preliminary determination, (Exhibit TUR-6), para. 86, as confirmed in the Final determination, (Exhibit TUR-11), paras. 97-100.
[61] Morocco's first written submission, paras. 31 and 36; responses to Panel question No. 1.1, para. 6, and No. 1.2(b), paras. 18-19; and second written submission, paras. 28-37.
[62] Turkey's response to Panel question No. 1.2(b), para. 16.

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

b. Unduly redacting critical information on the break-even threshold meant that the MDCCE did not give a "reasoned and adequate explanation of its injury finding", such that the claims under Articles 6.5 and 6.5.1 naturally evolved from Turkey's request for consultations, at paragraph 5.[64]

c. In respect of the break-even threshold, Articles 3.1, 6.5, and 6.5.1 relate to the treatment of the same information, with Articles 6.5 and 6.5.1 being more specific in respect of the confidential treatment of a sub-set of information.[65]

d. The request for consultations took issue with the "Injury Determination", which included the determination of the break-even threshold.[66]

e. The claims at issue naturally evolved from Turkey's injury claims "as, during consultations, the (important) role of the break-even threshold in the MDCCE's injury determination became clear".[67]

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

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

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

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

[63] Turkey's response to Panel question No. 1.2(b), para. 16.
[64] Turkey's opening statement at the second meeting of the Panel, para. 4.5.
[65] Turkey's second written submission, paras. 2.23-2.24.
[66] Turkey's second written submission, para. 2.21.
[67] Turkey's response to Panel question No. 1.2(b), para. 17; see also opening statement at the first meeting of the Panel, para. 4.29.
[68] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138.
[69] Appellate Body Reports, *Mexico – Anti-Dumping Measures on Rice*, para. 138; *Argentina – Import Measures*, para. 5.13.
[70] Panel Report, *China – Broiler Products*, para. 7.224. The panels in *EU – Biodiesel (Argentina)*, paras. 7.48, 7.54, and 7.62; and *China – Publications and Audiovisual Products*, para. 7.122, relied on similar considerations. See also *Australia – Tobacco Plain Packaging*, Preliminary ruling of the Panel, WT/DS458/18, para. 3.46 (appeal of panel report pending).

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

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

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

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

[71] Article 6.5 also has a second sentence which is not relevant for present purposes.
[72] Article 6.5.1 also has additional sentences which are not relevant for present purposes.
[73] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.
[74] Turkey's opening statement at the second meeting of the Panel, para. 4.5.
[75] Emphasis added.
[76] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.255.
[77] Concerning the issue whether "the reasoning supporting the determination be 'formally or explicitly stated' in documents in the record of the investigation to which interested parties (and/or their legal counsel) have access at least from the time of the final determination", the Appellate Body found that the requirements of Article 3.1 do "*not* imply that the determination must be based only on reasoning or facts that were disclosed to, or discernible by, the parties to an anti-dumping investigation". (Appellate Body Report, *Thailand – H-Beams*, paras. 107 and 111 (emphasis original)). This situation differs from the issue whether

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.48. Morocco argues that Turkey's Article 6.9 claim concerning the break-even threshold in paragraph 4(c) of the panel request is outside the Panel's terms of reference. It did not evolve from either the Article 6.9 claim in respect of facts available in paragraph 3, nor from the claims under Articles 3.1 and 3.4 in paragraph 4(a) of the request for consultations.[82] According to Morocco, the request for consultations contains a claim under Article 6.9 that is limited to the disclosure of the essential facts pertaining to facts available. Also, the reference to Articles 3.1 and 3.4, or the failure to provide a "reasoned and adequate explanation" in the request for consultations is overly generic and concerns obligations that are different from Article 6.9.[83]

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

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

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

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

[81] Emphasis original.
[82] See paragraph 7.5. above.
[83] Morocco's first written submission, paras. 31 and 35; responses to Panel question No. 1.1, para. 5, and No. 1.2(c), paras. 21-23; and second written submission, paras. 28-37.
[84] Turkey's response to Panel question No. 1.2(c), para. 23; second written submission, para. 2.26; see also opening statements at the first meeting of the Panel, para. 4.29, and at the second meeting of the Panel, para. 4.6.
[85] Turkey's response to Panel question No. 1.2(c), para. 23.
[86] Emphasis added.

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

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

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

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

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

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

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

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

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

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

7.58. In addition to the above, Turkey repeats the argument that it became aware of the circumstances underlying the Article 6.9 claim during consultations.[91] For the same reason set out above[92], we do not find Turkey's assertion credible. Moreover, Turkey must have been aware of the alleged failure to disclose the break-even threshold in the disclosure since the disclosure was made on 20 June 2014.

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

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

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

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

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

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

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

a. At paragraph 4(a), the panel request set out a claim under Article VI:6(a) in respect of the MDCCE's findings of "establishment" and "material retardation".

b. In its first written submission, Turkey did not mention any claim of inconsistency under Article VI:6(a).

c. Likewise, Turkey did not advance any claim under Article VI:6(a) in its opening or closing statements of the first substantive meeting, or in its oral responses to the Panel during this meeting.

d. Following the first substantive meeting, the Panel issued written questions to the parties. In response, Turkey for the first time alleged a violation of Article VI:6(a) in addition to its claims under footnote 9 and Article 3.1.[96]

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

[91] Turkey's response to Panel question No. 1.2(c), para. 23.
[92] See above para. 7.43.
[93] Morocco's second written submission, paras. 24-27.
[94] Turkey's opening statement at the second meeting of the Panel, para. 4.4.
[95] Working Procedures of the Panel, adopted on 22 August 2017, Annex A-1.
[96] Turkey's responses to Panel question No. 4.3(a), para. 92, and No. 4.3(b), para. 93.

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

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

7.2.2 Conclusion

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

a. the claim under footnote 9 to Article 3 in respect of the MDCCE's finding of "establishment";

b. the claims under Articles 6.5 and 6.5.1 in respect of the confidential treatment of the domestic industry's (Maghreb Steel) break-even threshold; and

c. the claim under Article 6.9 in respect of the alleged failure to disclose the domestic industry's (Maghreb Steel) break-even threshold.

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

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

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

7.3.1 Provision at issue

7.69. Article 5.10 provides:

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

7.3.2 Evaluation

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

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

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

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

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

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

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

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

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

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

[101] Morocco's first written submission, para. 48.
[102] Appellate Body Report, *US – Hot-Rolled Steel*, para. 73; Panel Report, *US – Softwood Lumber V*, para. 7.333.
[103] Panel Report, *Mexico – Olive Oil*, paras. 7.121 and 7.123.
[104] Morocco's first written submission, paras. 44-45.
[105] Morocco's first written submission, paras. 44-46.
[106] Turkey's second written submission, para. 3.4 (referring to European Union's third-party submission, para. 10).
[107] Morocco's second written submission, para. 210.
[108] Morocco's first written submission, paras. 44-45.
[109] Turkey's second written submission, para. 3.4.
[110] Turkey's second written submission, para. 3.4.

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

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

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

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

[111] Morocco's first written submission, fns 34-35.
[112] Morocco's opening statement at the first meeting of the Panel, para. 13.
[113] Turkey's opening statement at the first meeting of the Panel, para. 2.4 (quoting Panel Report, *Mexico – Olive Oil*, para. 7.121).
[114] Turkey's opening statement at the first meeting of the Panel, para. 2.5.
[115] Panel Report, *Mexico – Olive Oil*, para. 7.121.
[116] Panel Report, *Mexico – Olive Oil*, para. 7.119.
[117] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 282 (quoting Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 242, quoting in turn Appellate Body Report, *US – Hot-Rolled Steel*, para. 73, quoting in turn Panel Report, *US – Hot-Rolled Steel*, para. 7.54).
[118] Appellate Body Report, *EC – Fasteners (China)*, para. 611.
[119] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.74.

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

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

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

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

7.4.1 Factual background

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

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

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

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

7.84. In the draft final determination[124] issued on 20 June 2014, the MDCCE, however, referred to the discrepancy of "approximately 10,000 tonnes".[125] It explained that a review of detailed evidence indicated that unreported export sales from Turkey had been made through third-party traders and that movement certificates (certificates of origin) established that these sales originated from the two producers. The producers had therefore failed to report the entirety of their export sales to

[120] Turkey's second written submission, para. 3.6.
[121] Correspondence December 2013-January 2014, (Exhibit TUR-25).
[122] Addendum to questionnaire response, (Exhibit TUR-26 (BCI)), p. 5.
[123] In its final determination, the MDCCE refers to a visit to a "public institution", which Morocco identified as the Moroccan Customs, following the issuance of the preliminary determination. During this visit, the MDCCE obtained sales information concerning the allegedly missing 10,000 tonnes. (Final determination, (Exhibit TUR-11), paras. 21 and 56). The MDCCE indicated that it relied on this sales information, comprising customs and commercial documents, to consider that the allegedly missing export sales originated from the Turkish producers. (Final determination, (Exhibit TUR-11), para. 57).
[124] Through the draft final determination, the MDCCE purported to disclose the essential facts to the producers.
[125] Draft final determination, (Exhibit TUR-10), para. 51.

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

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

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

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

7.4.2 Provision at issue

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

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

7.4.3 Evaluation

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

7.4.3.1 Claim under Article 6.8 of the Anti-Dumping Agreement

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

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

[126] Draft final determination, (Exhibit TUR-10), paras. 51-58.
[127] Correspondence with customs and commercial documents from Erdemir Group, (Exhibit TUR-29 (BCI)); Correspondence with customs and commercial documents from Colakoglu, (Exhibit TUR-30 (BCI)).
[128] Erdemir Group's comments on the draft final determination, (Exhibit TUR-19 (BCI)); Colakoglu's comments on the draft final determination, (Exhibit TUR-20 (BCI)).
[129] Final determination, (Exhibit TUR-11), paras. 59-61.
[130] Draft final determination, (Exhibit TUR-10), para. 56.

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

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

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

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

[131] Final determination, (Exhibit TUR-11), paras. 60-61.
[132] Morocco's opening statement at the first meeting of the Panel, para. 25. (emphasis added)
[133] Appellate Body Report, *US – Hot-Rolled Steel*, para. 104.
[134] Panel Report, *Guatemala – Cement II*, para. 8.251.
[135] We recall that "in conducting its investigation, an investigating authority 'must actively seek out pertinent information' and may not remain 'passive in the face of possible shortcomings in the evidence submitted'". (Appellate Body Report, *EU – PET (Pakistan)*, para. 5.130 (referring to Appellate Body Report, *US – Washing Machines*, para. 5.268, quoting in turn Appellate Body Report, *US – Wheat Gluten*, paras. 53 and 55, which refers to Appellate Body Reports, *US – Corrosion-Resistant Steel Sunset Review*, para. 199; *US – Anti-Dumping and Countervailing Duties (China)*, para. 344; and Panel Report, *China – Broiler Products*, para. 7.261)).
[136] Panel Reports, *US – Steel Plate*, para. 7.71; *EC – Salmon (Norway)*, paras. 7.358-7.360.
[137] Morocco's first written submission, paras. 82 and 96.
[138] Morocco's opening statement at the first meeting of the Panel, para. 21. (fn omitted)
[139] Verification Report for Erdermir Group/Isdemir, (Exhibit TUR-8 (BCI)); Verification Report for Colakoglu, (Exhibit TUR-9 (BCI)).

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

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

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

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

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

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

[140] Morocco's response to Panel question No. 7.5, para. 18.
[141] Morocco's response to Panel question No. 7.5, para. 18.
[142] Morocco's position implies that at verification an investigating authority could simply seek to confirm the information that an interested party had previously furnished, even in case when the investigating authority has a concrete suspicion of under-reporting by that interested party. This, however, would strike us as incompatible with the fundamental task of an investigating authority to "investigate".
[143] According to Morocco, the "exhaustivité des données" referred only to the data set provided by the producers and did not concern whether the entirety of sales data had been reported. Morocco's argument is entirely implausible and contradicted by the MDCCE's inquiry in this context, e.g. into stocks and production. (Verification Report for Erdermir Group/Isdemir, (Exhibit TUR-8 (BCI)), p. 3; Verification Report for Colakoglu, (Exhibit TUR-9 (BCI)), p. 5).
[144] Morocco's first written submission, paras. 70, 85, 108, and 115; responses to Panel question No. 2.5(a), para. 61, No. 2.5(d), para. 66, No. 2.5(f)(iii), para. 78, No. 2.6(b), para. 82, and No. 7.5, para. 19; second written submission, para. 72; and opening statement at the second meeting of the Panel, para. 43.
[145] Turkey's comments on Morocco's response to Panel question No. 7.5, p. 9.
[146] Morocco's responses to Panel question No. 2.3, paras. 47-48, No. 2.5(a), para. 59, No. 2.5(d), para. 67, and No. 7.3, para. 11; second written submission, paras. 68-69.
[147] Morocco's responses to Panel question No. 2.3, paras. 47-48, No. 2.5(a), paras. 59-60, No. 2.5(c), para. 65, No. 2.5(d), para. 67, and No. 7.3, para. 11; second written submission, paras. 68-69; and opening statement at the second meeting of the Panel, para. 32.
[148] Absent any reasons given by the MDCCE in its determination of why the producers' explanations and evidence were insufficient, we may not, on our own, assess these explanations and evidence. Nor may we

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.4.3.2 Claims under Annex II to the Anti-Dumping Agreement

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

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

7.4.4 Conclusion

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

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

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

7.5.1 Factual background

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

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

[161] Turkey's first written submission, paras. 6.92-6.128; second written submission, paras. 4.42-4.68.
[162] Draft final determination, (Exhibit TUR-10), paras. 51-56 and 58.
[163] Initiation report, (Exhibit TUR-2), p. 5.

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

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

7.5.2 Provision at issue

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

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

7.5.3 Evaluation

7.5.3.1 Claims that certain essential facts were not disclosed at all

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

a. The essential facts on the basis of which the MDCCE determined that the producers had failed to report export sales other than the [[***]] tonnes identified in the MDCCE's communication of 7 July 2014 (referred to hereinafter as "additional, unidentified export sales").[166]

b. The data used in arriving at the margin of dumping – based on facts available in the petition – of 11%, in particular the data for the underlying C&F prices and the adjustments.[167]

c. The data and methodology used by the MDCCE in cross-checking the facts available pertaining to the margin of dumping in the petition.

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

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

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

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

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

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

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

[168] See paras. 7.90. and 7.104. above.

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

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

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

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

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

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

[169] Appellate Body Reports, *China – GOES*, para. 240; *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.130.
[170] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.130 (referring to Appellate Body Report, *China – GOES*, para. 241).
[171] Appellate Body Report, *China – GOES*, fn 390 (quoting Panel Report, *EC – Salmon (Norway)*, para. 7.805).
[172] Panel Reports, *China – Broiler Products*, para. 7.317; *China – Broiler Products (Article 21.5 – US)*, paras. 7.368 and 7.401.
[173] Turkey' first written submission, paras. 7.2, 7.12, and 7.17.
[174] Turkey's response to Panel question No. 3.1(a), para. 56; second written submission, para. 5.2.
[175] Morocco's first written submission, para. 151; second written submission, paras. 106-109.
[176] Morocco's first written submission, paras. 137-138 and 147; second written submission, paras. 95 and 102-105.
[177] Morocco's first written submission, paras. 137 and 147; second written submission, paras. 95 and 103 (quoting Draft final determination, (Exhibit TUR-10), paras. 51 and 55).
[178] Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.370.

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

7.119. Morocco also argues that the MDCCE disclosed the names of the traders in the email to Erdemir Group on 31 December 2013.[180] Morocco's assertion that this communication constituted a disclosure for purposes of Article 6.9 raises a number of concerns. But in any event, nothing suggests, and the parties do not assert, that simply listing the names of the traders would have allowed the producers to precisely identify the allegedly unreported sales at issue.

7.120. Finally, Morocco also argues that the underlying customs and sales documents in respect of the additional, unidentified export sales that the producers allegedly failed to report were confidential and thus could not be disclosed.[181] Morocco notes that Turkey does not challenge the treatment of this information as confidential under Article 6.5.[182] Regardless of the MDCCE's compliance with Article 6.5, which is not at issue here, we have already found in the context of Article 6.8 that Morocco's reliance on the alleged confidentiality of the underlying documents is not persuasive.[183] In particular, we recall that the MDCCE did disclose redacted versions of similar documents for the [[***]] tonnes. Moreover, as also explained in that context, Morocco's assertion in respect of the confidentiality of the information is not reflected in the record of the investigation. It is thus an *ex post* rationalization that we do not consider further.

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

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

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

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

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

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

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

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

[183] See para. 7.100. above.

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

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

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

7.125. The draft final determination does not provide any information on the C&F prices or the adjustments applied to them. Morocco correctly points out that the initiation report, to which the draft final determination refers[189], indicates the sources of the information for the C&F prices.[190] The initiation report also indicates that adjustments were made in relation to logistical costs, commission of intermediaries, and financing costs. Further, Morocco refers to a table in the initiation report, listing ex-factory export prices, ex-factory normal values, amounts of dumping, and margins of dumping.[191] However, none of this information in the initiation report conveys the data for the C&F prices and for the adjustments used in order to arrive at the ex-factory export prices.[192] Without this information on C&F prices and the adjustments, the producers could not ascertain the accuracy of the petition rate used by the MDCCE as facts available, which they would need to do in order to defend their interests.

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

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

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

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[185] Morocco's second written submission, paras. 113-118.
[186] Morocco's second written submission, paras. 115 and 117.
[187] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.131; Panel Report, *China – Broiler Products*, para. 7.91.
[188] See fn 175 above.
[189] Draft final determination, (Exhibit TUR-10), para. 58; Initiation report, (Exhibit TUR-2), pp. 4-5. Turkey does not take issue with the fact that the MDCCE cross-referenced the initiation report in making its disclosure for purposes of Article 6.9. (Turkey's response to Panel question No. 3.1(a), paras. 61 and 65).
[190] Morocco's second written submission, para. 115.
[191] Morocco's second written submission, para. 116.
[192] With respect to the C&F prices, Morocco refers to the reference in the initiation report to a specialized publication, "Tribune de la Sidérurgie", as a relevant and publicly available *source* of information. Morocco's reliance on the reference to this publication is not persuasive. We do not need to consider whether a disclosure under Article 6.9 of particular essential facts could be made by simply referring to an external source, that is apparently not even part of the investigation record, where those essential facts can somehow be retrieved. In any event, the publication at issue was only one of two sources mentioned in the initiation report in respect of the C&F prices – the other being a mere reference to "intermediaries" – and only covered data for one of two months at issue (data for October 2012 was obtained from the publication, data for March 2012 from "intermediaries"). This means that any disclosure whatsoever would have been incomplete, at best.
[193] Turkey's responses to Panel question No. 3.1(a), paras. 59 and 64, and No. 3.3(a), para. 71; second written submission, para. 5.3.

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

7.129. We recall that we declined, for procedural reasons, to rule on Turkey's claim under Article VI:6(a) of the GATT 1994.[195] Turkey asserted its Article VI:6(a) claim only in response to our written questions, and thus contrary to paragraph 6 of the Panel's Working Procedures that requires the parties to present the facts of the case and the arguments in the first written submission before the first substantive meeting.

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

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

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

7.132. Turkey argues that the disclosure of the movement certificates and commercial invoices pertaining to the [[***]] tonnes of export sales, through communication on 7 July 2014, did not take place in sufficient time for the producers to defend their interests, contrary to the requirements of Article 6.9.[197]

7.133. Turkey's claim at issue here concerns the timing[198] of the disclosure which, according to the first sentence of Article 6.9, shall be "before the final determination", and, pursuant to the second sentence of Article 6.9, "should take place in sufficient time for the parties to defend their interests". Turkey makes three arguments in this respect. First, the investigation exceeded the deadlines set out in Article 5.10. Second, the MDCCE did not meaningfully assess the producers' comments, such that the disclosure itself did not take place in sufficient time for the producers to defend their interests. Third, the producers only had five working days to respond after receiving the underlying documents identifying the [[***]] tonnes of export sales, which was much shorter than the 21-day period provided for by domestic Moroccan law.

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

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

[194] Morocco's second written submission, paras. 115 and 117.
[195] See para. 7.65. above.
[196] Turkey's responses to Panel question No. 3.1(a), paras. 59 and 64, and No. 3.3(a), para. 71; second written submission, para. 5.3.
[197] Turkey's first written submission, paras. 7.2 and 7.19; see also response to Panel question No. 3.1(b), paras. 67-69; and second written submission, paras. 5.6-5.7.
[198] Turkey's responses to Panel question No. 3.1(b), para. 67, and No. 3.2, para. 70; second written submission, para. 5.5; and opening statement at the second meeting of the Panel, para. 3.24.
[199] The MDCCE relied on the customs and commercial documents at issue in order to establish that the producers had failed to report [[***]] tonnes of export sales. On this basis, and absent any arguments by the parties to the contrary, we have no reason to doubt that these documents, or at least that information contained therein establishing – in the MDCCE's view – the existence of unreported export sales, constituted essential facts within the meaning of Article 6.9.
[200] Morocco's first written submission, para. 153; second written submission, paras. 119-122.

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

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

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

7.5.4 Conclusion

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

a. Turkey has established its claim that the MDCCE acted inconsistently with Article 6.9 by failing to inform all interested parties of any essential facts in respect of the additional, unidentified export sales that the MDCCE considered the producers to have failed to report.

b. Turkey has established its claim that the MDCCE acted inconsistently with Article 6.9 by failing to inform all interested parties of the data for the C&F prices and for the adjustments used in arriving at the producers' margins of dumping using facts available.

c. Turkey has not established its claim that the MDCCE acted inconsistently with Article 6.9 by failing to inform all interested parties of the movement certificates and commercial invoices in respect of the [[***]] tonnes of allegedly unreported export sales in sufficient time for the producers to defend their interests.

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

[201] Turkey's response to Panel question No. 3.1(b), para. 69.
[202] In this regard, the minimum period for comments on the disclosure established by municipal law has also no bearing on a Member's compliance with Article 6.9.
[203] Appellate Body Reports, *China – GOES*, fn 390; *China – HP-SSST (Japan) / China – HP-SSST (EU)*, fn 316.

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

7.140. In the underlying investigation, the MDCCE found that the domestic industry, which it defined as comprising of the sole domestic producer, Maghreb Steel[204], had suffered injury in the form of "material retardation of the establishment of the domestic industry".[205] In arriving at this determination, the MDCCE followed a two-step analysis: it first examined, applying five criteria, whether the domestic industry was established. Having found that the domestic industry was unestablished, it proceeded to examine whether the establishment of that industry had been materially retarded.[206]

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

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

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

7.6.1 Provisions at issue

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

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

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

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

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[204] Final determination, (Exhibit TUR-11), para. 30; Preliminary determination, (Exhibit TUR-6), paras. 22 and 53.
[205] The parties in this case do not dispute whether the domestic producer, Maghreb Steel, constituted a domestic industry.
[206] Final determination, (Exhibit TUR-11), paras. 80 and 111.
[207] Final determination, (Exhibit TUR-11), paras. 83 and 111.
[208] Final determination, (Exhibit TUR-11), para. 111.

7.6.2 Evaluation

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

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

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

7.149. This approach finds support in the findings of other panels and the Appellate Body. In *Argentina – Poultry Anti-Dumping Duties*, the panel examined inconsistency with Article 3.1 independently of other provisions of Article 3.[214] Similarly, the Appellate Body and several prior panels found violations of Article 3.1, in a first step of their evaluation, independent of any assessment of consistency with other provisions of Article 3. Having found a violation of Article 3.1, they subsequently proceeded to find consequential violations of certain other provisions of Article 3.[215] Further, in *EC – Countervailing Measures on DRAM Chips*, the panel refrained from taking the view that Article 15.1 of the SCM Agreement, which is the equivalent of Article 3.1 of the

[209] See para. 7.67. above.
[210] Appellate Body Report, *US – Hot-Rolled Steel*, para. 192 (referring to Appellate Body Report, *Thailand – H-Beams*, para. 106).
[211] Article 3.1, read in light of footnote 9 to Article 3, imposes obligations on an investigating authority with respect to its "injury determination", which extend to cases where the injury determined takes the form of material retardation of the establishment of a domestic industry.
[212] Final determination, (Exhibit TUR-11), paras. 69 and 195; Preliminary determination, (Exhibit TUR-6), para. 92.
[213] The parties disagree over whether the Anti-Dumping Agreement requires an investigating authority to determine that the domestic industry is unestablished in the context of making a determination that the establishment of that industry is materially retarded. (Turkey's response to Panel question No. 4.2, paras. 86-87; Morocco's response to Panel question No. 4.2, para. 94). However, in this dispute, we do not need to address that question because in the underlying investigation the MDCCE did determine that the domestic industry was unestablished as part of its analysis of the material retardation of the establishment of the domestic industry. The relevant question, as set out in paragraph 7.148. above, is therefore whether the MDCCE's determination that the domestic industry was unestablished was based on positive evidence and objective examination.
[214] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, paras. 7.283-7.285.
[215] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 211-214; Panel Reports, *EU – Biodiesel (Argentina)*, paras. 7.413, 7.415, and 7.431; *Mexico – Anti-Dumping Measures on Rice*, paras. 7.65 and 7.86-7.87.

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

7.150. We have also considered carefully the report of the panel in *China – Cellulose Pulp* concerning this issue. The panel, in that case, took the view that the "basic principles" in Article 3.1 that a determination of injury be based on positive evidence and objective examination do not establish independent obligations, which can be judged separately from the substantive requirements set out in the remainder of Article 3 of the Anti-Dumping Agreement.[217] We note, however, that these observations of the panel were *obiter*, and did not form a basis of its findings. Further, the panel qualified those observations by stating that a claim of inconsistency with Article 3.1 may not "normally" be made independently of other provisions of Article 3.[218] We consider that through the use of the word "normally", the panel indicated that in certain cases, claims could be made under Article 3.1 independently of other provisions of Article 3. Indeed, the panel recognized that "a general claim of bias on the part of the investigating authority would fall squarely under Article 3.1".[219] The panel further suggested that whether an investigating authority's decision-making process was biased can be determined only by scrutinizing the specific decisions that the authority took in the context of its injury analysis.[220] In the underlying investigation, the MDCCE's finding that the domestic industry was unestablished formed part of the MDCCE's injury analysis. In evaluating the consistency of that finding with Article 3.1, we *would* thus review, as the panel in *China – Cellulose Pulp* suggested, a specific decision that the MDCCE took in the context of its injury analysis.

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

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

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

[216] Panel Report, *EC – Countervailing Measures on DRAM Chips*, fn 218.
[217] Panel Report, *China – Cellulose Pulp*, para. 7.13.
[218] Panel Report, *China – Cellulose Pulp*, para. 7.15.
[219] Panel Report, *China – Cellulose Pulp*, fn 47.
[220] The panel observed that whether the decision-making process of the investigating authority was unbiased can "only be determined on the basis of a careful scrutiny of the decisions made by the investigating authority in reaching a conclusion on the question of whether dumped imports caused injury, as set out in the relevant determination and other documents". (Panel Report, *China – Cellulose Pulp*, para. 7.17).
[221] Turkey's second written submission, paras. 6.13-6.14.
[222] Final determination, (Exhibit TUR-11), para. 76.
[223] The injury period in the underlying investigation ran from January 2009 until December 2012. (Final determination, (Exhibit TUR-11), para. 11). Maghreb Steel began production of hot-rolled steel in 2010.
[224] Turkey submits that the breadth of the term "establishment of the industry", read in conjunction with "création d'une branche de la production nationale" and "creación de esta rama de producción" in the French and Spanish versions, respectively, is closer to "bringing into existence" of an industry rather than making the industry "firm or stable". (Turkey's first written submission, para. 8.26). At the same time, Turkey accepts the

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

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

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

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

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

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

7.157. In determining whether Maghreb Steel was established, the MDCCE took into consideration how long the domestic industry had been producing the domestic like product, hot-rolled steel. The MDCCE considered, in particular, the time that had lapsed between when Maghreb Steel began producing and marketing that product, and when it filed its petition containing evidence of injury with the MDCCE.[231] In its final determination, the MDCCE noted that Maghreb Steel had provided data that did not go back more than 30 months for hot-rolled steel sheets[232], and only 8 months for

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[255] Appellate Body Report, *US – Cotton Yarn*, para. 102.
[256] Appellate Body Report, *US – Hot-Rolled Steel*, para. 190.
[257] Appellate Body Report, *US – Hot-Rolled Steel*, para. 204.
[258] Appellate Body Report, *US – Hot-Rolled Steel*, para. 204.
[259] We recall here that the MDCCE had sought to apply a standard of stability of presence for purposes of examining whether Maghreb Steel was established.
[260] Final determination, (Exhibit TUR-11), para. 94.
[261] Final determination, (Exhibit TUR-11), para. 138.
[262] Morocco's response to Panel question No. 4.12, para. 108.

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

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

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

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

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

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

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

[263] Preliminary determination, (Exhibit TUR-6), para. 120.
[264] Turkey's opening statement at the first meeting of the Panel, para. 4.4.
[265] Turkey's second written submission, para. 6.40.
[266] Morocco's opening statement at the second meeting of the Panel, para. 83 (referring to Final determination, (Exhibit TUR-11), paras. 95 and 180).
[267] Final determination, (Exhibit TUR-11), para. 95.

sales at a loss occurred only in 2012.[268] In particular, Turkey refers to the MDCCE's statement below, in the context of the MDCCE's analysis of the volume of dumped imports:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[276] Preliminary determination, (Exhibit TUR-6), para. 83.
[277] Final determination, (Exhibit TUR-11), paras. 110 and 138. Further, Morocco has not presented any evidence to show that any revenue was attributed to these transfers in Maghreb Steel's books. Indeed, Morocco confirms that Maghreb Steel's hot-rolled steel production branch did not charge for the transfer of hot-rolled steel to the cold-rolled steel branch. (Morocco's response to Panel question No. 9.8, para. 70).
[278] Turkey's opening statement at the first meeting of the Panel, para. 4.5.
[279] Morocco's second written submission, paras. 153-154.
[280] Morocco's second written submission, para. 155.
[281] Preliminary determination, (Exhibit TUR-6), para. 86 and table 2.
[282] Final determination, (Exhibit TUR-11), para. 138.
[283] Morocco's second written submission, para. 157.
[284] "Details of the calculation of the profitability threshold and break-even point".

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

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

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

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

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

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

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

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

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

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

7.193. Further, we note that contrary to Morocco's assertion that Maghreb Steel had "never" met its break-even threshold[288], Turkey argues that the MDCCE's determination does not demonstrate that the MDCCE had assessed whether the company had failed to meet its break-even threshold *throughout the injury period*. Turkey contends that the MDCCE improperly based its finding that Maghreb Steel had not met the break-even threshold on a comparison between only the level of production in 2012 and the break-even threshold.[289] In its preliminary determination, the MDCCE specified that Maghreb Steel's production in 2012 amounted to barely 63% of its break-even point under normal market conditions.[290] The MDCCE noted further that, based on that information, it must be concluded that Maghreb Steel had not yet reached its break-even point.[291] Turkey argues that these statements of the MDCCE show that the MDCCE took into account only the data pertaining to 2012 to assess whether Maghreb Steel's production had reached the break-even threshold.[292] We consider that these statements of the MDCCE do not conclusively show that the MDCCE had assessed whether Maghreb Steel had failed to meet its break-even threshold in each year of the injury period.

7.194. Morocco points to the MDCCE's statement in its final determination that Maghreb Steel "is far from having reached its break-even point"[293], as evidence of a general finding by the authority that Maghreb Steel had not reached its break-even threshold.[294] That statement, however, does not specify the particular years in which Maghreb Steel failed to reach its break-even threshold and, therefore, also does not conclusively show that the MDCCE had assessed whether Maghreb Steel had failed to meet its break-even threshold in each year of the injury period. Further, we recall that Morocco submits that the MDCCE's finding that Maghreb Steel had never met the break-even threshold was based on Maghreb Steel's questionnaire response. Maghreb Steel's questionnaire response, however, does not provide a break-even threshold for the years 2010 and 2011.[295] This indicates that the MDCCE could not have assessed whether Maghreb Steel had failed to meet its break-even threshold for the years 2010 and 2011, and objectively concluded, solely on the basis of the data provided for 2012, that Maghreb Steel had failed to meet its break-even threshold *throughout* the injury period.

7.195. We further recall that Morocco has confirmed in these proceedings that the break-even threshold was calculated only for 2012.[296] In light of that fact, we fail to comprehend how the MDCCE could have assessed whether Maghreb Steel had failed to meet its break-even threshold throughout the injury period.

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

[288] Morocco's response to Panel question No. 4.17, para. 119 (referring to Preliminary determination, (Exhibit TUR-6), paras. 86-87; and Final determination, (Exhibit TUR-11), para. 100).
[289] Turkey's first written submission, para. 8.61 (referring to Preliminary determination, (Exhibit TUR-6), para. 87); second written submission, paras. 6.61-6.65.
[290] Preliminary determination, (Exhibit TUR-6), para. 87.
[291] Preliminary determination, (Exhibit TUR-6), para. 88.
[292] Turkey's second written submission, para. 6.62.
[293] The MDCCE's original statement in French is as follows: "[M]aghreb Steel est encore loin d'avoir atteint son seuil de rentabilité, chose que les exportateurs n'ont pas démenti." (Final determination, (Exhibit TUR-11), para. 100).
[294] Morocco's response to Panel question No. 8.9(a), para. 49 (referring to Final determination, (Exhibit TUR-11), para. 100).
[295] We note that Morocco has confirmed, in response to our questions, that Maghreb Steel's questionnaire response provides the break-even threshold only for 2012. (Morocco's response to Panel question No. 8.9(b), para. 50 (referring to Excerpt from Maghreb Steel's questionnaire response, section G, (Exhibit MAR-8), p. 8)). Maghreb Steel's questionnaire response sets out a "0" (zero) with respect to the break-even threshold for 2010 and 2011. Morocco submits that the "0" refers to the fact that Maghreb Steel calculated only one break-even threshold, and did not calculate separate thresholds for 2010 and 2011. (Morocco's response to Panel question No. 8.9(c), para. 51).
[296] Morocco's responses to Panel question No. 8.9(b), para. 50 (referring to Excerpt from Maghreb Steel's questionnaire response, section G, (Exhibit MAR-8), p. 8); and No. 8.9(c), para. 51.

indexed actual production volumes in 2010 and 2011, set out in table 7 of the MDCCE's preliminary determination, shows that Maghreb Steel failed to meet the break-even threshold in 2010 and 2011.[297] Turkey argues in response that table 2, based on Morocco's own submission, is based on Maghreb Steel's questionnaire response, which provides the break-even threshold only for 2012. Therefore table 2 does not support Morocco's arguments that the MDCCE assessed the break-even threshold for the whole injury period. Further, table 7 provides data on production volume only, while the break-even threshold was derived from a comparison of the totality of revenues against the totality of costs. Turkey contends that it remains unclear from table 7 how it is possible to derive the break-even threshold from information on production volumes only.[298]

7.197. Morocco's arguments fail to persuade us. Morocco's position is based on conclusions drawn from piecing together distinct elements of the MDCCE's preliminary determination, without any indication that such exercise was actually undertaken by the MDCCE. Further, even if such analysis was undertaken by the MDCCE, it would not provide a proper assessment of Maghreb Steel's break-even threshold for 2010 and 2011. As noted, Morocco has confirmed that the break-even threshold was calculated only for 2012.[299] Morocco has failed to demonstrate how the actual production volumes in 2010 and 2011 respectively can be compared with the break-even threshold calculated for 2012, a different year, to show that Maghreb Steel failed to break even, and suffered losses, in 2010 and 2011. Considering that the MDCCE understood a company to meet its break-even threshold when its total revenue equals its total costs[300], and given that costs and selling prices may vary across different years, Morocco has not presented us with any basis in the MDCCE's determination to conclude that the break-even threshold calculated for 2012 served as an appropriate benchmark against which to assess whether Maghreb Steel broke even in 2010 and 2011. Absent such demonstration and in order to meaningfully assess whether or not a company had broken even in a particular year, an unbiased and objective authority would not compare a company's *actual volumes sold in that year* to the *break-even threshold for another year*, where that break-even threshold is calculated on the basis of cost and selling price data for that other year.

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

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

7.199. In the underlying investigation, the MDCCE assessed Maghreb Steel's monthly production data for the domestic like product over the period 2010-2012, to find that the company's production had fluctuated significantly month-on-month, reaching as much as 60% of production from one month to the next, and had completely stopped in February 2012.[301] The MDCCE concluded that sharp and significant variations in Maghreb Steel's monthly production over the injury period indicated that the company's production had not stabilized. The MDCCE reached this conclusion even though Maghreb Steel's production had increased from 2010 to 2012.[302]

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

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

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

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

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

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

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

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

7.202. We recall that in the underlying investigation the MDCCE had examined Maghreb Steel's stability of production as one of the criteria for determining whether the domestic industry was established. We accept that the question of stability of production has an important bearing on the broader question of whether or not the operations of an industry are sufficiently stabilized to consider that industry as being established. That said, the stability of production must be viewed in light of the industry at issue and the prevailing market conditions[308], for even a well-established industry of long standing will not be able to maintain stable production when the prevailing market conditions, or the cyclical nature of an industry, do not allow it. In this regard, we note that Morocco does not respond to Turkey's specific argument that the variations in monthly average production were in line with the variations in Morocco's demand for hot-rolled steel over the 2010-2012 period, and that imports over that period experienced similar variability. Nor does Morocco respond to Turkey's specific argument that any fluctuations in production should also be viewed in light of Maghreb Steel's ability to increase its domestic sales by 9.3% over the same period. An objective and impartial investigating authority would weigh any instability suggested by production fluctuations against variability in the prevailing market conditions, as evidenced on the record, and against the broader operational stability suggested by the increase in sales.

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

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

[303] Turkey's opening statement at the first meeting of the Panel, para. 4.9.
[304] Turkey's second written submission, para. 6.73; response to Panel question No. 4.18(b), paras. 144-147 (referring to Preliminary determination, (Exhibit TUR-6), p. 103 and table 5; and Maghreb Steel's financial report 2012, (Exhibit TUR-51), pp. 47, 56, and 60).
[305] Turkey's second written submission, para. 6.73; response to Panel question No. 4.18(b), para. 149.
[306] Morocco's response to Panel question No. 4.16(c), paras. 115-117.
[307] Morocco's response to Panel question No. 8.3, para. 26.
[308] In respect of captive production, it may also be necessary to consider any variability in light of variability in upstream operations.
[309] Morocco's response to Panel question No. 8.3, paras. 28-31.

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

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

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

7.6.2.1.5 Whether the MDCCE did not properly assess the "new industry" criterion in its establishment analysis[313]

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

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

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

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

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

(Appellate Body Report, *Russia – Commercial Vehicles*, paras. 5.53-5.54 (referring to Appellate Body Reports, *China – GOES*, paras. 136, 147, and 152; and *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.141) (emphasis original; fns omitted)).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.212. Recalling Morocco's argument[322] that the MDCCE did not rely solely on the absence of pre-existing production of hot-rolled steel in Morocco in finding that Maghreb Steel was a new industry, but did consider certain additional factors in making that finding, we now turn to evaluate the MDCCE's consideration of those factors.

7.213. Morocco argues that in concluding that Maghreb Steel was a new industry, the MDCCE also considered the physical separation of Maghreb Steel's production facilities for hot-rolled and cold-rolled steel. Morocco further asserts[323] that the MDCCE's finding as regards the physical separation of production facilities found support in the report on the initiation of the investigation, which provided that:

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

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

7.215. Morocco identifies the same statement in the report on the initiation of the investigation, referred to in paragraph 7.213. above, as support for the MDCCE's finding as regards the size of investment.[325] Morocco also submits[326] that the statement below shows that the MDCCE took into consideration that the production of hot-rolled steel required two major investments:

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

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

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

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

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

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

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

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

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

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

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

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

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

7.6.2.1.6 Conclusion

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

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[327] The MDCCE's original statement in French is as follows:
> Préalablement à la réalisation de deux investissements aussi importants, l'un de 1,6 milliard de DH en vue du développement de l'activité du laminoir à chaud de bobines (LAC) et l'autre, de 1,2 milliard de DH pour le développement de l'activité du laminoir à chaud de tôles fortes (TF), l'entreprise s'est assurée de la viabilité de l'activité au moyen de l'élaboration dudit plan, fondé sur des paramètres économiques objectifs et communément acceptés.

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

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

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

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

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

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

7.221. Turkey argues that the MDCCE, having erroneously determined that the domestic industry was unestablished, failed to conduct the correct injury analysis in comparing the industry's actual performance with its projected performance levels, and therefore acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.[332] Morocco contends, in response, that the MDCCE properly found that the domestic industry was unestablished in accordance with footnote 9 to Article 3 and Article 3.1 of the Anti-Dumping Agreement, and therefore the MDCCE was correct in conducting its injury analysis in the form of "material retardation of the establishment of the domestic industry" (material retardation). Morocco further states that Turkey's claim is completely consequential to its claims under footnote 9 and Article 3.1.[333]

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

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

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

a. the MDCCE failed to examine 6 of the 15 injury factors listed in Article 3.4;

b. the MDCCE excluded, without providing a satisfactory explanation, data pertaining to Maghreb Steel's captive production of hot-rolled steel; and

c. the MDCCE relied on the McLellan report for the domestic industry's projected performance levels, despite having found certain "miscalculations" in that report.

[331] Final determination, (Exhibit TUR-11), paras. 148-150; Preliminary determination, (Exhibit-TUR-6), para. 133.
[332] Turkey's first written submission, para. 8.82.
[333] Morocco's first written submission, paras. 210-211.
[334] Final determination, (Exhibit TUR-11), para. 69; Preliminary determination, (Exhibit TUR-6), para. 92.
[335] The injury period in the underlying investigation ran from January 2009 until December 2012. In its final determination, the MDCCE noted however, that given that injury cannot be attributed prior to the beginning of the marketing of the domestic like product, it considered it preferable to select definitively the period 2010-2012 as the injury period. (Final determination, (Exhibit TUR-11), paras. 11 and 121).

7.7.1 Provisions at issue

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

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

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

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

7.7.2 Evaluation

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

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

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

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

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

[336] Final determination, (Exhibit TUR-11), para. 112.
[337] Final determination, (Exhibit TUR-11), paras. 113-114; Preliminary determination, (Exhibit TUR-6), para. 126.
[338] Preliminary determination, (Exhibit TUR-6), para. 131.

Articles 3.1 and 3.4.[339] Morocco asserts in response that the MDCCE did evaluate the six factors, implicitly, by way of analysing certain other factors.[340]

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

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

7.232. We note that Article 3.4 states that "[t]he examination of the impact of the dumped imports … shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry" including the 15 listed factors. The words "shall include" mean that Article 3.4 requires an investigating authority to evaluate all relevant factors, including the 15 listed factors, when examining the impact of dumped imports. Our view in this regard is consistent with that of the Appellate Body and several panels that it is mandatory for an investigating authority to evaluate each of the 15 injury factors listed in Article 3.4.[343] These factors are "deemed to be relevant in every investigation" and "must always be evaluated by the investigating authorities".[344]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[347] Turkey's first written submission, paras. 9.11-9.12.
[348] Morocco's first written submission, para. 238.
[349] Morocco's first written submission, para. 214.
[350] Morocco's first written submission, para. 214.
[351] We bear in mind the observations of a past panel that in the context of an anti-dumping investigation "a Member is placed in a difficult position in rebutting a *prima facie* case that an evaluation [under Article 3.4 of the Anti-Dumping Agreement] has *not* taken place if it is unable to direct the attention of a panel to some contemporaneous written record of that process". (Panel Report, *Egypt – Steel Rebar*, para. 7.49 (emphasis original)).
[352] Morocco's first written submission, para. 229.
[353] Morocco's first written submission, paras. 230-233.

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

7.237. We note that, as Morocco asserts, the Appellate Body has clarified that Article 3.4 does not regulate the *manner* in which an investigating authority sets out the results of the "evaluation" of each factor in its published documents. Therefore, an investigating authority is not required in every anti-dumping investigation to make a separate record of the evaluation of each of the injury factors listed in Article 3.4.[356] The Appellate Body further stated that whether a panel conducting an assessment of an anti-dumping measure is able to find in the record sufficient and credible evidence to satisfy itself that a factor has been evaluated, even though a separate record of the evaluation of that factor has not been made, will depend on the particular facts of each case.[357] As regards the nature of "evaluation" of injury factors that Article 3.4 requires an investigating authority to undertake, the Appellate Body clarified that only because the analysis of a factor is implicit in the analyses of other factors does not necessarily lead to the conclusion that such a factor was not evaluated.[358]

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

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

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

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

[354] Turkey's second written submission, paras. 7.6-7.7.
[355] Turkey's second written submission, para. 7.7.
[356] Morocco's second written submission, para. 178 (referring to Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 161).
[357] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 161.
[358] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 160.
[359] See para. 7.184. above.
[360] In any event, the MDCCE's determination does not show that it analysed the trends in any losses suffered by the domestic industry throughout the injury period.
[361] Morocco's first written submission, para. 230.
[362] Turkey's response to Panel question No. 9.1, para. 38 (referring to International Accounting Standard 7, *Statement of cash flows* (24 March 2010), (Exhibit TUR-69), p. 1).
[363] Turkey's response to Panel question No. 9.1, para. 38 (referring to International Accounting Standard 1, *Presentation of Financial Statements*, (Exhibit TUR-70), p. 2).

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

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

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

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

[364] Turkey's response to Panel question No. 9.1, para. 39.
[365] Morocco's comments on Turkey's response to Panel question No. 9.1, para. 30.
[366] Morocco's response to Panel question No. 9.1, para. 54.
[367] Turkey's comments on Morocco's response to Panel question No. 9.1.
[368] Turkey's response to Panel question No. 9.2(b), para. 45.
[369] Morocco's response to Panel question No. 9.2(b), para. 56.
[370] Turkey's comments on Morocco's response to Panel question No. 9.2(b).

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

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

7.7.2.1.2 Growth

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

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

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

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

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[371] Morocco's response to Panel question No. 9.5(a), paras. 58-60 (referring to Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 165).
[372] Morocco's response to Panel question No. 9.5(a), para. 58 (referring to Panel Report, *Egypt – Steel Rebar*, para. 7.37).
[373] Turkey's response to Panel question Nos. 9.5(a) and (b), para. 53.
[374] Turkey's second written submission, para. 7.11.
[375] Morocco's response to Panel question No. 9.5(a), para. 58 (referring to Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 165).
[376] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 162.
[377] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 161.

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

7.7.2.1.3 Wages

7.251. The MDCCE made no explicit reference to "wages" in its injury analysis. In its final determination, the MDCCE stated, in the context of evaluating employment in the domestic industry, that in 2012 Maghreb Steel announced the laying off of more than 300 workers, which took place in 2013.[379]

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

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

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

7.7.2.1.4 Factors affecting domestic prices

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

[378] Morocco's response to Panel question No. 9.5(a), paras. 59-60.
[379] Final determination, (Exhibit TUR-11), para. 183.
[380] Morocco's first written submission, para. 234.
[381] Turkey's opening statement at the first meeting of the Panel, para. 4.16.
[382] Turkey's opening statement at the first meeting of the Panel, para. 4.16.
[383] Morocco's response to Panel question No. 5.8, para. 152; second written submission, para. 184.
[384] Morocco's second written submission, para. 184 (referring to Preliminary determination, (Exhibit TUR-6), para. 150).
[385] Preliminary determination, (Exhibit TUR-6), para. 150.

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

7.256. Turkey argues that the MDCCE did not evaluate "factors affecting domestic prices" and therefore acted inconsistently with Articles 3.1 and 3.4.[388] Morocco responds that the MDCCE did evaluate factors affecting domestic prices, in finding that the dumped imports of hot-rolled steel had a non-negligible impact on the undercutting of the domestic industry's selling prices, and by assessing an alleged increase in the price of raw materials in its causation analysis.[389] Turkey contends that the statements that Morocco refers to appear in different parts of the challenged determinations and in different contexts, which pertain to the MDCCE's inquiry under Articles 3.2 and 3.5, and are unrelated to the analytical inquiry required under Article 3.4.[390]

7.257. Morocco argues in response that the precise location of the analysis is not determinative of the issue of whether a certain factor has been analysed. Morocco contends that the Appellate Body has clarified that Article 3.4 does not regulate the manner in which the results of the analysis of each injury factor are to be set out in the published documents[391], and in general, Article 3 does not provide a prescribed format or template that an investigating authority must adhere to in making its injury determination.[392] Turkey acknowledges that in certain cases an investigating authority may analyse evidence relevant to one or more Article 3.4 factors under another provision of Article 3. However, in such case the authority may refer to the factual analysis set out in another section in order to avoid repetition, but the authority is not absolved of the obligation to evaluate each of the relevant factors under Article 3.4. Turkey takes the view that in such case, the authority must still ensure that the relevant factor is explicitly mentioned in the analysis of the injury factors, even if there is a reference to the factual discussion in another part of the report.[393]

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

a. the MDCCE's statement that dumped imports had a non-negligible impact on the undercutting of the domestic industry's selling prices[394]; and

b. the MDCCE's statement addressing an alleged increase in the price of raw materials.[395]

7.259. We recall that Article 3 does not provide a prescribed template or format that an investigating authority must adhere to in making its determination of injury, provided that its determination comports with the disciplines that apply under the discrete paragraphs of Article 3.[396] Therefore, we agree with Morocco that what is material for our assessment is not the location of the statements at issue in the MDCCE's determinations, but whether those statements show that the MDCCE did evaluate factors affecting domestic prices, as required under Article 3.4.

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

[386] Final determination, (Exhibit TUR-11), para. 145.
[387] Final determination, (Exhibit TUR-11), paras. 221-225.
[388] Turkey's first written submission, para. 9.10.
[389] Morocco's first written submission, para. 235 (referring to Final determination, (Exhibit TUR-11), paras. 145 and 221-225).
[390] Turkey's opening statement at the first meeting of the Panel, para. 4.17.
[391] Morocco's response to Panel question No. 5.7, para. 149 (referring to Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 161).
[392] Morocco's response to Panel question No. 5.7, para. 149 (referring to Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.141).
[393] Turkey's second written submission, para. 7.5.
[394] Final determination, (Exhibit TUR-11), para. 145.
[395] Final determination, (Exhibit TUR-11), para. 225.
[396] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.141.

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

7.261. For the foregoing reasons, we reject Turkey's claim that the MDCCE did not evaluate "factors affecting domestic prices", and therefore do not find that the MDCCE acted inconsistently with Articles 3.1 and 3.4 in that regard.

7.7.2.1.5 Conclusion

7.262. Based on the foregoing, we conclude that the MDCCE acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement in failing to evaluate 5 of the 15 injury factors listed in Article 3.4, in particular, return on investments, actual and potential negative effects on cash flow, wages, growth, and ability to raise capital or investments. We do not find that the MDCCE acted inconsistently with Articles 3.1 and 3.4 by failing to evaluate factors affecting domestic prices.

7.7.2.2 Whether the MDCCE acted inconsistently with Articles 3.1 and 3.4 in excluding, from its injury analysis, Maghreb Steel's captive production

7.263. Turkey claims that the MDCCE acted inconsistently with Articles 3.1 and 3.4 because, in analysing the injury factors listed in Article 3.4, the MDCCE excluded, without providing a satisfactory explanation, data pertaining to the captive market and considered data pertaining to only the merchant market.[402]

7.264. Morocco argues that the MDCCE had "focused" on the merchant market in its injury analysis, and asserts that the MDCCE did explain, reasonably and adequately, why it had focused on that market.[403] Morocco contends further that even though the MDCCE focused on the merchant market in its injury analysis, it did not entirely ignore the captive market, as Maghreb Steel's captive sales

[397] We note that the panel in *EU – Footwear (China)* took a similar view in finding that the investigating authority "did address at least one factor affecting domestic prices, when it concluded that dumped imports undercut the prices of the domestic like product, and that the domestic industry's sales prices were depressed". (Panel Report, *EU – Footwear (China)*, para. 7.445). Further, we note that the Appellate Body found that the results of the inquiries, pursuant to Articles 3.2 and 3.5 of the Anti-Dumping Agreement, are also relevant to the impact analysis required under Article 3.4, given that this provision requires the evaluation of *all* relevant economic factors and indices having a bearing on the state of the industry, including factors affecting domestic prices. (Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.209).

[398] Turkey has not challenged, and therefore the Panel has not considered, whether the MDCCE objectively examined the effect of dumped imports or the alleged increase in raw material prices on domestic prices.

[399] Morocco's response to Panel question No. 5.7, para. 151.

[400] Turkey's second written submission, para. 7.12.

[401] Panel Report, *EU – Footwear (China)*, para. 7.445.

[402] Turkey's first written submission, paras. 9.28-9.29; opening statement at the first meeting of the Panel, para. 4.19.

[403] Morocco's first written submission, paras. 242-243; opening statement at the first meeting of the Panel, para. 69.

were factored into the company's break-even threshold.[404] In its second written submission, Morocco posits that the MDCCE "expressed misapprehension" about considering the captive market in the injury analysis.[405] It further contends that because the MDCCE had taken into consideration the captive market in analysing the break-even threshold, it "necessarily" also took into consideration the captive market in analysing the domestic industry's return on investment, actual and potential negative effects on cash flow, and the ability to raise capital or investments. Further, Morocco contends that the MDCCE did not distinguish between the captive and merchant markets in analysing the domestic industry's employment, and therefore also did not make that distinction in analysing wages. Finally, Morocco asserts that the MDCCE also took the captive market into consideration in evaluating the domestic industry's production.[406]

7.265. Turkey rejects Morocco's arguments, and pointing to the MDCCE's final determination, asserts that the MDCCE did state that the exclusion of the captive market from the assessment of the injury factors was perfectly justified.[407] Further, Turkey asserts that Morocco did confirm that the MDCCE "considered [that] it was not necessary to examine directly or specifically the captive market in its retardation analysis".[408]

7.266. We note that the MDCCE's determinations do not demonstrate whether or not the MDCCE excluded the captive market in analysing each of the nine factors listed in Article 3.4 that it expressly referred to in its injury analysis. In particular, the MDCCE does not clearly state in its determinations whether it had excluded the captive market in analysing these factors. In its final determination, in the section addressing volume of dumped imports, the MDCCE stated that it considered that the exclusion of captive sales was completely justified insofar as the domestic market is characterized by a clear separation between the captive market and the merchant market, and because Maghreb Steel's captive sales do not compete directly with imports.[409] However, the MDCCE appears to have made that statement specifically in the context of analysing changes in volume of imports in relation to domestic production and consumption, and not in the context of its injury analysis as a whole. Further, in analysing the domestic industry's production, the MDCCE noted that part of "this" production is destined for internal consumption within Maghreb Steel, suggesting that the MDCCE took Maghreb Steel's captive production into consideration in that particular analysis.[410] Therefore, while the MDCCE's determinations do not conclusively show that the MDCCE excluded the captive market in analysing every factor that it evaluated as part of its injury analysis, they do show that the MDCCE excluded the captive market in analysing changes in volume of imports in relation to domestic production and consumption.

7.267. Further, even Morocco does not argue that the MDCCE took the captive market into consideration in analysing *all* the injury factors that the MDCCE assessed. As evident from Morocco's assertions set out in paragraph 7.264. , the MDCCE took the captive market into account only in some but not all injury factors listed in Article 3.4. Further, in response to the Panel's question regarding the MDCCE's evaluation of the domestic industry's profitability, Morocco confirmed that in analysing the profitability factor, the MDCCE did not take the captive market into account.[411] We therefore consider that regardless of whether the MDCCE excluded the captive market in analysing all injury factors, based on the record and Morocco's submissions[412], it follows that the MDCCE excluded the captive market in analysing at least some of them. We will therefore evaluate Turkey's claim on the basis that our assessment pertains to the MDCCE's analysis of those injury factors in respect of which the MDCCE did exclude the captive market.

7.268. Turkey argues, invoking the Appellate Body's findings in *US – Hot-Rolled Steel*, that, by excluding the captive market from the scope of the industry, the MDCCE conducted a "selective

[404] Morocco's first written submission, paras. 244-245; opening statement at the first meeting of the Panel, para. 70.
[405] Morocco's second written submission, para. 189.
[406] Morocco's second written submission, para. 193 (referring to Preliminary determination, (Exhibit TUR-6), para. 135); response to Panel question No. 5.3(a), para. 133.
[407] Turkey's opening statement at the first meeting of the Panel, para. 4.19 (referring to Final determination, (Exhibit TUR-11), para. 137).
[408] Turkey's second written submission, para. 7.14 (quoting Morocco's opening statement at the first meeting of the Panel, para. 69).
[409] Final determination, (Exhibit TUR-11), para. 137.
[410] Preliminary determination, (Exhibit TUR-6), para. 135.
[411] Morocco's response to Panel question No. 5.4, para. 135.
[412] Morocco's response to Panel question No. 5.3(a), para. 133; second written submission, para. 193.

examination of one part of a domestic industry" and therefore acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.[413] Turkey contends, based on the Appellate Body's reasoning, that while the MDCCE was not precluded from splitting its analysis of the state of the industry into the merchant and captive markets, it was required to provide an even-handed explanation of each of these market segments. Turkey further contends that the MDCCE failed to satisfactorily explain why it was not necessary to examine the part of the domestic industry concerning the captive market.[414]

7.269. Based on Turkey's argument, the main issue before us is whether the MDCCE acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement in disregarding, in its analysis of certain injury factors, data pertaining to the captive market.

7.270. We note that the facts and issue before the Appellate Body in *US – Hot-Rolled Steel* are similar to the facts and issue before the Panel in this dispute. In that case, the USITC did not analyse data pertaining to the domestic industry's captive market in its injury investigation.[415] Similar to the facts in this dispute, the domestic like product that domestic producers internally transferred to the captive market was used by an integrated producer to manufacture a downstream product, and did not generally enter the merchant market. Domestic producers whose production was captive, therefore did not compete directly with imports.[416] The issue before the Appellate Body, *inter alia*, was whether the USITC, in failing to analyse the domestic industry's captive market in its injury investigation, acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

7.271. We recall that the Appellate Body found that in the absence of a satisfactory explanation, Article 3.1 of the Anti-Dumping Agreement does not entitle investigating authorities to conduct a selective examination of one part of the domestic industry.[417] At the outset, the Appellate Body noted that it follows clearly from the definition of injury in footnote 9 to Article 3 of the Anti-Dumping Agreement that the focus of the injury determination is the state of the "domestic industry", which read in light of Article 4.1 of the Anti-Dumping Agreement, is the domestic industry *in totality*. An investigating authority, in its investigation, may therefore not focus on simply one part, sector or segment of the domestic industry.[418]

7.272. The Appellate Body reasoned that the standard of objectivity in Article 3.1 called upon an investigating authority to examine all parts of the domestic industry to ensure that the authority would not focus only on parts that were performing poorly as distinct from those that were performing well, or *vice versa*. An investigating authority, by focusing only on poorly performing parts to the exclusion of parts performing well, would raise the likelihood, as a result of the fact-finding or evaluation process, of determining that the domestic industry is injured.[419]

7.273. We consider the Appellate Body's reasoning applicable to the facts of this dispute. The MDCCE, in focusing in its injury analysis on data pertaining exclusively to the merchant market, selectively examined the performance of only one part of the domestic industry, that is, the part that was supplying to the merchant market. In doing so, it excluded evaluating Maghreb Steel's performance in the captive market, a part of the domestic industry which was shielded from competition with imports, and which the MDCCE cited the McLellan report as finding, had secured a guaranteed market.[420] In particular, as noted earlier in paragraph 7.173. above, the McLellan report, upon which the MDCCE had relied in the underlying investigation, itself concluded that almost half of Maghreb Steel's production, which was directed to the captive market, had access to a guaranteed market, and would therefore hold "bonnes perspectives commerciales" (good commercial prospects) for the domestic industry.[421] In our view, an unbiased and objective investigating authority, in analysing the state of the domestic industry, would not disregard a guaranteed market which held "good commercial prospects" for the domestic industry's performance, and which accounted for half of that industry's production, and would therefore have taken that captive market into consideration

[413] Turkey's first written submission, para. 9.18 (referring to Appellate Body Report, *US – Hot-Rolled Steel*, para. 214).
[414] Turkey's first written submission, para. 9.24.
[415] Appellate Body Report, *US – Hot-Rolled Steel*, para. 212.
[416] Appellate Body Report, *US – Hot-Rolled Steel*, para. 181.
[417] Appellate Body Report, *US – Hot-Rolled Steel*, para. 214.
[418] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 189-190.
[419] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 196 and 204.
[420] Preliminary determination, (Exhibit TUR-6), para. 120.
[421] Preliminary determination, (Exhibit TUR-6), para. 120.

in its analysis. We agree with Turkey that in the underlying investigation this consideration is particularly pertinent, given that the McLellan report, a study on which the MDCCE had relied in its injury analysis, itself recognized the significance of the captive market in the overall viability of the domestic industry.[422]

7.274. In failing to evaluate each of the two parts that made up the hot-rolled steel domestic industry in Morocco, the MDCCE failed to even-handedly evaluate the domestic industry as a whole, and therefore failed to meet the requirement of objectivity set out in Article 3.1 of the Anti-Dumping Agreement. Further, we consider that the requirement of objectivity in Article 3.1 applies to the MDCCE's evaluation of each injury factor that formed part of its injury analysis, and therefore required the MDCCE to evaluate data pertaining to the captive market in its evaluation of *each* of those injury factors. This is because the overarching obligation in Article 3.1 that an investigating authority conduct its investigation based on objective examination extends to the injury analysis as a whole, and therefore to the authority's evaluation of *all* rather than only certain injury factors that form part of its analysis.

7.275. Morocco argues that the Appellate Body in *US – Hot-Rolled Steel* stated that it is permissible for an investigating authority not to examine all of the other parts that make up the industry if it provides an explanation as to why it is not necessary to examine, directly or specifically, the other parts of the domestic industry. It contends further that the MDCCE did explain why it focused on the merchant market in its injury analysis, and therefore in focusing on that market in its analysis, it did not act inconsistently with Articles 3.1 and 3.4.[423]

7.276. We note that the MDCCE explained that it considered that the exclusion of captive sales was completely justified insofar as the domestic market is characterized by a clear separation between the captive market and the merchant market, and because Maghreb Steel's captive sales do not compete directly with imports.[424] However, as Turkey points out, the Appellate Body in *US – Hot-Rolled Steel* considered that it may be "highly pertinent for investigating authorities to evaluate the relevance of the fact that a significant proportion of the domestic production of the like product is shielded from direct competition with imports, and that the part of the domestic industry that is most likely to be affected by the imports is limited to the merchant market".[425] Therefore, this explanation, which the MDCCE set out as a justification for *not evaluating* the domestic industry's performance in the captive market, is for the Appellate Body a "highly pertinent" ground for *evaluating* the domestic industry's performance in the captive market. We agree with the Appellate Body's reasoning that the absence of competition with imports constitutes a ground for evaluating, rather than disregarding, the performance of a particular domestic industry in the captive market, and apply it in the present case.

7.277. In the case at hand, the domestic like product destined for the captive market which was "shielded from direct competition with imports" amounted to about 50% of the domestic production.[426] That a significant part the domestic production of the like product was shielded from direct competition with imports would, in our view, have led an objective and unbiased authority to inquire into whether that part of the domestic production was performing positively. An unbiased and objective investigating authority would thus have understood the absence of competition with imports as a ground *for*, and not *against*, examining the captive market in analysing the state of the industry. We therefore consider that the MDCCE's explanation that Maghreb Steel's captive sales do not compete directly with imports did not serve as a satisfactory explanation based on which the MDCCE could exclude the captive market from its injury analysis.

7.278. Based on the foregoing, we conclude that the MDCCE acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement in disregarding the captive market in its injury analysis.

[422] Turkey's first written submission, para. 9.27.
[423] Morocco's first written submission, paras. 241-243.
[424] Final determination, (Exhibit TUR-11), para. 137.
[425] Appellate Body Report, *US – Hot-Rolled Steel*, para. 198.
[426] Final determination, (Exhibit TUR-11), para. 158.

7.7.2.3 Whether the MDCCE acted inconsistently with Articles 3.1 and 3.4 in relying on the McLellan report

7.279. As noted in paragraph 7.227. , in its injury analysis, the MDCCE compared projected performance levels for the domestic industry against the actual performance of the industry across nine injury factors. These projections were set out in Maghreb Steel's 2008 Business Plan (Business Plan), which was based on a pre-feasibility report (the McLellan report).[427] The MDCCE considered both the McLellan report and the Business Plan in its analysis.[428] The MDCCE enumerated, however, certain projections in Maghreb Steel's Business Plan that it noted had proved inaccurate pertaining specifically to domestic demand, sales of downstream products, and the price of slab, a raw material used in manufacturing hot-rolled steel. In its final determination, the MDCCE noted the need to assess these inaccurate projections in light of actual developments, and proceeded to explain why it considered that the inaccuracies were not significant.[429] After undertaking that assessment, the MDCCE stated its decision to rely on the projections in the Business Plan and the McLellan report as valid benchmarks against which to compare the domestic industry's actual performance.[430] In its final determination, the MDCCE found that the domestic industry had suffered injury in the form of material retardation because, among others, the domestic industry's actual performance fell short of its projected performance.[431]

7.280. Turkey contends that the "miscalculations" in the McLellan report identified by the MDCCE had an impact on the MDCCE's injury analysis, as the projections in that report formed the benchmark against which the MDCCE compared the domestic industry's actual performance in order to assess injury.[432] Turkey argues that since the MDCCE failed to properly assess the relevance and consequences of these miscalculations, the MDCCE's reliance on the McLellan report was incorrect, and therefore its overall analysis which was based on that study, is inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.[433] Morocco contends in response that the MDCCE found that some of the projections in the Business Plan were imprecise rather than incorrect, and in any event, the MDCCE did not simply accept the projections but assessed them in light of actual developments. Morocco argues that therefore the MDCCE was correct in relying on the Business Plan and McLellan report, and did not act inconsistently with Articles 3.1 and 3.4.[434]

7.281. We must evaluate whether the MDCCE, in relying on the Business Plan (which was based on the McLellan report), despite having found certain inaccuracies in it, made an injury determination which was inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement. In particular, we must examine whether an unbiased and objective investigating authority would have relied on the Business Plan despite having found the inaccuracies that the MDCCE found in that document.

7.282. The first inaccuracy in the Business Plan that the MDCCE addressed pertains to the projected increase in domestic consumption of hot-rolled steel. The MDCCE found that the Business Plan forecast an increase in domestic consumption of hot-rolled steel of 10% per year which was not reached. It noted, however, that domestic consumption of hot-rolled steel did indeed increase by 6.3% between 2010 and 2012, in contrast to the trend in Europe. It further stated that the total rise in domestic consumption of hot-rolled steel sheet had, nevertheless, reached 10% between 2010 and 2012.[435]

7.283. Turkey asserts that the projected domestic demand was about 40% higher than the actual figure.[436] In our view, a projection on domestic consumption of a product would, in the normal course, affect projections of sales, investment decisions, inventories, among others, of the industry manufacturing that product. An unbiased and objective investigating authority would therefore have considered that an overestimation of the projected domestic consumption of hot-rolled steel would, in all likelihood, lead to an overestimation in the projections of certain factors relevant to the injury analysis. Morocco contends, however, that the MDCCE analysed what had actually happened in the

[427] Preliminary determination, (Exhibit TUR-6), para. 118.
[428] Final determination, (Exhibit TUR-11), para. 150.
[429] Final determination, (Exhibit TUR-11), paras. 159-162.
[430] Final determination, (Exhibit TUR-11), para. 163.
[431] Final determination, (Exhibit TUR-11), para. 195.
[432] Turkey's first written submission, para. 9.32.
[433] Turkey's first written submission, para. 9.38.
[434] Morocco's first written submission, para. 248.
[435] Final determination, (Exhibit TUR-11), para. 160.
[436] Turkey's first written submission, para. 9.33.

market, in particular that the domestic consumption of hot-rolled steel had still grown by 6.3%. In light of that analysis, the MDCCE considered that the inaccuracy at issue, which was only a "slight" overestimation of demand, did not affect the overall projection. It therefore decided that the use of these inaccurate projections was appropriate.[437] We consider however that the inaccuracy at issue would have led an unbiased and objective investigating authority to question, and further investigate, the impact of the inaccuracy on the actual and projected performance of the hot-rolled steel industry in respect of the relevant injury factors before dismissing that inaccuracy as insignificant. The MDCCE however, did not do so. We therefore consider that the MDCCE did not act objectively in dismissing the inaccuracy in the forecasted domestic consumption of hot-rolled steel in the Business Plan.

7.284. The second inaccuracy that the MDCCE addressed pertains to projections for the sales of the downstream product, cold-rolled steel. In particular, the MDCCE found that sales of the downstream product did not increase by 10% as the Business Plan had forecast. The MDCCE's determination indicates that the sales of the downstream product, on the contrary, actually decreased.[438] Turkey asserts that information on sales of downstream products is critical for a producer of intermediate goods because an increase in sales of the downstream products will mean an increase in sales of the intermediate goods. Turkey argues that therefore the "miscalculation" in the sales of downstream products in the Business Plan will have had effects on the projections of the hot-rolled steel industry's production, sales, market share, return on investment, and cash flow, among others.[439]

7.285. We agree with Turkey that an increase in sales of a downstream product, here cold-rolled steel, is likely to mean an increase in sales of the intermediate good, here hot-rolled steel, which is used in the manufacture of that downstream product. This is because an increase in sales of cold-rolled steel would imply an increase in demand for the intermediate good, hot-rolled steel. In the underlying investigation, the MDCCE found that the sales of cold-rolled steel did not increase as forecasted, but actually declined. Morocco contends that the MDCCE did note that the decrease in the level of sales of cold-rolled steel however did not lead to slow-down in internal consumption of hot-rolled steel, which remained "very solid" throughout the period.[440] We understand the MDCCE's statement that Morocco points to as indicating that the internal consumption of hot-rolled steel remained strong despite the decrease in sales of cold-rolled steel. However, that statement does not indicate that the MDCCE found that the internal consumption of hot-rolled steel remained "unaffected" by the decrease in sales of cold-rolled steel. In particular, the MDCCE's statement does not indicate whether the internal consumption of hot-rolled products remained at the same level as it would have if the sales of cold-rolled steel had risen to the projected level. Therefore, the MDCCE's statement in question does not suffice as an analysis of the impact of the inaccuracy at issue on the actual and projected performance of the hot-rolled industry, which we consider an unbiased and objective investigating authority would have undertaken, before deciding to rely on the Business Plan.

7.286. The third inaccuracy that the MDCCE identified in the Business Plan pertained to the price of slab, a raw material used to manufacture hot-rolled steel. The MDCCE noted that the Business Plan had forecast the price of slab to stand at about USD 440/tonne, whereas the price of slab actually reached USD 550/tonne during the period under investigation. Turkey asserts that considering that slab is an intermediate product used to manufacture hot-rolled steel, the price of slab forms part of the cost-structure of hot-rolled steel. An incorrect projection of the price of slab therefore means an incorrect projection of the cost-structure of the hot-rolled industry, and must have had an impact on business decisions, such as investment and production capacity, among others.[441] Morocco contends in response that the MDCCE found that the inaccurate projection of the price of slab did not have a major effect in Maghreb Steel's overall operations because the MDCCE considered that Maghreb Steel quickly reduced its purchases of slab as its electric steel plant was put into operation in 2012.[442]

7.287. In our view, an unbiased and objective investigating authority would consider that an inaccurate projection of the price of slab, given that it is an intermediate product used to

[437] Morocco's first written submission, para. 249.
[438] Final determination, (Exhibit TUR-11), para. 161.
[439] Turkey's first written submission, para. 9.34.
[440] Morocco's first written submission, para. 250 (referring to Final determination, (Exhibit TUR-11), para. 161).
[441] Turkey's first written submission, para. 9.36.
[442] Morocco's first written submission, para. 251.

manufacture hot-rolled steel, would affect the projected cost of production of hot-rolled steel, and therefore the projections of the hot-rolled industry's performance. Such an authority would consider that because the domestic industry's actual performance was compared against those projections of the domestic industry's performance to analyse injury to the industry, an inaccurately projected price of slab could affect the overall injury analysis. In the case at hand, the MDCCE dismissed the significance of the inaccuracy in the projected price of slab on the basis that Maghreb Steel quickly stopped purchasing slab. We consider that the MDCCE's explanation was not reasoned and adequate. As Turkey asserts[443], Maghreb Steel's electric works were implemented in 2012, which even assuming that the works were implemented in January 2012, was 19 months after the company began producing hot-rolled steel. We recall that the entire 19-month period fell within the injury period.[444] We agree with Turkey that in those 19 months, the inaccuracy in the projected price of slab was likely to have had an impact on Maghreb Steel's performance. We therefore consider that the MDCCE did not act objectively in dismissing the significance of the inaccuracy in the projected price of slab, without investigating the actual impact of the inaccuracy on the hot-rolled steel industry's performance.

7.288. Based on the foregoing, we take the view that the inaccuracies in the Business Plan were of a nature that an unbiased and objective investigating authority would not have relied on them, without further analysis. The MDCCE dismissed the significance of the inaccuracies in the Business Plan, without further investigating the impact of those inaccuracies on Maghreb Steel's actual and projected performance levels, and did so based on explanations that were not reasoned and adequate. Therefore, the MDCCE improperly relied on the McLellan report (on which the Business Plan was based). As a result, we find that the MDCCE's overall injury analysis, which was based on that report, is inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

7.7.3 Overall Conclusion

7.289. For the foregoing reasons, we conclude that:

a. The MDCCE acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement in failing to evaluate 5 of the 15 injury factors listed in Article 3.4, in particular, return on investments, actual and potential negative effects on cash flow, growth, wages, and ability to raise capital or investments. The MDCCE did not act inconsistently with Articles 3.1 and 3.4 by failing to evaluate factors affecting domestic prices.

b. The MDCCE acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement in disregarding the captive market in its injury analysis.

c. The MDCCE, in relying in its injury analysis on the McLellan report (on which the Business Plan was based) without properly investigating the significance of inaccuracies in that report, did not base its injury determination on an objective examination, and therefore acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set out in this Report, we conclude that the following claims of Turkey are outside our terms of reference:

a. the claim under footnote 9 to Article 3 of the Anti-Dumping Agreement in respect of the MDCCE's finding of "establishment";

b. the claims under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement in respect of the confidential treatment of the domestic industry's (Maghreb Steel) break-even threshold; and

[443] Turkey's first written submission, para. 9.37.
[444] See fn 347 above.

c. the claim under Article 6.9 of the Anti-Dumping Agreement in respect of the alleged failure to inform all interested parties of the domestic industry's (Maghreb Steel) break-even threshold.

8.2. For the procedural reasons set out in this Report, we decline to rule on:

a. the claim under Article VI:6(a) of the GATT 1994 in respect of the MDCCE's finding of "establishment"; and

b. the claim under Article 6.9 of the Anti-Dumping Agreement in respect of any "essential facts" used by the MDCCE in cross-checking the facts available rate.

8.3. For the reasons set out in this Report, we conclude that Turkey has established that Morocco acted inconsistently with:

a. Article 5.10 of the Anti-Dumping Agreement by failing to conclude the investigation within the 18-month maximum time limit set out in that provision;

b. Article 6.8 of the Anti-Dumping Agreement by rejecting the reported information and establishing the margins of dumping for the two investigated Turkish producers on the basis of facts available;

c. Article 6.9 of the Anti-Dumping Agreement by failing to inform all interested parties of: (i) any essential facts in respect of the additional, unidentified export sales that the MDCCE considered the producers to have failed to report; and (ii) the essential facts in respect of the data for the C&F prices and for the adjustments used in arriving at the producers' margins of dumping using facts available;

d. Article 3.1 of the Anti-Dumping Agreement in determining that the domestic industry was "unestablished";

e. Articles 3.1 and 3.4 of the Anti-Dumping Agreement by improperly conducting the injury analysis in the form of "material retardation of the establishment of the domestic industry"; and

f. Articles 3.1 and 3.4 of the Anti-Dumping Agreement by: (i) failing to evaluate 5 of the 15 injury factors listed in Article 3.4; (ii) disregarding the captive market in the injury analysis; and (iii) relying in the injury analysis on the McLellan report without properly investigating the significance of inaccuracies in that report.

8.4. For the reasons set out in this Report, we conclude that Turkey has not established that Morocco acted inconsistently with:

a. Article 6.9 of the Anti-Dumping Agreement by failing to inform all interested parties of the movement certificates and commercial invoices in respect of the [[***]] tonnes of allegedly unreported export sales in sufficient time for the two investigated Turkish producers to defend their interests; and

b. Articles 3.1 and 3.4 of the Anti-Dumping Agreement by failing to evaluate "factors affecting domestic prices".

8.5. We do not consider it necessary to address Turkey's claims under paragraphs 1, 3, 5, 6, and 7 of Annex II of the Anti-Dumping Agreement.

8.6. Pursuant to Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered Agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that Agreement. Accordingly, to the extent the MDCCE has acted inconsistently with certain provisions of the Anti-Dumping Agreement, we conclude that Morocco has nullified or impaired benefits accruing to Turkey under this Agreement.

8.7. Pursuant to Article 19.1 of the DSU, we recommend that Morocco bring its measures into conformity with its obligations under the above-mentioned Agreement.

8.8. In light of the inconsistencies of the measures with the Anti-Dumping Agreement, including with Article 5.10, Turkey also requests the Panel to exercise its discretion under the second sentence of Article 19.1 of the DSU and to suggest that Morocco bring its measures into conformity with its WTO obligations by immediately revoking the anti-dumping measure at issue.[445]

8.9. We consider that Article 19.1 of the DSU allows, but does not require, us to suggest ways in which the Member concerned could implement the Panel's recommendations.[446] Further, implementation of DSB recommendations and rulings is left, in the first instance, to the discretion of the implementing Member.[447] We therefore deny Turkey's request.

_____

[445] Turkey's first written submission, paras. 5.20 and 11.4.
[446] Panel Report, *US – Stainless Steel (Korea)*, para. 7.9.
[447] Panel Reports, *US – Shrimp II (Viet Nam)*, para. 8.6; *EC – Fasteners (China)*, para. 8.8; *US – Hot-Rolled Steel*, para. 8.11.

WORLD TRADE ORGANIZATION

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

REPORT OF THE PANEL

Addendum

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

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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 its presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

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

[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 [[Fabrizio Di Gianni]] and [[Edouard Descotis]], the subject line reads "Détermination final-ADP tôles laminées à chaud ([[Van Bael & Bellis]]/CIB)" and as attachment it indicates "Rapport final-tôles-VNC.pdf".
[34] Morocco's request for interim review, paras. 9-11.

MDCCE's statement in the final determination and Morocco's arguments in these proceedings" as to 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.

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[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 submission[50] 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.

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[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] Tukey 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.

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[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

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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 limits[19] "requires" or "imposes" deadlines[20] 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 Disclosure[29] 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, 6.13.
[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 approach[116] 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.

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[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 minimum[123] 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 investigation[125] 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

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[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 information[172] 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]

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[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 confidential[185], 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.

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[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 it[193], 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.

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[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]

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[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 fact[7], 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 authority[9], 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 3.4focus specifically on establishment and material retardation. However, the consultations request makes no mention of either establishment or retardation. Neither Article 3.1 not 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 it 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 Erdermir Group in an email sent in December 2013[29], 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 disclosed[32], 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 destine 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 investigation[39], 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 Erdermir Group and Colakoglu to the Draft Final Determination.[41] In the Final Determination, the MDCCE first explained the position of the producers[42], 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 destine 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 responses[54] 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 from[67], 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 an 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 threshold[81], 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 Determination[88], 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 analysis[93], 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 costs[103], 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 2012[106] 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 2012announcement 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 2010-2012[112]; 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 anticipated[113]; that it had already announced the layoff of 300 employees[114] and was anticipating having to lay off at least 400 employees[115] and that it had experienced a sharp decline in productivity measured in annual production per person employed[116]; that its stocks had increased between 2009 and 2011, and had a significant remaining stock still in 2012[117]; 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 shortcoming 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 information[133] 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 enterprise attaint 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 exceed. 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

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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.