



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

AB-2018-11

Report of the Appellate Body

BCI redacted, as indicated [BCI]

WORLD TRADE ORGANIZATION
APPELLATE BODY

Morocco – Anti-Dumping Measures on
Certain Hot-Rolled Steel from Turkey

Morocco, *Appellant*
Turkey, *Appellee*

China, *Third Participant*
Egypt, *Third Participant*
European Union, *Third Participant*
India, *Third Participant*
Japan, *Third Participant*
Korea, *Third Participant*
Russian Federation, *Third Participant*
Singapore, *Third Participant*
United States, *Third Participant*

AB-2018-11

Appellate Body Division:

Bhatia, Presiding Member
Graham, Member
Zhao, Member

1.1. This appeal concerns the Panel Report, *Morocco – Anti-Dumping Measures on Certain Hot-Rolled Steel from Turkey*¹ (Panel Report). The Panel was established on 20 February 2017 to consider complaints by Turkey² with respect to the definitive anti-dumping measures imposed by Morocco on imports of certain hot-rolled steel products (hot-rolled steel) from Turkey.³

1.2. Morocco initiated the anti-dumping investigation at issue on 21 January 2013⁴, and imposed provisional anti-dumping duties on the imported products at issue, 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 2013.⁵ On 12 August 2014, the MDCCE published the final affirmative determination of dumping, injury, and causation.⁶ The definitive measure came into force on 26 September 2014.⁷ The factual aspects of this dispute are set forth in greater detail in section 2 of the Panel Report.

1.3. Before the Panel, Turkey raised the following claims 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):

- 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 under that provision;
- b. the MDCCE acted inconsistently with Article 6.8 of, and paragraphs 1, 3, 5, 6, and 7 of Annex II to, the Anti-Dumping Agreement in its use of facts available to determine the margins of dumping for two Turkish producers of subject imports;
- c. the MDCCE acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to disclose all "essential facts" in a timely manner with respect to its decision to use facts available to determine the margins of dumping;

¹ WT/DS513/R, 31 October 2018.

² Request for the Establishment of a Panel by Turkey, WT/DS513/2.

³ Minutes of the Dispute Settlement Body (DSB) Meeting held on 20 February 2017, WT/DSB/M/392, paras. 5.1-5.5.

⁴ Panel Report, para. 2.2.

⁵ Panel Report, para. 2.3.

⁶ Panel Report, para. 2.4.

⁷ Panel Report, para. 2.4.

- d. the MDCCE's determination that the domestic industry, composed of the sole domestic producer Maghreb Steel⁸, 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 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 domestic industry's break-even threshold in its analysis of whether the domestic industry was "established".⁹

1.4. Turkey requested the Panel to exercise its discretion under Article 19.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and to suggest that Morocco bring its measures into conformity with its World Trade Organization (WTO) obligations by immediately revoking the anti-dumping measure at issue.¹⁰

1.5. The Panel Report was circulated to Members of the WTO on 31 October 2018. For the reasons set out in its Report, the Panel found the following claims of Turkey to be outside the Panel's 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
- 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.¹¹

1.6. For the procedural reasons set out in its Report, the Panel declined 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.¹²

1.7. For the reasons set out in its Report, the Panel concluded that Turkey had 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

⁸ Panel Report, para. 7.30.

⁹ Panel Report, para. 3.1.

¹⁰ Panel Report, para. 3.2.

¹¹ Panel Report, para. 8.1.

¹² Panel Report, para. 8.2.

respect of the data for the cost and freight 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.¹³

1.8. For the reasons set out in its Report, the Panel concluded that Turkey had 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 [BCI] 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".¹⁴

1.9. The Panel did not consider it necessary to address Turkey's claims under paragraphs 1, 3, 5, 6, and 7 of Annex II to the Anti-Dumping Agreement.¹⁵

1.10. Pursuant to Article 19.1 of the DSU, the Panel recommended that Morocco bring its measures into conformity with its obligations under the Anti-Dumping Agreement.¹⁶ The Panel noted Turkey's request that the Panel exercise its discretion under Article 19.1 of the DSU and suggest that Morocco bring its measures into conformity with its WTO obligations by immediately revoking the anti-dumping measure at issue.¹⁷ The Panel considered that "Article 19.1 of the DSU allows, but does not require, [the Panel] to suggest ways in which the Member concerned could implement the Panel's recommendations"¹⁸, and that "implementation of [Dispute Settlement Body (DSB)] recommendations and rulings is left, in the first instance, to the discretion of the implementing Member".¹⁹ The Panel therefore denied Turkey's request.²⁰

1.11. On 20 November 2018, Morocco notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, and filed a Notice of Appeal²¹ and an appellant's submission pursuant to Rule 20 and Rule 21, respectively, of the Working Procedures for Appellate Review²² (Working Procedures). On 10 December 2018, Turkey filed an appellee's submission.²³ On 11 December 2018, the European Union, Japan, and the United States each filed a third participant's

¹³ Panel Report, para. 8.3. The McLellan report refers to "a pre-feasibility report ... prepared for Maghreb Steel by McLellan and Partners Ltd., an independent consulting firm". (Panel Report, para. 7.223)

¹⁴ Panel Report, para. 8.4.

¹⁵ Panel Report, para. 8.5.

¹⁶ Panel Report, para. 8.7.

¹⁷ Panel Report, para. 8.8. See also para. 1.4 above.

¹⁸ Panel Report, para. 8.9 (referring to Panel Report, *US – Stainless Steel (Korea)*, para. 7.9).

¹⁹ Panel Report, para. 8.9 (referring to Panel Reports, *US – Shrimp II (Viet Nam)*, para. 8.6; *EC – Fasteners (China)*, para. 8.8; *US – Hot-Rolled Steel*, para. 8.11).

²⁰ Panel Report, para. 8.9.

²¹ WT/DS513/5 (contained in Annex A-1 of the Addendum to this Report, WT/DS513/AB/R/Add.1).

²² WT/AB/WP/6, 16 August 2010.

²³ Pursuant to Rule 22 of the Working Procedures.

submission.²⁴ China, Egypt, India, Korea, the Russian Federation, and Singapore each notified its intention to appear at the oral hearing as a third participant.²⁵

1.12. The claims and arguments of the participants, and the arguments of the third participants that filed a written submission, are reflected in the executive summaries of their written submissions provided to the Appellate Body.²⁶ The Notice of Appeal and the executive summaries of the participants' and third participants' written submissions are contained in Annexes A, B, and C of the Addendum to this Report, WT/DS513/AB/R/Add.1.

1.13. By letter dated 15 January 2019, the Chair of the Appellate Body notified the Chair of the DSB that the Appellate Body would not be able to circulate its Report within the 60-day period pursuant to Article 17.5 of the DSU, or within the 90-day period pursuant to the same provision, for the reasons mentioned therein.²⁷

1.14. On 4 December 2019, the Appellate Body received a letter from Morocco, in which Morocco stated:

My authorities have requested that I inform you of Morocco's decision to withdraw its appeal in [this] dispute. Morocco requests the Appellate Body to inform the DSB of Morocco's decision in accordance with Rule 30(1) of the Working Procedures for Appellate Review.

The anti-dumping measure underlying the dispute expired on 26 September 2019. Although Morocco continues to believe that the Panel's findings suffer from serious flaws, those findings have become moot with the expiration of the underlying measure. Consequently, and in light of the heavy workload of the Appellate Body, Morocco has decided to withdraw the appeal.

Morocco respectfully requests the Appellate Body to record the reasons for Morocco's decision as set out above in the event that the Appellate Body issues a report.

1.15. Rule 30(1) of the Working Procedures provides that:

At any time during an appeal, the appellant may withdraw its appeal by notifying the Appellate Body, which shall forthwith notify the DSB.

1.16. Upon receipt of Morocco's letter of 4 December 2019, the Appellate Body on the same day notified the Chair of the DSB, pursuant to Rule 30(1) of the Working Procedures, that Morocco had decided to withdraw the appeal in this dispute.²⁸

1.17. In response to Morocco's letter, on the same day, Turkey sent a letter to the Appellate Body, in which Turkey stated:

Turkey takes note of Morocco's decision to withdraw its appeal in [this] matter. Pursuant to Rule 30(1) of the Working Procedures for Appellate Review, Turkey joins Morocco in requesting the Appellate Body to notify the DSB of this decision.

On the previous instance in which an appeal was withdrawn, the Appellate Body proceeded to issue a short report noting the withdrawal of the appeal (*India – Autos*, WT/DS146/AB/R; WT/DS175/AB/R). This report, together with the underlying

²⁴ Pursuant to Rule 24(1) of the Working Procedures.

²⁵ Pursuant to Rule 24(2) and Rule 24(4) of the Working Procedures.

²⁶ Pursuant to the Appellate Body's communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings" (WT/AB/23, 11 March 2015).

²⁷ WT/DS513/6. The Chair of the Appellate Body referred to the size of the Panel record and the complex issues appealed, and further noted the backlog of appeals pending with the Appellate Body, the fact that all Appellate Body Divisions in the appeals filed since 1 October 2018 were composed of the same three remaining Appellate Body Members, and that it would not be possible to staff this appeal for some time. (Ibid.)

²⁸ WT/DS513/7, dated 5 December 2019.

Panel Report, was then adopted by the DSB in the normal manner. The Appellate Body may wish to follow this practice in this instance. For clarity, when it informs the DSB of Morocco's withdrawal of its appeal, the Appellate Body should indicate whether it intends to issue a report as it did in *India – Autos*.

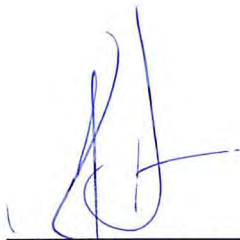
1.18. Under Article 16.4 of the DSU, a panel report shall be adopted at a DSB meeting within 60 days after the date of its circulation, unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. Article 16.4 further provides that, if a party has notified its decision to appeal, "the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal." In addition, under Article 17.14, an Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the report within 30 days following its circulation to the Members.

1.19. In this dispute, the 60-day period pursuant to Article 16.4 of the DSU ended on 30 December 2018. In view of Morocco's withdrawal of the appeal by its letter of 4 December 2019, the Appellate Body hereby completes its work in this appeal. The 30-day period for adopting the Appellate Body Report, together with the Panel Report, thus begins from the circulation of this Report.


Signed in the original in Geneva this 6th day of December 2019 by:



Ujal Singh Bhatia
Presiding Member



Thomas R. Graham
Member



Hong Zhao
Member



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

AB-2018-11

Report of the Appellate Body

Addendum

This Addendum contains Annexes A to C to the Report of the Appellate Body circulated as document WT/DS513/AB/R.

The Notice of Appeal and the executive summaries of written submissions contained in this Addendum are attached as they were received from the participants and third participants. The content has not been revised or edited by the Appellate Body, except that paragraph and footnote numbers that did not start at 1 in the original may have been renumbered to do so, and the text may have been formatted in order to adhere to WTO style. The executive summaries do not serve as substitutes for the submissions of the participants and third participants in the Appellate Body's examination of the appeal.

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NOTICE OF APPEAL

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ANNEX A-1*

MOROCCO'S NOTICE OF APPEAL

1. Pursuant to Articles 16.4 and 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Rule 20 of the Working Procedures for Appellate Review (WT/AB/WP/6, 16 August 2010) ("Working Procedures"), Morocco hereby notifies the Dispute Settlement Body ("DSB") of its decision to appeal certain issues of law and legal interpretations in the Panel Report in *Morocco — Anti-Dumping Measures on Certain Hot-Rolled Steel from Turkey* (WT/DS513/R) ("Panel Report").
2. Pursuant to Rules 21 of the Working Procedures, Morocco files this Notice of Appeal together with its Appellant Submission with the Appellate Body Secretariat.
3. Pursuant to Rule 20(2)(d)(iii) of the Working Procedures, this Notice of Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to Morocco's ability to rely on other paragraphs of the Panel Report in its appeal.
4. Morocco seeks review by the Appellate Body of the Panel's findings regarding its terms of reference. In particular, the Panel erred in finding that Turkey's claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement fell within its terms of reference.¹ Accordingly, Morocco requests that the Appellate Body reverse the Panel's findings in, *inter alia*, paragraphs 7.27-7.29 and 7.66, and find that Turkey's claims under Articles 3.1 and 3.4 were not within the Panel's terms of reference. Morocco additionally requests the Appellate Body to reverse all of the Panel's substantive findings under Articles 3.1 and 3.4 of the Anti-Dumping Agreement, including, *inter alia*, the findings in paragraphs 7.166, 7.175, 7.191, 7.198, 7.207, 7.218, 7.219, 7.222, 7.235, 7.245, 7.250, 7.254, 7.262, 7.274, 7.277, 7.278, 7.283, 7.285, 7.287, 7.288, 7.289, and 8.3 d-f.
5. Morocco seeks review by the Appellate Body of the Panel's findings under Article 6.8 of the Anti-Dumping Agreement. The Panel erred in the interpretation and application of Article 6.8, and also failed to make an objective assessment of the matter, including an objective assessment of the facts of the case, under Article 11 of the DSU. The Panel's errors include, *inter alia*:
 - finding that the MDCCE had not made an affirmative determination of non-cooperation in the final determination.² The Panel also acted inconsistently with Article 11 of the DSU in reaching its finding;
 - finding that the MDCCE was required to "engage meaningfully" with the producers and that the MDCCE failed to do so;³
 - finding that 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;⁴
 - finding that the MDCCE did not have a proper basis to determine that the two producers had themselves failed to report the export sales;⁵ and,
 - finding that MDCCE could not reject and replace all the sales information that the producers had reported.⁶

* This document, dated 23 November 2018, was circulated to Members as document WT/DS513/5.

¹ See, for example, Panel Report, para. 7.29.

² See, for example, Panel Report, para. 7.91.

³ See, for example, Panel Report, paras. 7.92, 7.93, 7.99, and 7.101.

⁴ See, For example, Panel Report, paras. 7.94-7.95.

⁵ See, for example, Panel Report, paras. 7.95, 7.97, 7.99, 7.100, 7.101, and 7.102.

⁶ See, for example, Panel Report, para. 7.103.

6. Morocco also seeks review by the Appellate Body of the Panel's treatment of Exhibit MAR-11 (BCI) in the context of the Panel's assessment of Turkey's claim under Article 6.8 of the Anti-Dumping Agreement. The Panel's treatment of MAR-11 is not consistent with the obligation under Article 11 of the DSU to make an objective assessment of the matter, including an objective assessment of the facts of the case.⁷

7. As a result of the errors indicated in paragraphs 5 and 6 above, Morocco requests that the Appellate Body reverse the Panel's findings, *inter alia*, in paragraphs 7.92, 7.93, 7.94, 7.95, 7.97, 7.99, 7.100, 7.101, 7.102, 7.103, 7.104, 7.107, and 8.3 b., that the MDCCE's recourse to facts available in respect of the producers' alleged failure to report the entirety of their export sales was inconsistent with Article 6.8.

8. Morocco seeks review by the Appellate Body of the Panel's findings under Article 3.1 of the Anti-Dumping Agreement. The Panel erred in the interpretation and application of Article 3.1, and also failed to make an objective assessment of the matter under Article 11 of the DSU. The Panel's errors include:

- finding 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;⁸
- finding that it need not rule on 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;⁹
- undertaking an assessment and making findings under Article 3.1 in the abstract without regard to whether an obligation to determine "unestablishment" exists or the contours of that obligation;¹⁰
- finding that the MDCCE did not assess, based on positive evidence and an objective examination, whether the domestic industry was established;¹¹
- finding that the MDCCE did not properly examine the question of the domestic industry's establishment;¹²
- finding that the MDCCE acted inconsistently with Article 3.1 of the Anti-Dumping Agreement in determining that the domestic industry was unestablished;¹³ and
- additionally, the Panel acted inconsistently with Article 11 of the DSU in finding that the MDCCE's analysis of "establishment" violated the Anti-Dumping Agreement without finding that the Anti-Dumping Agreement requires an investigating authority to determine that the domestic industry is "unestablished".¹⁴ In reaching this finding, the Panel failed to make an objective assessment of the matter, including an objective assessment of the applicability of and conformity with the relevant covered agreements.

9. Based on the above, Morocco requests that the Appellate Body reverse the Panel's findings in, *inter alia*, footnote 213 to paragraph 7.148 and paragraphs 7.148, 7.151, 7.166, 7.175, 7.191, 7.198, 7.207, 7.218, 7.219, and 8.3 d. of the Panel Report. Morocco also requests that the Appellate Body find that the Panel acted inconsistently with its duty to conduct an objective assessment of the matter under Article 11 of the DSU.

⁷ See, for example, Panel Report, para. 7.101.

⁸ See, for example, Panel Report, paras. 7.148 and 7.151.

⁹ See, for example, Panel Report, fn 213 to para. 7.148.

¹⁰ See, for example, Panel Report, paras. 7.151, 7.166, 7.175, 7.191, 7.198, 7.207, 7.218, 7.219, and 8.3 d.

¹¹ See, for example, Panel Report, para. 7.219.

¹² See, for example, Panel Report, para. 7.219.

¹³ See, for example, Panel Report, paras. 7.166, 7.175, 7.191, 7.198, 7.207, 7.218, 7.219, and 8.3 d.

¹⁴ See, for example, Panel Report, fn. 213 to para. 7.148.

10. Morocco seeks review by the Appellate Body of the Panel's findings under Articles 3.1 and 3.4 of the Anti-Dumping Agreement with respect to "material retardation of the establishment of the domestic industry". The Panel's finding regarding the MDCCE's decision to conduct the injury analysis in the form of "material retardation of the establishment of the domestic industry" is entirely premised on its finding under Article 3.1 regarding "unestablishment".¹⁵ Accordingly, as a consequence of reversing the Panel's finding under 3.1 regarding the finding of "unestablishment"¹⁶, Morocco requests that the Appellate Body also reverse the Panel's findings in, *inter alia*, paragraphs 7.222 and 8.3 e., that the MDCCE acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement by conducting the injury analysis in the form of "material retardation of the establishment of the domestic industry".

11. Morocco seeks review by the Appellate Body of the Panel's findings under Articles 3.1 and 3.4 of the Anti-Dumping Agreement with regard to its assessment of the captive market. The Panel erred in the interpretation and application of Articles 3.1 and 3.4. The Panel's errors include, *inter alia*:

- finding that, 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;¹⁷
- finding 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;¹⁸
- finding that MDCCE's conclusion that 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;¹⁹ and,
- finding 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.²⁰

12. Accordingly, Morocco requests that the Appellate Body reverse the Panel's findings in, *inter alia*, paragraphs 7.273, 7.274, 7.277, 7.278, 7.289 b., and 8.3 f(ii) of the Panel Report.

13. Morocco also seeks review by the Appellate Body of the Panel's interpretation and application of Articles 3.1 and 3.4 of the Anti-Dumping Agreement with regard to its assessment of the McLellan Report. The Panel erred in its interpretation and application of Articles 3.1 and 3.4. The Panel's errors include, *inter alia*:

- faulting the MDCCE for relying on the McLellan report because some of the projections in the report did not turn out to be entirely accurate;²¹
- finding that the MDCCE did not base its injury determination on an objective examination²² because it 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 based on explanations that were not reasoned and adequate;²³ and,

¹⁵ See, for example, Panel Report, para. 7.222 and 8.3 e.

¹⁶ See, for example, Panel Report, paras. 7.166, 7.175, 7.191, 7.198, 7.207, 7.218, 7.219, and 8.3 d.

¹⁷ See, for example, Panel Report, para. 7.274.

¹⁸ See, for example, Panel Report, para. 7.274.

¹⁹ See, for example, Panel Report, para. 7.277.

²⁰ See, for example, Panel Report, paras. 7.278, 7.289 b., and 8.3 f(ii).

²¹ See, for example, Panel Report, paras. 7.283, 7.285, 7.287, and 7.288.

²² See, for example, Panel Report, para. 7.289 c.

²³ See, for example, Panel Report, paras. 7.283, 7.285, 7.287, 7.288, 7.289 c., 8.3 f.(iii).

- finding that that the MDCCE's reliance on the McLellan Report was improper, and that the MDCCE's overall injury analysis, which was based on that report, was inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.²⁴

14. Accordingly, Morocco requests that the Appellate Body reverse the Panel's findings in, *inter alia*, paragraphs 7.283, 7.285, 7.287, 7.288, 7.289 c., and 8.3 f(iii) of the Panel Report.

²⁴ See, for example, Panel Report, paras. 7.288, 7.289 c., and 8.3 (f)(iii).

ANNEX B

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ANNEX B-1

EXECUTIVE SUMMARY OF MOROCCO'S APPELLANT'S SUBMISSION¹

1. Morocco appeals the Panel Report in *Morocco – Anti-Dumping Measures on Certain Hot-Rolled Steel from Turkey*.² The Panel made serious errors of law and legal interpretation, and failed to make an objective assessment of the matter, in finding that Morocco's anti-dumping determination is inconsistent with the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement").

A. THE PANEL ERRED IN ITS INTERPRETATION AND APPLICATION OF ARTICLE 4.4 OF THE DSU

2. The Panel erred in finding that Turkey's claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement regarding "establishment" and "retardation" fell within its terms of reference. The Panel also erred in finding that Turkey's argument regarding the injury factors under Article 3.4 fell within its terms of reference. Turkey's claims under Articles 3.1 and 3.4 regarding "establishment" and "retardation", and the injury factors, were not subject to consultations and therefore were not properly before the Panel.

3. The fact that Turkey took issue with the MDCCE's finding of unestablishment or determination of retardation, or the alleged failure to address the relevant injury factors, should have been mentioned in the consultations request in order for the request to give an indication of the legal basis for the complaint. This is more so considering that none of the provisions expressly mentioned in Turkey's consultations request refers to "establishment" or "material retardation". Turkey's consultations request also does not refer to the MDCCE's alleged failure "to assess all the relevant injury factors". However, Turkey only made a very generic reference to "Injury/Causation Determination" and to four different provisions under the Anti-Dumping Agreement that contain distinct obligations and do not refer to or provide a legal standard for establishment or retardation, and referred to a narrative that was unrelated to the provisions listed. The mere listing of the legal provisions, together with the reference to "Injury/Causation Determination" without more was insufficient to give an indication of the legal basis of Turkey's claims. What is more, the Panel acknowledged that the narrative actually provided in Turkey's consultations request was unrelated to the claims under Articles 3.1 and 3.4. Such request does not sufficiently indicate the legal basis of the complaint Turkey pursued in its panel request.

4. For these reasons, Morocco respectfully requests that the Appellate Body reverse the Panel's finding, and find that Turkey's claims under Articles 3.1 and 3.4 were not within the Panel's terms of reference. Consequently, Morocco respectfully requests the Appellate Body to reverse all the Panel's substantive findings under these provisions.

B. THE PANEL ERRED UNDER ARTICLE 6.8 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE 11 OF THE DSU IN FINDING THAT THE MDCCE WAS NOT ENTITLED TO RELY ON FACTS AVAILABLE

5. Article 6.8 of the Anti-Dumping Agreement allows the use of facts available in an anti-dumping investigation in certain circumstances. An investigating authority may resort to the facts available where a party: (i) refuses access to necessary information; (ii) otherwise fails to provide necessary information within a reasonable period; or (iii) significantly impedes the investigation.³

6. In the investigation at issue, the MDCCE had to rely on facts available in calculating the dumping margin because of a lack of cooperation by the Turkish producers, Erdemir Group and Colakoglu, in the investigation. During the investigation, the MDCCE determined that the Turkish producers had failed to report a significant part of their export transaction to Morocco in their

¹ Total number of words, 2,442.

² Panel Report, *Morocco – Hot-Rolled Steel (Turkey)* ("Panel Report").

³ Panel Report, *Argentina – Ceramic Tiles*, para. 6.20.

questionnaire responses, which indicated a lack of cooperation.⁴ The two Turkish producers had thus failed to provide necessary information within a reasonable period. On this basis, the MDCCE decided to resort to facts available.⁵ The producers' explanations regarding these sales were not sufficient to demonstrate that they would have in fact reported all their sales.⁶ Therefore, the MDCCE's reliance on facts available was consistent with Article 6.8 of the Anti-Dumping Agreement.

7. The Panel's conclusion under Article 6.8 is based primarily on its finding that the MDCCE did not maintain its determination in the final determination that the Turkish producers had failed to report the relevant export sales.⁷ The Panel's finding is incorrect, as the MDCCE did make an affirmative determination of non-cooperation in the final determination.⁸

8. The Panel also went on to criticize the MDCCE's determination on the grounds that the MDCCE did not "engage meaningfully" with the Turkish producers.⁹ In doing so, the Panel applied an incorrect legal standard under Article 6.8. If the Panel considered that the MDCCE had not communicated sufficiently with interested parties, it should have analyzed the MDCCE's conduct in light of the specific obligations under Annex II. However, the Panel provided no analysis under Annex II. In any case, the Panel's finding is in error as the MDCCE engaged sufficiently with the producers on the issue of unreported sales, and substantiated its finding of the non-reported sales. The MDCCE thoroughly looked into the issue of the unreported sales, and based its finding of non-cooperation on objective assessment of the facts on the record. Furthermore, 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.¹⁰ In making its findings regarding the MDCCE's engagement, the Panel also erred in its appreciation of Morocco's evidence under Article 11 of the DSU. Therefore, Morocco requests the Appellate Body to reverse the Panel's finding that the MDCCE's recourse to facts available was inconsistent with Article 6.8.

C. THE PANEL ERRED UNDER ARTICLE 3.1 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE 11 OF THE DSU IN ITS FINDINGS REGARDING "ESTABLISHMENT"

9. Compliance with Article 3 cannot be assessed in the abstract. A panel cannot assess whether an investigating authority has conducted an objective examination based on positive evidence without knowing what obligation the investigating authority is required to fulfill. In order to assess the objectivity of an assessment, a panel must first know what should be assessed, and what is the standard for such assessment. Whether a determination is based on positive evidence necessarily depends on the elements that need to be established under the relevant treaty provision. However, the Panel did not identify or define the contours of the underlying obligation before conducting its analysis under Article 3.1. On the contrary, it deliberately declined to decide whether the obligation to make a determination of "unestablishment" existed and, as a consequence, also declined to define the contours of such an obligation.¹¹ As a result, it also did not decide what factors an investigating authority should assess in its examination of establishment or whether a particular methodology is required. In other words, the Panel did not explain what obligations, if any, exist on the investigation authority with regard to its "establishment" analysis. As the Panel did not determine what the obligations on the MDCCE were in this context, it also could not determine whether the assessment was done objectively or was based on positive evidence.

10. Because the Panel did not identify any obligation set for the MDCCE's analysis of establishment, it erred in its interpretation and application of Article 3.1. For these reasons, Morocco respectfully requests that the Appellate Body reverse the Panel's finding that Morocco acted inconsistently with Article 3.1 of the Anti-Dumping Agreement in determining that the domestic industry was unestablished.

⁴ Final Determination, Exhibit TUR-11, para. 53; See also, Preliminary Determination, Exhibit TUR-6, Table No. 4

⁵ Draft Final Determination, Exhibit TUR-10, para. 56.

⁶ Final Determination, Exhibit TUR-11, paras. 60-61.

⁷ Panel Report, para. 7.91.

⁸ Final Determination, Exhibit TUR-11, para. 58.

⁹ Panel Report, para. 7.92.

¹⁰ See, Panel Report, *US – Steel Plate*, paras. 7.60-7.62.

¹¹ Panel Report, fn 213 to para 7.148.

11. The Panel also erred under Article 11 of the DSU in finding that the MDCCE's analysis of "establishment" violated the Anti-Dumping Agreement even though the Panel did not find that the Anti-Dumping Agreement requires an investigating authority to determine that the domestic industry is "unestablished". The Panel recognized that the parties disagreed as to whether there exists such an obligation, but decided that it did not need to address that question.¹² The Panel was under an obligation to assess whether or not there exists an obligation in Article 3.1 of the Anti-Dumping Agreement for an investigating authority to determine that the domestic industry is not established. The Panel could not have examined the consistency with Article 3.1 without first having resolved this issue of legal interpretation. Morocco notes that there is nothing in Article 3.1 that suggests that an investigating authority is required to determine whether the domestic industry is "established" in order to rely on the concept of material retardation. Moreover, Turkey's claim that an investigating authority is required to determine that the industry is unestablished was not even based on Article 3.1. In finding that it need not address this question, the Panel acted inconsistently with its obligation to make an objective assessment of the matter under Article 11 of the DSU.

12. As a consequence of reversing the Panel's finding under 3.1 regarding "unestablishment", Morocco requests that the Appellate Body also reverse the Panel's finding 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.

D. THE PANEL ERRED IN FINDING THAT THE MDCCE FAILED TO COMPLY WITH ARTICLES 3.1 AND 3.4 OF THE ANTI-DUMPING AGREEMENT WITH RESPECT TO THE CAPTIVE MARKET

13. The Panel erroneously found that an investigating authority must separately examine and discuss merchant and captive markets for each of the factors listed in Article 3.4 in order to comply with Article 3.1 requirement of an "objective examination".¹³ Neither the text of Anti-Dumping Agreement nor prior Appellate Body statements support the Panel's finding.

14. Article 3.1 requires "an objective examination" that is "based on positive evidence". Article 3.4 lists numerous "economic factors and indices having a bearing on the state of the industry". This includes factors that either do not exist within the captive market or are irrelevant within the context of the captive market. The Panel's interpretation is a mischaracterization of the Appellate Body's previous findings. The Appellate Body has found that, to be consistent with their obligations under Article 3.4, investigating authorities must address all the factors listed thereunder.¹⁴ However, the Appellate Body has not found that an investigating authority must separately address each factor as to the captive and merchant markets.

15. MDCCE's actions are supported by the Appellate Body's statement that "investigating authorities must determine, objectively, and on the basis of positive evidence, the importance to be attached to each potentially relevant factor and the weight to be attached to it" under Article 3.4.¹⁵ In other words, the Appellate Body found that it is up to the investigating authority to weigh the evidence and decide the importance of each potential factor. MDCCE weighed the evidence and found that it was appropriate to exclude the captive market from its analysis. The Panel's interpretation that MDCCE should have examined the captive market under each factor of Article 3.4 fails to take into account how an investigating authority must perform its injury analysis and creates meaningless obligations unsupported by the Agreement. For these reasons, Morocco requests the Appellate Body reverse the Panel's finding that the MDCCE's analysis of the captive market was inconsistent with Articles 3.1 and 3.4.

E. THE PANEL ERRED IN ITS APPLICATION OF ARTICLES 3.1 AND 3.4 OF THE ANTI-DUMPING AGREEMENT IN FINDING THAT THE MDCCE'S RELIANCE ON THE MCLELLAN REPORT WAS IMPROPER

16. To make its assessment of material retardation, the MDCCE compared the projections in the business plan prepared by Maghreb Steel to its actual performance.¹⁶ The business plan had been

¹² Panel Report, fn 213 to para 7.148.

¹³ See Panel Report, para. 7.274.

¹⁴ Appellate Body Report, *Thailand – H-Beams*, paras. 121-128.

¹⁵ Appellate Body Report, *US – Hot Rolled Steel*, para 197.

¹⁶ Preliminary Determination, Exhibit TUR-6, para. 116.

drawn up on the basis of a pre-feasibility report prepared by McLellan.¹⁷ Most of the projections in the McLellan report were accurate and it was thus a reliable basis against which to compare the Maghreb Steel's actual performance.¹⁸ The MDCCE, however, noted that some of the hypotheses were imprecise, and decided to analyse these issues in the light of what had actually taken place, in order to assess the reliability of the plan.¹⁹

17. The Panel faulted the MDCCE for relying on the McLellan report because three of the projections in the report did not turn out to be accurate. The Panel failed to recognize that projections by their very nature cannot be expected to always be accurate. The fact that all of the projections in a report do not turn out to be 100% accurate is not a sufficient basis to invalidate the report, much less to fault an investigating authority for relying on such a report. Faulting the MDCCE for relying on the McLellan report is to subject MDCCE to an impossible standard.

18. In any case, the reasons given by the Panel with respect to each of the three inaccuracies are also unpersuasive. The Panel acknowledged that the MDCCE properly recognized that there were certain shortcomings in the McLellan report and addressed the inaccuracies.²⁰ Importantly, the MDCCE did not simply accept the projections without more, but rather assessed them in light of what actually happened and analysed their appropriateness based on the facts before it.²¹ Therefore, contrary to the Panel's finding, the MDCCE reached its conclusion on the appropriateness of the McLellan report based on an unbiased and objective assessment of the facts.

19. The MDCCE properly considered all the differences in the projections and the actual figures. The MDCCE reached a reasonable conclusion that the differences did not render the business plan unreliable. For these reasons, the Panel erred in finding that the MDCCE improperly relied on the McLellan report. Therefore, Morocco respectfully requests the Appellate Body to reverse the Panel's finding that 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 based on explanations that were not reasoned and adequate. Accordingly, Morocco respectfully requests the Appellate Body to reverse the Panel's finding 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.

¹⁷ Preliminary Determination, Exhibit TUR-6, para. 118.

¹⁸ Final Determination, Exhibit TUR-11, paras. 155-158.

¹⁹ Final Determination, Exhibit TUR-11, para. 159.

²⁰ Final Determination, Exhibit TUR-11, para. 159.

²¹ Final Determination, Exhibit TUR-11, para. 159.

ANNEX B-2

EXECUTIVE SUMMARY OF TURKEY'S APPELLEE'S SUBMISSION¹

1 MOROCCO'S APPEAL OF THE PANEL'S FINDING OF INCONSISTENCY WITH ARTICLE 6.8 OF THE ANTI-DUMPING AGREEMENT

1.1. In the underlying investigation, the Moroccan investigating authority (MDCCE) alleged that there was a shortfall of 10'200 metric tonnes in the reporting by the two investigated Turkish exporters, Erdemir Group and Colakoglu, of their sales of the subject product to Morocco during the period of investigation (PoI). The MDCCE derived this figure by subtracting the 18'800 metric tonnes of sales reported by the Turkish exporters in their questionnaire responses from the figure of 29'000 metric tonnes of sales, which the MDCCE claimed was the total volume of subject imports during the PoI, based on Moroccan official statistics. The MDCCE, therefore, rejected all of the sales data submitted by the two Turkish exporters and determined the dumping margins for these companies by relying solely on "facts available".²

1.2. The Panel stated that "[i]n 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".³ The MDCCE did not, however, make a sufficient determination that the exporters had, in fact, failed to provide information. The Panel also found fault with the MDCCE's "failure to engage meaningfully with the producers on this issue", in order to resolve whether the exporters had actually failed to report any sales.⁴ The Panel thus upheld Turkey's claim "that the MDCCE's recourse to facts available in respect of the producers' alleged failure to report the entirety of their export sales [was] inconsistent with Article 6.8".⁵

1.3. Morocco appealed the Panel's findings on several grounds. As explained below, all of these grounds lack merit, and should be dismissed.

1.4. With respect to ground 1, Morocco disagrees with the Panel's view that "[t]he MDCCE ... did not affirmatively determine that the producers had in fact failed to report particular export sales".⁶ Morocco presents this ground of appeal as "a matter of legal characterization [of the MDCCE's determination] that falls within the scope of appellate review under Article 17.6 of the DSU".⁷ In the alternative, "Morocco considers that the Panel did not conduct an objective assessment of the final determination", and, therefore, "acted inconsistently with its obligations under Article 11 of the DSU".⁸

1.5. Morocco improperly describes this ground as an error in the legal characterization of the MDCCE's Final Determination. This ground of appeal is clearly directed at the Panel's assessment of the content of the Final Determination, i.e. the Panel's appreciation of the record facts. Such assessments are factual in their nature, and may not be reviewed on any basis except under Article 11 of the DSU.⁹

1.6. Furthermore, regarding the Panel's factual assessment of the Final Determination, Morocco has not pointed to any instance where the Panel acted inconsistently with Article 11 of the DSU.

1.7. However, even assuming that Morocco's ground of appeal concerns the legal characterization of the MDCCE's Final Determination, Morocco has not established that the Panel made any legal errors in its assessment of the MDCCE's findings. In finding that the MDCCE's use of facts available

¹ This Executive Summary contains a total of 3,741 words (including footnotes). Turkey's appellee's submission contains a total of 42,142 words (including footnotes).

² Final Determination, Exhibit TUR-11, paras. 52-63.

³ Panel Report, para. 7.91.

⁴ Panel Report, para. 7.92.

⁵ Panel Report, paras. 7.104-7.107.

⁶ Panel Report, para. 7.91.

⁷ Morocco's appellant's submission, para. 65.

⁸ Morocco's appellant's submission, para. 66.

⁹ See, *inter alia*, Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 177.

was not based on any affirmative finding of non-cooperation, or failure to provide information,¹⁰ the Panel found many shortcomings and deficiencies in the MDCCE's investigation.¹¹ The Panel's finding of inconsistency with Article 6.8 should therefore be affirmed.

1.8. With respect to ground 2.1, Morocco considers that "[t]he Panel applied an incorrect legal standard under Article 6.8 in requiring that there be a 'meaningful engagement' before an investigating authority is allowed to resort to facts available".¹² However, rather than "set[ing] out a 'meaningful engagement' requirement",¹³ in its assessment, the Panel addressed in a diligent and comprehensive manner the parties' arguments concerning the MDCCE's conduct of the investigation, and made relevant factual findings to buttress its overall finding of inconsistency with Article 6.8. In any event, Morocco's statement that "there is no specific requirement of 'meaningful engagement' under Article 6.8"¹⁴ is clearly contradicted by the plain wording of Article 6.8, Annex II and WTO case law interpreting these provisions.¹⁵ Thus, Morocco's ground of appeal should be dismissed.

1.9. Morocco appeals certain additional factual findings of the Panel (grounds 2.2-2.5), without, however, specifying the precise legal bases for its appeal. As a preliminary matter, Turkey considers that these grounds of appeal fail to meet the requirements of Rules 20(2)(d) and 21(2)(b) in the Working Procedures for Appellate Review, and, therefore, should be dismissed. In the alternative, should the Appellate Body decide otherwise, Turkey submits that Morocco failed to substantiate these grounds of appeal, by referring to specific legal errors of the Panel.

1.10. With respect to ground 2.2, Morocco states that "the Panel erred in considering that the MDCCE failed to engage sufficiently with the producers on the issue of unreported sales".¹⁶ Morocco, however, omits to mention that, throughout the investigation, the MDCCE did not provide the Turkish exporters with details of the specific sales that it considered were not reported. In these circumstances, the Panel expressed its doubts "regarding the producers' alleged failure to report any additional, unidentified export sales".¹⁷ Likewise, the Panel rejected Morocco's argument that the Turkish producers failed to report the portion of their export sales for which the MDCCE provided documents as an *ex post* explanation.¹⁸ In sum, the Panel reached a reasonable and well-grounded factual finding and Morocco's appeal of this finding should be dismissed.

1.11. With respect to ground 2.3, Morocco submits that the Panel erred in suggesting that "the MDCCE did not have a proper basis to determine that the two producers had themselves failed to report the export sales" as the MDCCE "thoroughly looked into the issue of the unreported sales, and based its finding of non-cooperation on objective assessment of the facts on the record".¹⁹ However, the Panel found that the MDCCE's investigation of the alleged discrepancy was anything but thorough and objective.²⁰ Given that Morocco essentially repeats its arguments made before the Panel, Turkey respectfully requests the Appellate Body to reject Morocco's attempt to re-argue the case.

1.12. With respect to ground 2.4, Morocco submits that the Panel erred in finding that "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".²¹ While Morocco disagrees with the Panel's finding that whether the investigated exporters reported all of their sales could have been easily verified during the verification visits at the exporters, it has not explained why the Panel's finding was incorrect.²² Morocco has failed to establish any error in the Panel's finding.

¹⁰ Panel Report, para. 7.91.

¹¹ Panel Report, paras. 7.92-7.104.

¹² Morocco's appellant's submission, para. 70.

¹³ Morocco's appellant's submission, para. 71.

¹⁴ Morocco's appellant's submission, para. 72.

¹⁵ See, *inter alia*, Appellate Body Report, *US – Hot-Rolled Steel*, paras. 82, 86; Panel Report, *Guatemala – Cement II*, para. 8.251.

¹⁶ Morocco's appellant's submission, paras. 80 and 92.

¹⁷ Panel Report, para. 7.99.

¹⁸ Panel Report, para. 7.97.

¹⁹ Morocco's appellant's submission, paras. 84, 92.

²⁰ Panel Report, paras. 7.97, 7.101, 7.102, footnote 153.

²¹ Morocco's appellant's submission, para. 92.

²² Morocco's appellant's submission, para. 83; Panel Report, para. 7.95.

1.13. With respect to ground 2.5, Morocco submits that "the Panel erred in finding that the MDCCE failed to explain why the [Turkish exporters' alleged] failure to report the sales [amounting to 10,200 MT] tainted the sales data that had been reported".²³ As the Appellate Body and the panels in *US – Steel Plate* and *China – Broiler Products (Article 21.5 – US)* have clarified, if the investigating authority concludes that certain facts that were not reported taint the reliability of the investigated exporter's entire data set, the authority must explain this conclusion in its determinations.²⁴ As confirmed by the Panel, the MDCCE's Final Determination does not contain any such explanation.²⁵ In sum, Morocco failed to establish any error in this part of the Panel's analysis.

1.14. Finally, with respect to ground 3, Morocco appeals the Panel's dismissal of Exhibit MAR-11 (BCI), which, according to Morocco, listed the export sales constituting the alleged discrepancy.²⁶ Morocco fails to identify any legal error that would amount to a violation of Article 11 of the DSU. Morocco merely recasts its arguments, which the Panel has already rejected, and attempts to re-argue the case before the Appellate Body. As is well settled, the mere fact that the Panel disagreed with Morocco's arguments and evidence is insufficient to substantiate an Article 11 claim.²⁷

1.15. For these reasons, Turkey submits that Morocco failed to establish that the Panel erred in its finding of inconsistency with Article 6.8. However, in the event that the Appellate Body reverses this finding, Turkey requests the Appellate Body to complete the legal analysis with respect to its claims under Article 6.8 and Annex II to the Anti-Dumping Agreement, and to find that the MDCCE's use of facts available was inconsistent with these provisions.

2 MOROCCO'S APPEAL OF THE MDCCE'S ANALYSIS OF "ESTABLISHMENT" IN THE INJURY ANALYSIS

2.1. In its analysis of material retardation, the MDCCE conducted a two-step analysis. First, it determined whether the industry was "established". The MDCCE described this first step as "indispensable".²⁸ Second, the MDCCE ascertained whether that establishment was materially retarded.²⁹

2.2. The Panel concluded that Article 3.1 of the Anti-Dumping Agreement can be violated independently when an erroneous finding that the domestic industry is "unestablished" taints the overall injury analysis.³⁰

2.3. Morocco appeals, both as an issue of law and an issue of "applicability" under Article 11 of the DSU, the fact that the Panel allegedly failed to identify any obligation in Article 3 requiring the MDCCE to conduct an analysis of "establishment".

2.4. Article 3.1 requires that "[a] determination of injury" be based on objective examination and positive evidence. Article 3.1 applies not only to the ultimate conclusion of injury but also to each of the necessary intermediate steps leading up to the overall finding of injury. In an injury assessment based on "material retardation of the establishment of an industry", an authority must satisfy itself that the determinations that (1) an industry was "unestablished" and (2) the establishment was "retarded", were based on objective examination and positive evidence.

2.5. The Panel observed that the MDCCE "relied on" its analysis of "establishment" in determining that the appropriate form of injury to be examined was material retardation of the establishment of the domestic industry.³¹ Thus, the Panel correctly concluded that, once the MDCCE had relied on an

²³ Morocco's appellant's submission, paras. 93-94.

²⁴ Appellate Body Report, *Mexico – Anti Dumping Measures on Rice*, paras. 293 (and 289); Panel Report, *US – Steel Plate*, paras. 7.60-7.61, footnote 60; Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.343.

²⁵ Panel Report, para. 7.103.

²⁶ Panel Report, para. 7.101, footnote 153; Morocco's appellant's submission, paras. 97, 102.

²⁷ Appellate Body Report, *China – Rare Earths*, para. 5.227.

²⁸ Final Determination, Exhibit TUR-11, para. 80.

²⁹ Turkey's first written submission, paras. 8.6-8.9 and 9.1-9.5.

³⁰ Panel Report, Footnote 213.

³¹ Panel Report, para. 7.148.

analytical step as a basis for its overall injury determination, it was required to take that step in accordance with Article 3.1.³² The Panel did not commit legal error.

2.6. Morocco further claims, under Article 11 of the DSU, that the Panel made an error of "applicability" by failing to ascertain whether there exists an obligation in Article 3.1 for an investigating authority to determine whether the domestic industry is unestablished.³³

2.7. The Panel assessed whether Article 3.1 *applied* to the MDCCE's analysis of establishment and concluded "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".³⁴ Thus, Article 3.1 is *applicable* to any measure that taints the overall injury analysis. The Panel explicitly addressed the issue of applicability of Article 3.1 to the MDCCE's analysis of "establishment".

2.8. For these reasons, Morocco's appeal should be rejected.

2.9. If, however, the Appellate Body finds that the Panel acted inconsistently with Article 11 of the DSU, Turkey requests the Appellate Body to complete the analysis and find that Article 3.1 imposes obligations for injury analyses in the form of material retardation. If an industry is established, there is nothing to retard anymore. Thus, as a threshold matter, an authority must ensure that an industry is "unestablished" before it assesses whether that establishment has been retarded.

2.10. Turkey thus requests the Appellate Body to uphold the Panel's finding that the MDCCE's "establishment" determination was inconsistent with Article 3.1.³⁵ Similarly, Turkey requests the Appellate Body to uphold the separate Panel's finding that the MDCCE's "establishment" analysis was also inconsistent with Article 3.4.³⁶

3 MOROCCO'S APPEAL REGARDING THE CAPTIVE MARKET IN THE INJURY ANALYSIS

3.1. The MDCCE excluded the captive production from its injury analysis under Article 3.4.³⁷ The Panel agreed that the MDCCE should have assessed the data for the captive market in its overall injury analysis.³⁸ The Panel also found that the MDCCE's explanation for dismissing the significance of the captive market was not objective. The Panel concluded that the MDCCE acted inconsistently with Articles 3.1 and 3.4 in disregarding the captive market in its analysis.³⁹

3.2. On appeal, Morocco raises two arguments.

3.3. First, Morocco argues that "the Panel erroneously concluded that an investigating authority must separately examine and discuss merchant and captive markets for each of the factors listed in Article 3.4".⁴⁰ The Panel recalled the Appellate Body's guidance that Article 3.1 requires that, where an authority undertakes an examination of one part of a domestic industry, it 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.⁴¹

3.4. Morocco claims that there are several factors that may not be relevant to the analysis of the captive market. However, even if that were case, the authority would still be required to evaluate those factors and, if not applicable to the captive market, to say so. Accordingly, no factor may be excluded *a priori* from the analysis of the captive market. Rather, the authority must satisfy itself, on a case-by-case basis, whether each factor is relevant. For this reason, Turkey requests the

³² Panel Report, paras. 7.149 and 7.150.

³³ Morocco's appellant's submission, para. 124.

³⁴ Panel Report, para. 7.151.

³⁵ Panel Report, paras. 7.219 and 8.3.d.

³⁶ Panel Report, paras. 8.3.d and 8.3.e.

³⁷ Preliminary determination, Exhibit TUR-6, para. 11.

³⁸ Panel Report, para. 7.273.

³⁹ Panel Report, paras. 7.278 and 8.3(f)(ii).

⁴⁰ Morocco's appellant's submission, para. 135.

⁴¹ Appellate Body Report, *US – Hot-Rolled Steel*, para. 204. (*italics added*)

Appellate Body to reject Morocco's appeal concerning the Panel's statement that the MDCCE was required to evaluate "each injury factor that formed part of its injury analysis".

3.5. Second, Morocco criticizes the Panel's finding that the MDCCE's explanation that captive sales needed to be excluded from the injury analysis because they do not compete directly with imports was not "satisfactory".⁴² Morocco's appeal effectively requests the Appellate Body to reverse its own rulings in *US – Hot-Rolled Steel* and in *US – Cotton Yarn*, where it emphasized that the fact that the captive production is not in competition with imports is "highly pertinent" to the injury inquiry. Thus, the Panel correctly found that the MDCCE could not properly rely on its assertion that Maghreb Steel's captive production was not in competition with imports as a justification for disregarding the captive production.

3.6. Turkey thus requests the Appellate Body to uphold the Panel's finding concerning the treatment of the captive market.⁴³

4 MOROCCO'S APPEAL REGARDING THE ERRORS IN THE MCLELLAN REPORT IN THE INJURY ANALYSIS

4.1. The MDCCE relied on the projections contained in the MCLELLAN report for purposes of the evaluating the injury factors listed in Article 3.4. However, the MDCCE recognized that at least three critical projections in that report were inaccurate. The Panel found that the MDCCE acted inconsistently with Articles 3.1 and 3.4 by failing to assess the relevance and consequences of those errors.⁴⁴

4.2. First, Morocco argues that the fact "[t]hat some of the projections may have turned out to be inaccurate does not undermine the objectivity of the analysis".⁴⁵ Morocco mischaracterizes the Panel's finding, which was that the MDCCE failed to analyze properly the impact of the inaccuracies, and not the fact that there were inaccuracies. Morocco's argument, if accepted, would mean that the MDCCE could use the MCLELLAN report as a valid benchmark against which to compare the actual performance, even if those inaccuracies had the effect of exacerbating the existence of injury. Morocco's argument should be rejected.

4.3. Second, Morocco criticizes the Panel's analysis of the MDCCE's consideration of each of the three inaccuracies in the MCLELLAN report.

4.4. Regarding the projected increase in demand, Morocco merely repeats the MDCCE's factual findings and states that the MDCCE'S explanations were appropriate. The Panel noted that the inaccuracy in the increase in demand would, "in all likelihood", lead to an overestimation in the projections of certain factors relevant to the injury analysis, such as sales, investment decisions, inventories among others. Morocco fails to explain how the MDCCE considered that the inaccurate increase in demand did not affect the projections for the relevant injury factors.

4.5. Regarding the projected sales of the downstream product, Morocco criticizes the Panel's finding that the MDCCE should have addressed whether the internal consumption of hot-rolled steel remained "unaffected" notwithstanding the inaccuracy in the projected increase in sales of the downstream product.⁴⁶ The projected consumption for hot-rolled steel was used to forecast the performance of several economic factors under Article 3.4. The question, therefore, was whether the projection for hot-rolled steel consumption remained unaffected by the actual decrease in sales of the downstream product even though those sales were projected to increase. As the Panel found, the MDCCE should have assessed whether the error affected the projected hot-rolled steel consumption.

4.6. Regarding the projected slab prices, Morocco argues that the Panel erred in finding that the MDCCE should have investigated what impact this inaccuracy had during the period June 2010 December 2011.⁴⁷ Morocco further argues that the difference in slab prices did not affect

⁴² Morocco's appellant's submission, para. 149.

⁴³ Panel Report, para. 8.3.f(ii).

⁴⁴ Panel Report, para. 7.288.

⁴⁵ Morocco's appellant's submission, para. 165.

⁴⁶ Morocco's appellant's submission, para. 169.

⁴⁷ Morocco's appellant's submission, para. 173.

Maghreb Steel during 2012, after the electric plants were put into operation. However, since steel slab is a raw material used in the production of hot-rolled steel, the inaccurate projected steel slab prices "must have had an impact on business decisions, such as investment and production capacity, among others"⁴⁸, during at least the first 19 months of the period of investigation.

4.7. Turkey requests the Appellate Body to uphold the Panel's findings with respect to the errors identified in the MCLELLAN report.

5 MOROCCO'S APPEAL CONCERNING TURKEY'S CONSULTATIONS REQUEST

5.1. Morocco's appeal concerns the alleged insufficiency of the "legal basis of the complaint" in Turkey's consultations request. Morocco argues that Turkey was required to state in its consultations request that Turkey took issue with the specific MDCCE's analyses of "establishment" and "retardation", as well as the failure to analyze six economic factors listed in Article 3.4 of the Anti-Dumping Agreement.

5.2. Article 4.4 of the DSU contains the requirements of a consultations request. The "legal basis of the complaint" refers to "the claims pertaining to a specific provision of a covered agreement containing the obligation alleged to be violated".⁴⁹ Moreover, the requirement in Article 4.4 of the DSU is to "indicate" the legal basis in the consultations request. Unlike Article 6.2, Article 4.4 does not require a "brief summary" of the legal basis in a consultations request.

5.3. In its consultations request, Turkey "indicated" the legal basis of the complaint in its consultations request: i.e. Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement. Each of these provisions contains a single obligation. Moreover, Turkey's consultations request clearly took issue with the MDCCE's own and only injury determination.

5.4. In its appeal, Morocco also conflates the legal standards applicable to Articles 4.4 and 6.2 of the DSU. Specifically, Morocco seeks to extrapolate the legal standard applicable to the "brief summary" in Article 6.2 to Article 4.4 of the DSU, even though the latter does not contain such a requirement.

5.5. Accordingly, Turkey requests the Appellate Body to uphold the Panel's finding that Articles 3.1 and 3.4 were properly within its terms of reference.⁵⁰

6 REQUEST FOR FINDINGS AND RULINGS

6.1. Turkey requests that the Appellate Body decline Morocco's requests to reverse the Panel's findings of inconsistency with Articles 3.1, 3.4 and 6.8 of the Anti-Dumping Agreement. In addition, Turkey requests the Appellate Body to uphold the Panel's finding that Articles 3.1 and 3.4 were properly within its terms of reference as Turkey satisfied the requirements of Article 4.4 of the DSU regarding its consultations request.

7 REQUEST FOR A SUGGESTION FOR IMPLEMENTATION

7.1. Turkey requests the Appellate Body to suggest that Morocco terminate the anti-dumping duty at issue.

7.2. Regarding the Panel's finding under Article 5.10 of the Anti-Dumping Agreement, Morocco considers that a violation of this provision "would have no real implications for the anti-dumping measure in question".⁵¹ Furthermore, the multiple findings of violation of Articles 3.1, 3.4, 6.8 and 6.9 require, for implementation, the termination of the measure at issue.

7.3. A suggestion by the Appellate Body would help avoid potential Article 21.5 proceedings. This suggestion is necessary because the Appellate Body report would likely be circulated in the course

⁴⁸ Panel Report, para. 7.286.

⁴⁹ Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.80, referring to Appellate Body Report, *EC – Selected Customs Matters*, para. 130.

⁵⁰ Panel Report, para. 7.29.

⁵¹ Morocco's first written submission, para. 58.

of the sunset review investigation. A suggestion would timely assist the parties in furthering the objective of a positive and prompt solution to the dispute.

7.4. Turkey requests the Appellate Body to suggest to Morocco that it terminate the anti-dumping duty at issue.

ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS

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ANNEX C-1

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S THIRD PARTICIPANT'S SUBMISSION¹

1. The European Union agrees with the Panel that an investigating authority is required to engage meaningfully with the producers when doubts arise as to the completeness, accuracy or reliability of the information provided. However, this obligation does not require the investigating authority to tell exporters how to cure defects in their initial replies to questionnaires. Requests for explanations or additional information must be sufficiently clear and precise, taking account of the circumstances of each investigation.
2. The European Union notes that an investigating authority may only make determinations on the basis of facts available if it has observed the provisions of Annex II. Therefore, compliance with all the obligations laid down by those provisions is relevant for the evaluation of a claim of inconsistency with Article 6.8. Since Annex II contains the specific provisions informing the question of whether the necessary information has been provided and whether resort to facts available is justified, the Panel could have chosen to examine first the claims brought under the various paragraphs of Annex II.
3. The European Union submits that investigating authorities may search for missing additional information during on-the-spot verifications at the producers, but are under no obligation to do so. Cooperating producers should provide all relevant sales data during the stages of the investigation preceding the verification.
4. The European Union agrees with the Panel that an investigating authority may consider that a failure to report certain sales taints or renders unusable the sales data that has been reported. When rejecting incomplete data, the investigating authority must provide an appropriate explanation to that effect, focusing specifically on the manner in which the omitted information undermines the reliability of the sales information submitted during the investigation.
5. The European Union considers that, when an investigating authority relies in order to make a determination of injury on findings that are not required by the Anti-Dumping Agreement, those findings must nonetheless be based on positive evidence and an objective examination. Article 3.1 of the Anti-Dumping Agreement requires that an investigating authority base on an objective examination and positive evidence *any of its findings* that form part of the inquiry into the impact of dumped imports on domestic producers. In particular, it is key that the determination that the industry is unestablished, a necessary logical precondition for a finding of retardation, complies with Article 3.1 since an erroneous determination would taint the overall injury analysis.
6. The European Union submits that an investigating authority must consider, in the absence of a satisfactory explanation, all of the Article 3.4 factors in relation to the merchant and captive segments of the domestic market and the domestic market as a whole.

¹ Total words of the submission (including footnotes but excluding the executive summary) = 4,478; total words of the executive summary = 444.

ANNEX C-2

EXECUTIVE SUMMARY OF JAPAN'S THIRD PARTICIPANT'S SUBMISSION¹

1. Japan welcomes this opportunity to present its views to the Appellate Body on three systemic interpretive issues arising in this dispute.
2. First, the consultations process is for the parties to define and delimit the scope of the dispute. The scope of a consultations request is not necessarily identical to the request for panel establishment, because the claims in a panel request constitute a natural evolution of the consultations process.
3. Second, "facts available" under Article 6.8 (incorporating Annex II) of the Anti-Dumping Agreement should be used, not to punish non-cooperation by interested parties, but to replace information that may be missing, in order to arrive at an accurate determination of dumping or injury.
4. Finally, all *Anti-Dumping Agreement* provisions on "injury", including the fifteen factors specified in Article 3.4, apply to a determination of "material retardation". Where a particular factor listed in Article 3.4 is not relevant, that irrelevance must be explained.

¹ Total Number of words, 160.

ANNEX C-3

EXECUTIVE SUMMARY OF THE UNITED STATES' THIRD PARTICIPANT'S SUBMISSION¹

1. The United States welcomes the opportunity to present its views on certain findings raised on appeal by Morocco. In this submission, the United States will present its views on the proper legal interpretation of certain provisions of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") that have been raised in this dispute.

2. The United States' submission addresses Morocco's claims under Articles 3.1 and 6.8 of the AD Agreement, as well as Article 11 of the DSU. First, the United States addresses certain of Morocco's claims concerning the Panel's findings under Article 6.8 of the AD agreement. As set forth below, the United States agrees that the Panel erred in reading an additional obligation into the text of Article 6.8 by finding that the MDCCE failed to "meaningfully engage" with the parties at issue.

3. However, Morocco's appeal concerning the Panel's findings under Article 6.8 of the AD Agreement also raises systemic concerns. Specifically, Morocco's claim under Article 11 of the DSU highlights the burden placed on the Appellate Body and other parties when parties appeal what are clearly factual determinations by a panel through characterizing such determinations as a failure of a panel's obligation to make an "objective assessment" under Article 11 of the DSU. The Appellate Body has an opportunity in this appeal to reconsider how its originally limited approach to review the "objective assessment" of a panel has been seized by appellants to cover practically all factual determinations by a panel. Given the lack of textual basis in the DSU for appellate review of panel fact-finding, the Appellate Body should instead reassert that the proper issues for appeal are limited to issues of law and legal interpretations covered by a panel report.²

4. Furthermore, the United States will also explain that Morocco's appeal under Article 6.8 raises the issue of whether the municipal law of a WTO Member is an issue of law or fact. As the United States has previously stated, the meaning of a Member's municipal law, and certainly the application of a Member's municipal law as in this case, is an issue of fact and not law under the scope of appellate review.

5. The United States will then address Morocco's claim under Article 3.1 of the AD Agreement, and explain that while it disagrees with Morocco that Article 3.1 cannot be breached independently of other obligations under Article 3, a panel may also not assess Article 3.1 in the abstract. Thus, the United States agrees with Morocco that the Panel erred in its interpretation of Article 3.1 by imposing obligations that do not exist in the text of Article 3.1.

¹ Pursuant to the *Guidelines in Respect of Executive Summaries of Written Submissions*, WT/AB/23 (March 11, 2015), the United States indicates that this executive summary contains a total of 485 words, and this U.S. third participant submission (not including the text of the executive summary) contains 8,124 words (including footnotes).

² DSU, Article 17.6 ("An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.").



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

AB-2018-11

Report of the Appellate Body

Addendum

This Addendum contains Annexes A to C to the Report of the Appellate Body circulated as document WT/DS513/AB/R.

The Notice of Appeal and the executive summaries of written submissions contained in this Addendum are attached as they were received from the participants and third participants. The content has not been revised or edited by the Appellate Body, except that paragraph and footnote numbers that did not start at 1 in the original may have been renumbered to do so, and the text may have been formatted in order to adhere to WTO style. The executive summaries do not serve as substitutes for the submissions of the participants and third participants in the Appellate Body's examination of the appeal.

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ANNEX A

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ANNEX A-1*

MOROCCO'S NOTICE OF APPEAL

1. Pursuant to Articles 16.4 and 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Rule 20 of the Working Procedures for Appellate Review (WT/AB/WP/6, 16 August 2010) ("Working Procedures"), Morocco hereby notifies the Dispute Settlement Body ("DSB") of its decision to appeal certain issues of law and legal interpretations in the Panel Report in *Morocco — Anti-Dumping Measures on Certain Hot-Rolled Steel from Turkey* (WT/DS513/R) ("Panel Report").
2. Pursuant to Rules 21 of the Working Procedures, Morocco files this Notice of Appeal together with its Appellant Submission with the Appellate Body Secretariat.
3. Pursuant to Rule 20(2)(d)(iii) of the Working Procedures, this Notice of Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to Morocco's ability to rely on other paragraphs of the Panel Report in its appeal.
4. Morocco seeks review by the Appellate Body of the Panel's findings regarding its terms of reference. In particular, the Panel erred in finding that Turkey's claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement fell within its terms of reference.¹ Accordingly, Morocco requests that the Appellate Body reverse the Panel's findings in, *inter alia*, paragraphs 7.27-7.29 and 7.66, and find that Turkey's claims under Articles 3.1 and 3.4 were not within the Panel's terms of reference. Morocco additionally requests the Appellate Body to reverse all of the Panel's substantive findings under Articles 3.1 and 3.4 of the Anti-Dumping Agreement, including, *inter alia*, the findings in paragraphs 7.166, 7.175, 7.191, 7.198, 7.207, 7.218, 7.219, 7.222, 7.235, 7.245, 7.250, 7.254, 7.262, 7.274, 7.277, 7.278, 7.283, 7.285, 7.287, 7.288, 7.289, and 8.3 d-f.
5. Morocco seeks review by the Appellate Body of the Panel's findings under Article 6.8 of the Anti-Dumping Agreement. The Panel erred in the interpretation and application of Article 6.8, and also failed to make an objective assessment of the matter, including an objective assessment of the facts of the case, under Article 11 of the DSU. The Panel's errors include, *inter alia*:
 - finding that the MDCCE had not made an affirmative determination of non-cooperation in the final determination.² The Panel also acted inconsistently with Article 11 of the DSU in reaching its finding;
 - finding that the MDCCE was required to "engage meaningfully" with the producers and that the MDCCE failed to do so;³
 - finding that 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;⁴
 - finding that the MDCCE did not have a proper basis to determine that the two producers had themselves failed to report the export sales;⁵ and,
 - finding that MDCCE could not reject and replace all the sales information that the producers had reported.⁶

* This document, dated 23 November 2018, was circulated to Members as document WT/DS513/5.

¹ See, for example, Panel Report, para. 7.29.

² See, for example, Panel Report, para. 7.91.

³ See, for example, Panel Report, paras. 7.92, 7.93, 7.99, and 7.101.

⁴ See, For example, Panel Report, paras. 7.94-7.95.

⁵ See, for example, Panel Report, paras. 7.95, 7.97, 7.99, 7.100, 7.101, and 7.102.

⁶ See, for example, Panel Report, para. 7.103.

6. Morocco also seeks review by the Appellate Body of the Panel's treatment of Exhibit MAR-11 (BCI) in the context of the Panel's assessment of Turkey's claim under Article 6.8 of the Anti-Dumping Agreement. The Panel's treatment of MAR-11 is not consistent with the obligation under Article 11 of the DSU to make an objective assessment of the matter, including an objective assessment of the facts of the case.⁷

7. As a result of the errors indicated in paragraphs 5 and 6 above, Morocco requests that the Appellate Body reverse the Panel's findings, *inter alia*, in paragraphs 7.92, 7.93, 7.94, 7.95, 7.97, 7.99, 7.100, 7.101, 7.102, 7.103, 7.104, 7.107, and 8.3 b., that the MDCCE's recourse to facts available in respect of the producers' alleged failure to report the entirety of their export sales was inconsistent with Article 6.8.

8. Morocco seeks review by the Appellate Body of the Panel's findings under Article 3.1 of the Anti-Dumping Agreement. The Panel erred in the interpretation and application of Article 3.1, and also failed to make an objective assessment of the matter under Article 11 of the DSU. The Panel's errors include:

- finding 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;⁸
- finding that it need not rule on 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;⁹
- undertaking an assessment and making findings under Article 3.1 in the abstract without regard to whether an obligation to determine "unestablishment" exists or the contours of that obligation;¹⁰
- finding that the MDCCE did not assess, based on positive evidence and an objective examination, whether the domestic industry was established;¹¹
- finding that the MDCCE did not properly examine the question of the domestic industry's establishment;¹²
- finding that the MDCCE acted inconsistently with Article 3.1 of the Anti-Dumping Agreement in determining that the domestic industry was unestablished;¹³ and
- additionally, the Panel acted inconsistently with Article 11 of the DSU in finding that the MDCCE's analysis of "establishment" violated the Anti-Dumping Agreement without finding that the Anti-Dumping Agreement requires an investigating authority to determine that the domestic industry is "unestablished".¹⁴ In reaching this finding, the Panel failed to make an objective assessment of the matter, including an objective assessment of the applicability of and conformity with the relevant covered agreements.

9. Based on the above, Morocco requests that the Appellate Body reverse the Panel's findings in, *inter alia*, footnote 213 to paragraph 7.148 and paragraphs 7.148, 7.151, 7.166, 7.175, 7.191, 7.198, 7.207, 7.218, 7.219, and 8.3 d. of the Panel Report. Morocco also requests that the Appellate Body find that the Panel acted inconsistently with its duty to conduct an objective assessment of the matter under Article 11 of the DSU.

⁷ See, for example, Panel Report, para. 7.101.

⁸ See, for example, Panel Report, paras. 7.148 and 7.151.

⁹ See, for example, Panel Report, fn 213 to para. 7.148.

¹⁰ See, for example, Panel Report, paras. 7.151, 7.166, 7.175, 7.191, 7.198, 7.207, 7.218, 7.219, and 8.3 d.

¹¹ See, for example, Panel Report, para. 7.219.

¹² See, for example, Panel Report, para. 7.219.

¹³ See, for example, Panel Report, paras. 7.166, 7.175, 7.191, 7.198, 7.207, 7.218, 7.219, and 8.3 d.

¹⁴ See, for example, Panel Report, fn. 213 to para. 7.148.

10. Morocco seeks review by the Appellate Body of the Panel's findings under Articles 3.1 and 3.4 of the Anti-Dumping Agreement with respect to "material retardation of the establishment of the domestic industry". The Panel's finding regarding the MDCCE's decision to conduct the injury analysis in the form of "material retardation of the establishment of the domestic industry" is entirely premised on its finding under Article 3.1 regarding "unestablishment".¹⁵ Accordingly, as a consequence of reversing the Panel's finding under 3.1 regarding the finding of "unestablishment"¹⁶, Morocco requests that the Appellate Body also reverse the Panel's findings in, *inter alia*, paragraphs 7.222 and 8.3 e., that the MDCCE acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement by conducting the injury analysis in the form of "material retardation of the establishment of the domestic industry".

11. Morocco seeks review by the Appellate Body of the Panel's findings under Articles 3.1 and 3.4 of the Anti-Dumping Agreement with regard to its assessment of the captive market. The Panel erred in the interpretation and application of Articles 3.1 and 3.4. The Panel's errors include, *inter alia*:

- finding that, 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;¹⁷
- finding 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;¹⁸
- finding that MDCCE's conclusion that 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;¹⁹ and,
- finding 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.²⁰

12. Accordingly, Morocco requests that the Appellate Body reverse the Panel's findings in, *inter alia*, paragraphs 7.273, 7.274, 7.277, 7.278, 7.289 b., and 8.3 f(ii) of the Panel Report.

13. Morocco also seeks review by the Appellate Body of the Panel's interpretation and application of Articles 3.1 and 3.4 of the Anti-Dumping Agreement with regard to its assessment of the McLellan Report. The Panel erred in its interpretation and application of Articles 3.1 and 3.4. The Panel's errors include, *inter alia*:

- faulting the MDCCE for relying on the McLellan report because some of the projections in the report did not turn out to be entirely accurate;²¹
- finding that the MDCCE did not base its injury determination on an objective examination²² because it 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 based on explanations that were not reasoned and adequate;²³ and,

¹⁵ See, for example, Panel Report, para. 7.222 and 8.3 e.

¹⁶ See, for example, Panel Report, paras. 7.166, 7.175, 7.191, 7.198, 7.207, 7.218, 7.219, and 8.3 d.

¹⁷ See, for example, Panel Report, para. 7.274.

¹⁸ See, for example, Panel Report, para. 7.274.

¹⁹ See, for example, Panel Report, para. 7.277.

²⁰ See, for example, Panel Report, paras. 7.278, 7.289 b., and 8.3 f(ii).

²¹ See, for example, Panel Report, paras. 7.283, 7.285, 7.287, and 7.288.

²² See, for example, Panel Report, para. 7.289 c.

²³ See, for example, Panel Report, paras. 7.283, 7.285, 7.287, 7.288, 7.289 c., 8.3 f.(iii).

- finding that that the MDCCE's reliance on the McLellan Report was improper, and that the MDCCE's overall injury analysis, which was based on that report, was inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.²⁴

14. Accordingly, Morocco requests that the Appellate Body reverse the Panel's findings in, *inter alia*, paragraphs 7.283, 7.285, 7.287, 7.288, 7.289 c., and 8.3 f(iii) of the Panel Report.

²⁴ See, for example, Panel Report, paras. 7.288, 7.289 c., and 8.3 (f)(iii).

ANNEX B

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ANNEX B-1

EXECUTIVE SUMMARY OF MOROCCO'S APPELLANT'S SUBMISSION¹

1. Morocco appeals the Panel Report in *Morocco – Anti-Dumping Measures on Certain Hot-Rolled Steel from Turkey*.² The Panel made serious errors of law and legal interpretation, and failed to make an objective assessment of the matter, in finding that Morocco's anti-dumping determination is inconsistent with the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement").

A. THE PANEL ERRED IN ITS INTERPRETATION AND APPLICATION OF ARTICLE 4.4 OF THE DSU

2. The Panel erred in finding that Turkey's claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement regarding "establishment" and "retardation" fell within its terms of reference. The Panel also erred in finding that Turkey's argument regarding the injury factors under Article 3.4 fell within its terms of reference. Turkey's claims under Articles 3.1 and 3.4 regarding "establishment" and "retardation", and the injury factors, were not subject to consultations and therefore were not properly before the Panel.

3. The fact that Turkey took issue with the MDCCE's finding of unestablishment or determination of retardation, or the alleged failure to address the relevant injury factors, should have been mentioned in the consultations request in order for the request to give an indication of the legal basis for the complaint. This is more so considering that none of the provisions expressly mentioned in Turkey's consultations request refers to "establishment" or "material retardation". Turkey's consultations request also does not refer to the MDCCE's alleged failure "to assess all the relevant injury factors". However, Turkey only made a very generic reference to "Injury/Causation Determination" and to four different provisions under the Anti-Dumping Agreement that contain distinct obligations and do not refer to or provide a legal standard for establishment or retardation, and referred to a narrative that was unrelated to the provisions listed. The mere listing of the legal provisions, together with the reference to "Injury/Causation Determination" without more was insufficient to give an indication of the legal basis of Turkey's claims. What is more, the Panel acknowledged that the narrative actually provided in Turkey's consultations request was unrelated to the claims under Articles 3.1 and 3.4. Such request does not sufficiently indicate the legal basis of the complaint Turkey pursued in its panel request.

4. For these reasons, Morocco respectfully requests that the Appellate Body reverse the Panel's finding, and find that Turkey's claims under Articles 3.1 and 3.4 were not within the Panel's terms of reference. Consequently, Morocco respectfully requests the Appellate Body to reverse all the Panel's substantive findings under these provisions.

B. THE PANEL ERRED UNDER ARTICLE 6.8 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE 11 OF THE DSU IN FINDING THAT THE MDCCE WAS NOT ENTITLED TO RELY ON FACTS AVAILABLE

5. Article 6.8 of the Anti-Dumping Agreement allows the use of facts available in an anti-dumping investigation in certain circumstances. An investigating authority may resort to the facts available where a party: (i) refuses access to necessary information; (ii) otherwise fails to provide necessary information within a reasonable period; or (iii) significantly impedes the investigation.³

6. In the investigation at issue, the MDCCE had to rely on facts available in calculating the dumping margin because of a lack of cooperation by the Turkish producers, Erdemir Group and Colakoglu, in the investigation. During the investigation, the MDCCE determined that the Turkish producers had failed to report a significant part of their export transaction to Morocco in their

¹ Total number of words, 2,442.

² Panel Report, *Morocco – Hot-Rolled Steel (Turkey)* ("Panel Report").

³ Panel Report, *Argentina – Ceramic Tiles*, para. 6.20.

questionnaire responses, which indicated a lack of cooperation.⁴ The two Turkish producers had thus failed to provide necessary information within a reasonable period. On this basis, the MDCCE decided to resort to facts available.⁵ The producers' explanations regarding these sales were not sufficient to demonstrate that they would have in fact reported all their sales.⁶ Therefore, the MDCCE's reliance on facts available was consistent with Article 6.8 of the Anti-Dumping Agreement.

7. The Panel's conclusion under Article 6.8 is based primarily on its finding that the MDCCE did not maintain its determination in the final determination that the Turkish producers had failed to report the relevant export sales.⁷ The Panel's finding is incorrect, as the MDCCE did make an affirmative determination of non-cooperation in the final determination.⁸

8. The Panel also went on to criticize the MDCCE's determination on the grounds that the MDCCE did not "engage meaningfully" with the Turkish producers.⁹ In doing so, the Panel applied an incorrect legal standard under Article 6.8. If the Panel considered that the MDCCE had not communicated sufficiently with interested parties, it should have analyzed the MDCCE's conduct in light of the specific obligations under Annex II. However, the Panel provided no analysis under Annex II. In any case, the Panel's finding is in error as the MDCCE engaged sufficiently with the producers on the issue of unreported sales, and substantiated its finding of the non-reported sales. The MDCCE thoroughly looked into the issue of the unreported sales, and based its finding of non-cooperation on objective assessment of the facts on the record. Furthermore, 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.¹⁰ In making its findings regarding the MDCCE's engagement, the Panel also erred in its appreciation of Morocco's evidence under Article 11 of the DSU. Therefore, Morocco requests the Appellate Body to reverse the Panel's finding that the MDCCE's recourse to facts available was inconsistent with Article 6.8.

C. THE PANEL ERRED UNDER ARTICLE 3.1 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE 11 OF THE DSU IN ITS FINDINGS REGARDING "ESTABLISHMENT"

9. Compliance with Article 3 cannot be assessed in the abstract. A panel cannot assess whether an investigating authority has conducted an objective examination based on positive evidence without knowing what obligation the investigating authority is required to fulfill. In order to assess the objectivity of an assessment, a panel must first know what should be assessed, and what is the standard for such assessment. Whether a determination is based on positive evidence necessarily depends on the elements that need to be established under the relevant treaty provision. However, the Panel did not identify or define the contours of the underlying obligation before conducting its analysis under Article 3.1. On the contrary, it deliberately declined to decide whether the obligation to make a determination of "unestablishment" existed and, as a consequence, also declined to define the contours of such an obligation.¹¹ As a result, it also did not decide what factors an investigating authority should assess in its examination of establishment or whether a particular methodology is required. In other words, the Panel did not explain what obligations, if any, exist on the investigation authority with regard to its "establishment" analysis. As the Panel did not determine what the obligations on the MDCCE were in this context, it also could not determine whether the assessment was done objectively or was based on positive evidence.

10. Because the Panel did not identify any obligation set for the MDCCE's analysis of establishment, it erred in its interpretation and application of Article 3.1. For these reasons, Morocco respectfully requests that the Appellate Body reverse the Panel's finding that Morocco acted inconsistently with Article 3.1 of the Anti-Dumping Agreement in determining that the domestic industry was unestablished.

⁴ Final Determination, Exhibit TUR-11, para. 53; See also, Preliminary Determination, Exhibit TUR-6, Table No. 4

⁵ Draft Final Determination, Exhibit TUR-10, para. 56.

⁶ Final Determination, Exhibit TUR-11, paras. 60-61.

⁷ Panel Report, para. 7.91.

⁸ Final Determination, Exhibit TUR-11, para. 58.

⁹ Panel Report, para. 7.92.

¹⁰ See, Panel Report, *US – Steel Plate*, paras. 7.60-7.62.

¹¹ Panel Report, fn 213 to para 7.148.

11. The Panel also erred under Article 11 of the DSU in finding that the MDCCE's analysis of "establishment" violated the Anti-Dumping Agreement even though the Panel did not find that the Anti-Dumping Agreement requires an investigating authority to determine that the domestic industry is "unestablished". The Panel recognized that the parties disagreed as to whether there exists such an obligation, but decided that it did not need to address that question.¹² The Panel was under an obligation to assess whether or not there exists an obligation in Article 3.1 of the Anti-Dumping Agreement for an investigating authority to determine that the domestic industry is not established. The Panel could not have examined the consistency with Article 3.1 without first having resolved this issue of legal interpretation. Morocco notes that there is nothing in Article 3.1 that suggests that an investigating authority is required to determine whether the domestic industry is "established" in order to rely on the concept of material retardation. Moreover, Turkey's claim that an investigating authority is required to determine that the industry is unestablished was not even based on Article 3.1. In finding that it need not address this question, the Panel acted inconsistently with its obligation to make an objective assessment of the matter under Article 11 of the DSU.

12. As a consequence of reversing the Panel's finding under 3.1 regarding "unestablishment", Morocco requests that the Appellate Body also reverse the Panel's finding 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.

D. THE PANEL ERRED IN FINDING THAT THE MDCCE FAILED TO COMPLY WITH ARTICLES 3.1 AND 3.4 OF THE ANTI-DUMPING AGREEMENT WITH RESPECT TO THE CAPTIVE MARKET

13. The Panel erroneously found that an investigating authority must separately examine and discuss merchant and captive markets for each of the factors listed in Article 3.4 in order to comply with Article 3.1 requirement of an "objective examination".¹³ Neither the text of Anti-Dumping Agreement nor prior Appellate Body statements support the Panel's finding.

14. Article 3.1 requires "an objective examination" that is "based on positive evidence". Article 3.4 lists numerous "economic factors and indices having a bearing on the state of the industry". This includes factors that either do not exist within the captive market or are irrelevant within the context of the captive market. The Panel's interpretation is a mischaracterization of the Appellate Body's previous findings. The Appellate Body has found that, to be consistent with their obligations under Article 3.4, investigating authorities must address all the factors listed thereunder.¹⁴ However, the Appellate Body has not found that an investigating authority must separately address each factor as to the captive and merchant markets.

15. MDCCE's actions are supported by the Appellate Body's statement that "investigating authorities must determine, objectively, and on the basis of positive evidence, the importance to be attached to each potentially relevant factor and the weight to be attached to it" under Article 3.4.¹⁵ In other words, the Appellate Body found that it is up to the investigating authority to weigh the evidence and decide the importance of each potential factor. MDCCE weighed the evidence and found that it was appropriate to exclude the captive market from its analysis. The Panel's interpretation that MDCCE should have examined the captive market under each factor of Article 3.4 fails to take into account how an investigating authority must perform its injury analysis and creates meaningless obligations unsupported by the Agreement. For these reasons, Morocco requests the Appellate Body reverse the Panel's finding that the MDCCE's analysis of the captive market was inconsistent with Articles 3.1 and 3.4.

E. THE PANEL ERRED IN ITS APPLICATION OF ARTICLES 3.1 AND 3.4 OF THE ANTI-DUMPING AGREEMENT IN FINDING THAT THE MDCCE'S RELIANCE ON THE MCLELLAN REPORT WAS IMPROPER

16. To make its assessment of material retardation, the MDCCE compared the projections in the business plan prepared by Maghreb Steel to its actual performance.¹⁶ The business plan had been

¹² Panel Report, fn 213 to para 7.148.

¹³ See Panel Report, para. 7.274.

¹⁴ Appellate Body Report, *Thailand – H-Beams*, paras. 121-128.

¹⁵ Appellate Body Report, *US – Hot Rolled Steel*, para 197.

¹⁶ Preliminary Determination, Exhibit TUR-6, para. 116.

drawn up on the basis of a pre-feasibility report prepared by McLellan.¹⁷ Most of the projections in the McLellan report were accurate and it was thus a reliable basis against which to compare the Maghreb Steel's actual performance.¹⁸ The MDCCE, however, noted that some of the hypotheses were imprecise, and decided to analyse these issues in the light of what had actually taken place, in order to assess the reliability of the plan.¹⁹

17. The Panel faulted the MDCCE for relying on the McLellan report because three of the projections in the report did not turn out to be accurate. The Panel failed to recognize that projections by their very nature cannot be expected to always be accurate. The fact that all of the projections in a report do not turn out to be 100% accurate is not a sufficient basis to invalidate the report, much less to fault an investigating authority for relying on such a report. Faulting the MDCCE for relying on the McLellan report is to subject MDCCE to an impossible standard.

18. In any case, the reasons given by the Panel with respect to each of the three inaccuracies are also unpersuasive. The Panel acknowledged that the MDCCE properly recognized that there were certain shortcomings in the McLellan report and addressed the inaccuracies.²⁰ Importantly, the MDCCE did not simply accept the projections without more, but rather assessed them in light of what actually happened and analysed their appropriateness based on the facts before it.²¹ Therefore, contrary to the Panel's finding, the MDCCE reached its conclusion on the appropriateness of the McLellan report based on an unbiased and objective assessment of the facts.

19. The MDCCE properly considered all the differences in the projections and the actual figures. The MDCCE reached a reasonable conclusion that the differences did not render the business plan unreliable. For these reasons, the Panel erred in finding that the MDCCE improperly relied on the McLellan report. Therefore, Morocco respectfully requests the Appellate Body to reverse the Panel's finding that 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 based on explanations that were not reasoned and adequate. Accordingly, Morocco respectfully requests the Appellate Body to reverse the Panel's finding 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.

¹⁷ Preliminary Determination, Exhibit TUR-6, para. 118.

¹⁸ Final Determination, Exhibit TUR-11, paras. 155-158.

¹⁹ Final Determination, Exhibit TUR-11, para. 159.

²⁰ Final Determination, Exhibit TUR-11, para. 159.

²¹ Final Determination, Exhibit TUR-11, para. 159.

ANNEX B-2

EXECUTIVE SUMMARY OF TURKEY'S APPELLEE'S SUBMISSION¹

1 MOROCCO'S APPEAL OF THE PANEL'S FINDING OF INCONSISTENCY WITH ARTICLE 6.8 OF THE ANTI-DUMPING AGREEMENT

1.1. In the underlying investigation, the Moroccan investigating authority (MDCCE) alleged that there was a shortfall of 10'200 metric tonnes in the reporting by the two investigated Turkish exporters, Erdemir Group and Colakoglu, of their sales of the subject product to Morocco during the period of investigation (PoI). The MDCCE derived this figure by subtracting the 18'800 metric tonnes of sales reported by the Turkish exporters in their questionnaire responses from the figure of 29'000 metric tonnes of sales, which the MDCCE claimed was the total volume of subject imports during the PoI, based on Moroccan official statistics. The MDCCE, therefore, rejected all of the sales data submitted by the two Turkish exporters and determined the dumping margins for these companies by relying solely on "facts available".²

1.2. The Panel stated that "[i]n 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".³ The MDCCE did not, however, make a sufficient determination that the exporters had, in fact, failed to provide information. The Panel also found fault with the MDCCE's "failure to engage meaningfully with the producers on this issue", in order to resolve whether the exporters had actually failed to report any sales.⁴ The Panel thus upheld Turkey's claim "that the MDCCE's recourse to facts available in respect of the producers' alleged failure to report the entirety of their export sales [was] inconsistent with Article 6.8".⁵

1.3. Morocco appealed the Panel's findings on several grounds. As explained below, all of these grounds lack merit, and should be dismissed.

1.4. With respect to ground 1, Morocco disagrees with the Panel's view that "[t]he MDCCE ... did not affirmatively determine that the producers had in fact failed to report particular export sales".⁶ Morocco presents this ground of appeal as "a matter of legal characterization [of the MDCCE's determination] that falls within the scope of appellate review under Article 17.6 of the DSU".⁷ In the alternative, "Morocco considers that the Panel did not conduct an objective assessment of the final determination", and, therefore, "acted inconsistently with its obligations under Article 11 of the DSU".⁸

1.5. Morocco improperly describes this ground as an error in the legal characterization of the MDCCE's Final Determination. This ground of appeal is clearly directed at the Panel's assessment of the content of the Final Determination, i.e. the Panel's appreciation of the record facts. Such assessments are factual in their nature, and may not be reviewed on any basis except under Article 11 of the DSU.⁹

1.6. Furthermore, regarding the Panel's factual assessment of the Final Determination, Morocco has not pointed to any instance where the Panel acted inconsistently with Article 11 of the DSU.

1.7. However, even assuming that Morocco's ground of appeal concerns the legal characterization of the MDCCE's Final Determination, Morocco has not established that the Panel made any legal errors in its assessment of the MDCCE's findings. In finding that the MDCCE's use of facts available

¹ This Executive Summary contains a total of 3,741 words (including footnotes). Turkey's appellee's submission contains a total of 42,142 words (including footnotes).

² Final Determination, Exhibit TUR-11, paras. 52-63.

³ Panel Report, para. 7.91.

⁴ Panel Report, para. 7.92.

⁵ Panel Report, paras. 7.104-7.107.

⁶ Panel Report, para. 7.91.

⁷ Morocco's appellant's submission, para. 65.

⁸ Morocco's appellant's submission, para. 66.

⁹ See, *inter alia*, Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 177.

was not based on any affirmative finding of non-cooperation, or failure to provide information,¹⁰ the Panel found many shortcomings and deficiencies in the MDCCE's investigation.¹¹ The Panel's finding of inconsistency with Article 6.8 should therefore be affirmed.

1.8. With respect to ground 2.1, Morocco considers that "[t]he Panel applied an incorrect legal standard under Article 6.8 in requiring that there be a 'meaningful engagement' before an investigating authority is allowed to resort to facts available".¹² However, rather than "set[ing] out a 'meaningful engagement' requirement",¹³ in its assessment, the Panel addressed in a diligent and comprehensive manner the parties' arguments concerning the MDCCE's conduct of the investigation, and made relevant factual findings to buttress its overall finding of inconsistency with Article 6.8. In any event, Morocco's statement that "there is no specific requirement of 'meaningful engagement' under Article 6.8"¹⁴ is clearly contradicted by the plain wording of Article 6.8, Annex II and WTO case law interpreting these provisions.¹⁵ Thus, Morocco's ground of appeal should be dismissed.

1.9. Morocco appeals certain additional factual findings of the Panel (grounds 2.2-2.5), without, however, specifying the precise legal bases for its appeal. As a preliminary matter, Turkey considers that these grounds of appeal fail to meet the requirements of Rules 20(2)(d) and 21(2)(b) in the Working Procedures for Appellate Review, and, therefore, should be dismissed. In the alternative, should the Appellate Body decide otherwise, Turkey submits that Morocco failed to substantiate these grounds of appeal, by referring to specific legal errors of the Panel.

1.10. With respect to ground 2.2, Morocco states that "the Panel erred in considering that the MDCCE failed to engage sufficiently with the producers on the issue of unreported sales".¹⁶ Morocco, however, omits to mention that, throughout the investigation, the MDCCE did not provide the Turkish exporters with details of the specific sales that it considered were not reported. In these circumstances, the Panel expressed its doubts "regarding the producers' alleged failure to report any additional, unidentified export sales".¹⁷ Likewise, the Panel rejected Morocco's argument that the Turkish producers failed to report the portion of their export sales for which the MDCCE provided documents as an *ex post* explanation.¹⁸ In sum, the Panel reached a reasonable and well-grounded factual finding and Morocco's appeal of this finding should be dismissed.

1.11. With respect to ground 2.3, Morocco submits that the Panel erred in suggesting that "the MDCCE did not have a proper basis to determine that the two producers had themselves failed to report the export sales" as the MDCCE "thoroughly looked into the issue of the unreported sales, and based its finding of non-cooperation on objective assessment of the facts on the record".¹⁹ However, the Panel found that the MDCCE's investigation of the alleged discrepancy was anything but thorough and objective.²⁰ Given that Morocco essentially repeats its arguments made before the Panel, Turkey respectfully requests the Appellate Body to reject Morocco's attempt to re-argue the case.

1.12. With respect to ground 2.4, Morocco submits that the Panel erred in finding that "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".²¹ While Morocco disagrees with the Panel's finding that whether the investigated exporters reported all of their sales could have been easily verified during the verification visits at the exporters, it has not explained why the Panel's finding was incorrect.²² Morocco has failed to establish any error in the Panel's finding.

¹⁰ Panel Report, para. 7.91.

¹¹ Panel Report, paras. 7.92-7.104.

¹² Morocco's appellant's submission, para. 70.

¹³ Morocco's appellant's submission, para. 71.

¹⁴ Morocco's appellant's submission, para. 72.

¹⁵ See, *inter alia*, Appellate Body Report, *US – Hot-Rolled Steel*, paras. 82, 86; Panel Report, *Guatemala – Cement II*, para. 8.251.

¹⁶ Morocco's appellant's submission, paras. 80 and 92.

¹⁷ Panel Report, para. 7.99.

¹⁸ Panel Report, para. 7.97.

¹⁹ Morocco's appellant's submission, paras. 84, 92.

²⁰ Panel Report, paras. 7.97, 7.101, 7.102, footnote 153.

²¹ Morocco's appellant's submission, para. 92.

²² Morocco's appellant's submission, para. 83; Panel Report, para. 7.95.

1.13. With respect to ground 2.5, Morocco submits that "the Panel erred in finding that the MDCCE failed to explain why the [Turkish exporters' alleged] failure to report the sales [amounting to 10,200 MT] tainted the sales data that had been reported".²³ As the Appellate Body and the panels in *US – Steel Plate* and *China – Broiler Products (Article 21.5 – US)* have clarified, if the investigating authority concludes that certain facts that were not reported taint the reliability of the investigated exporter's entire data set, the authority must explain this conclusion in its determinations.²⁴ As confirmed by the Panel, the MDCCE's Final Determination does not contain any such explanation.²⁵ In sum, Morocco failed to establish any error in this part of the Panel's analysis.

1.14. Finally, with respect to ground 3, Morocco appeals the Panel's dismissal of Exhibit MAR-11 (BCI), which, according to Morocco, listed the export sales constituting the alleged discrepancy.²⁶ Morocco fails to identify any legal error that would amount to a violation of Article 11 of the DSU. Morocco merely recasts its arguments, which the Panel has already rejected, and attempts to re-argue the case before the Appellate Body. As is well settled, the mere fact that the Panel disagreed with Morocco's arguments and evidence is insufficient to substantiate an Article 11 claim.²⁷

1.15. For these reasons, Turkey submits that Morocco failed to establish that the Panel erred in its finding of inconsistency with Article 6.8. However, in the event that the Appellate Body reverses this finding, Turkey requests the Appellate Body to complete the legal analysis with respect to its claims under Article 6.8 and Annex II to the Anti-Dumping Agreement, and to find that the MDCCE's use of facts available was inconsistent with these provisions.

2 MOROCCO'S APPEAL OF THE MDCCE'S ANALYSIS OF "ESTABLISHMENT" IN THE INJURY ANALYSIS

2.1. In its analysis of material retardation, the MDCCE conducted a two-step analysis. First, it determined whether the industry was "established". The MDCCE described this first step as "indispensable".²⁸ Second, the MDCCE ascertained whether that establishment was materially retarded.²⁹

2.2. The Panel concluded that Article 3.1 of the Anti-Dumping Agreement can be violated independently when an erroneous finding that the domestic industry is "unestablished" taints the overall injury analysis.³⁰

2.3. Morocco appeals, both as an issue of law and an issue of "applicability" under Article 11 of the DSU, the fact that the Panel allegedly failed to identify any obligation in Article 3 requiring the MDCCE to conduct an analysis of "establishment".

2.4. Article 3.1 requires that "[a] determination of injury" be based on objective examination and positive evidence. Article 3.1 applies not only to the ultimate conclusion of injury but also to each of the necessary intermediate steps leading up to the overall finding of injury. In an injury assessment based on "material retardation of the establishment of an industry", an authority must satisfy itself that the determinations that (1) an industry was "unestablished" and (2) the establishment was "retarded", were based on objective examination and positive evidence.

2.5. The Panel observed that the MDCCE "relied on" its analysis of "establishment" in determining that the appropriate form of injury to be examined was material retardation of the establishment of the domestic industry.³¹ Thus, the Panel correctly concluded that, once the MDCCE had relied on an

²³ Morocco's appellant's submission, paras. 93-94.

²⁴ Appellate Body Report, *Mexico – Anti Dumping Measures on Rice*, paras. 293 (and 289); Panel Report, *US – Steel Plate*, paras. 7.60-7.61, footnote 60; Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.343.

²⁵ Panel Report, para. 7.103.

²⁶ Panel Report, para. 7.101, footnote 153; Morocco's appellant's submission, paras. 97, 102.

²⁷ Appellate Body Report, *China – Rare Earths*, para. 5.227.

²⁸ Final Determination, Exhibit TUR-11, para. 80.

²⁹ Turkey's first written submission, paras. 8.6-8.9 and 9.1-9.5.

³⁰ Panel Report, Footnote 213.

³¹ Panel Report, para. 7.148.

analytical step as a basis for its overall injury determination, it was required to take that step in accordance with Article 3.1.³² The Panel did not commit legal error.

2.6. Morocco further claims, under Article 11 of the DSU, that the Panel made an error of "applicability" by failing to ascertain whether there exists an obligation in Article 3.1 for an investigating authority to determine whether the domestic industry is unestablished.³³

2.7. The Panel assessed whether Article 3.1 *applied* to the MDCCE's analysis of establishment and concluded "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".³⁴ Thus, Article 3.1 is *applicable* to any measure that taints the overall injury analysis. The Panel explicitly addressed the issue of applicability of Article 3.1 to the MDCCE's analysis of "establishment".

2.8. For these reasons, Morocco's appeal should be rejected.

2.9. If, however, the Appellate Body finds that the Panel acted inconsistently with Article 11 of the DSU, Turkey requests the Appellate Body to complete the analysis and find that Article 3.1 imposes obligations for injury analyses in the form of material retardation. If an industry is established, there is nothing to retard anymore. Thus, as a threshold matter, an authority must ensure that an industry is "unestablished" before it assesses whether that establishment has been retarded.

2.10. Turkey thus requests the Appellate Body to uphold the Panel's finding that the MDCCE's "establishment" determination was inconsistent with Article 3.1.³⁵ Similarly, Turkey requests the Appellate Body to uphold the separate Panel's finding that the MDCCE's "establishment" analysis was also inconsistent with Article 3.4.³⁶

3 MOROCCO'S APPEAL REGARDING THE CAPTIVE MARKET IN THE INJURY ANALYSIS

3.1. The MDCCE excluded the captive production from its injury analysis under Article 3.4.³⁷ The Panel agreed that the MDCCE should have assessed the data for the captive market in its overall injury analysis.³⁸ The Panel also found that the MDCCE's explanation for dismissing the significance of the captive market was not objective. The Panel concluded that the MDCCE acted inconsistently with Articles 3.1 and 3.4 in disregarding the captive market in its analysis.³⁹

3.2. On appeal, Morocco raises two arguments.

3.3. First, Morocco argues that "the Panel erroneously concluded that an investigating authority must separately examine and discuss merchant and captive markets for each of the factors listed in Article 3.4".⁴⁰ The Panel recalled the Appellate Body's guidance that Article 3.1 requires that, where an authority undertakes an examination of one part of a domestic industry, it 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.⁴¹

3.4. Morocco claims that there are several factors that may not be relevant to the analysis of the captive market. However, even if that were case, the authority would still be required to evaluate those factors and, if not applicable to the captive market, to say so. Accordingly, no factor may be excluded *a priori* from the analysis of the captive market. Rather, the authority must satisfy itself, on a case-by-case basis, whether each factor is relevant. For this reason, Turkey requests the

³² Panel Report, paras. 7.149 and 7.150.

³³ Morocco's appellant's submission, para. 124.

³⁴ Panel Report, para. 7.151.

³⁵ Panel Report, paras. 7.219 and 8.3.d.

³⁶ Panel Report, paras. 8.3.d and 8.3.e.

³⁷ Preliminary determination, Exhibit TUR-6, para. 11.

³⁸ Panel Report, para. 7.273.

³⁹ Panel Report, paras. 7.278 and 8.3(f)(ii).

⁴⁰ Morocco's appellant's submission, para. 135.

⁴¹ Appellate Body Report, *US – Hot-Rolled Steel*, para. 204. (*italics added*)

Appellate Body to reject Morocco's appeal concerning the Panel's statement that the MDCCE was required to evaluate "each injury factor that formed part of its injury analysis".

3.5. Second, Morocco criticizes the Panel's finding that the MDCCE's explanation that captive sales needed to be excluded from the injury analysis because they do not compete directly with imports was not "satisfactory".⁴² Morocco's appeal effectively requests the Appellate Body to reverse its own rulings in *US – Hot-Rolled Steel* and in *US – Cotton Yarn*, where it emphasized that the fact that the captive production is not in competition with imports is "highly pertinent" to the injury inquiry. Thus, the Panel correctly found that the MDCCE could not properly rely on its assertion that Maghreb Steel's captive production was not in competition with imports as a justification for disregarding the captive production.

3.6. Turkey thus requests the Appellate Body to uphold the Panel's finding concerning the treatment of the captive market.⁴³

4 MOROCCO'S APPEAL REGARDING THE ERRORS IN THE MCLELLAN REPORT IN THE INJURY ANALYSIS

4.1. The MDCCE relied on the projections contained in the MCLELLAN report for purposes of the evaluating the injury factors listed in Article 3.4. However, the MDCCE recognized that at least three critical projections in that report were inaccurate. The Panel found that the MDCCE acted inconsistently with Articles 3.1 and 3.4 by failing to assess the relevance and consequences of those errors.⁴⁴

4.2. First, Morocco argues that the fact "[t]hat some of the projections may have turned out to be inaccurate does not undermine the objectivity of the analysis".⁴⁵ Morocco mischaracterizes the Panel's finding, which was that the MDCCE failed to analyze properly the impact of the inaccuracies, and not the fact that there were inaccuracies. Morocco's argument, if accepted, would mean that the MDCCE could use the MCLELLAN report as a valid benchmark against which to compare the actual performance, even if those inaccuracies had the effect of exacerbating the existence of injury. Morocco's argument should be rejected.

4.3. Second, Morocco criticizes the Panel's analysis of the MDCCE's consideration of each of the three inaccuracies in the MCLELLAN report.

4.4. Regarding the projected increase in demand, Morocco merely repeats the MDCCE's factual findings and states that the MDCCE'S explanations were appropriate. The Panel noted that the inaccuracy in the increase in demand would, "in all likelihood", lead to an overestimation in the projections of certain factors relevant to the injury analysis, such as sales, investment decisions, inventories among others. Morocco fails to explain how the MDCCE considered that the inaccurate increase in demand did not affect the projections for the relevant injury factors.

4.5. Regarding the projected sales of the downstream product, Morocco criticizes the Panel's finding that the MDCCE should have addressed whether the internal consumption of hot-rolled steel remained "unaffected" notwithstanding the inaccuracy in the projected increase in sales of the downstream product.⁴⁶ The projected consumption for hot-rolled steel was used to forecast the performance of several economic factors under Article 3.4. The question, therefore, was whether the projection for hot-rolled steel consumption remained unaffected by the actual decrease in sales of the downstream product even though those sales were projected to increase. As the Panel found, the MDCCE should have assessed whether the error affected the projected hot-rolled steel consumption.

4.6. Regarding the projected slab prices, Morocco argues that the Panel erred in finding that the MDCCE should have investigated what impact this inaccuracy had during the period June 2010 December 2011.⁴⁷ Morocco further argues that the difference in slab prices did not affect

⁴² Morocco's appellant's submission, para. 149.

⁴³ Panel Report, para. 8.3.f(ii).

⁴⁴ Panel Report, para. 7.288.

⁴⁵ Morocco's appellant's submission, para. 165.

⁴⁶ Morocco's appellant's submission, para. 169.

⁴⁷ Morocco's appellant's submission, para. 173.

Maghreb Steel during 2012, after the electric plants were put into operation. However, since steel slab is a raw material used in the production of hot-rolled steel, the inaccurate projected steel slab prices "must have had an impact on business decisions, such as investment and production capacity, among others"⁴⁸, during at least the first 19 months of the period of investigation.

4.7. Turkey requests the Appellate Body to uphold the Panel's findings with respect to the errors identified in the MCLELLAN report.

5 MOROCCO'S APPEAL CONCERNING TURKEY'S CONSULTATIONS REQUEST

5.1. Morocco's appeal concerns the alleged insufficiency of the "legal basis of the complaint" in Turkey's consultations request. Morocco argues that Turkey was required to state in its consultations request that Turkey took issue with the specific MDCCE's analyses of "establishment" and "retardation", as well as the failure to analyze six economic factors listed in Article 3.4 of the Anti-Dumping Agreement.

5.2. Article 4.4 of the DSU contains the requirements of a consultations request. The "legal basis of the complaint" refers to "the claims pertaining to a specific provision of a covered agreement containing the obligation alleged to be violated".⁴⁹ Moreover, the requirement in Article 4.4 of the DSU is to "indicate" the legal basis in the consultations request. Unlike Article 6.2, Article 4.4 does not require a "brief summary" of the legal basis in a consultations request.

5.3. In its consultations request, Turkey "indicated" the legal basis of the complaint in its consultations request: i.e. Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement. Each of these provisions contains a single obligation. Moreover, Turkey's consultations request clearly took issue with the MDCCE's own and only injury determination.

5.4. In its appeal, Morocco also conflates the legal standards applicable to Articles 4.4 and 6.2 of the DSU. Specifically, Morocco seeks to extrapolate the legal standard applicable to the "brief summary" in Article 6.2 to Article 4.4 of the DSU, even though the latter does not contain such a requirement.

5.5. Accordingly, Turkey requests the Appellate Body to uphold the Panel's finding that Articles 3.1 and 3.4 were properly within its terms of reference.⁵⁰

6 REQUEST FOR FINDINGS AND RULINGS

6.1. Turkey requests that the Appellate Body decline Morocco's requests to reverse the Panel's findings of inconsistency with Articles 3.1, 3.4 and 6.8 of the Anti-Dumping Agreement. In addition, Turkey requests the Appellate Body to uphold the Panel's finding that Articles 3.1 and 3.4 were properly within its terms of reference as Turkey satisfied the requirements of Article 4.4 of the DSU regarding its consultations request.

7 REQUEST FOR A SUGGESTION FOR IMPLEMENTATION

7.1. Turkey requests the Appellate Body to suggest that Morocco terminate the anti-dumping duty at issue.

7.2. Regarding the Panel's finding under Article 5.10 of the Anti-Dumping Agreement, Morocco considers that a violation of this provision "would have no real implications for the anti-dumping measure in question".⁵¹ Furthermore, the multiple findings of violation of Articles 3.1, 3.4, 6.8 and 6.9 require, for implementation, the termination of the measure at issue.

7.3. A suggestion by the Appellate Body would help avoid potential Article 21.5 proceedings. This suggestion is necessary because the Appellate Body report would likely be circulated in the course

⁴⁸ Panel Report, para. 7.286.

⁴⁹ Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.80, referring to Appellate Body Report, *EC – Selected Customs Matters*, para. 130.

⁵⁰ Panel Report, para. 7.29.

⁵¹ Morocco's first written submission, para. 58.

of the sunset review investigation. A suggestion would timely assist the parties in furthering the objective of a positive and prompt solution to the dispute.

7.4. Turkey requests the Appellate Body to suggest to Morocco that it terminate the anti-dumping duty at issue.

ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS

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ANNEX C-1

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S THIRD PARTICIPANT'S SUBMISSION¹

1. The European Union agrees with the Panel that an investigating authority is required to engage meaningfully with the producers when doubts arise as to the completeness, accuracy or reliability of the information provided. However, this obligation does not require the investigating authority to tell exporters how to cure defects in their initial replies to questionnaires. Requests for explanations or additional information must be sufficiently clear and precise, taking account of the circumstances of each investigation.
2. The European Union notes that an investigating authority may only make determinations on the basis of facts available if it has observed the provisions of Annex II. Therefore, compliance with all the obligations laid down by those provisions is relevant for the evaluation of a claim of inconsistency with Article 6.8. Since Annex II contains the specific provisions informing the question of whether the necessary information has been provided and whether resort to facts available is justified, the Panel could have chosen to examine first the claims brought under the various paragraphs of Annex II.
3. The European Union submits that investigating authorities may search for missing additional information during on-the-spot verifications at the producers, but are under no obligation to do so. Cooperating producers should provide all relevant sales data during the stages of the investigation preceding the verification.
4. The European Union agrees with the Panel that an investigating authority may consider that a failure to report certain sales taints or renders unusable the sales data that has been reported. When rejecting incomplete data, the investigating authority must provide an appropriate explanation to that effect, focusing specifically on the manner in which the omitted information undermines the reliability of the sales information submitted during the investigation.
5. The European Union considers that, when an investigating authority relies in order to make a determination of injury on findings that are not required by the Anti-Dumping Agreement, those findings must nonetheless be based on positive evidence and an objective examination. Article 3.1 of the Anti-Dumping Agreement requires that an investigating authority base on an objective examination and positive evidence *any of its findings* that form part of the inquiry into the impact of dumped imports on domestic producers. In particular, it is key that the determination that the industry is unestablished, a necessary logical precondition for a finding of retardation, complies with Article 3.1 since an erroneous determination would taint the overall injury analysis.
6. The European Union submits that an investigating authority must consider, in the absence of a satisfactory explanation, all of the Article 3.4 factors in relation to the merchant and captive segments of the domestic market and the domestic market as a whole.

¹ Total words of the submission (including footnotes but excluding the executive summary) = 4,478; total words of the executive summary = 444.

ANNEX C-2

EXECUTIVE SUMMARY OF JAPAN'S THIRD PARTICIPANT'S SUBMISSION¹

1. Japan welcomes this opportunity to present its views to the Appellate Body on three systemic interpretive issues arising in this dispute.

2. First, the consultations process is for the parties to define and delimit the scope of the dispute. The scope of a consultations request is not necessarily identical to the request for panel establishment, because the claims in a panel request constitute a natural evolution of the consultations process.

3. Second, "facts available" under Article 6.8 (incorporating Annex II) of the Anti-Dumping Agreement should be used, not to punish non-cooperation by interested parties, but to replace information that may be missing, in order to arrive at an accurate determination of dumping or injury.

4. Finally, all *Anti-Dumping Agreement* provisions on "injury", including the fifteen factors specified in Article 3.4, apply to a determination of "material retardation". Where a particular factor listed in Article 3.4 is not relevant, that irrelevance must be explained.

¹ Total Number of words, 160.

ANNEX C-3

EXECUTIVE SUMMARY OF THE UNITED STATES' THIRD PARTICIPANT'S SUBMISSION¹

1. The United States welcomes the opportunity to present its views on certain findings raised on appeal by Morocco. In this submission, the United States will present its views on the proper legal interpretation of certain provisions of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") that have been raised in this dispute.

2. The United States' submission addresses Morocco's claims under Articles 3.1 and 6.8 of the AD Agreement, as well as Article 11 of the DSU. First, the United States addresses certain of Morocco's claims concerning the Panel's findings under Article 6.8 of the AD agreement. As set forth below, the United States agrees that the Panel erred in reading an additional obligation into the text of Article 6.8 by finding that the MDCCE failed to "meaningfully engage" with the parties at issue.

3. However, Morocco's appeal concerning the Panel's findings under Article 6.8 of the AD Agreement also raises systemic concerns. Specifically, Morocco's claim under Article 11 of the DSU highlights the burden placed on the Appellate Body and other parties when parties appeal what are clearly factual determinations by a panel through characterizing such determinations as a failure of a panel's obligation to make an "objective assessment" under Article 11 of the DSU. The Appellate Body has an opportunity in this appeal to reconsider how its originally limited approach to review the "objective assessment" of a panel has been seized by appellants to cover practically all factual determinations by a panel. Given the lack of textual basis in the DSU for appellate review of panel fact-finding, the Appellate Body should instead reassert that the proper issues for appeal are limited to issues of law and legal interpretations covered by a panel report.²

4. Furthermore, the United States will also explain that Morocco's appeal under Article 6.8 raises the issue of whether the municipal law of a WTO Member is an issue of law or fact. As the United States has previously stated, the meaning of a Member's municipal law, and certainly the application of a Member's municipal law as in this case, is an issue of fact and not law under the scope of appellate review.

5. The United States will then address Morocco's claim under Article 3.1 of the AD Agreement, and explain that while it disagrees with Morocco that Article 3.1 cannot be breached independently of other obligations under Article 3, a panel may also not assess Article 3.1 in the abstract. Thus, the United States agrees with Morocco that the Panel erred in its interpretation of Article 3.1 by imposing obligations that do not exist in the text of Article 3.1.

¹ Pursuant to the *Guidelines in Respect of Executive Summaries of Written Submissions*, WT/AB/23 (March 11, 2015), the United States indicates that this executive summary contains a total of 485 words, and this U.S. third participant submission (not including the text of the executive summary) contains 8,124 words (including footnotes).

² DSU, Article 17.6 ("An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.").