

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

(WT/DS513)

**THIRD PARTY SUBMISSION OF
THE UNITED STATES OF AMERICA**

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<i>Argentina – Floor Tiles (Panel)</i>	Panel Report, <i>Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy</i> , WT/DS189/R, adopted 5 November 2001
<i>Brazil – Aircraft (AB)</i>	Appellate Body Report, <i>Brazil – Export Financing Programme for Aircraft</i> , WT/DS46/AB/R, adopted 20 August 1999
<i>China – Broiler Products (Panel)</i>	Panel Report, <i>China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States</i> , WT/DS427/R and Add.1, adopted 25 September 2013
<i>China – GOES (AB)</i>	Appellate Body Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/AB/R, adopted 16 November 2012
<i>China – GOES (Panel)</i>	Panel Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/R and Add.1, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R
<i>China – Raw Materials (AB)</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012
<i>Dominican Republic – Cigarettes (AB)</i>	Appellate Body Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/AB/R, adopted 19 May 2005
<i>EC – Bananas III (AB)</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997
<i>EC – Fasteners (China) (AB)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R, adopted 28 July 2011
<i>EC – Large Civil Aircraft (AB)</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R, adopted 1 June 2011

<i>EC – Salmon (Norway) (Panel)</i>	Panel Report, <i>European Communities – Anti-Dumping Measure on Farmed Salmon from Norway</i> , WT/DS337/R, adopted 15 January 2008
<i>EC – Tube or Pipe Fittings (AB)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003
<i>Korea – Beef (AB)</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001
<i>Mexico – Anti-Dumping Measures on Rice (AB)</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/AB/R, adopted 20 December 2005
<i>Mexico – Anti-Dumping Measures on Rice (Panel)</i>	Panel Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report WT/DS295/AB/R
<i>Mexico – Corn Syrup (Article 21.5 – US) (AB)</i>	Appellate Body Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS132/AB/RW, adopted 21 November 2001
<i>Mexico – Olive Oil (Panel)</i>	Panel Report, <i>Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities</i> , WT/DS341/R, adopted 21 October 2008
<i>Thailand – H-Beams (AB)</i>	Appellate Body Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/AB/R, adopted 5 April 2001
<i>Thailand – H-Beams (Panel)</i>	Panel Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R
<i>US – Carbon Steel (AB)</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002

<i>US – Customs Bond Directive (AB)</i>	Appellate Body Report, <i>United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties</i> , WT/DS343/AB/R / WT/DS345/AB/R, adopted 1 August 2008
<i>US – Hot-Rolled Steel (AB)</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001
<i>US – OCTG from Argentina (AB)</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004
<i>US – Steel Plate (Panel)</i>	Panel Report, <i>United States – Anti-Dumping and Countervailing Measures on Steel Plate from India</i> , WT/DS206/R and Corr.1, adopted 29 July 2002
<i>US – Zeroing (EC) (AB)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")</i> , WT/DS294/AB/R, adopted 9 May 2006

I. INTRODUCTION

1. The United States welcomes the opportunity in this proceeding to provide its views of 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.

II. MOROCCO’S CLAIMS REGARDING ARTICLE 4.4 AND ARTICLE 6.2 OF THE DSU

2. Morocco claims that Turkey breached Article 4.4 of the DSU because it improperly expanded the scope of the dispute when it added certain claims to its panel request that were not previously listed as a legal basis for its complaint in the consultation request.¹ In particular, Morocco argues that Turkey’s claims under Article 3, footnote 9, and Articles 6.5, 6.5.1, and 6.9 of the AD Agreement were not listed in the consultation request, were thus not the subject of consultations, and are not within the Panel’s terms of reference.²

3. Morocco also argues that Turkey breached Article 6.2 of the DSU because the Article 6.5 and 6.5.1 claims in its first written submission regarding “good cause” were not contained in Turkey’s panel request.³

4. The United States takes no position on the factual merits of Morocco’s claims. However, the United States offers the following views concerning the legal obligations with respect to Articles 4.4 and 6.2 of the DSU.

5. Article 4 of the DSU contains procedures applicable to consultations while Article 6 sets out the requirements for the establishment of panels. Article 4.7 provides a link between these two stages of a dispute, stating “[i]f the consultations fail to settle a dispute . . . the complaining party may request the establishment of a panel” to consider that dispute. It follows from these provisions, as the Appellate Body has observed, that “Articles 4 and 6 of the DSU . . . set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel.”⁴ As a “prerequisite to panel proceedings,” consultations play a critical role in the dispute settlement process because they “serve the purpose of, *inter alia*, allowing parties to reach a mutually agreed solution, and where no solution is reached, providing the parties an opportunity to ‘define and delimit’ the scope of the dispute between them.”⁵

6. Articles 4.4 and 6.2 set out the requirements for a consultations request and a panel request, respectively, and contain different obligations with respect to the identification of the measures and the legal basis of the claims at issue. Article 4.4 requires “identification of the measures at issue” and “an indication of the legal basis for the complaint,” while Article 6.2

¹ First Written Submission of Morocco (Oct. 9, 2017) (“Morocco’s First Written Submission”), paras. 24-39.

² Morocco’s First Written Submission, para. 31.

³ Morocco’s First Written Submission, paras. 255-260.

⁴ *Brazil – Aircraft (AB)*, para. 131.

⁵ *US – Customs Bond Directive (AB)*, para. 293 (quoting *Mexico – Corn Syrup (Article 21.5 – US) (AB)*, paras. 54, 58).

requires that a complainant “identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.” That is, while each document must identify the “measures at issue,” the standard for a panel request requires more precision (the “specific” measures must be identified). Moreover, while the consultation request may give “an indication of the legal basis,” the panel request requires “a brief summary of the legal basis” and must “present the problem clearly.”

7. The text of Articles 4.4 and 6.2 suggest that the claims set out in each of the consultation request and panel request may not be identical. That is, under Article 4.4, the consultation request must give “an indication” of the legal basis, suggesting a signal in relation to the legal claims.⁶ On the other hand, Article 6.2 requires “a brief summary” of the legal basis, suggesting greater precision that covers the main points of the legal claims.⁷ It would be expected, then, that the precise legal claims set out in a panel request may be further articulated as compared to those set out in the consultations request. Indeed, in *Mexico – Anti-Dumping Measures on Rice*, the Appellate Body observed that, “[t]he claims set out in a panel request may thus be expected to be shaped by, and thereby constitute a natural evolution of, the consultation process.”⁸ There may be some circumstances in which the legal claims are so different as between the panel and consultations requests that questions could be raised whether the dispute has been subject to consultations (DSU Article 4.7). Here, it could be relevant to the Panel’s consideration that consultations had been requested pursuant to the AD Agreement and claims under Articles 3 and 6 had been raised in the consultations request.

8. With respect to Article 6.2, an examination “must be objectively determined on the basis of the panel request as it existed at the time of filing” and be “demonstrated on the face” of the panel request.⁹

9. In other words, if a panel request fails to provide the basis on which “to determine with sufficient clarity what ‘problem’ or ‘problems’ were alleged to have been caused by which measures,” the claimant has “failed to present the legal basis for [the] complaint[] with sufficient clarity to comply with Article 6.2 of the DSU.”¹⁰ A deficient summary of the legal basis of the complaint means that a claim will not fall within a panel’s terms of reference.¹¹

10. Where an article in a covered agreement contains several distinct legal obligations, each capable of being breached, a cursory reference to such an article in a panel request does not reveal which one, or more, of those obligations is at issue. In that circumstance, a complaining party may not have provided the brief summary of the legal basis sufficient to present the

⁶ The dictionary definition of “indication” is “something that indicates or suggests; a sign, a symptom, a hint”. *New Shorter Oxford English Dictionary*, Volume I, p. 1348.

⁷ The dictionary definition of “summary” is “containing the chief points of a matter”. *New Shorter Oxford English Dictionary*, Volume II, p. 3139.

⁸ *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 138.

⁹ *US – Carbon Steel (AB)*, para. 127.

¹⁰ *China – Raw Materials (AB)*, para. 231.

¹¹ See *China – Raw Materials (AB)*, para. 171; *Dominican Republic – Cigarettes (AB)*, para. 120.

problem clearly. And while “[a] party’s later submissions may be referenced where the meanings of the terms used in the panel request are not clear on their face... the content of these subsequent submissions ‘cannot have the effect of curing the failings of a deficient panel request’.”¹²

11. However, Article 6.2 does not require a complaining party to explain in its panel request all the reasons why it considers the measure to have breached the legal provisions at issue. In this respect, the Appellate Body has distinguished between “claims” and “arguments” for purposes of reviewing a panel request in light of the terms of Article 6.2 of the DSU, and has found that Article 6.2 requires claims, but not arguments, to be set forth in the panel request.¹³

12. Therefore, the Panel should examine whether Turkey’s consultation request identified the measures at issue and provided “an indication of the legal basis for the complaint” in accordance with Article 4.4 of the DSU.

13. The Panel should also examine whether Turkey’s panel request contained a summary of the legal basis of its complaint under Articles 6.5 and 6.5.1 with “sufficient clarity” and thus, “present[ed] the problem clearly” in accordance with Article 6.2 of the DSU.

III. TURKEY’S CLAIMS REGARDING ARTICLE 3 OF THE AD AGREEMENT

A. Turkey’s Claims Regarding Footnote 9 of Article 3 of the AD Agreement

14. Turkey claims that the MDCCE’s determination was inconsistent with footnote 9 of Article 3 because it determined the domestic industry to be “unestablished.” Specifically, Turkey argues that the “establishment” of a domestic industry “alludes to an industry being brought into existence, rather than an already producing industry being stable or firm.”¹⁴ For Turkey, “material retardation of the establishment of an industry” could also occur in circumstances “where there has been some production of the like product, but such production has not reached a sufficient level to allow consideration of injury or threat of injury to an existing domestic industry.”¹⁵

15. Morocco does not contest Turkey’s interpretation of the phrase “material retardation of the establishment” of a domestic industry, and notes that Turkey generally agrees with the framework of analysis adopted by the MDCCE.¹⁶ However, Morocco disagrees with Turkey that

¹² *EC – Fasteners (China) (AB)*, para. 562 (quoting *EC – Large Civil Aircraft (AB)*, para. 642); *EC – Bananas III (AB)*, para. 143; *US – Carbon Steel (AB)*, para. 127.

¹³ See *Korea – Beef (AB)*, para. 88; *EC – Bananas III (AB)*, para. 143.

¹⁴ First Written Submission of Turkey (Sep. 11, 2017) (“Turkey’s First Written Submission”), para. 8.27 (emphasis omitted).

¹⁵ Turkey’s First Written Submission, para. 8.27 (citing Judith Czako et al., *A Handbook on Anti-Dumping Investigations* (Cambridge University Press/WTO: Cambridge) (2003) (Exhibit TUR-38), p.276) (emphasis omitted).

¹⁶ Morocco’s First Written Submission, paras. 169-172.

in applying this framework, the MDCCE acted inconsistently with footnote 9 of Article 3 in determining that the domestic industry was “unestablished.”¹⁷

16. Article 3 is entitled “Determination of Injury.” Footnote 9 is appended to the title, and provides the definition of “injury.” Specifically, footnote 9 states:

Under this Agreement the term “injury” shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

Therefore, footnote 9 defines injury to encompass three situations: (1) material injury to a domestic industry, (2) threat of material injury to a domestic industry; or (3) material retardation of the establishment of such an industry.

17. The United States agrees with Turkey that Article 4.1 of the AD Agreement generally defines a “domestic industry” as referring to “the domestic producers as a whole of the like products or to those of them whose collective output of the products constitute a major proportion of the total domestic production of those products.” Article 4.1, however, does not indicate what level of production or other factors an industry must evince to have achieved “establishment” for purposes of Article 3.

18. Turning to the text of footnote 9, the ordinary meaning of the term “establishment” is “[t]he action of establishing; the fact of being established.”¹⁸ The verb to “establish” means to “set up on a permanent secure basis; bring into being, found, (a government, institution, business, etc.)” or to “make stable or firm; strengthen (*lit & fig*).”¹⁹ Therefore, establishment refers to the point at which an industry is set up on a secure basis, brought into being, or made stable or firm.

19. With respect to the phrase “material retardation,” the ordinary meaning of the verb to “retard” means “keep back, delay, hinder; make slow or late; delay the progress, development, or accomplishment of,” “defer, postpone, put off,” “be or become delayed; come, appear, or happen later; undergo retardation.”²⁰ The ordinary meaning of “material” is “serious, important; of consequence.”²¹ Therefore, “material retardation” means a consequential or important delay or hindrance of the development or accomplishment of something.

20. Read together, the ordinary meaning of the terms “material retardation of the establishment of ... an industry” would suggest a [*material*] consequential or important [*retardation*] hindrance or delay of the accomplishment of the [*establishment*] bringing into

¹⁷ Morocco’s First Written Submission, paras. 174-209.

¹⁸ *New Shorter Oxford English Dictionary*, Volume I, p. 853.

¹⁹ *New Shorter Oxford English Dictionary*, Volume I, p. 852.

²⁰ *New Shorter Oxford English Dictionary*, Volume II, p. 2571.

²¹ *New Shorter Oxford English Dictionary*, Volume I, p. 1714.

being, or setting up on a secure basis, of an industry. This reading is consistent with the findings of the panel in *Mexico – Olive Oil*, which considered the issue in the context of Article 16.1 of the *Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”). There, the panel rejected the European Communities’ argument that “establishment” did not refer to the point of starting up a business, but rather to the achievement of a level of maturity.²² Instead, the panel found that, “the ordinary meaning of the term ‘establishment’ in the context of material retardation includes the starting up, or bringing into being or founding, of an industry, which means that an applicant in such a situation may not yet be a domestic industry.”²³

21. Therefore, the “establishment” of a domestic industry can occur either at the point an industry comes into being (for example, by commencing production), or at which it achieves stability. If an investigating authority determines that the domestic industry has not been established, then it may consider whether the performance of the industry reflects normal start-up difficulties or whether the imports of the subject merchandise have materially retarded the establishment of the domestic industry. The United States considers that each of the factors used by the MDCCE in the underlying investigation may be relevant to an investigating authority’s analysis in making findings regarding the “establishment” of a domestic industry.²⁴

B. Turkey’s Claims Regarding Articles 3.1 and 3.4 of the AD Agreement

22. Turkey claims that MDCCE failed to conduct an “objective examination” consistent with footnote 9 of Article 3 and Article 3.1 of the AD Agreement because “the MDCCE incorrectly found the domestic industry was unestablished . . . [and] had no basis to conduct an injury analysis in the form of material retardation”²⁵ Turkey also claims that MDCCE’s determination that the industry was materially retarded was also inconsistent with Articles 3.1 and 3.4 because MDCCE failed to assess all the factors listed in Article 3.4 of the AD Agreement.²⁶

23. Morocco argues that MDCCE properly found the domestic industry to be unestablished consistent with Articles 3.1 and 3.4 of the AD Agreement.²⁷ Specifically, Morocco asserts that its determination was based on positive evidence consistent with Article 3.1.²⁸ Moreover,

²² *Mexico - Olive Oil (Panel)*, para. 7.204.

²³ *Mexico - Olive Oil (Panel)*, para. 7.204.

²⁴ In determining whether a domestic industry is established, an investigating authority may examine several or all of the following criteria: (1) when the domestic industry began production; (2) whether the production has been steady or start-and-stop; (3) the size of domestic production compared to the size of the domestic market as a whole; (4) whether the industry has reached a reasonable “break-even point”; and (5) whether the activities are truly a new industry or merely a new product line of an established industry. See Turkey’s First Written Submission, para. 8.28 (citing to *Antidumping and Countervailing Duty Handbook* (TUR-40)).

²⁵ Turkey’s First Written Submission, para. 8.82.

²⁶ Turkey’s First Written Submission, para. 9.40.

²⁷ Morocco’s First Written Submission, para. 211.

²⁸ Morocco’s First Written Submission, paras. 174-209.

Morocco asserts that in determining that the industry was materially retarded, it analyzed all the factors listed in Article 3.4.²⁹

24. The United States agrees with Turkey that the obligations of Article 3.4 of the AD Agreement must be considered in conjunction with the overarching principles of Article 3.1 of that Agreement.³⁰ Article 3.1 of the AD Agreement provides that:

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

25. Thus, Article 3.1 of the AD Agreement sets forth two overarching obligations that apply to multiple aspects of an authority's injury determination. The first overarching obligation is that the injury determination be based on "positive evidence." The Appellate Body has endorsed a description of "positive evidence" as "evidence that is relevant and pertinent with respect to the issue being decided, and that has the characteristics of being inherently reliable and trustworthy."³¹ The second obligation is that the injury determination involves an "objective examination" of the volume of the dumped imports, their price effects, and their impact on the domestic industry. The Appellate Body has stated that, to be "objective," an injury analysis must be "based on data which provides an accurate and unbiased picture of what it is that one is examining" and be conducted "without favouring the interests of any interested party, or group of interested parties, in the investigation."³² Accordingly, any determinations or findings made in connection with Article 3.4 must be based on "positive evidence" and "involve an objective examination," as required by Article 3.1 of the AD Agreement.

26. Article 3.4 of the AD Agreement sets out an authority's obligation to ascertain the impact of dumped imports on the domestic industry. The article provides that "[t]he examination of the impact of dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry" and enumerates certain factors that an authority must include in its evaluation. The United States observes that Article 3.4 imposes an obligation on the authority to conduct an "examination" of the impact of the dumped imports on the domestic industry. And the text of Article 3.4 expressly requires investigating authorities to examine the "impact" of subject imports on a domestic industry, and not just the state of the industry.

27. As recognized by Article 3.1 of the AD Agreement, subject imports can influence a domestic industry's performance through volume and price effects. Thus, to examine the impact of subject imports on a domestic industry, an authority would need to consider the relationship

²⁹ Morocco's First Written Submission, paras. 228-252.

³⁰ *China – GOES (AB)*, para. 126 (citing *Thailand – H-Beams (AB)*, para. 106).

³¹ *Mexico – Anti-Dumping Measures on Rice (AB)*, paras. 163-164.

³² *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 180; *US – Hot-Rolled Steel (AB)*, para. 193.

between subject imports – including subject import price undercutting, and the price depressing or suppressing effects of subject imports – and the domestic industry’s performance during the period of investigation.

28. This interpretation is supported by the Appellate Body’s observations in *China – GOES*:

Articles 3.4 and 15.4...do not merely require an examination of the state of the domestic industry, but contemplate that an investigating authority must derive an understanding of *the impact of* subject imports on the basis of such an examination. Consequently, Articles 3.4 and 15.4 are concerned with the relationship between subject imports and the state of the domestic industry, and this relationship is analytically akin to the type of link contemplated by the term “the effect of” under Articles 3.2 and 15.2.³³

29. Thus, in examining “the relationship between subject imports and the state of the domestic industry”³⁴ pursuant to Article 3.4 of the AD Agreement, an authority must consider whether changes in the state of the industry are the consequences of subject imports and whether subject imports have explanatory force for the industry’s performance trends. The “examination” contemplated by Article 3.4 must be based on a “thorough evaluation of the state of the industry” and it must “contain a persuasive explanation as to how the evaluation of relevant factors led to the determination of injury.”³⁵

30. The manner in which an authority chooses to articulate the “evaluation” of economic factors may vary. Article 3.4 does not dictate the methodology that should be employed by the authority, or the manner in which the results of this evaluation are to be set out.³⁶ However, the United States observes that the Panel must be able to discern that the authority’s examination of the impact on the domestic industry – an examination that necessarily includes an evaluation of relevant economic factors – is based on positive evidence and an objective examination. If the investigating authority’s factual evaluation was one an unbiased and objective authority could have reached, the Panel should find no breach under the standard of review articulated in Article 17.6(i) of the AD Agreement.

IV. TURKEY’S CLAIMS REGARDING ARTICLE 6 OF THE AD AGREEMENT

A. Turkey’s Claims Regarding Articles 6.5 and 6.5.1 of the AD Agreement

31. Turkey claims that MDCCE acted inconsistently with Article 6.5 of the AD Agreement when it treated the break-even threshold – one of the factors MDCCE evaluated in determining

³³ *China – GOES (AB)*, para. 149.

³⁴ *China – GOES (AB)*, para. 149.

³⁵ *Thailand – H-Beams (Panel)*, para. 7.236.

³⁶ *EC – Tube or Pipe Fittings (AB)*, para. 131. Indeed, in that dispute, an internal “note for the file” setting out the European Commission’s consideration of some of the injury factors listed in Article 3.4 was found to satisfy the requirements of Articles 3.1 and 3.4 of the AD Agreement. *Id.* at paras. 119 and 133.

whether the domestic industry was established – as confidential and failed to “discuss” the “good cause” that warranted treating such information as confidential.³⁷ Turkey also asserts that MDCCE breached its obligation under Article 6.5.1 of the AD Agreement when it did not require the party to submit a non-confidential summary of the information, or to explain why such summary would not be possible.³⁸

32. Morocco first argues that Turkey’s claim with respect to the “good cause” that warranted treating the information as confidential is outside the Panel’s terms of reference because it was not included in the panel request in accordance with Article 6.2 of the DSU.³⁹ Morocco further asserts that it properly treated the break-even threshold as confidential consistent with Articles 6.5 and 6.5.1 of the AD Agreement.⁴⁰

33. The United States focuses its comments below on the interpretation of the relevant legal obligations under Articles 6.5 and 6.5.1 of the AD Agreement. The United States provides above its comments concerning Article 6.2 of the DSU in Section II.

34. The chapeau of Article 6.5 provides:

Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.

35. Additionally, Article 6.5.1 of the AD Agreement states:

The authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

36. These provisions balance the protection of confidential information with the right of parties to be given a full and fair opportunity to see relevant information and defend their

³⁷ Turkey’s First Written Submission, paras. 10.1-10.4.

³⁸ Turkey’s First Written Submission, paras. 10.3-10.4.

³⁹ Morocco’s First Written Submission, paras. 255-260.

⁴⁰ Morocco’s First Written Submission, paras. 262-273.

interests.⁴¹ The United States considers that Article 6.5 requires that investigating authorities ensure the confidential treatment of information. Article 6.5.1 then balances the need to protect confidential information against the disclosure requirements of other Article 6 provisions by requiring that, if an investigating authority accepts confidential information, it shall require that confidential information is summarized in sufficient detail to permit a reasonable understanding of the substance of the information. Such a summary must convey a “reasonable understanding of the substance of the information submitted in confidence.”⁴²

37. Under Article 6.5 of the AD Agreement, investigating authorities must treat as confidential information that is “by nature” confidential or that is provided “on a confidential basis,” and for which “good cause” is shown for such treatment. The Appellate Body in *EC – Fasteners (China)* supported this view when it explained that a party must show good cause for confidential treatment at the time the information is submitted, after which the investigating authority “must objectively assess the ‘good cause’ alleged for confidential treatment, and scrutinize the party’s showing in order to determine whether the submitting party has sufficiently substantiated its request.”⁴³

38. Based on the above, therefore, the Panel should first determine if an interested party designated information as confidential. The Panel should then determine whether an investigating authority that accepted confidential information ensured that a summary of that confidential information was provided to other parties in sufficient detail to permit a reasonable understanding of the substance of the information and allow such parties the ability to adequately defend their interests.

B. Turkey’s Claims Regarding Article 6.8 and Annex II of the AD Agreement

39. Turkey claims that MDCCE breached Article 6.8 and paragraphs 1, 3, 5, 6, and 7 of Annex II of the AD Agreement in making its determination of the dumping margin for the two Turkish exporters under investigation.⁴⁴ Specifically, Turkey argues that the MDCCE acted inconsistently with Article 6.8 by improperly resorting to facts available, rather than relying on the information provided pertaining to the exporters’ sales information.⁴⁵

40. Morocco claims that MDCCE had sufficient reason to conclude that the two Turkish exporters had not provided the necessary information during the investigation, and was justified

⁴¹ See, e.g., AD Agreement, Article 6.2, first sentence (“Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests.”); AD Agreement, Article 6.9, second sentence (“Such disclosure should take place in sufficient time for the parties to defend their interests.”).

⁴² AD Agreement, Article 6.5.1.

⁴³ *EC – Fasteners (China) (AB)*, para. 539.

⁴⁴ Turkey’s First Written Submission, paras. 6-6.127.

⁴⁵ Turkey’s First Written Submission, paras. 6.1.

in resorting to facts available.⁴⁶ Specifically, Morocco argues that the MDCCE explained that the exporters' information was rejected because it was not "verifiable information."⁴⁷

41. Although the United States takes no position on the factual merits of Turkey's claims, it provides the following observations concerning the proper legal interpretation of Article 6.8 and paragraphs 1, 3, 5, 6, and 7 of Annex II of the AD Agreement.

42. Article 6.8 provides that:

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

Article 6.8 thus permits investigating authorities to apply facts otherwise available in cases where an interested party refuses access to, or otherwise does not provide, information that is necessary to the investigation within a reasonable period of time, or significantly impedes the investigation.

43. The provisions of Annex II of the AD Agreement are also relevant to the proper interpretation of Article 6.8. Turkey raises challenges under paragraphs 1, 3, 5, 6, and 7 of Annex II. Paragraph 1 provides that an investigating authority should "specify in detail the information required from any interested party"⁴⁸ and that interested parties "shall be given notice of the information which the authorities require."⁴⁹

44. Paragraph 3 of Annex II to the AD Agreement states that:

All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made.

⁴⁶ Morocco's First Written Submission, para. 81.

⁴⁷ Morocco's First Written Submission, para. 121.

⁴⁸ AD Agreement, Annex II, para. 1.

⁴⁹ *China – GOES (Panel)*, para. 7.384. Paragraph 1 of Annex II of the AD Agreement provides:

As soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response. The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.

45. Thus, investigating authorities “are not entitled to reject information submitted” if that information meets the conditions in paragraph 3 of being “verifiable,” “appropriately submitted so that it can be used without undue difficulties,” and “supplied in a timely fashion.”⁵⁰ Information is verifiable when “the accuracy and reliability of the information can be assessed by an objective process of examination.”⁵¹ “Undue difficulties” are difficulties “beyond what is otherwise the norm in an antidumping investigation.”⁵²

46. Paragraph 5 of Annex II additionally provides that “[e]ven though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability.” The language in the provision stipulates that investigating authorities should not disregard information submitted by interested parties unless there is evidence that the party failed to act to the best of its ability.

47. Paragraph 6 further states that if the evidence or information is not accepted, the supplying party should be informed and “should have the opportunity to provide further explanations within a reasonable period If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determination.”

48. Finally, according to paragraph 7 of Annex II, an investigating authority that relies on information from a secondary source may reach a result “less favourable” to an interested party if that party “does not cooperate and thus relevant information is being withheld” from the authority.⁵³

49. Thus, Annex II has been interpreted to mean that “all the information provided by the parties, even if not ideal in all respects, should to the extent possible be used by the authorities and in case secondary source information is to be used, the authorities should do so with special circumspection.”⁵⁴ Moreover, Article 6.8 applies exclusively to interested parties from whom information is required by competent authorities, and both Article 6.8 and Annex II establish the expectation that competent authorities will use that information to the extent that it can be used.⁵⁵ In this way, Annex II reflects that an investigating authority’s ability to rely on facts potentially less favorable to the interests of a non-cooperating interested party is inherent in the authority’s

⁵⁰ *US – Hot-Rolled Steel (AB)*, para. 81. As in the *Hot-Rolled Steel* case, the fourth condition listed in paragraph 3, that the information is supplied in a medium or computer language requested by the authorities, is not at issue in this dispute.

⁵¹ *US – Steel Plate (Panel)*, para. 7.71 n.67.

⁵² *US – Steel Plate (Panel)*, para. 7.62.

⁵³ See also *US – Hot-Rolled Steel (AB)*, para. 99 (discussing paragraph 7 of Annex II of the AD Agreement, and noting that non-cooperation on the part of an interested party may lead to an outcome that is less favorable to the interested party).

⁵⁴ *Mexico – Anti-Dumping Measures on Rice (Panel)*, para. 7.238. The Appellate Body reinforced this point, indicating that so long as “a respondent acted to the best of its ability, an agency must generally use, in the first instance, the information the respondent did provide, if any.” *Mexico – Anti-Dumping Measures on Rice (AB)*, para 288.

⁵⁵ *US – Zeroing (EC) (AB)*, para. 459.

role in conducting an investigation in accordance with the AD Agreement, provided certain conditions are met.

50. Turkey separately argues that, even if the use of facts available was permissible, the MDCCE was only permitted to use the available facts to replace the specific missing information, as opposed to all submitted sales information.⁵⁶ In the United States' view, it may be appropriate for an investigating authority to fill gaps in the record, if the record otherwise contains usable data and is incomplete with respect to only a discrete category of information. Substitution with respect to all data from the non-cooperating party may be appropriate if, for instance, none of the reported data is reliable or usable because the data contains pervasive and persistent deficiencies, or is unverifiable. This is a determination that will depend on the specific facts and circumstances of a case.⁵⁷

51. With respect to all uses of facts available, the investigating authority must provide a sufficient basis for its application. To the extent that Turkey is alleging that Morocco has insufficiently explained the basis for its application of the facts available, the sufficiency of an investigating authority's explanations is dealt with under the procedural obligations of Article 12 of the AD Agreement, and not Article 6.8.

C. Turkey's Claims Regarding Article 6.9 of the AD Agreement

52. Turkey alleges that Morocco acted inconsistently with Article 6.9 of the AD Agreement by failing to disclose all "essential facts" with respect to its decision to use facts available to determine dumping margins for the Turkish exporters.⁵⁸ In addition, Turkey considers that with respect to the "essential facts" that were disclosed, MDCCE failed to provide "sufficient time" to the Turkish exporters to comment on the disclosures and defend their interests in breach of Article 6.9.⁵⁹ Turkey also claims that the break-even threshold with respect to MDCCE's injury determination was an "essential" fact, and that MDCCE breached Article 6.9 of the AD Agreement by failing to disclose information concerning it in both the preliminary and final determinations.⁶⁰

53. Morocco asserts that the MDCCE disclosed to the interested parties the essential facts consistent with Article 6.9.⁶¹ Moreover, Morocco argues that the MDCCE provided sufficient

⁵⁶ Turkey's First Written Submission, para. 6.107.

⁵⁷ *US – Steel Plate (Panel)*, para. 7.692.

The ...question[] presented in this dispute[] is whether a conclusion that some information submitted fails to satisfy the criteria of paragraph 3 [of Annex II], and thus may be rejected, can in any case justify a decision to reject other information submitted which, if considered in isolation, would satisfy the criteria of paragraph 3. We consider that the answer to this question is yes, in some cases, but that the result in any given case will depend on the specific facts and circumstances of the investigation at hand.

⁵⁸ Turkey's First Written Submission, paras. 7.2, 7.12-7.17.

⁵⁹ Turkey's First Written Submission, paras. 7.2, 7.18.

⁶⁰ Turkey's First Written Submission, paras. 10.5-10.6.

⁶¹ Morocco's First Written Submission, paras. 133-152.

time for the Turkish exporters to defend their interests.⁶² Morocco also argues that “Article 6.9 must be interpreted coherently with Article 6.5, which recognizes that confidential information cannot be disclosed,” and that because the break-even threshold was treated as confidential, the MDCCE was not required to disclose it.⁶³ Further, Morocco contends that non-confidential questionnaire information used to calculate the break-even threshold was available to the parties.⁶⁴

54. Article 6.9 states:

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

55. The meaning of “essential facts” in this context is informed by the description that these facts “form the basis for the decision whether to apply definitive measures” and the requirement that they be disclosed “in sufficient time for the parties to defend their interests.” Indeed, the ability of interested parties to defend their interests lies at the heart of the disclosure obligation of Article 6.9. As the panel in *EC – Salmon (Norway)* stated: “We consider that the purpose of disclosure under Article 6.9 is to provide the interested parties with the necessary information to enable them to comment on the completeness and correctness of the facts being considered by the investigating authority, provide additional information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts.”⁶⁵

56. Absent a full disclosure of the “essential facts” forming the basis for consideration of an underlying dumping determination, it might not be possible for an interested party to identify whether the investigating authority properly considered the factual information before it. In short, failure to provide this information could result in an interested party being unable to defend its interests within the meaning of Article 6.9 because it would not be able to sufficiently identify which issues, if any, are adverse to its interests.⁶⁶

57. As stated by the Appellate Body in *China – GOES*:

[T]he ‘essential facts’ refer to those facts that are...salient for a decision to apply definitive measures, as well as those that are salient for a contrary outcome. An authority must disclose such facts, in a coherent way, so as to permit an interested party to understand the basis for the decision whether or not to apply definitive

⁶² Morocco’s First Written Submission, para. 153.

⁶³ Morocco’s First Written Submission, paras. 276, 278.

⁶⁴ Morocco’s First Written Submission, para. 279.

⁶⁵ *EC – Salmon (Norway)*, para. 7.805.

⁶⁶ *China – GOES (AB)*, para. 240 (“In our view, disclosing the essential facts under consideration pursuant to Articles 6.9 . . . is paramount for ensuring the ability of the parties concerned to defend their interests”).

measures...[D]isclosing the essential facts...is paramount for ensuring the ability of the parties concerned to defend their interests.⁶⁷

58. The panel’s analysis in *China – Broiler Products* provides further guidance regarding “essential facts” that must be disclosed to interested parties. In that dispute, the panel stated that, under Article 6.9, “the ‘essential facts’ underlying the findings and conclusions relating to (dumping, injury, and a causal link) . . . must be disclosed.”⁶⁸

59. Moreover, the second sentence of Article 6.9 provides that the disclosure of essential facts must be “in sufficient time to allow the parties to defend their interests.” Article 6.9, however, does not specify any minimum amount of time that would constitute “sufficient time” for a party to defend its interests. As a panel has previously observed, “Article 6.9 of the AD Agreement does not prescribe the manner in which the authority is to comply with this disclosure obligation.”⁶⁹ Thus, in considering whether the obligation in Article 6.9 has been breached, the analysis should turn on whether, under the specific facts of the dispute, the objective set out in Article 6.9 has been met. Specifically, whether interested parties were able to defend their interests.⁷⁰

60. Accordingly, in evaluating Turkey’s claims under Article 6.9, the Panel should assess whether the MDCCE properly disclosed the essential facts, and whether it provided interested parties with a full opportunity for the defense of their interests.

V. TURKEY’S REQUEST UNDER ARTICLE 19.1 OF THE DSU

61. In the event that the Panel finds Morocco to have acted inconsistently with the AD Agreement, Turkey argues that “the only appropriate and effective way for Morocco to bring its measure into conformity is by revoking the measure forthwith.”⁷¹ Turkey requests the Panel to exercise its authority under Article 19.1 of the DSU to this effect.⁷²

62. Morocco argues that there is no basis for Turkey’s request under Article 19.1 of the DSU.⁷³ Morocco asserts that choice of the means to implement the DSB’s recommendations and rulings belongs to the respondent Member.⁷⁴ Morocco requests the Panel not to make any suggestions regarding how it should implement any possible adverse rulings.⁷⁵

63. Article 19.1 of the DSU provides:

⁶⁷ *China – GOES (AB)*, para. 240.

⁶⁸ *China – Broiler Products (Panel)*, para. 7.86.

⁶⁹ *Argentina – Floor Tiles (Panel)*, para. 6.125.

⁷⁰ *EC – Salmon (Norway) (Panel)*, para. 7.805.

⁷¹ Turkey’s First Written Submission, para. 5.20. *See also* Turkey’s First Written Submission, para. 11.2.

⁷² Turkey’s First Written Submission, para. 5.20.

⁷³ Morocco’s First Written Submission, paras. 281-286.

⁷⁴ Morocco’s First Written Submission, para. 283.

⁷⁵ Morocco’s First Written Submission, paras. 281-286.

Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations. [footnotes omitted]

64. Therefore, when a panel finds a measure to be inconsistent, it “shall” recommend that the Member bring the measure into conformity. A panel also has the authority, but not the obligation (“may”), to “suggest ways in which the Member could implement the recommendations.”⁷⁶

65. Panels have seldom chosen to make suggestions to Members regarding their implementation of recommendations of the DSB. The United States agrees with Morocco that, under the DSU, a Member retains flexibility with respect to how that Member implements the DSB recommendations.⁷⁷ Moreover, Turkey has not identified any particular circumstances in this dispute that would warrant the suggestion it requests under Article 19.1 of the DSU. To the extent the Panel finds that any challenged measure by Morocco is inconsistent with the AD Agreement, however, the Panel must make the mandatory recommendation indicated in Article 19.1, *i.e.*, that the Member concerned bring its measure into conformity with the relevant covered agreement.

VI. CONCLUSION

66. The United States appreciates the opportunity to provide its views in this third-party submission and hopes that its comments will be useful to the Panel.

⁷⁶ DSU, Article 19.1.

⁷⁷ Morocco’s First Written Submission, para. 57.