

**EGYPT – DEFINITIVE ANTI-DUMPING MEASURES ON
STEEL REBAR FROM TURKEY**

Report of the Panel

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I. INTRODUCTION

A. COMPLAINT OF TURKEY

1.1 On 6 November 2000, Turkey requested consultations with Egypt pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("the DSU"), Article XXIII of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), and Article 17.3 of the Agreement on Implementation of Article VI of the GATT 1994 ("the Anti-Dumping Agreement" or "the AD Agreement"), with regard to the definitive anti-dumping measures imposed by Egypt on imports of concrete steel reinforcing bar ("rebar") from Turkey¹.

1.2 On 3-5 December 2000 and 3-4 January 2001, Turkey and Egypt held the requested consultations, but failed to reach a mutually satisfactory resolution of the matter.

1.3 On 3 May 2001, Turkey requested the establishment of a panel to examine the matter².

B. ESTABLISHMENT AND COMPOSITION OF THE PANEL

1.4 At its meeting of 20 June 2001, the Dispute Settlement Body ("the DSB") established a panel in accordance with the request made by Turkey in document WT/DS/211/2 and Corr. 1, and in accordance with Article 6 of the DSU.

1.5 At that meeting, the parties to the dispute also agreed that the Panel should have standard terms of reference. The terms of reference therefore are the following:

"To examine, in the light of the relevant provisions of the covered agreements cited by Turkey in document WT/DS211/2 and Corr.1, the matter referred to the DSB by Turkey in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.6 On 18 July 2001, the parties agreed to the following composition of the Panel:

Chairman: Mr. Peter Palecka

Members: Mr. Daniel Moulis
Mr. Virachai Plasai

1.7 Chile, the European Communities, Japan and the United States reserved their rights to participate in the panel proceedings as third parties.

C. PANEL PROCEEDINGS

1.8 The Panel met with the parties on 27-28 November 2001 and 25-26 February 2002. The Panel met with third parties on 27 November 2001.

1.9 On 21 May 2002, the Panel provided its interim report to the parties (*See* Section VI, *infra*).

¹ WT/DS/211/1.

² WT/DS/211/2 and Corr.1.

II. FACTUAL ASPECTS

2.1 This dispute concerns the imposition of a definitive anti-dumping measure by Egypt on imports of rebar from Turkey, imported under heading 72.14.00.00, and its subheadings, of the Harmonized Tariff Schedule of Egypt.

2.2 On 23 and 26 December 1998, two applications were filed, by Ezz Steel Company ("Al Ezz") and Alexandria National Iron and Steel Company ("Alexandria National") with Egypt's International Trade Policy Department ("the ITPD"), the Egyptian Investigating Authority ("IA"). The applicants alleged that imports of rebar originating in Turkey were being dumped in Egypt and threatened to cause material injury to the domestic industry since the second half of 1998. On 6 February 1999, a notice of initiation of an anti-dumping investigation was published in the Official Gazette of Egypt.

2.3 On 21 October 1999, Egypt published in the Official Gazette a notice concerning the imposition of definitive anti-dumping duties on imports of steel rebar originating in or exported from Turkey. The anti-dumping duties imposed were as follows:

Manufacturer/Exporter	Duty (%)
Habas	22.63
Diler	27
Colakoglu	45
ICDAS	30
IDC	61
Ekinciler	61
Others*	61

*Egypt's published notice states that the "Others" rate was calculated according to the highest rate, and that according to Article 37.3 of the Regulation of Law No 161/1998 Concerning the Protection of the National Economy From the Effect of Injurious Practices in International Trade, should a company wish to commence exporting, the applicable rate would be the highest rate.³

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. TURKEY

3.1 Turkey requests the Panel to find that Egypt's anti-dumping duty investigation and final anti-dumping determination was inconsistent with Article X:3 of the GATT 1994 and with Articles 2.2, 2.4, 3.1, 3.2, 3.4, 3.5, 6.1, 6.2, 6.6, 6.7, and 6.8, and Annex II, paragraphs 1, 3, 5, 6, and 7, and Annex I, paragraph 7 of the Anti-Dumping Agreement, and that as a result the measures nullify and impair the benefits accruing to Turkey under the GATT 1994 and the Anti-Dumping Agreement.

³ Exh. TUR-17, p.4.

B. EGYPT

3.2 Egypt requests the Panel (1) to find that Egypt's anti-dumping measures on imports of rebar from Turkey are in compliance with Egypt's obligations under the GATT 1994 and the Anti-Dumping Agreement, and (2) thus to reject the claims as put forward by Turkey.

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties are set out in their submissions to the Panel. The parties' executive summaries of their submissions are attached to this Report as Annexes (*See List of Annexes, page iv*). Also attached as Annexes are the full texts of the parties' responses to questions posed by the Panel and by the other party.

V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of the third parties, Chile, the European Communities, Japan and the United States, are set out in their submissions to the Panel, the full texts of which are attached to this Report as Annexes 9, 10, 11 and 12, respectively (*See List of Annexes, page iv*).

VI. INTERIM REVIEW

6.1 On 21 May 2002, we submitted our interim report to the parties. Both parties submitted written requests for review of precise aspects of the interim report. Neither party requested an interim review meeting, and neither party submitted written comments on the other party's request for interim review.

A. REQUEST OF TURKEY

1. Claim under Annex II, paragraph 7

6.2 In its request for interim review, Turkey stated that paragraph 7.300 mischaracterized the claim addressed therein as raising only the issue of the estimated rate of inflation in Turkey during the relevant period. Turkey maintains that this claim also raises the issue of arbitrary adjustments to submitted cost data in the context of facts available.

6.3 We have modified paragraph 7.300 to indicate that the estimated rate of inflation is the main issue raised by the claim. We note that the second aspect identified by Turkey, is addressed in paragraph 7.303, which we have not modified. Finally, we have modified paragraph 7.305 to take into account the second aspect of Turkey's claim.

2. Claim under Article 2.4

6.4 In its request for interim review, Turkey questioned our characterization in paragraph 7.384 of the significance of references in certain companies' anti-dumping questionnaire responses to the treatment of credit costs in their cost accounting records.

6.5 We have modified paragraph 7.384 to remove the characterization referred to by Turkey.

3. Claim under Articles 2.2.1.1 and 2.2.2

6.6 In its request for interim review, Turkey questioned the accuracy of the characterization in paragraph 7.423 of the IA's request for information concerning the issue of interest income offset, and of the responses of certain companies to that request. We have modified the punctuation of the sentence in question, and added a footnote, to clarify the nature of the information request referred to

in that paragraph. We also have modified paragraph 7.426 to refer to the point in the investigation at which the question of the relationship to production of interest income arose and how it was addressed by the respondent companies.

B. REQUEST OF EGYPT

6.7 In its request for interim review, Egypt identified certain erroneous references, in paragraphs 7.250 through 7.252 to two of the companies that were respondents in the anti-dumping investigation. We have modified these paragraphs to correct these errors.

C.

VII. FINDINGS

A. INTRODUCTION

7.1 Throughout these proceedings we have found ourselves confronted by having to address the relationship between, on the one hand, what an investigating authority is obligated by the provisions of the Anti-Dumping Agreement to do when conducting an anti-dumping investigation and making the required determinations, and on the other hand, what interested parties should themselves contribute to the process of the investigation, in the way of evidence or argumentation, for issues of concern to them to be considered and taken into account during the course of the investigation and in the determinations made by the relevant authorities.

7.2 We note in this respect that the AD Agreement appears to impose two types of procedural obligations on an investigating authority, namely, on the one hand, those that are stipulated explicitly and in detail, and which have to be performed in a particular way in every investigation, and, on the other hand, those that establish certain due process or procedural principles, but leave to the discretion of the investigating authority exactly how they will be performed. In our view, the first type of obligation must be performed by the investigating authority on its own initiative, and exactly as specified in the AD Agreement. There is no need for and no obligation on interested parties to raise these issues and obligations during the course of an investigation in order to protect their rights under the AD Agreement.

7.3 In respect of the second type of obligation, however, the actions of an interested party during the course of an investigation are critical to its protection of its rights under the AD Agreement. As the Appellate Body observed in *US – Hot-Rolled Steel*⁴, "in order to complete their investigations, investigating authorities are entitled to expect a very significant degree of effort to the best of their abilities from investigated exporters".⁵ The Appellate Body went on to state that "cooperation is indeed a two-way process involving joint effort".⁶ In the context of this two-way process of developing the information on which determinations ultimately are based, where an investigating authority has an obligation to "provide opportunities" to interested parties to present evidence and/or arguments on a given issue, and the interested parties themselves have made no effort during the investigation to present such evidence and/or arguments, there may be no factual basis in the record on which a panel could judge whether or not an "opportunity" either was not "provided" or was denied. Similarly, where a given point is left by the AD Agreement to the judgement and discretion of the investigating authority to resolve on the basis of the record before it, and where opportunities have been provided by the authority for interested parties to submit into the record information and arguments on that point, the decision by an interested party not to make such submissions is its own

⁴ Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("US – Hot-Rolled Steel"), WT/DS184/AB/R, adopted 23 August 2001.

⁵ *Ibid.*, para.102.

⁶ *Ibid.*, para.104.

responsibility, and not that of the investigating authority, and cannot later be reversed by a WTO dispute settlement panel⁷.

B. PRELIMINARY OBJECTIONS

7.4 Egypt raised three issues as preliminary objections, but did not request us to rule on these issues on a preliminary basis. Egypt's preliminary objections are (i) that Turkey has failed to present a *prima facie* case of a violation of the relevant Articles of GATT 1994 and of the AD Agreement, (ii) that Turkey is trying to lead us to conduct a *de novo* review of the evidence submitted to the Egyptian IA and to act contrary to the required standard of review as set out in Article 17.6(i) of the AD Agreement⁸, and (iii), that Turkey has introduced certain new evidence in the context of these proceedings which was not before the IA during the course of the investigation.⁹ Egypt also requested us to dismiss certain claims as being outside our terms of reference.

1. Alleged failure of Turkey to present a *prima facie* case

7.5 Regarding Egypt's assertion that Turkey has failed to establish a *prima facie* case of violation, it is clear to us that whether a party raises the issue or not, in any WTO dispute the burden of proof is on the complaining party to make a *prima facie* case. We recall in this regard that in *EC - Hormones* the Appellate Body stated:

"The initial burden lies on the complaining party, which must establish a *prima facie* case of inconsistency with a particular provision of the SPS Agreement on the part of the defending party, or more precisely, of its SPS measure or measures complained about. When that *prima facie* case is made, the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistency."¹⁰

7.6 The Appellate Body furthermore stated in *Korea - Dairy*:

"We find no provision in the DSU or in the *Agreement on Safeguards* that requires a panel to make an explicit ruling on whether the complainant has established a *prima facie* case of violation before a panel may proceed to examine the respondent's defence and evidence."¹¹

7.7 We agree with the Appellate Body, and as we could find no such a provision in the AD Agreement either, we will refrain from making a ruling at this stage on whether Turkey has made a *prima facie* case or not, but will proceed by reviewing the substantive elements of Turkey's case before us.

⁷ As the panel noted in, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel From Japan* ("US – Hot-Rolled Steel"), "errors made during the investigation cannot be rectified in subsequent submissions before a WTO panel". (Panel Report, WT/DS184/R, adopted 23 August 2001 as modified by the Appellate Body, WT/DS184/AB/R, para.7.246.). Although this quotation was in respect of the investigating authority in that case, we find the principle involved to be relevant here.

⁸ First Written Submission of Egypt, p.16-18.

⁹ *Ibid.*, p.73.

¹⁰ Appellate Body Report, *European Communities - Measures Concerning Meat and Meat Products (Hormones)* ("EC – Hormones"), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998: I, 135, para.98.

¹¹ Appellate Body Report, *Definitive Safeguard Measure on Imports of Certain Dairy Products* ("Korea – Dairy"), WT/DS98/AB/R, adopted 12 January 2000, para.145.

2. Alleged request by Turkey for a *de novo* review

7.8 Concerning Egypt's assertion that Turkey is seeking a *de novo* review by the Panel of the evidence submitted to the IA, it is clear that in any dispute under the AD Agreement, a panel must adhere to the standard of review set forth in Article 17.6(i) of that agreement, which precludes a *de novo* review by a panel.

7.9 Article 17.6(i) of the AD Agreement provides:

7.10 "In examining the matter referred to in paragraph 5:

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

7.11 Although Article 17.6(i) of the AD Agreement specifically addresses this point, we also find guidance on this issue in the Appellate Body's comments on the provisions of Article 11 of the DSU in *EC – Hormones*, with reference to the "objective assessment" of the facts to be made by a panel:

"So far as fact-finding by panels is concerned, their activities are always constrained by the mandate of Article 11 of the DSU: the applicable standard is neither *de novo* review as such, nor "total deference", but rather the "objective assessment of the facts". Many panels have in the past refused to undertake *de novo* review, wisely, since under current practice and systems, they are in any case poorly suited to engage in such a review. On the other hand, "total deference to the findings of the national authorities", it has been well said, "could not ensure an 'objective assessment' as foreseen by Article 11 of the DSU."¹²

7.12 We also note the ruling by the Appellate Body in *US – Lamb* where it is stated¹³:

"We wish to emphasize that, although panels are not entitled to conduct a *de novo* review of evidence, nor to *substitute* their own conclusions for those of the competent authorities, this does *not* mean that panels must simply *accept* the conclusions of the competent authorities."

7.13 This was confirmed in an anti-dumping context by the panel in *Guatemala – Cement II*, in which the panel stated:

"We consider that it is not our role to perform a *de novo* review of the evidence which was before the investigating authority in this case. Rather, Article 17 makes it clear that our task is to review the determination of the investigating authorities. Specifically, we must determine whether its establishment of the facts was proper and the evaluation of those facts was unbiased and objective."¹⁴

7.14 In light of the above, we are therefore conscious that we should not involve ourselves in a *denovo* review of the facts as submitted to the competent Egyptian authorities. Rather, our task is to

¹² *Ibid*, para.117.

¹³ Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* ("US – Lamb"), WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, para.106.

¹⁴ Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico* ("Guatemala Cement II"), WT/DS156/R, adopted 17 November 2000, para.8.19.

review the determinations made by those authorities, in the light of the evidence of record that they had before them. As will become apparent, in the light of the facts of this case, we deem it necessary to undertake a detailed review of the evidence submitted to the IA to be able to determine whether an objective and unbiased investigating authority could have reached the determinations that Turkey challenges in this dispute.

3. Introduction of evidence that was not before the Investigating Authority

7.15 The third issue is Egypt's claim that evidence that was submitted by Turkey during this proceeding in an effort to demonstrate that the IA made errors in its analysis and determinations during the rebar anti-dumping investigation, which evidence was not before the investigation authority in that investigation, may not be examined by us.¹⁵ Egypt, relying on Article 17.5(ii) of the AD Agreement, argues that we should reject this evidence as it was not made available to the Investigating Authority in the course of the investigation itself.

7.16 Article 17.5(ii) provides:

"The DSB shall, at the request of the complaining party, establish a panel to examine the matter based upon:

(ii) the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member."

7.17 As Turkey has confirmed that the mentioned evidence was not made available to the Investigating Authority in conformity with the appropriate domestic procedures, but was submitted for the first time in the context of the proceedings before us, Egypt argues that we should disregard it. Egypt finds support for its contention in the finding of the panel in *US – Hot-Rolled Steel*¹⁶ where it was held that:

"It seems clear to us that, under [Article 17.5(ii) of the AD Agreement], a Panel may not, when examining a claim of violation of the AD Agreement in a particular determination, consider facts or evidence presented to it by a party in an attempt to demonstrate error in the determination concerning questions that were investigated and decided by the authorities, unless they had been made available in conformity with the appropriate domestic procedures to the authorities of the investigating country during the investigation."

7.18 Turkey argues, in response to a written question posed by us during the First Substantive Meeting of the Panel with the Parties,¹⁷ regarding the status of the evidence in question and the legal

¹⁵ First Written Submission of Egypt, p.18 and 73. On page 73 the following documents are identified by Egypt: *AMM Weekly Steel Scrap Price Composite for 1998* – submitted by Turkey as Exh. TUR-13, and *Metal Bulletin – 1998 European Iron Steel Scrap Prices for 1998*, submitted by Turkey as Exh. TUR-14. In the Oral Presentation of Egypt to the Panel on 27 November 2001, Egypt further identifies the following documents as "new evidence" submitted by Turkey: An article from *The Dow Jones Commodity Service* – Report of 11 September 1997, titled "NKK Singapore to Build Steel Bar Mill for Egypt Steelmaker" and an article from *The Middle East Economic Digest* – Report of 6 March 1998, titled "Egypt: Alexandria National Iron and Steel Company (Both of these articles are referred to by Turkey in its First Written Submission under Claim C.2, but were not submitted by Turkey as exhibits.); the *Birmingham Steel Corporation, Securities and Exchange Commission (SEC)* "Form 10-Q", submitted by Turkey as Exh. TUR-19, and the *EFG-Hermes Study*, submitted by Turkey as Exh. TUR-32.

¹⁶ Panel Report, *US – Hot-Rolled Steel*, para.7.6.

¹⁷ In Question 4 to Turkey of the *Written Questions by the Panel*, dated 28 November 2001, we asked Turkey: "Could Turkey please clarify the status of Exhibits TUR-13, TUR-14, TUR-19 and TUR-32, and also of the documents listed in footnote 16 and 17 of its First Written Submission, that is, were these documents

basis on which we should take these documents into consideration, that the reason that this evidence was not submitted during the course of the investigation was that the Turkish exporters were under the impression that the injury investigation conducted by the Investigating Authority was with regard to "threat" of material injury and not "actual" material injury.¹⁸

7.19 Turkey also argues that if we should decide, in terms of Article 17.5(ii), that the record that we can take into account should ordinarily be limited to the facts made available to the Investigating Authority during the course of the investigation, we nevertheless should adopt the legal principle of taking "judicial notice" of certain other facts.¹⁹ We are not aware of a principle of "judicial notice" at the WTO level. Certainly, we as Panelists have an awareness of matters pertaining to life, nature and society. But the question is not what we as Panelists know or ought to accept as being known by the IA. The question is what the IA did and was expected to do under the AD Agreement at the time of the investigation.

7.20 We note that, as the evidence proffered by Turkey and disputed by Egypt relates exclusively to the injury determination by the IA and the causal link between the injury and dumped imports, Article 3.5 of the AD Agreement also contains specific language addressing the issue of evidence. This article provides, in relevant part:

"The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence *before the authorities*." (emphasis added) Furthermore, we agree with the statement by the panel in *US - Hot-Rolled Steel*²⁰, that:

"The conclusion that we will not consider new evidence with respect to claims under the AD Agreement flows not only from Article 17.5(ii), but also from the fact that a panel is not to perform a *de novo* review of the issues considered and decided by the investigating authorities."

7.21 It is clear to us (and indeed, there is no disagreement on this point between the parties) that the evidence in question, which was proffered by Turkey in the dispute to challenge determinations made by the IA during the anti-dumping investigation, was not made available to the Investigating Authority in conformity with the appropriate domestic procedures during the investigation, as required by Article 17.5(ii), and it is clear as well that consideration of new evidence of this sort can be construed as a *de novo* review, which is not permissible. We thus will not take this evidence into consideration when reviewing the measures of the determinations and actions of the Egyptian Investigating Authority.

submitted to the Egyptian Investigating Authority, and if so, when? If not, please provide legal argumentation regarding the basis on which the Panel could take these documents into consideration" – Annex 4-1.

¹⁸ This aspect is addressed in Section VII.C.3, *infra*.

¹⁹ On page 3 of its response of 7 December 2001 to Question 4 to Turkey of the *Written Questions by the Panel*, dated 28 November 2001, Turkey responded: "Both at the English and American common law, most proof in a court of law is presented by means of testimonial evidence or by the offering of real evidence. But there is an exception to the requirement that a party who relies on a certain proposition must prove it, and that exception is facts that can be 'judicially noticed'. In the United States, there is a federal rule of evidence permitting both trial courts and appellate courts to take 'judicial notice' of facts that are not subject to reasonable dispute because they are either (1) generally known; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. ... The first type of fact of which judicial notice may be taken is a fact that is 'so well known that it would be a waste of judicial resources to require proof; reasonably informed people simply could not differ as to the fact.' The second type of fact is 'one that is capable of ready verification through sources whose reliability cannot reasonably be questioned'." – Annex 4-1.

²⁰ Panel Report, *US – Hot-Rolled Steel*, para.7.

4. Request for dismissal of certain claims

7.22 In addition to the above preliminary objections, Egypt also requests us to reject certain claims submitted by Turkey as Egypt asserts that these claims are not within the terms of reference of the Panel and are therefore not properly before us.²¹

7.23 As there seemed to be some differences between Turkey's claims, as reflected in its Request for Establishment of a Panel²², and its claims and legal argumentation in its First Written Submission, we requested Turkey during the First Substantive Meeting of the Panel with the Parties on 28 November 2001 to "set out in summary format its legal argumentation in support of each of its claims, i.e., listing the respective provisions of the Anti-Dumping Agreement and GATT 1994, and explaining briefly in the light of the Vienna Convention on the Law of Treaties how the cited factual circumstances constitute violations of those provisions".²³ Egypt, in its Rebuttal Submission, asserted that Turkey had "in its response of 7 December 2001 to the Panel's Questions, taken this opportunity to (1) introduce new claims; and (2) modify existing claims as regards injury and dumping that were not mentioned in the request for establishment of a Panel".²⁴

7.24 In particular, Egypt objects to the following claims as set out in Turkey's response to our question:

- (a) That the IA did not consider factors affecting domestic prices under Article 3.4.
- (b) That Egypt violated paragraph 6 of Annex II of the AD Agreement by sending the letter of 19 August 1999 to the Turkish respondents.
- (c) That the IA violated Article 17.6(i) of the AD Agreement.
- (d) That the IA violated paragraph 3 of Annex II of the AD Agreement and Article X:3 of GATT 1994 in its selection of facts as facts available.²⁵

7.25 In reviewing Turkey's Request for Establishment of a Panel²⁶ and its response to our Question 1, it is clear to us that, with the exception of Article 17.6(i), Turkey has explicitly cited in its Request for Establishment of a Panel all of the above-cited provisions allegedly violated by Egypt. However, it is also clear to us that the way in which some of the provisions are cited in Turkey's "restatement" of its claims²⁷ does not correspond to the same claims as set out in its Request for Establishment of a Panel. In light of this, we requested Egypt to provide us, in respect of each claim that it requests us to dismiss, the two-part analysis referred to in *Korea – Dairy*²⁸ and *EC – Bed Linen*²⁹, that is, the asserted lack of clarity in the Request for Establishment of a Panel, and evidence of any resulting prejudice to Egypt's ability to defend its interest in this dispute due to such lack of clarity.³⁰

²¹ Written Rebuttal of Egypt, dated 19 December 2001, p.14.

²² WT/DS211/2 of 11 May 2001.

²³ Question 1 to Turkey of the *Written Questions by the Panel*, dated 28 November 2001 Annex 4.1..

²⁴ Written Rebuttal of Egypt, p.1.

²⁵ *Ibid.*

²⁶ WT/DS211/2, as amended.

²⁷ Written Response of Turkey, dated 7 December 2001, to Question 1 of *Questions by the Panel*, of 28 November 2001 – Annex 4.1.

²⁸ Appellate Body Report, *Korea – Dairy*, para.6.

²⁹ Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India ("EC – Bed Linen")*, WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body Report, WT/DS141/AB/R, para.6.26.

³⁰ Question 6 to Egypt of the *Written Questions by the Panel*, dated 27 February 2002 – Annex 4-2.

7.26 In its response to our question, Egypt asserts that it was prejudiced with regard to the following claims:^{31,32}

(a) Claims under Article 3.4 as regards "factors affecting domestic prices"

Egypt contends that Turkey presents the same arguments in relation to Article 3.4 and 3.5 and alleges a violation under Article 3.4 or 3.5 and that Turkey's claims in relation to these two provisions as stated in its Request for Establishment of a Panel at Claim 3 and 4 were not clarified in Turkey's First Submission, or subsequently. Egypt is of the view that Article 3.4 and 3.5 establish multiple obligations and if any violation with respect thereunder is not presented with sufficient clarity, the burden on the respondent becomes too onerous and both the Panel and the respondent are at risk of being misled as to which claims are in fact being asserted against the respondent. Egypt asserts that it was unclear as to which provision under Article 3 Turkey was presenting its argumentation with respect to "factors affecting domestic prices" and that Egypt was prejudiced as regards the preparation of its defence with respect to those particular factors.³³

(b) Paragraph 6 of Annex II

Egypt contends that in its Request for Establishment of a Panel, Turkey claimed a violation of Annex II, paragraph 6, with respect to the deadline granted to the respondents to reply to the letter of 19 August 1999³⁴, but that Turkey, in its restatement of claims³⁵, additionally claimed that the sheer fact of sending the letter of 19 August 1999 also constituted a violation of paragraph 6. As paragraph 6 provides that an investigating authority should grant a party an opportunity to provide further explanations within a reasonable period as to why its information should not be rejected, Egypt fails to understand the basis for Turkey's claim as it provided no further explanation or clarification. As a result of the absence of any explanation of the claim, Egypt contends that its ability to defend its interest was severely prejudiced.³⁶

(c) Paragraph 3 of Annex II and Article X:3 of GATT 1994

Regarding the alleged violation of Annex II, paragraph 3, Egypt contends that Turkey failed to identify the obligation contained in that provision that the IA would have violated in its selection of "facts available", therefore preventing Egypt from presenting a meaningful defence, as paragraph 3 relates to the circumstances in which the data submitted by respondents must be accepted or can be rejected. Egypt argues that this provision does not address the *selection* of facts available once it has been decided to reject the data submitted by the respondents. As the legal basis for this

³¹ Response of Egypt, dated 13 March 2002, to Question 6 of the *Written Questions by the Panel*, of 27 February 2002 – Annex 8-2..

³² As these claims are the only ones addressed by Egypt in response to our question, we assume that these are the only issues which Egypt would like to pursue in this context and we therefore limit our analysis to these issues as well.

³³ Written Response of Egypt, dated 13 March 2002, to Question 6 to Egypt of the *Written Questions by the Panel*, of 27 February 2002 - Annex 8-2.

³⁴ Exh. TUR-11.

³⁵ Written Response, dated 7 December 2001, of Turkey to Question 1 to Turkey of the *Written Questions by the Panel*, of 28 November 2001 - Annex. 8-1.

³⁶ Written Response of Egypt, dated 13 March 2002, to Question 6 to Egypt of the *Written Questions by the Panel*, of 27 February 2002 – Annex 8-2.

claim is not clear to Egypt, and as Turkey did not provide any clarification, Egypt contends that it was severely prejudiced in respect to defending its rights.³⁷

Regarding the alleged violation of Article X:3 of GATT 1994 is concerned, Egypt contends that the allegations of a violation were vague and unsubstantiated and that it is therefore not in a position to defend its interests.³⁸

(d) Failure to refer to the relevant treaty article in the Request for Establishment of a Panel

(i) Whether the Final Report contains findings or conclusions sufficient to satisfy the requirements of Article 12.2

Egypt contends that an Article 12.2 claim is not before us as it was not referred to in the Request for Establishment of a Panel, and through a reference to the finding of the panel in *EC – Bed Linen*, para. 6.15, asserts that if a treaty article is not mentioned in the request for establishment of a panel, such a claim is not before a panel. Egypt states that as a result, it did not prepare any defence on this claim.³⁹

(ii) Whether the Panel can disregard evidence under Article 6.4

Egypt contends that although Turkey claims in its Rebuttal Submission that we should not consider evidence that was not provided to interested parties during the course of the investigation, such as the report on *Other Causes of Injury*⁴⁰, a violation of Article 6.4 was not claimed by Turkey and is therefore not before us.⁴¹

(iii) Article 17.6(i) of the AD Agreement

Although Turkey alleges a violation of Article 17.6(i) of the AD Agreement, Egypt contends that this provision governs the standard of review to be applied by a panel when considering whether an investigating authority's establishment of the facts was proper and the evaluation unbiased and objective – it does not govern the rights and obligations of Members under the AD Agreement. Furthermore, Egypt asserts that Article 17.6(i) was not cited in the Request for Establishment of a Panel and is therefore not before us.⁴²

7.27 We address the issues raised by Egypt in relation to (a) and (d)(iii) above in Sections VII.C.1 and VII.D.2, *infra*.

7.28 Concerning the issues raised in (d)(i) and (d)(ii), we do not believe that Turkey has attempted to raise claims under Article 12.2 or under Article 6.4, and therefore we neither address nor dismiss such purported "claims".

7.29 With regard to the issues relating to paragraph 6 and paragraph 3 of Annex II under (b) and (c), we are of the view that the relevant issues addressed by these two provisions are so interrelated

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ Exh. EGT-6.

⁴¹ *Ibid.*

⁴² *Ibid.*

that Egypt could not have been prejudiced in the preparation of its defence in the way in which Turkey presented its claims in this regard.

7.30 With regard to Egypt's objection regarding Article X:3 of GATT 1994, we consider that Turkey effectively abandoned its claim (set forth in paragraph 9 of its Request for Establishment of a Panel) that the IA's decision to resort to facts available violated Article X:3. In particular, Turkey made no arguments in this respect in any of its submissions to us. Furthermore, in response to a specific question on this point, Turkey indicated that its Article X:3 claim in the context of facts available concerns the selection of particular facts as "facts available", a point addressed in paragraph 11 of its Request for Establishment of a Panel. Paragraph 11 of the Request does not refer, however, to Article X:3.

7.31 Given Turkey's apparent abandonment of its claim that Egypt violated Article X:3 by reason of the IA's decision to resort to facts available⁴³, we do not consider this claim further. As for Turkey's claim that the selection of particular facts as "facts available" violated Article X:3, it is clear that the Request for Establishment of a Panel makes no reference to this provision in this context. We consider significant here that, unlike paragraphs 3 and 6 of Annex II (items (b) and (c) above), Article X:3 is not related in any self-evident way to any of the other provisions cited by Turkey in paragraph 11 of its Request for Establishment of a Panel. Nor is this claim of violation of Article X:3 related in any way to Turkey's other claims of violation of this provision. We find that this claim is simply not specified in Turkey's Request for Establishment of a Panel, and that the specifications and justifications for its validity as a claim as presented by Turkey during the course of the dispute have not been clear or convincing. We therefore dismiss this claim and do not consider it further.

7.32 As for Turkey's claim of violation of Article X:3 due to the IA's alleged refusal to schedule a meeting with certain respondents, we address this claim in Section VII.F, *infra*.

C. CLAIMS RELATING TO INJURY AND CAUSATION

1. Claims under Article 3.4 of the AD Agreement

(a) Alleged failure to examine factors specifically listed in Article 3.4

7.33 Turkey claims that Egypt violated Article 3.4 by failing to examine all of the factors listed in Article 3.4 of the AD Agreement.⁴⁴ In particular, Turkey asserts that Egypt did not evaluate productivity, actual and potential negative effects on cash flow, employment, wages, growth and ability to raise capital or investments. Turkey also argues that the public versions of the Essential Facts and Conclusions Report and of the Final Report provide no evidence that there was a sufficient examination or evaluation of capacity utilisation or return on investment.

7.34 Egypt argues that the record of the investigation makes clear that all of the factors listed in Article 3.4 were considered by the IA. In its response to a question from the Panel⁴⁵ in the context of the First Substantive Meeting with the Parties⁴⁶, Egypt presents a table indicating specific references in the Essential Facts and Conclusions Report and in the Final Report to the following factors listed in Article 3.4: sales, profits, output, market share, return on investments, capacity utilisation, prices,

⁴³ Written Response of Turkey, dated 7 December 2002, to Question 1 of the *Written Questions by the Panel*, of 28 November 2001 – Annex 4-1.

⁴⁴ Statement by Turkey during the First Substantive Meeting of the Panel with the Parties, 27 November 2001, p.12, and Written Response of Turkey, dated 7 December 2001, to Question 1 of the *Written Questions by the Panel* of 28 November 2001 – Annex 4-1.

⁴⁵ Question 5 of Egypt of the *Written Questions by the Panel*, of 28 November 2001 – Annex 4-2.

⁴⁶ Written Response by Egypt, dated 7 December 2001, to Question 5 of the *Written Questions by the Panel*, of 28 November 2001 – Annex 4-2.

dumping margin and inventories. In its Rebuttal Submission⁴⁷, Egypt further states that "growth" (one of the factors alleged by Turkey not to have been addressed at all by the IA) was addressed by the information on "sales volume" and "market share", while "ability to raise capital" (another factor identified in Turkey's claim) is addressed by pre-tax profit as a percentage of shareholders' funds. Concerning the remaining factors alleged by Turkey not to have been considered at all, Egypt refers to the *Confidential Injury Analysis*, a submission containing Business Confidential Information which was provided to the Panel and to Turkey in accordance with the Supplemental Procedures Concerning Business Confidential Information that were adopted by the Panel.⁴⁸ According to Egypt, this *Analysis* forms part of the Final Determination in the rebar investigation, which must be distinguished from the Final Report. In particular, Egypt states that the *Confidential Injury Analysis* makes evident that the IA's analysis indeed covered "all of the factors listed in Article 3.4".⁴⁹

7.35 Article 3.4 of the AD Agreement reads as follows:

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

7.36 In evaluating this claim, we take note of and agree with the findings of previous panels⁵⁰ and the Appellate Body⁵¹ that *all* of the factors listed in Article 3.4 must be addressed in every investigation. Egypt does not argue to the contrary. Rather, the issue raised by this claim is the nature of the consideration performed, as reflected in the Essential Facts and Conclusions Report, in the Final Report, and in the *Confidential Injury Analysis*, taken collectively. Two questions are raised in this regard: first, as a threshold matter, whether the IA addressed each of the listed factors at all; and second, if so, whether the evidence provided by Egypt to the Panel establishes that the consideration of those factors substantively satisfies the requirements of Article 3.4.

7.37 Turning first to the threshold question, i.e., whether each factor is addressed in some way in at least one of these documents, we find in the affirmative. We take note of the references in the *Essential Facts and Conclusions Report*⁵² and *Final Report*⁵³ to sales, profits, output, market share, return on investments, capacity utilisation, prices, dumping margin, and inventories. There is no doubt that these factors were explicitly addressed by the IA. Similarly, we are satisfied that by addressing in the *Essential Facts and Conclusions Report* and the *Final Report* sales volume and

⁴⁷ Written Rebuttal of Egypt, dated 19 December 2001, Section III.A.1.

⁴⁸ Attached hereto as Annex 13.

⁴⁹ Statement by Egypt during the Second Substantive Meeting of the Panel with the Parties, 25 February 2002, p.13.

⁵⁰ See e.g., Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* ("EC – Bed Linen"), WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body Report, WT/DS141/AB/R, par.6.159, and the Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States* ("Mexico – Corn Syrup"), WT/DS132/R and Corr.1, adopted 24 February 2000, par.7.128.

⁵¹ See, e.g., Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ("Thailand – H-Beams"), WT/DS122/AB/R, adopted 5 April 2001, para.128.

⁵² Exh. TUR-15, *Essential Facts and Conclusions Report*, October 1999, p.29-32..

⁵³ Exh. TUR-16, *Final Report*, October 1999, p.35-39.

market share, the IA addressed "growth", as Egypt argues in its Rebuttal Submission.⁵⁴ We therefore do not consider further the factor "growth" in the context of this claim. Thus, the focus of this claim is whether the remaining factors identified by Turkey are reflected in the *Confidential Injury Analysis*, and if so, whether their treatment in that document is sufficient to satisfy the requirements of Article 3.4. Concerning the *Confidential Injury Analysis*, we are mindful of the findings of the Appellate Body in *Thailand – H-Beams* that confidential information relied upon by an IA, even if not shared with respondents, should be taken into account by a panel when assessing compliance with Article 3.4.⁵⁵

7.38 Turning to its content, we note that the *Confidential Injury Analysis* contains data on, *inter alia*, cash flow, employment, wages, and productivity. Moreover, we accept, as argued by Egypt⁵⁶, that by addressing in the *Confidential Injury Analysis* pre-tax profit as a percentage of shareholders' funds for Alexandria National and Al Ezz, the IA addressed in that *Analysis* "ability to raise capital". Thus, taken together, the *Essential Facts and Conclusions Report*, the *Final Report*, and the *Confidential Injury Analysis* demonstrate that the IA addressed, at least in some way, all of the factors listed in Article 3.4.

7.39 As noted above, however, this is only the threshold issue for our determination of whether the IA complied with the requirement of Article 3.4 in respect of the "examination" of all of the listed factors. Here, we recall the specific wording of the relevant part of that provision:

"The examination of the impact of the dumped imports on the domestic industry concerned shall include *an evaluation* of all relevant economic factors and indices..."
(emphasis added)

Thus, in taking up the second issue raised by this claim, this language compels us to consider whether the IA's "examination" included an "evaluation" in the sense of Article 3.4 of each of the listed Article 3.4 factors that appear only in the *Confidential Injury Analysis*.

7.40 We note Egypt's basic argument that the *Confidential Injury Analysis* is proof that the IA "examined" all of the factors listed in Article 3.4 that are not reflected in the *Essential Facts and Conclusions Report* and in the *Final Report*, and that the IA thus satisfied the requirements of that Article. To recall, Turkey alleges that Egypt failed to "examine" productivity, actual and potential negative effects on cash flow, employment, wages, growth and ability to raise capital or investments, because these factors are not referred to in the *Essential Facts and Conclusions Report* or the *Final Report*. Turkey further argues that to the extent that data are included on some of these factors in the *Confidential Injury Analysis*, this "*Analysis*" consists of data only, and thus is not sufficient to constitute an "evaluation" in the sense of Article 3.4.

7.41 In this regard, we posed two very similar questions to Egypt concerning where in the record of the investigation the IA's consideration could be found or discerned of the factors identified by Turkey and which are not addressed in the *Essential Facts and Conclusions Report* and/or in the *Final Report* (actual and potential negative effects on cash flow, employment, wages, productivity, and ability to raise capital or investment)⁵⁷, ⁵⁸. Both times, Egypt referred us exclusively to the *Confidential Injury Analysis*.⁵⁹ We emphasize that while (as we have found above) the *Confidential*

⁵⁴ Written Rebuttal Submission of Egypt, Section III.A.1.

⁵⁵ Appellate Body Report, *Thailand – H-Beams*, para.107 and 118.

⁵⁶ Written Rebuttal Submission of Egypt, Section III.A.1.

⁵⁷ Question 9 to Egypt and Question 3 to Both Parties of the *Written Questions by the Panel*, dated 27 February 2002 – Annex 8-2.

⁵⁸ As noted, we already have concluded above that "growth" effectively was addressed in the *Essential Facts and Conclusions Report* and the *Final Report*, and we thus do not consider that factor further here.

⁵⁹ Written Response of Egypt to Question 9 to Egypt and Question 3 to Both Parties of the *Written Questions by the Panel*, dated 27 February 2002 – Annex 8-2..

Injury Analysis refers to and contains data on all of the factors listed in Article 3.4 (including those that are the subject of this claim), it contains no narrative, but rather consists only of tables of data concerning the various factors, for the domestic industry as a whole, and individually, for the two domestic producers (Al Ezz and Alexandria National)⁶⁰. Egypt could not, or did not, provide any document of record other than the *Confidential Injury Analysis* in respect of the factors identified by Turkey. We therefore assume that these tables of data are the only documents of record reflecting or representing the IA's consideration of these factors.

7.42 The question before us, in respect of productivity, actual and potential negative effects on cash flow, employment, wages, and ability to raise capital or investments, therefore, is whether the mere presentation of tables of data, without more, constitutes an "evaluation" in the sense of Article 3.4.

7.43 We first consider the ordinary meaning of the word "evaluation". The Oxford English Dictionary defines "evaluation" as follows:

"(1) The action of appraising or valuing (goods, etc.); a calculation or statement of value. (2) The action of evaluating or determining the value of (a mathematical expression, a physical quantity, etc.), or of estimating the force of (probabilities, evidence)."⁶¹(emphasis added)

The Merriam-Webster's Collegiate Dictionary defines "evaluation" as follows:

"(1) To determine or fix the value of. (2) To determine the significance, worth, or condition of *usually by careful appraisal or study*."⁶²(emphasis added)

The Merriam-Webster's Thesaurus lists as synonyms for "evaluation" the following:

"(1) appraisal, appraisement, assessment, estimation, valuation (with related words: interpreting; judging, rating); (2) appraisal, appraisement, assessment, estimate, judgement, stock (with related words: appreciation; interpretation; decision)."⁶³

7.44 We find significant that all of these definitions and synonyms connote, particularly in the context of "evaluation" of evidence, the act of analysis, judgement, or assessment. That is, the first definition recited above refers to "estimating the force of" evidence, evoking a process of weighing evidence and reaching conclusions thereon. The second definition recited above -- to determine the significance, worth, or condition of, usually by careful appraisal or study -- confirms this meaning.

⁶⁰ The factors for which data are presented in the *Confidential Injury Analysis*, for the industry as a whole and for Alexandria National and Al Ezz individually, are sales volume, sales revenue, cost of production, gross profit, selling and administrative expenses, cost of sales, profit before interest expenses, finance cost, and net profit, on a total basis and on a per ton basis, as well as cost of production, gross profit, selling and administrative expenses, cost of sales, total cost and net profit as a per cent of revenue, as well as number of employees and per cent change thereof, wages, production capacity, production volume, and capacity utilisation, number of shareholders and per cent change thereof, value of total assets and percent change thereof, volume of finished goods inventory and per cent change thereof, cash flow, and worker productivity. In addition, for the industry as a whole, the *Analysis* contains tables on return on investment, volume of total domestic sales, of dumped imports, of other imports and total domestic market, as well as per cent market shares of the domestic industry, the dumped imports and the other imports, "undercutting" (i.e., domestic industry price, Turkish imports' price, and percentage difference), price depression (domestic industry prices between 1996 and first quarter 1999), price suppression (total cost, domestic industry price, and total cost as a percentage of price, between 1996 and first quarter 1999), and output volume and sales value, and per cent changes, between 1996 and first quarter 1999.

⁶¹ Oxford English Dictionary Online: <http://dictionary.oed.com>.

⁶² Merriam-Webster's Collegiate Dictionary online: <http://www.m-w.com>.

⁶³ Merriam-Webster's Thesaurus online: <http://www.m-w.com>.

Thus, for an investigating authority to "evaluate" evidence concerning a given factor in the sense of Article 3.4, it must not only gather data, but it must analyze and interpret those data.

7.45 We nevertheless do recognize that, in addition to the dictionary meanings of "evaluation" that we have cited, the definitions set forth above also refer to a purely quantitative process (i.e., calculating, stating, determining or fixing the value of something). If this were the definition applicable to the word "evaluation" as used in Article 3.4, arguably mere compilation of data on the listed factors, without any narrative explanation or analysis, might suffice to satisfy the requirements of Article 3.4. We find, however, contextual support in Article 17.6(i) of the AD Agreement for our reading that "evaluation" is something different from, and more than, simple compilation of tables of data. We recognize that Article 17.6(i) does not apply directly to investigating authorities, and that instead, it is part of the standard of review to be applied by panels in reviewing determinations of investigating authorities. However, Article 17.6(i) identifies as the object of a panel's review two basic components of a determination: first, the investigating authority's "establishment of the facts", and second, the investigating authority's "evaluation of those facts". Thus, Article 17.6(i)'s characterization of the essential components of a determination juxtaposes "establishment of the facts" with the "evaluation of those facts". That panels are instructed to determine whether an investigating authority's "establishment of the facts" was proper connotes an assessment by the panel of the means by which the data before the investigating authority were gathered and compiled. By contrast, the fact that panels are instructed to determine whether an investigating authority's "evaluation of those facts" was objective and unbiased, provides further support for our view that the "evaluation" to which Article 3.4 refers is the process of analysis and interpretation of the facts established in relation to each listed factor.

7.46 Our interpretation of the requirement of Article 3.4 to "evaluate" the factors and indices is consistent with that of panels in a number of past disputes. The panel in *Thailand – H-Beams* found in regard to the examination of the factors listed in Article 3.4 that:

"Article 3.4 requires the authorities properly to establish whether a factual basis exists to support a well-reasoned and meaningful analysis of the state of the industry and a finding of injury. This analysis does not derive from a mere characterization of the degree of "relevance or irrelevance" of each and every individual factor, but rather must be based on a thorough evaluation of the state of the industry and, in light of the last sentence of Article 3.4 [footnote omitted], must contain a persuasive explanation as to how the evaluation of relevant factors led to the determination of injury."⁶⁴

7.47 In *US – Hot-Rolled Steel*, the issue was whether the US investigating authority had violated Article 3.4 by failing to explicitly discuss, in its determination, certain factors for each year of the period of investigation. In that case, according to the panel, the authority had discussed each of the factors for the final two years of the three-year period of investigation, and only some of them for the first year of that period. The panel found that the determination explained the particular relevance of the second and third years of the period, and that the authority's failure to explicitly address each factor in its discussion of the first year of the period did not constitute a violation of Article 3.4⁶⁵. That is, the panel found, *inter alia*, that each of the listed Article 3.4 factors was explicitly *discussed* in the authority's determination, and given the explanations provided in that determination for the particular emphasis on a part of the period of investigation, the *evaluation* of the facts was deemed adequate by the panel.

7.48 This contrasts sharply with the situation in the present case, where the Egyptian Investigating Authority appears to have gathered data on all of the listed Article 3.4 factors, as reflected in various documents of record (including the *Essential Facts and Conclusions Report*, the *Final Report* and the

⁶⁴ Panel Report, *Thailand – H-Beams*, para.7.236.

⁶⁵ Panel Report, *US – Hot-Rolled Steel*, paras.7.235-7.236.

Confidential Injury Analysis). Egypt has been unable, however, to adduce sufficient evidence to the Panel, in response to our specific requests, of the IA's evaluation of all of those factors in its written analyses.⁶⁶

7.49 Here we must emphasize that in the context of an anti-dumping investigation, which is by definition subject to multilateral rules and multilateral review, a Member is placed in a difficult position in rebutting a *prima facie* case that an evaluation has *not* taken place if it is unable to direct the attention of a panel to some contemporaneous written record of that process. If there is no such written record -- whether in the disclosure documents, in the published determination, or in other internal documents -- of how certain factors have been interpreted or appreciated by an investigating authority during the course of the investigation, there is no basis on which a Member can rebut a *prima facie* case that its "evaluation" under Article 3.4 was inadequate or did not take place at all. In particular, without a written record of the analytical process undertaken by the investigating authority, a panel would be forced to embark on a *post hoc* speculation about the thought process by which an investigating authority arrived at its ultimate conclusions as to the impact of the dumped imports on the domestic industry. A speculative exercise by a panel is something that the special standard of review in Article 17.6 is intended to prevent. Thus, while Egypt attempts to derive support from the panel report in the *US – Hot-Rolled Steel* dispute for its position that Article 3.4 does not require an explicit written analysis of all of the factors listed therein⁶⁷, to us, the findings in that dispute confirms our interpretation, in that what was at issue, was the substantive adequacy of the authority's written analysis of *each* of those factors.

7.50 Nor do we consider, as suggested by Egypt⁶⁸, that the requirement of a written analysis of the Article 3.4 factors is exclusively governed by Article 12 of the AD Agreement (public notice and explanation of determinations). While Article 12 contains a requirement to *publish*, and to make available to the interested parties in the investigation, some form of a report on the investigating authority's determination, this is, as the Appellate Body has noted, a procedural requirement having to do with due process⁶⁹, rather than with the relevant substantive analytical requirements (which in the context of this claim are found in Article 3.4).

⁶⁶ See para.7.41, *supra*.

⁶⁷ Written Response, dated 13 March 2002, of Egypt to Question 9 to Egypt and Question 3 to Both Parties of the *Written Questions of the Panel*, of 27 February 2002 – Annex 8-2. Egypt contends in its response that "[t]he *Confidential Injury Analysis* therefore constitutes an evaluation of the factors that it covers in the sense of Article 3.4" and that this approach is consistent with the findings of the panel in *US – Hot-Rolled Steel*. However, the facts in the *US – Hot-Rolled Steel* dispute differ significantly from those in this dispute. In this dispute the allegation is that the IA did not properly evaluate all of the factors listed in Article 3.4 of the AD Agreement, whereas in the *US – Hot-Rolled Steel* case, all Article 3.4 factors were evaluated, but Japan claimed that the discussion did not sufficiently evaluate certain factors by failing to discuss data for all three years which comprised the period of investigation for the determination of injury – paras. 7.231-7.236 of the Panel Report, *ibid*.

⁶⁸ *Ibid*, response to Question 6 and 9 to Egypt.

⁶⁹ In the Appellate Body Report in *Thailand – H-Beams*, para.110, the Appellate Body stated that "... Article 12 establishes a framework of procedural and due process obligations concerning, notably, the contents of a *final determination*". We note that what is at issue before us is not the adequacy of the *final determination* or any other published document, as such, but rather, the adequacy of the *substance* of the analysis performed by the Egyptian investigating authority, in whatever document such analysis might be found. Moreover, the basic issue before the Appellate Body in *Thailand – H-Beams* was very different from that before us. In that appeal, the issue raised was whether the panel was limited by the language of Articles 3.1 and 17.6 to reviewing the Thai investigating authority's injury determination exclusively on the basis of facts and analysis discernible in documents that had been published or otherwise made available to the respondents in the investigation or their counsel, or whether in addition, the panel could and should take into account internal analysis memoranda and similar documents prepared by and for the exclusive use of the authority during the investigation, the contents of which were not discernible in any documents available to the respondents. Thus, the issue there was essentially about how a panel should address confidential information, an issue not before us in this dispute. Thus, while

7.51 On the basis of the above considerations, we find that while it gathered data on all of the factors listed in Article 3.4, the Egyptian investigating authority failed to *evaluate* productivity, actual and potential negative effects on cash flow, employment, wages, and ability to raise capital or investments. We therefore find that Egypt acted inconsistently with Article 3.4.

7.52 We turn finally to Turkey's argument that Article 3.4 was further violated because the IA's evaluation of "capacity utilisation" and of "return on investment" was inadequate. In respect of capacity utilisation, the IA's *Final Report* indicates, in sections 4.3.1 (sales), and 4.3.2 (production), respectively, that sales increased because domestic prices were reduced to compete with dumped imports, and that domestic production also increased, as the companies "attempt[ed] to increase production in order to reduce costs to be able to compete with the low-priced Turkish imports". The report also notes that the IA "concluded that the increase in production is attributed partly to starting new production lines in steel mills". Then, in Section 4.3.6 (production capacity), the *Final Report* states that "[n]o effect on industry capacity utilisation has been found". This statement that capacity utilisation was unaffected, although short, is consistent with the above-quoted statements that sales and production had increased, along with capacity. Given this context, we do not find that the IA failed to adequately evaluate capacity utilisation, and thus we do not find that Egypt violated Article 3.4 in this respect.

7.53 Concerning return on investment, the IA's *Final Report* notes in section 4.3.7 (return on investment) that there was "a decline in return on investment during the period of investigation". We note that this finding, although brief, is consistent with the longer discussion concerning net profits and losses in section 4.3.5 (profits). Given this context, we do not find that the IA failed to adequately evaluate return on investment, and thus we do not find that Egypt violated Article 3.4 in this respect.

(b) Alleged failure to examine "all relevant economic factors and indices having a bearing on the state of the industry"

7.54 Turkey claims a further violation of Article 3.4 by reason of the alleged failure by the Investigating Authority to examine "all relevant economic factors and indices having a bearing on the state of the industry", including, in particular, various factors allegedly affecting domestic prices and affecting profits.⁷⁰

7.55 The factors identified by Turkey in this regard are:

- (a) "The dramatic capacity expansion at the two major Egyptian rebar producers and its likely temporary effects on their cost structures";
- (b) "The effects of the capacity expansions, which started production at the end of 1998, on competition between the Egyptian producers as they attempted to fill newly expanded order books";
- (c) "Sharpening competition between Al Ezz and Alexandria National as Al Ezz sought to increase market share by capitalizing on its cost advantages over Alexandria National";
- (d) "Falling prices for steel scrap, the primary raw material input at Al Ezz";

Egypt cites *Thailand – H-Beams* as support for its position in the present dispute, in our view that dispute pertains to a different issue entirely. To the extent that it may touch upon issues before us, it does not detract in any way from our interpretation of the substantive requirements of Article 3.4 – paras.98 *et al* of the Appellate Body Report.

⁷⁰ Written Response of Turkey, dated 7 December 2001, to Question 1 to Turkey of the *Written Questions by the Panel*, of 28 November 2002 – Annex 4-1.

- (e) "A sharp contraction in demand in January 1999, the very month in which prices for rebar fell";
- (f) "The effect of comparably priced, fairly traded imports".⁷¹

7.56 According to Turkey, factor (a) has a bearing on cost of production and is therefore a "relevant factor" to the state of the industry. Factors (b)-(e) are, in Turkey's view, factors "affecting domestic prices" which either were not mentioned, or their effects on prices were not examined, or were not given any weight, in the investigating authority's analysis of why prices fell. Factor (f), Turkey states, may or may not have had an effect on prices, but Turkey argues that there was no support for a finding that dumped imports had a materially different effect on domestic prices than did other imports. In other words, Turkey claims that these are factors other than dumped imports that caused any injury experienced by the domestic industry⁷². In response to a question, Turkey clarified that factors (b) and (c) are subsumed in factor (a), in that they were alleged adverse effects of the capacity expansion, and that arguably, factor (d) was so subsumed as well.

7.57 Egypt argues that this claim by Turkey is misplaced and thus should be rejected, as in Egypt's view, it raises arguments concerning causation, and in particular has to do with the requirement not to attribute to dumped imports injury caused by other factors. According to Egypt, causation is exclusively regulated by Article 3.5, while Article 3.4 has to do exclusively with the *existence* of injury and not with its causes. Furthermore, Egypt argues, the investigating authority did examine a range of "other factors" in its investigation, but concluded that there were "no other causes of injury" sufficient to break the causal relationship between the dumped imports and the injury to the domestic industry⁷³. In addition, Egypt argues that Turkey did not, either in the Request for Establishment of a Panel, its first oral submission or its first written submission, refer to "factors affecting domestic prices", and asks us to dismiss this aspect of this claim. Egypt further argues that, in any case, the IA considered as "factors affecting domestic prices", demand and raw material costs.

7.58 We consider first Egypt's request that we dismiss Turkey's claim as to "factors affecting domestic prices" on the grounds that this was not mentioned in the Request for Establishment of a Panel or in Turkey's initial submissions. We find no merit in this request for dismissal, and therefore reject it. First, we view this issue as an argument in support of a claim, not as a claim in itself. Second, as a factual matter, the Request for Establishment of a Panel refers, in the context of Turkey's Article 3.4 claim, to the "effect...of other, neutral factors that caused prices to fall". We see no difference in substance between this reference and the language "factors affecting domestic prices", and no possible basis on which Egypt could have been confused by Turkey's references to and arguments about, "factors affecting domestic prices". This issue is pursued as well in Turkey's submissions.

7.59 Turning to the substance of this claim, we note the text of the relevant part of Article 3.4:

⁷¹ *Ibid*, p.21-22. We note that in respect of this claim, Turkey's Request for Establishment of a Panel refers to some, but not all of the factors listed above. In particular, the Request for Establishment of a Panel states in this context that: "Such factors include, but are not limited to, a large-scale capacity expansion by the Egyptian rebar producers during the period of review, the effects of non-subject imports from third countries, falling world-wide prices for steel scrap and a sudden contraction in domestic demand in January 1999, when the [IA] found its first evidence of falling domestic prices". Egypt raised no objection to Turkey's reference in its arguments in respect of this claim to factors that were not explicitly referred to in the request for establishment. We posed a question to both parties on this point (Question 1 to Both Parties of the *Written Questions by the Panel*, of 27 February 2002.), and in response, Egypt indicated that where a request for establishment uses an inclusive expression in respect of the specific grounds for a claim, the complaining party can allege additional grounds in its arguments, so long as the party complained against has the opportunity to offer rebuttal arguments.

⁷² *Ibid*, p.22.

⁷³ First Written Submission of Egypt, Section III.B.2.

"The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including ... *profits, ...; factors affecting domestic prices, ...* ." (emphasis added)

7.60 We recall that Turkey's claim is that Egypt violated Article 3.4 because the IA did not examine *all factors affecting profits*, and did not examine *all factors affecting domestic prices*. The above text indicates to us, however, a different requirement on an investigating authority. In particular, the text is straightforward in that the requirement is to examine all relevant factors and indices *having a bearing on the state of the industry*. The text then lists a variety of such factors and indices that are presumptively relevant to the investigation and must be examined, one of which is "profits". The text does not say, as argued by Turkey, "all factors affecting profits". To us, this text means that in its evaluation of the state of the industry, an investigating authority must include an analysis of the domestic industry's profits. Turkey has raised no claim that the IA failed to conduct such an analysis in the rebar investigation.

7.61 Another listed element is "factors affecting domestic prices". Here again, we note that contrary to Turkey's argument, the text does not read "all factors affecting domestic prices". Rather, what is required is that there be *an* evaluation of factors affecting domestic prices. This requirement is clearly linked to the requirements of Articles 3.1 and 3.2 for an "objective examination" of "the effect of dumped imports on prices in the domestic market for like products", which must involve a consideration of:

"whether there has been a significant price undercutting by the dumped imports when compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree."⁷⁴

In our view, this means that in its evaluation of the state of the industry, an investigating authority must in every case include a price analysis of the type required by Articles 3.1 and 3.2. Turkey has raised no claim that the IA failed to conduct such an analysis in the rebar investigation. In addition, in our view, an investigating authority must consider generally the question of "factors affecting domestic prices". In this regard, we note that in the rebar investigation, the IA considered the potential price effects of imports from third countries⁷⁵, and noted as well that the market for rebar was price-driven, rather than technology- or specification-driven⁷⁶.

7.62 Turkey's argument that Article 3.4 requires a full "non-attribution" analysis appears to stem from its reading of the term "having a bearing on" as having to do exclusively with causation, (i.e., as meaning factors *having an effect on* the state of the industry). There is another meaning of this term which we find more pertinent in the overall context of Article 3.4, however. In particular, the term "having a bearing on" can mean *relevant to* or *having to do with* the state of the industry⁷⁷, and this meaning is consistent with the fact that many of the factors listed in Article 3.4 are descriptors or indicators *of* the state of the industry, rather than being factors *having an effect* thereon. For example, sales levels, profits, output, etc. are not in themselves *causes* of an industry's condition. They are, rather, among the factual indicators by which that condition can be judged and assessed as injured or not. Put another way, taken as a whole, these factors are more in the nature of *effects* than *causes*.

⁷⁴ Article 3.2 of the AD Agreement.

⁷⁵ Document on Public File: *Report on Other Causes of Injury for the document no 296 on 5/9/99, Case of Rebar Originating or Exported from Turkey*, non-official translation. Submitted by Egypt as Exh. EGT-6.

⁷⁶ Exh. TUR-16, *Final Report*, para.4.3.5.3.

⁷⁷ For example, *Webster's New World Dictionary*, 2nd College Edition, 1986, at p.123, includes as a definition of "bearing": "relevant meaning, appreciation, relation [the evidence had no bearing on the case]".

7.63 This reading of "having a bearing on" finds contextual support in the wording of the last group of factors in Article 3.4, namely "actual and potential negative *effects on* cash flow, inventories, ..." (emphasis added). Further contextual support is found in the cross-reference to Article 3.4 contained in the first sentence of Article 3.5: "... the *effects* of dumping as set forth in paragraph[] 4 [of Article 3]".(emphasis added)

7.64 We note in addition that if Turkey were correct that the full causation analysis, including non-attribution, were required by Article 3.4, this would effectively render redundant Article 3.5, which explicitly addresses causation, including non-attribution. Such an outcome would not be in keeping with the relevant principles of international treaty law interpretation, or with consistent practice in WTO dispute settlement.⁷⁸

7.65 Moreover, even if we were to assume, *arguendo*, that Article 3.4 does require a causation and non-attribution analysis, the question would remain whether the IA was legally obligated to evaluate the particular "factors affecting profits" and "factors affecting domestic prices" referred to by Turkey before the Panel. Here we note simply that there is no such specific requirement in the text of Article 3.4. Whilst "factors affecting domestic prices" must be evaluated, there is no requirement to evaluate "all" such factors. Whether or not an evaluation of such factors was sufficient from the causal view point in any given case depends upon a consideration under Article 17.6 of the investigating authority's compliance with Article 3.5. We address causation issues generally, and the specific factors (a)-(f) asserted by Turkey, in Sections VII.C.4, VII.C.5 and VII.C.6, *infra*, which address Turkey's claims under Article 3.5.

7.66 For the foregoing reasons, we find that the IA was not required under Article 3.4 to examine and evaluate factors (a)-(f) listed above, and that Egypt thus did not act inconsistently with Article 3.4 on that basis.

2. Claim under Articles 3.1 and 3.2 – Alleged failure to base the finding of price undercutting on positive evidence

7.67 Turkey claims that the IA's finding of price undercutting was not based on positive evidence as required by Article 3.1, because the IA failed to make a proper determination of price undercutting in accordance with Article 3.2. On price undercutting, Turkey's argument is that Egypt failed to accurately determine whether there was price undercutting by imports of rebar from Turkey because the Investigating Authority failed to make price comparisons on delivered-to-the-customer basis. Turkey elaborates that the *Essential Facts and Conclusions Report* does not reveal the channels of distribution for the domestic and imported product or where in the chain of distribution any actual price competition between those products takes place. Without knowing these facts, according to Turkey, it is impossible to ascertain whether the IA measured the price competition at the correct level of trade, thus violating the Article 3.2 requirement that an investigating authority "consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product in the importing country ...".

7.68 Turkey further argues, on the basis of its examination of the *Confidential Injury Analysis*, that the price undercutting analysis is further flawed by the fact that the prices used for the domestic side were the weighted-average revenue per unit of domestic rebar producers, and for the import side, were the weighted-average unit customs entered value. According to Turkey, in addition to being flawed due to the level of trade at which it was made, this comparison was flawed, because the IA did not

⁷⁸ Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* ("US – Gasoline"), WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I,3. On page 23 of the Appellate Body Report it is stated: "... One of the corollaries of the 'general rule of interpretation' in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."

look at "prices" or ensure that it was comparing prices for the same product. According to Turkey, rebar prices vary by size, with thinner rebar commanding a higher price per unit due to higher production cost. Given this, comparing one weighted average "basket" to another, without knowing whether the composition of each basket is the same, cannot, according to Turkey, yield an accurate assessment of price undercutting.

7.69 Egypt responds⁷⁹ that contrary to Turkey's claim, the *Essential Facts and Conclusions Report* makes clear that the price comparison was made at the same level of trade (ex-factory for domestic goods, and ex-importer's store for the dumped imports). Egypt states that Turkey would prefer that the comparison be done at a different level of trade (delivered to the customer), but that there is no such legal requirement. Egypt further argues that such a comparison would ignore the fact that importers and exporters do not sell on a delivered basis. Thus, according to Egypt, the undercutting analysis was performed properly and on the basis of positive evidence, such that Egypt complied with Articles 3.1 and 3.2.

7.70 We understand the legal basis of Turkey's claim to be that, to satisfy the requirements of Article 3.2, a price undercutting analysis must be made on a delivered-to-the-customer basis, as it is only at that level that any such undercutting can influence customers' purchasing decisions, and that in addition, and in any case, for such an analysis to be based on positive evidence as required by Article 3.1, an investigating authority must justify its choice of the basis for the price comparison it makes. In Turkey's view, the IA used the wrong basis for price comparison, and did not adequately explain and justify its choice of that basis in the *Essential Facts and Conclusions Report*⁸⁰, in violation of Articles 3.1 and 3.2. Turkey finds further support for its claim that the price undercutting finding violated Article 3.1 in the fact that the average unit customs value of imports was compared with the unit revenue of domestic rebar sales.

7.71 We recall that Article 3.1 provides in relevant part that:

"A determination of injury ... shall be based on positive evidence and involve an objective examination of ... the effect of the dumped imports on prices in the domestic market for like products,"

7.72 Article 3.2 provides in relevant part that:

"With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree"

7.73 On the basis of the plain text of Article 3.2, we find no requirement that the price undercutting analysis must be conducted in any particular way, that is, at any particular level of trade. Therefore, we find that Turkey has not established that there was a legal obligation on the IA to perform the price undercutting analysis in the way asserted by Turkey. Rather, we find that an objective and unbiased investigating authority could have performed an undercutting analysis on the basis used by the IA. We therefore find that the IA's price undercutting finding is not inconsistent with Article 3.2.

⁷⁹ First Written Submission of Egypt, p.39.

⁸⁰ We note that the price undercutting discussion in the *Final Report* is identical to that in the *Essential Facts and Conclusions Report*.

7.74 In respect of the claim of violation of Article 3.1, we take note of the following passage in the *Essential Facts and Conclusions Report*⁸¹ (repeated verbatim in the *Final Report*⁸²):

"In considering price undercutting, the Investigating Authority will normally seek to compare prices at the same level of trade (the ex-factory and ex-importers' store levels), to ensure that differences in distribution costs and margins do not confuse the impact of dumping. Accordingly, the Investigating Authority's position is generally to compare importers' prices, which involve similar cost elements to those in the Egyptian manufacturer's ex-factory price, but do not include cost elements relating to the distribution of goods.

With regard to price undercutting, the Investigating Authority compared prices at the same level of trade."

7.75 While we need not, and do not, opine on the exact nature of the "positive evidence" requirement of Article 3.1, we note that even if we accept, *arguendo*, Turkey's interpretation thereof, the above-quoted passage from the *Essential Facts and Conclusions Report* makes clear that the IA's reports are not, as Turkey implies, devoid of any explanation for the choice of the level of trade at which prices were compared. Moreover, we note that there are any number of bases on which a price undercutting analysis could be performed, and we do not find the IA's justification of the basis that it used to be illogical on its face or not objective, nor do we see in it any evidence of bias. Concerning the undercutting-related information in the *Confidential Injury Analysis*, Turkey has pointed to no record evidence to substantiate its arguments concerning the existence or nature of any product differentiation of rebar generally or as between imports and the domestic product, or any effect thereof on prices. Indeed we note in this regard the statement by three of the respondents in their 28 September 1999 letter to the IA that "as the [IA] well knows, respondents do not break out costs by diameter"⁸³, suggesting that diameter differences had an immaterial effect on costs.

7.76 On the basis of the foregoing considerations, we find that Turkey has not established that an objective and unbiased investigating authority could not have found price undercutting on the basis of the evidence of record. We therefore find that Turkey has not established that the IA's price undercutting finding was not based on "positive evidence" in violation of Article 3.1.

3. Claim under Articles 6.1 and 6.2 – Alleged violation due to "change" in the "scope" of the injury investigation from threat to present material injury

7.77 Turkey alleges that Egypt changed the "scope" of the injury investigation from threat of material to present material injury, without informing Turkey and after the deadline for submitting factual information in the investigation. Turkey claims that by doing so, Egypt violated Article 6.1 by failing to give Turkey notice of the information required by the IA, and Article 6.2 by failing to give Turkey a full opportunity to defend its interests.⁸⁴

7.78 Turkey asserts, in particular, that the *Initiation Report* referred exclusively to threat of injury, and did not mention present material injury. Turkey argues that on that basis, Turkish companies provided evidence and arguments only in respect of the question of threat (i.e., the factors and considerations referred to in AD Article 3.7). Turkey argues that the IA then changed the scope of the injury investigation, after the deadline for submitting factual information and arguments had passed,

⁸¹ Exh. TUR-15, *Essential Facts and Conclusions Report*, para.4.2.1.

⁸² Exh. TUR-16, *Final Report*, para. 4.2.1.

⁸³ Exh EGT-3, p.2b.

⁸⁴ Written Response, dated 7 December 2002, of Turkey to Question 1 to Turkey of the *Written Questions by the Panel*, of 28 November 2001, p.25 – Annex 4.1.

meaning that the Turkish companies did not have an adequate opportunity to submit information and comment on the question of present material injury, in violation of Articles 6.1 and 6.2.

7.79 Egypt responds⁸⁵ that the IA presented in sufficient detail in the *Essential Facts and Conclusions Report* its findings and conclusions with respect to material injury, but that this is not the issue raised by this claim. Rather, according to Egypt, the issue is whether the IA was under an obligation to inform the Turkish respondents that it had changed the scope of the injury investigation from threat to present material injury during the course of the investigation. Egypt cites the panel report in *Guatemala – Cement II* in support of the proposition that no such obligation exists. According to Egypt, the issue raised by Turkey's claim is nearly identical to that addressed in *Guatemala – Cement II*. Egypt argues that in that case, Mexico claimed that Guatemala had violated Articles 6.1, 6.2 and 6.9 of the AD Agreement by changing the basis of the injury determination from a preliminary determination of threat of material injury to a final determination of present material injury without informing the respondents. Egypt notes that the panel found that "[n]o provision of the AD Agreement requires an investigating authority to inform interested parties, during the course of the investigation, that it has changed the legal basis for its injury determination."⁸⁶

7.80 Egypt also argues that the *Notice of Initiation*,⁸⁷ which was published in Egypt's Official Gazette, referred to evidence of material injury starting to occur as of that time, and that in addition, the fact that the investigation covered present material injury was reflected in a facsimile dated 17 July 1999 from the IA to counsel for three of the respondents.⁸⁸

7.81 Article 6.1 provides in relevant part:

"All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question."

7.82 Article 6.2 provides in relevant part:

"Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests."

7.83 As we understand Turkey's claim, the alleged violation of the Article 6.2 obligation to provide interested parties with a full opportunity for the defence of their interests is at least partially dependent on its claim that Article 6.1 was violated. That is, the alleged failure to be given notice of the information required by the authorities meant, according to Turkey, that the respondents did not have a full opportunity for the defence of their interests.

7.84 We start therefore by considering whether, as a factual matter, it is clear that the scope of the investigation was limited to threat of injury initially, but was thereafter changed, as alleged by Turkey, to an investigation relating to present material injury. We note in this regard first that the published *Notice of Initiation*⁸⁹ states that as of the time of initiation, there was evidence that injury was occurring. Furthermore, the (foreign) manufacturers' and exporters' questionnaires⁹⁰, which were sent by the IA shortly after the investigation was initiated, state explicitly that "the investigation of injury will cover the period from 1996 to 1998. As for the threat of injury, it will cover the period from 1999 to 2000". While these questionnaires then went on to pose specific questions to the foreign manufactures and to the exporters concerning some of the factors and issues addressed by Article 3.7,

⁸⁵ First Written Submission of Egypt, p.41.

⁸⁶ First Written Submission of Egypt, Section III.B.8, quoting *Guatemala – Cement II*, para.8.237.

⁸⁷ Exh. EGT-7.3.

⁸⁸ Exh. EGT-8.

⁸⁹ *Ibid*, par.4, p.2.

⁹⁰ Exhs. TUR-3 and TUR-2, Sections 1.8 and 1.5, respectively.

this is not in itself determinative. Indeed, it is logical, given that these factors have primarily to do with the likelihood of further increases in dumped imports, which is information in the hands of the foreign producers and exporters, that the requests for data on these factors would be directed to those foreign producers and exporters. By the same token, it is logical that requests for data on the Article 3.4 factors, information which is in the hands of the domestic industry, would be directed at the domestic producers, rather than the foreign producers and exporters.⁹¹ The IA's *Final Report* alludes to this point as well, quoting from the fax sent to counsel for three of the respondents on 17 July 1999⁹² in connection with the scope of the injury investigation which stated:

"At initiation, it is normal practice to cover both whether injury has commenced or whether it is threatened through the imports. Because of the requirements on threat of injury, it is also normal practice to include questions on this matter in the questionnaire sent to overseas exporters or producers."⁹³

7.85 Thus it is clear to us that a possible determination based on present material injury was, from the outset, within the scope of the investigation. For all of the foregoing reasons, we do not find that Turkey has established as a factual matter that the scope of the investigation was changed.

7.86 Nor do we find that Turkey has established as a factual matter that the IA failed to inform the Turkish respondents of the information required of them, or denied them the opportunity for the full defence of their interests. As noted, the questionnaires sent to the foreign producers and the exporters indicated that the injury investigation covered both present material injury and threat thereof, and identified the particular injury-related information requested of those interested parties by the IA. Three of the respondents then subsequently, and in addition, submitted a written brief, *after* the due date for responses to questionnaires, which presented various legal and factual arguments concerning injury issues.⁹⁴ There is no evidence to suggest, nor does Turkey claim, that the IA refused to consider this submission or objected to it in any way. To the contrary, the IA appears to have accepted this submission without objection or difficulty.⁹⁵

7.87 Furthermore, while counsel for these same respondents complained in comments on the *Essential Facts and Conclusions Report* about the alleged change in the scope of the investigation, implying that the respondents had learned only in that report that present material injury was at issue, ("For ITPD to assert, *now, long after the Notice of Initiation was issued*, that this case concerns injury rather than threat is to move the goalposts while the game is underway"⁹⁶ (emphasis added)), in fact these respondents were explicitly informed by the IA in the fax dated 17 July 1999⁹⁷, in response to an inquiry that had been made at verification, that the injury investigation covered both present material

⁹¹ Here it should be emphasized that requests for *data* and *information* by an investigating authority in an investigation are simply that. It is perfectly understandable that an investigating authority would request the various pieces of information that it must consider in an anti-dumping investigation from the interested parties having possession of that information. In our view, such information requests are not the same as the opportunities for interested parties to present arguments in respect of the legal and factual issues in an investigation.

⁹² Exh. EGT-8.

⁹³ Exh. TUR-16, *Final Report*, para.4.5.7.

⁹⁴ Exh. TUR-18. This submission was made by respondents Habas, Diler and Colakoglu on 21 May 1999. The responses to the manufacturer's and exporter's questionnaires were due on or about 7 April 1999 (the day that most of them were submitted), i.e., 37 days after having been sent to them.

⁹⁵ Moreover, the document identified by Egypt as being from the Public File of the investigation (Exh. EGT-6) addresses some of the arguments presented in that written brief, indicating that the IA took it into account in its injury analysis.

⁹⁶ Exh. TUR-20, p.17.

⁹⁷ Exh. EGT-8.

injury and threat.⁹⁸ These respondents implicitly confirmed their awareness of this fact in their 15 September 1999 submission on cost⁹⁹, in which they stated that "...[g]iven the clear fact that the Egyptian industry *is not materially injured* by Turkish exports, coupled with our earlier evidence concerning threat...we urge the ITPD to terminate these proceedings with a negative determination of *material injury or threat thereof*" (emphasis added). We note that this assertion that the industry was not materially injured was accompanied by no argumentation or evidence, however. Nor had these respondents made any attempt, upon receiving on 17 July 1999 explicit confirmation that the injury investigation covered present material injury as well as threat, to submit any such pertinent argumentation or evidence. We find significant that these respondents did not themselves take the initiative to try to protect their interests by requesting an opportunity to submit argumentation and evidence, or by simply presenting a submission, as they had done, apparently successfully, in respect of threat of material injury.¹⁰⁰ In short, we find no evidence that the respondents were "denied" the opportunity to present pertinent arguments on present material injury, nor that they ever attempted to do so.

7.88 Here, we emphasize that the language of the provision at issue creates an obligation on the IA to *provide opportunities* for interested parties to defend their interests. In the situation that is the subject of this claim, there is no evidence that such an opportunity was not *provided*. Rather, the evidence shows that the respondents did not in fact intervene (or even attempt to do so) on this issue. Failure by respondents to take the initiative to defend their own interests in an investigation cannot be equated, through WTO dispute settlement, with failure by an investigating authority to provide opportunities for interested parties to defend their interests.

7.89 We must stress that the foregoing factual analysis of the record evidence concerning the scope of the injury investigation accepts, *arguendo*, Turkey's implicit interpretation of AD Article 3.7. In particular, Turkey's legal premise appears to be that where an injury investigation is limited to threat of material injury, the factors and considerations referred to in AD Article 3.7 are the *only* ones that must be examined by the IA.

7.90 Article 3.7 of the Anti-Dumping Agreement provides as follows:

"A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent. [footnote omitted.] In making a determination regarding the existence of a threat of material injury, the authorities should consider, *inter alia*, such factors as:

- (i) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;

⁹⁸ The 17 July 1999 fax states in this regard: "At the recent meeting in Turkey with the investigation team, you raised the question about the dumping investigation ... whether this investigation concerned material injury arising from the importation of allegedly dumped goods from Turkey or threat of material injury arising from the same cause"

⁹⁹ Exh. TUR-34A, -34B and -34C, cover letter, p.2, footnote 1.

¹⁰⁰ The threat of injury submission was made on 21 May 1999, one day after the IA had informed these respondents that the deadline for any further questionnaire responses on the subject of threat of injury had been the due date for the questionnaires (Exh. TUR-31, p.2), a date already in the past. In presenting the threat submission, these respondents stated that it was not a response to the questionnaire, but was an "independent evidentiary submission" as foreseen in AD Article 6.1. There is no evidence that this submission was rejected. To the contrary, the document from the Public File (Exh. EGT-6) addresses certain arguments made in that submission.

- (ii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;
- (iii) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and
- (iv) inventories of the product being investigated.

No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur."

7.91 Thus, the text of this provision makes explicit that in a threat of injury investigation, the central question is whether there will be a "change in circumstances" that would cause the dumping to begin to injure the domestic industry. Solely as a matter of logic, it would seem necessary, in order to assess the likelihood that a particular change in circumstances would cause an industry to begin experiencing present material injury, to know about the condition of the domestic industry at the outset. For example, if an industry is increasing its production, sales, employment, etc., and is earning a record level of profits, even if dumped imports are increasing rapidly, presumably it would be more difficult for an investigating authority to conclude that it is threatened with imminent injury than if its production, sales, employment, profits and other indicators are low and/or declining.

7.92 This logic-based conclusion finds explicit support in the plain text of the AD Agreement. In particular, the title of Article 3, "Determination of Injury", carries footnote 9 which provides that:

"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." (emphasis added)

In other words, where the unmodified term "injury" appears in the AD Agreement, it encompasses all forms of injury – present and threatened material injury as well as material retardation of the establishment of an industry.

7.93 Applying this definition to Article 3.1, it is clear that any injury investigation, whether the question is present material injury, threat thereof, or material retardation, must "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" (emphasis added). It is in turn Article 3.4 which governs "the examination of the impact of the dumped imports on the domestic industry". Thus, in short, the Article 3.4 factors must be examined in every investigation, no matter which particular manifestation or form of injury is at issue in a given investigation.

7.94 This indeed is the reasoning applied and the conclusion reached by the panel in *Mexico – Corn Syrup*.¹⁰¹ There, the allegation by the United States was that the Mexican investigating authority

¹⁰¹ Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States ("Mexico – Corn Syrup")*, WT/DS132/R and Corr.1, adopted 24 February 2000, paras.7.111-7.143.

considered the Article 3.7 factors to the exclusion or near exclusion of the Article 3.4 factors. The panel found that:

"The text of the AD Agreement requires consideration of the Article 3.4 factors in a threat determination. Article 3.7 sets out *additional* factors that must be considered in a threat case, but does not eliminate the obligation to consider the impact of dumped imports on the domestic industry in accordance with the requirements of Article 3.4" (emphasis added)."¹⁰²

7.95 Thus, no matter what the initial or final scope of the injury investigation is, the Article 3.4 factors would need to have been examined in either a case of present material injury or of threat of material injury. The only difference would have been that the information and argumentation relating to the Article 3.7 factors would have become less relevant or non-relevant if the basis for the injury investigation was changed from threat to present material injury.

7.96 It may indeed be the case that an investigating authority so clearly misleads interested parties on the relevance to its investigation of the issues of present material injury and threat, or denies them opportunities to address these issues, as to provides the basis for a claim of violation of Articles 6.1 and 6.2. The circumstances of this case fall short of that possibility. On the basis of the foregoing considerations, we find that Turkey has not established that Egypt violated Articles 6.1 and 6.2, in respect of the scope of the injury investigation and the notice thereof provided to the Turkish respondents.

4. Claim under Articles 3.5 and 3.1 – Alleged failure to develop specific evidence linking imports to adverse volume and price effects upon the domestic industry, and consequent failure to base the finding of a causal link on positive evidence

7.97 Turkey argues that the principal indicator of injury relied upon by Egypt in its affirmative injury determination was falling prices and profitability in 1998 and 1999, and that the price decline was attributed to price underselling by imports from Turkey. According to Turkey, however, the IA failed to develop "positive evidence" that dumped imports had an effect on domestic prices, or any impact on the domestic industry. According to Turkey, this constituted a violation of the "positive evidence" requirement of Article 3.1, which in turn meant that Egypt also violated the requirement of Article 3.5 to demonstrate that the dumped imports¹⁰³ were, through the effects of dumping, causing injury within the meaning of the AD Agreement.

7.98 Turkey argues that the specific positive evidence that imports caused domestic prices to fall would include evidence that purchasers considered Turkish imports to be the price leaders in the market, evidence of specific sales lost by the domestic industry to Turkish imports, or evidence that domestic producers dropped their prices, or had to retract planned price increases, because customers cited, in price negotiations with the domestic producers, availability of rebar from Turkey at lower prices. According to Turkey, the mere existence of increases in the volume of dumped imports is insufficient evidence of an injurious impact on the domestic industry, as is the existence of some price underselling, where the domestic industry is increasing its sales volume and market share.

7.99 Egypt argues that on the basis of the data and information available, the IA determined that the volume of dumped imports increased over the period and that this had a significant effect on the price of the domestic rebar, and that the IA also examined the consequent impact on the domestic producers and found *inter alia* that because the industry is sensitive to volume changes, it had to lower prices to meet the competition from the dumped imports and to retain sales. Egypt further

¹⁰² *Ibid*, para.7.137.

¹⁰³ Written Response, dated 7 December 2001, to Question 1 to Turkey, of the *Written Questions by the Panel*, of 28 November 2001, p.20 – Annex 4-1.

argues that there is no requirement in any provision of the AD Agreement that the particular kinds of evidence referred to by Turkey be gathered and analyzed.

7.100 To recall, Article 3.1 provides as follows:

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

7.101 Article 3.5 provides in relevant part as follows:

"It must be demonstrated that the dumped imports are, through the effects of dumping, *as set forth in paragraphs 2 and 4*, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities." (emphasis added)

7.102 We note that neither of the provisions cited above refers to any of the particular kinds of evidence that Turkey argues should have been gathered and examined, or indeed to any kind or type of evidence at all. It is clear that Article 3.1 provides overarching general guidance as to the nature of the injury investigation and analysis that must be conducted by an investigating authority. Article 3.5 makes clear, through its cross-references, that Articles 3.2 and 3.4 are the provisions containing the specific guidance of the AD Agreement on the examination of the volume and price effects of the dumped imports, and of the consequent impact of the imports on the domestic industry, respectively. Thus, any reference in the AD Agreement to the particular kinds of evidence referred to by Turkey in respect of the volume and price effects of the dumped imports presumably would be found, if anywhere, in Article 3.2. This provision contains no such reference, which may explain why Turkey does not also allege a violation of Article 3.2 in respect of this claim.

7.103 In this connection, while Turkey objects to the nature of the price undercutting analysis performed by the IA¹⁰⁴, Turkey does not claim that the IA failed entirely to consider whether there had been price undercutting. Similarly, while Turkey questions the accuracy of some of the data concerning the volume of imports that was relied upon by the IA¹⁰⁵, Turkey does not challenge the IA's basic finding that the imports of rebar from Turkey increased in volume.

7.104 Nor is there any indication in the record (and again Turkey makes no such argument before us) that, during the course of the investigation, the Turkish respondents made any argument that the IA should consider the sorts of evidence that form the subject of this claim, or themselves offered any such evidence. Thus, it is undisputed both that the IA gathered and analyzed the kinds of information that *are* specifically required by the plain language of the AD Agreement, and that the respondents made no attempt during the course of the investigation to complement or expand that information with additional sorts of evidence that are not specifically referred to by the AD Agreement, but which Turkey now asserts in this dispute settlement proceeding that the IA was obligated to consider.

7.105 In short, we do not believe that there is a basis for us to find a violation of the AD Agreement in respect of a kind of evidence or analysis not explicitly required or even mentioned by the AD Agreement, where there is no evidence in the record of the investigation to suggest that such an analysis was necessary, or that any interested party pursued the issue during the investigation. Here again, this is a situation where the respondents made decisions during the investigation (which they

¹⁰⁴ Section VII.C.2, *supra*.

¹⁰⁵ Written Rebuttal of Turkey, p.8-9.

apparently now regret) *not* to raise specific arguments in defence of their interests in the context of the mandatory price effects analysis, the particular details of which are left by the AD Agreement to the discretion of the investigating authority. It is not within our mandate to reverse through the dispute settlement process the consequences of those respondents' decisions made during the course of the investigation as to which arguments they would present.

7.106 On the basis of the foregoing considerations, we find that Turkey has not established that Egypt violated the "positive evidence" requirement of Article 3.1 by virtue of the IA's not developing certain specific kinds of evidence, nor has Turkey established that, as a consequence, Egypt violated the requirement of Article 3.5 to demonstrate a causal relationship between the dumped imports and the injury to the domestic industry.

5. Claim under Article 3.5 – Alleged failure to take account of, and attribution to dumped imports of, the effects of other "known factors" injuring the domestic industry

7.107 Turkey claims that Egypt violated Article 3.5 by failing to take account of, and by attributing to dumped imports, the effects of other "known factors" that were at the same time injuring the domestic industry.

7.108 The particular "known factors" identified by Turkey are the same as those identified in connection with its claim under Article 3.4¹⁰⁶), namely:

- (a) "The dramatic capacity expansion at the two major Egyptian rebar producers and its likely temporary effects on their cost structures";
- (b) "The effects of the capacity expansions, which started production at the end of 1998, on competition between the Egyptian producers as they attempted to fill newly expanded order books";
- (c) "Sharpening competition between Al Ezz and Alexandria National as Al Ezz sought to increase market share by capitalizing on its cost advantages over Alexandria National";
- (d) "Falling prices for steel scrap, the primary raw material input at Al Ezz";
- (e) "A sharp contraction in demand in January 1999, the very month in which prices for rebar fell";
- (f) "The effect of comparably priced, fairly traded imports".

We recall, as noted above, Turkey's clarification that factors (b), (c) and arguably (d) are subsumed in (a) as adverse effects of capacity expansion.¹⁰⁷

7.109 Egypt argues that throughout the course of the investigation, the IA examined all evidence that was provided by interested parties, including evidence concerning capacity expansion, competition between domestic producers, falling prices for raw materials, domestic demand, and the effect of non-dumped imports. On the basis of this examination, Egypt argues, the IA found that there were "no other causes of injury" sufficient to break the causal relationship between the dumped imports and the injury to the domestic industry.¹⁰⁸

¹⁰⁶ Section VII.C.1(b), *supra*.

¹⁰⁷ Para.7.50, *supra*.

¹⁰⁸ First Written Submission of Egypt, p.28.

7.110 Before turning to the substance of this claim, we note that in response to a request from the Panel for certain documents, Egypt submitted a document which it identified as being part of the public file of the investigation, and which, according to Egypt, contains some of the detailed analysis performed by the IA in respect of a number of the "other factors" that it considered during the investigation. According to Egypt, this document was available for inspection upon request during the investigation (27 January 1999-21 October 1999).¹⁰⁹ The document contains sections on "shrinkage of demand", "non-dumped imports", "costs and administrative expenses", and "competition", in addition to several others.¹¹⁰

7.111 This document was not given to Turkey during the course of the investigation¹¹¹, (although Egypt claims that it was in the Public File to which Turkey could have had access during that period), and Turkey states that it did request information from the Public File during the consultations that began this dispute, but was informed that as the investigation was closed, no further access to the Public File was possible.¹¹²

7.112 It is not within our terms of reference to consider issues that arose in the context of dispute settlement consultations, and therefore we do not pursue that question further. We do take note, however, that the published *Notice of Initiation*¹¹³ specifically refers to the public file to which all interested parties could have access, and we further note that Turkey does not assert that any Turkish respondents ever sought access to that file during the investigation and was denied such access.

7.113 Turkey considers that the Panel should not rely on the public file document as evidence of the IA's consideration of certain other factors possibly causing injury. While Turkey acknowledges, in the light of the Appellate Body ruling in *Thailand – H-Beams* that Egypt can rely on evidence not referred to in the IA's published reports, it nevertheless maintains that Egypt can rely only on documents that were shared with or otherwise made available to the respondents¹¹⁴. It is not clear to us what distinction Turkey is making here, as our reading is that *Thailand – H-Beams* addresses and resolves both of these issues, to the effect that we can take into account the public file document.

7.114 Turning to the substance of the issue raised by this claim, we first recall the relevant language of Article 3.5:

"The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade-restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry."

7.115 As this provision makes clear, while it is mandatory to consider "known" factors other than the dumped imports which at the same time are injuring the domestic industry and to ensure that any such injury is not attributed to those imports, it also is clear that the particular list of factors contained in Article 3.5 is illustrative only. This is indicated by the language preceding this list: "Factors which

¹⁰⁹ Exh. EGT-6 and cover note to List of Exhibits attached to the Written Response of Egypt to Questions of the Panel, dated 12 December 2001.

¹¹⁰ *Ibid.*, p.1-4 and 6.

¹¹¹ Written Rebuttal Submission of Turkey, p.1.

¹¹² Oral Statement by Turkey during the Second Substantive Meeting of the Panel with the Parties on 25 February 2002.

¹¹³ Exh. EGT-7.3, Section 12.

¹¹⁴ Statement by Turkey during the Second Substantive Meeting of the Panel with the Parties on 25 February 2002, Section I.B.

may be relevant in this respect *include, inter alia, ...*" (emphasis added). Nor does Turkey argue to the contrary. Rather, Turkey argues that the particular factors that it refers to in this dispute were wholly responsible for any injury suffered by the Egyptian domestic industry, that these factors were or should have been "known" to the IA, and that the IA in making its affirmative injury and causation determination improperly attributed the injury caused by the other factors to the dumped imports.

7.116 We start by considering whether, as a factual matter, Turkey is correct that the IA failed to examine the "other" factors identified by Turkey in this dispute. Turning to the first of these factors, capacity expansion, we note that both the IA's *Essential Facts and Conclusions Report*¹¹⁵ and the *Final Report*¹¹⁶ mention the fact of the industry's capacity expansion, although not its magnitude, and states that the industry did not reduce production to meet import competition, but rather reduced its prices to maintain capacity utilisation, and to try to cover its costs. The reports then conclude that there was "no effect" on capacity utilisation (i.e., that there was no change in capacity utilisation). Thus, it appears that the IA found the industry's capacity expansion to be a neutral factor in its injury and causation analysis. Moreover, we note that while the issue of the industry's capacity expansion was raised by certain respondents during the investigation, the only detailed arguments that were presented in this regard, which were in the submission on threat of material injury of Habas, Diler and Colakoglu, were to the effect that even after the industry's capacity expansion, the industry had *insufficient* capacity to meet domestic demand.¹¹⁷ The only other reference by any respondent to the capacity expansion, which can be found in the Turkish Government's comments on the *Essential Facts and Conclusions Report*, consists of a simple assertion to the effect that the new investments made by the Egyptian producers were largely responsible for the decline in those producers' profits and return on investment.¹¹⁸

7.117 Concerning Turkey's argument that the capacity expansion would have had a large effect on the industry's costs of production, which should have been pursued by the IA during the investigation, we note that the data on the industry's costs, as contained in the *Confidential Injury Analysis*, the source for the data referred to in the IA's *Essential Facts and Conclusions Report* and its *Final Report*, shows in fact that unit costs of production declined consistently over the period of investigation. Thus, the record evidence does not seem to bear out factually the hypothesis posed by Turkey.¹¹⁹

7.118 In respect of the decline in scrap prices, in its *Final Report*, the IA acknowledges the arguments made on this point during the investigation, but implies that one comment is illogical and notes that the other is not supported by the evidence. In particular, the Government of Turkey stated in its comments to the IA on the *Essential Facts and Conclusions Report* that the IA had failed to comply with the requirement to properly analyze known factors other than imports because it did not:

" ... take into consideration decreasing international market prices of scrap in 1998, while establishing a causal relationship between the domestic market prices in Egypt and the export prices of goods originating in Turkey. In fact, as the prices of scrap –

¹¹⁵ *Ibid*, Section 4.3.2.4 and 4.5.4.

¹¹⁶ *Ibid*, Section 4.3.2.2, 4.3.2.3 and 4.6.

¹¹⁷ Exh. TUR-20, p. 9. The submission refers to, and attaches, secondary source documents reporting that demand for steel in Egypt was growing rapidly due to a boom in the construction industry, and that the Egyptian market was "growing ahead of supply", such that imports were filling an "otherwise-unfilled demand".

¹¹⁸ Exh. TUR-30, Section 4.

¹¹⁹ Upon receiving the *Confidential Injury Analysis*, Turkey raised the further argument that the industry's financing cost had increased at the time of the capacity expansion, and that this increase was what was responsible for the industry's loss of profits - See Written Rebuttal of Turkey, p23-24. As noted in the discussion of scrap prices in paragraphs, *infra*, however, unit revenues declined significantly between 1997 and first quarter 1999, particularly between 1998 and first quarter 1999, indeed by more than the increase in financing costs. Thus, we believe that an objective and unbiased investigating authority could have reached the conclusion reached by the Egyptian IA in respect of these trends.

which establishes the majority of the rebar costs – decreased so did the prices of rebars in the Egyptian market, as in most of other countries.

The decline in domestic producers' profits and return on investment cannot be related to Turkish exports, either. *Other than the decrease of scrap prices*, this decline can only be associated with the new investments made by the Egyptian producer in the recent years, which ITPD mentioned in paragraph 4.3.2.4 of the Report."¹²⁰ (emphasis added)

7.119 Similarly, Habas, Diler and Colakoglu argue in their comments on the *Essential Facts and Conclusions Report* that scrap prices were declining and the pricing in Egypt for rebar simply reflected the drop in input prices.

7.120 In the *Final Report*, the IA notes the first comment that "loss of profits were due to the decrease in scrap prices", and notes that:

"Normally, a decrease in the price of a raw material would increase profits. However, in this case, the domestic producers necessarily had to reduce prices so as to meet import competition. Thus, the loss of profits were found to be cause [sic] by meeting the price competition rather than due to the reduction in scrap prices. Further, the amount of decrease in prices was greater than the amount of decrease of scrap prices."¹²¹

7.121 We note that the data on the industry's unit costs and unit revenues contained in the *Confidential Injury Analysis* – which was the source for the data reflected in the *Essential Facts and Conclusions Report* and the *Final Report* – show the pattern alluded to by the IA in the above passage. In particular, unit revenues and unit costs declined over the period of investigation, particularly at the end thereof, but the decline in unit revenues outpaced that in unit costs, resulting in a reduction in gross profits. Selling and administrative costs also declined, but not enough to offset the reduction in gross profit, meaning that profit before interest expense also declined. Thus, the IA's description in its reports of the trends in costs versus rebar prices is consistent with the financial data on the industry.

7.122 Concerning the effects of intra-industry competition, Turkey's argument appears to be somewhat inconsistent, in that Turkey seems to be arguing both that the new capacity would have brought about cost increases at both domestic producers that would have increased their price competition with each other, and that Al Ezz was the lower-cost producer and thus was simply out-competing Alexandria National. While this factor does not seem to be explicitly referred to in the IA published reports, it is mentioned in the document identified as being from the Public File of the investigation, and in that context the IA notes that there was virtually no difference in the prices charged by the two companies. Moreover, it is not clear to us which data in the *Confidential Injury Analysis* would necessarily signify "the effects of intra-industry competition" as such. Indeed, as noted above, overall the industry's costs declined steadily over the period of investigation, and yet industry profits declined as unit revenues declined. Here we recall that, pursuant to the AD Agreement, the IA must evaluate the condition of the domestic industry overall.¹²²

7.123 Concerning the alleged sharp contraction in demand in January 1999, which according to Turkey exactly coincided with falling rebar prices, we note that the IA considered the first calendar quarter of 1999 as a whole, rather than month-by-month. There is no requirement the AD Agreement concerning how the time periods within a period of investigation should be broken out analytically.

¹²⁰ Exh. TUR-30, Section 4.

¹²¹ Exh. TUR-16, *Final Report*, para.4.3.5.3.

¹²² Article 3 of the AD Agreement.

Given that economic data frequently are prone to short-term fluctuations, in our view it could be imprudent for investigating authorities to base significant aspects of their findings and conclusions on data for extremely short periods. Indeed, this seems to have been the point of view, during the investigation, of the respondents that made a separate threat of injury submission. In particular, in that submission's discussion of "other economic factors", in respect of domestic rebar sales data, these respondents restated published government data on a "three-month rolling average basis (to smooth out some of the seasonal fluctuation, such as the annual dip in December) ..." ¹²³. In addition, as noted above, these respondents' general argument, made in their submission of 20 May 1999 (i.e., four months after the asserted decline in demand) was that rebar demand in Egypt was "booming". The data in the *Confidential Injury Analysis* show that demand in the first quarter of 1999 was running at a level comparable to that in 1998, and considerably higher than that in 1996 and 1997, and that at the same time imports from Turkey and domestic sales were increasing. Furthermore, the document from the Public File shows that the IA did examine whether there had been a contraction in demand during the period of investigation and concluded on the basis of the record evidence that there had not been. Thus, in our view, an unbiased and objective investigating authority could have reached the conclusion that was reached by the IA in the rebar investigation on the basis of the facts of record on this issue.

7.124 Finally, concerning the effects of "comparably-priced, fairly-traded imports", Turkey argues that the imports from Saudi Arabia and Libya were similar in volume, and comparable in price, to the imports from Turkey. Turkey asserts that given this situation, there was no basis for the IA to conclude that the imports from Turkey were causing injury while those from Saudi Arabia and Libya were not. The relevant passage from the *Final Report* states:

"Market share of the domestic rebar industry declined in 1998 and increased in the first quarter of 1999 due to reduction in the price to combat dumped prices. All of this had a negative impact on the profitability of the domestic producers. The market share of third country imports declined and Turkish rebar imports replaced the market share of third country imports." ¹²⁴

The import data contained in the IA's published reports appear to be consistent with the above description. In particular, the volume of imports from third countries, taken as a whole, declined from roughly 700,000 tons per year in 1996-1998 to 43,400 tons in the first quarter of 1999 (extrapolated to an annual level of roughly 174,000 tons), while the imports from Turkey, which had dropped from 145,000 tons in 1996 to zero in 1997, rebounded to 210,000 tons in 1998 and stood at 73,600 tons in the first quarter of 1999, an annual extrapolated rate of 294,000 tons. Thus, by the end of the period of investigation, the volume of dumped imports was considerably greater than the total volume of imports from all other sources. Given these statistics, and in particular the fact that as of the end of the period of investigation, the imports from Turkey had risen to a significantly higher level than the imports from all other countries combined, which were sharply declining, the factual basis for Turkey's argument is not clear to us. Furthermore, the document from the Public File indicates that the IA did consider, and rejected, the more detailed arguments concerning the alleged effects of the imports from Saudi Arabia and Libya that had been raised by the three respondents in their threat of injury submission. ¹²⁵

7.125 To summarize, we have taken careful note of the factors asserted by Turkey to have been "other known factors" in the sense of Article 3.5. We also have taken note of the discussions of those factors by the IA in the investigation in its published reports and in the document from the public file, and compared those discussions with the related underlying data of record. As a factual matter, as discussed above, we find that the IA did in fact explicitly discuss in its published reports most of the

¹²³ Exh. TUR-18, p.8.

¹²⁴ *Ibid*, Section 4.3.4.5.

¹²⁵ Exh. TUR-18.

"other factors" identified by Turkey, a number of which are identified by Turkey as being essentially the same, and covered the remainder of these factors (namely possible effects of intra-industry competition and of any contraction in demand) in the document from the Public File. On the basis of the data of record, we find no evidence that the IA's consideration of those factors, including its conclusions about them, were biased or not objective.

7.126 It is clear that Turkey has reached different conclusions than the IA concerning certain evidence of record, and Turkey invites us to do the same. We recall, however, that we are bound by the requirements of Articles 17.5 and 17.6 of the AD Agreement to consider, on the basis of the evidence that was before the investigating authority during the investigation, whether the establishment of the facts in respect of any factor was improper, and whether the evaluation of any factor was biased or non-objective. That is, we are precluded from basing our findings on our own *de novo* review of the record evidence, and our own conclusions about each factor and the existence of injury and causation overall. We are, rather, to consider whether the conclusions reached in the investigation *could* have been reached by an objective and unbiased investigating authority on the basis of its analysis of the evidence of record at the time of the determination. For the reasons discussed above, we find that this standard has been met, and thus that Turkey has not established that the IA's evaluation of the possible causation of injury by factors other than the dumped imports was inconsistent with Article 3.5.

6. Claim under Articles 3.5 and 3.1 – Alleged failure to demonstrate that the imports caused injury "through the effects of dumping"

7.127 Turkey claims that because the period of investigation (POI) for dumping ended on 31 December 1998, and most of the injury found by the IA occurred in the first quarter of 1999, the IA failed to demonstrate that dumping and injury occurred at the same point in time such that there was a link between the imports that were specifically found to be dumped and the injury found, violating Articles 3.5 and 3.1.¹²⁶ In particular, according to Turkey the largest price and profitability declines occurred in first quarter 1999, but the IA made no finding that imports were sold at less than normal value during that period, nor is there any evidence linking the effect of the dumped imports on prices in the domestic market for like product, or linking these imports to the effects on domestic producers. Turkey further argues that by failing to link the imports in 1998 to the injury in 1999, the IA failed to demonstrate "that the dumped imports are, through the effects of dumping, ... causing injury within the meaning of this Agreement"¹²⁷, in violation of Article 3.5.

7.128 We turn first to the factual basis for this claim by Turkey. In particular, Turkey's argument seems largely to rest on its view that there was a differentiation or demarcation as to the nature or extent of the injury found by the IA to exist in 1998 (the period of investigation for the dumping investigation) as compared to first quarter 1999 (the final portion of the period of investigation for the injury investigation). Our review of the *Final Report*, however, shows no hint of such a differentiation. Rather, the Report refers to declines in various indicators in both 1998 and 1999 without reference to any particular qualitative change or shift from the one period to the next. We note that the IA found present material injury during the period of investigation on the basis of those declines. Therefore, there is substantial simultaneity in the period of investigation for dumping and the period during which injury was found.¹²⁸

7.129 Moreover, Turkey's approach rests on the quite artificial assumption that the market instantly absorbs, and reacts to, imports the moment they enter the territory of the importing country. Such an

¹²⁶ Written Response, dated 7 December 2001, of Turkey to Question 1 to Turkey of the *Written Questions by the Panel*, of 28 November 2001, p.24 – Annex 4-1.

¹²⁷ *Ibid*, p.24.

¹²⁸ See *Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations*, G/ADP/6, adopted 5 May 2000 by the Committee on Anti-Dumping Practices.

assumption implicitly rests on the existence of so-called "perfect information" in the market (i.e., that all actors in the market are instantly aware of all market signals). Turkey did not establish a *prima facie* case that such a condition existed in the Egyptian market for rebar during the period covered by the investigation.

7.130 In addition, neither of the articles cited in this claim, nor any other provision of the AD Agreement, contains any specific rule as to the time periods to be covered by the injury or dumping investigations, or any overlap of those time periods.

7.131 In fact, the only provisions that provide guidance as to how the price effects and effects on the domestic industry of the dumped imports are to be gauged are (as cross-referenced in Article 3.5), Articles 3.2 (volume and price effects of dumped imports), and Article 3.4 (impact of the dumped imports on the domestic industry). Neither of these provisions specifies particular time periods for these analyses. (We note that Turkey's specific claims in respect of the price effects analysis and the analysis of the effects of the dumped imports on the domestic industry are addressed in Sections VII.C.4 and VII.C.5, *supra*.)

7.132 For the foregoing reasons, we find that Turkey has not established that the IA was obligated by Articles 3.1 and 3.5 to perform an analysis and make a finding of the type asserted by Turkey in respect of whether the imports caused injury "through the effects of dumping". We thus find that Turkey has not established that Egypt violated Articles 3.5 and 3.1 in this respect.

D. CLAIMS RELATING TO THE DUMPING INVESTIGATION – "FACTS AVAILABLE"

1. Factual background

7.133 The dumping-related claims in this dispute all turn on one key event in the dumping investigation, namely a request sent by the IA to all respondents on 19 August 1999¹²⁹ ("the 19 August request") for certain cost-related information. The chronology of events was that in its questionnaires sent to foreign manufacturers and exporters in late January or early February 1999, the IA requested certain information pertaining to the cost of producing rebar.¹³⁰ In June 1999, subsequent to receiving the questionnaire responses, the IA conducted on-the-spot verifications at the respondents' premises in Turkey. The verifications covered only the price data, and not the cost data, reported in those responses. Then on 19 August 1999, the IA sent each of the respondents that had submitted a questionnaire response¹³¹ a letter indicating that the IA had certain concerns about the accuracy of the cost data reported in the questionnaire responses, in particular about whether the cost data fully reflected the effects of the hyperinflation then prevailing in Turkey. The IA informed the respondents that it therefore intended to adjust the reported costs to reflect the monthly rate of inflation, and to perform the profitability test on the basis of the adjusted costs, unless the respondents provided, by 1 September 1999 (i.e., 13 days later), certain specified additional cost-related information and explanations. The respondents all requested extensions of time, of varying lengths, to respond. In response to these requests, the IA extended the deadline for all of the respondents by 14 days, i.e., to 15 September 1999. No follow-up or other requests for further extensions were made by any respondent.

¹²⁹ Exh. TUR-11.

¹³⁰ Exh. TUR-3.

¹³¹ One Turkish respondent, Ekinciler, did not respond to the questionnaire and thus did not receive a cost-related letter from the IA on 19 August 1999.

2. Claim under Article 17.6(i)

7.134 Turkey claims that the IA's determination of the facts in the rebar investigation was not "proper", nor was its evaluation of the facts "objective" and "unbiased" within the meaning of Article 17.6(i).

7.135 We recall that the full text of Article 17.6(i) of the AD Agreement provides:

"[I]n its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned."

7.136 Turkey's specific claim in this context is that the IA's findings that the respondents' cost of production did not include the effects of hyperinflation in Turkey, which was put by the IA at 5 per cent per month, were speculative and contrary to all the facts on the record.¹³² Turkey asserts that:

"The only support for the Investigation Authority's supposition in this regard is the undisputed fact that Turkey's economy was experiencing high inflation during the period of investigation. However, hyperinflation in the economy as a whole certainly does not mean that each sector and product group is experiencing inflation at the same rate. This is particularly true of industries, like the Turkish rebar industry, that import most of their raw materials and where the raw material input is a commodity product subject to significant swings in price.

...

The Investigating Authority's findings that respondents' costs did not include the effects of inflation, which the Investigating Authority put at 5 % per month, were contrary to all of the facts on the record. For this reason, the Investigating Authority's determination of the fact was not "proper," nor was its evaluation of the facts "objective" and "unbiased" within the meaning of Article 17.6(i)."¹³³

7.137 Egypt contends that Article 17.6(i) of the AD Agreement governs the standard of review to be applied by a panel when considering whether the Investigating Authority's establishment of the facts was proper and the evaluation unbiased and objective. Egypt further asserts that Article 17.6(i) does not govern the rights and obligations of Members under the AD Agreement. Egypt also contends that this claim was not cited in the Request for Establishment of a Panel¹³⁴ and as a consequence, this claim is not within the terms of reference of the Panel and must be rejected.¹³⁵

7.138 Turkey contests Egypt's view by referring to the Appellate Body finding in *US – Hot-Rolled Steel* where it states that Article 17.6(i) imposes certain substantive obligations upon investigating authorities:

"Article 17.6(i) of the Anti-Dumping Agreement also states that the panel is to determine, first, whether the investigating authorities "establishment of the facts was proper" and, second, whether the authorities' " evaluation of the facts was unbiased and objective." Although the text of Article 17.6(i) is couched in terms of an

¹³² Written Response, dated 7 December 2001, of Turkey to Question 1 to Turkey of the *Written Questions by the Panel*, of 28 November 2001, p.30 – Annex 4-1.

¹³³ *Ibid*, p.31.

¹³⁴ WT/DS211/2, as amended.

¹³⁵ Second Written Submission of Egypt, p.14.

obligation on panels – panels "shall" make these determinations – the provision, at the same time, in effect defines when investigating authorities can be considered to have acted consistently with the Anti-Dumping Agreement in the course of their "establishment" and "evaluation" of the relevant facts. In other words, Article 17.6(i) sets forth the appropriate standard to be applied by panels in examining the WTO consistency of the investigating authorities' establishment and evaluation of the facts under other provisions of the Anti-Dumping Agreement."¹³⁶

7.139 Turkey also refers to Claim 1 in its Request for Establishment of a Panel where it stated that "the Egyptian investigative authority ... rendered determinations of injury and dumping in its investigation without *proper establishment of the facts* and based on an evaluation of the facts that was neither *unbiased nor objective*" and to Claim 9 where it stated that "[t]he factual basis cited by the [Investigating Authority] for seeking large amounts of supplemental cost information late in the anti-dumping proceeding were unfounded The [Investigating Authority's] subsequent decision to rely on 'facts available' was based on an *improper determination of the facts* in the investigation and on an evaluation of the facts that was neither *unbiased nor objective*. Thus, Turkey asserts that contrary to Egypt's views, Turkey put a violation of Article 17.6(i) squarely in issue in its request for this Panel"¹³⁷ and that the claim is properly before us.

7.140 Turkey further argues that:

"It is not clear, under the Agreement, that Turkey must allege violation of a separate substantive obligation under the Agreement in order to make this claim. Turkey believes there is a violation of the Agreement if, in reaching its final determination on any issue, the investigating authorities' establishment of the facts is improper or its evaluation of the facts fails to meet the test of objectivity and lack of bias.

However, to the extent that the panel considers that it may only review a violation of Article 17.6(i) in the context of a separate substantive claim, we note that in Section II.D of the restatement of our claims, where reference to Article 17.6(i) is made, Turkey's claim is that Egypt's decision to apply "facts available" was a violation of both Article 6.8 and Article 17.6(i) of the Agreement because that decision was based on an improper determination of the facts and upon an evaluation of the facts that was neither unbiased nor objective. Thus to the extent that the Panel considers that Article 17.6(i) merely sets forth a standard of review for Panel consideration of other substantive violations, then we invite the Panel to consider this claim in connection with our claimed violation of Article 6.8."¹³⁸

7.141 Turning first to whether a claim of violation of Article 17.6(i) is properly before us, we note first that Article 17.6(i) is not listed in Turkey's Request for the Establishment of a Panel¹³⁹, either in the list of Articles allegedly violated, or in Claims 1 or 9, as referred to by Turkey¹⁴⁰, as an article of the AD Agreement which was alleged by Turkey to be violated by Egypt. While certain language similar to that in Article 17.6(i) is contained in certain paragraphs of the Request for Establishment of a Panel, that provision is never mentioned. It is well-established that in WTO dispute settlement, it is always necessary, at a minimum, for the particular Articles of an agreement which are the subject of

¹³⁶ Statement by Turkey at the Second Substantive Meeting of the Panel with the Parties, p.12.

¹³⁷ *Ibid*, p.13.

¹³⁸ Response of Turkey to Question 2 to Turkey of the *Written Questions by the Panel*, dated 14 March 2002 – Annex 8-1.

¹³⁹ WT/DS211/2, as amended.

¹⁴⁰ Written Response, dated 7 December 2001, to Question 1 to Turkey of the *Written Questions by the Panel*, of 28 November 2002 – Annex 4-1.

any claim to be cited explicitly in the request for establishment of a panel.¹⁴¹ Given the absence of any such explicit citation, we dismiss this claim as being outside our terms of reference.

7.142 Furthermore, while, given our dismissal of this claim on procedural grounds, we need not rule on whether a violation of Article 17.6(i) can be the subject of a claim by a party in a dispute, we have considerable doubts in this regard. What is clear nevertheless, and in any case, is that Article 17.6(i) lays down the standard which a panel has to apply in examining the matter referred to it in terms of Article 17.5 of the AD Agreement. As such, we are of course bound by it in our consideration of the claims in this dispute.

3. Claim under Article 6.8 and Annex II, paragraphs 5 and 6 - Resort to "facts available"

7.143 Turkey claims that "[b]ecause the basis for initially questioning and then rejecting Turkish respondents' costs was unfounded", the IA's resort to facts available was unjustified. According to Turkey, the Turkish respondents provided all 'necessary information' and certainly did not 'impede' the investigation".¹⁴² Turkey argues that the rationale for requesting the additional cost data – namely that the originally-reported data did not appear to reflect the high inflation the prevailing in Turkey – was purely speculative, in that hyperinflation in an economy does not necessarily mean that each sector or group experiences inflation at the same rate, in particular industries like the rebar industry which import most of their raw materials and where those materials are commodity products subject to significant swings in price. According to Turkey, the respondents demonstrated in their responses to the IA's 19 August request for cost information that there was nothing "missing" from the respondents' reported costs. Moreover, Turkey states, the Government of Turkey had provided official inflation statistics that showed that inflation did not increase by 5 per cent per month in 1998, but that in a number of months, inflation did not exceed 2.5 per cent. Thus, according to Turkey, because the basis for requesting and then rejecting the cost data was factually unfounded, the IA's resort to "facts available" was unjustified under Article 6.8. Turkey further claims that resort to "facts available" was inconsistent with Annex II, paragraphs 5 and 6, in that the respondents had acted to the best of their ability, in that the IA had failed to inform certain respondents that their information was being rejected, and had failed to give them an opportunity to provide further explanations.¹⁴³

7.144 Egypt argues, first, that Turkey is requesting the Panel to perform a *de novo* review of the evidence that was before the IA, in that, according to Egypt, Turkey's arguments essentially reproduce those made by the respondents during the investigation in respect of cost of production and hyperinflation. Egypt states that the standard of review set forth in Article 17.6(i) does not allow panels to engage in such *de novo* review. According to Egypt, the Panel must limit its review of the decision to rely in part on "facts available" to whether the facts were properly established and whether the conclusions reached were unbiased and objective. Further, Egypt argues, the decision to partially use "facts available" was in compliance with Article 6.8 and Annex II of the AD Agreement. In this

¹⁴¹ See, Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas ("EC – Bananas III")*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591, para.143, Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy products ("Korea – Dairy")*, WT/DS98/AB/R, adopted 12 January 2000, para.124, and *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India ("EC – Bed Linen")*, WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body, p.9-10.

¹⁴² Turkey's Written response of Turkey, dated 7 December 2001, to Question 1 of the *Written Questions by the Panel*, of 28 November 2001, p.31 – Annex 4-1.

¹⁴³ Turkey also claims that the IA's resort to facts available was inconsistent with Articles 2.4, 2.2.1.1, and 2.2.2 of the Anti-Dumping Agreement, and with Article X:3 of the GATT. These claims are addressed separately, in Sections VII.D.4 and VII.B.4. In its Request for Establishment of a Panel, Turkey also refers to alleged violations of paragraphs 3 and 7 of Annex II in the context of the IA's resort to facts available. Turkey's arguments in its submissions indicate, however, that the allegations of violation of these provisions are in connection with the information used as facts available, and not with the resort to "facts available" as such. These claims are addressed in Sections VII.D.7-VII.D.9. *infra*.

regard, Egypt argues that the cost data as originally reported were incomplete and unusable, and that the respondents failed to submit the additional information, in particular supporting evidence and reconciliation sheets, requested by the IA on 19 August, and that in addition, three of them subsequently refused to submit any further information when they were informed that their responses to the 19 August request were deficient. Finally, Egypt argues, the data and allegations presented by the respondents concerning costs were contradicted by the evidence on the record.

(a) Article 6.8 and Annex II

7.145 Article 6.8 of the AD Agreement governs the use of "facts available" by an investigating authority and provides:

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

7.146 Article 6.8 therefore addresses the dilemma in which investigating authorities might find themselves - they must base their calculations of normal value and export price on some data, but the necessary information may not have been submitted. Article 6.8 identifies the circumstances in which an IA may overcome this lack of necessary information by relying on facts which are otherwise available to the investigating authority.

7.147 It is clear to us that according to the wording of Article 6.8, an investigating authority may disregard the primary source of information and resort to the facts available only under the specific conditions of Article 6.8. An IA may therefore resort to "facts available" only where a party: (i) refuses access to necessary information; (ii) otherwise does not provide necessary information within a reasonable period; or (iii) significantly impedes the investigation.

7.148 Egypt does not assert, nor do we find an indication in the record, that the IA considered that any of the Turkish respondents "significantly impede[d]" the investigation. In fact, Egypt states that its reasons for resort to facts available in respect of Habas, Diler and Colakoglu were that these companies "refused access to necessary information" and "failed to provide necessary information", and that in respect of Icdas and IDC, the reason was that these companies "otherwise failed to provide necessary information".¹⁴⁴ We will thus have to consider whether, as indicated by Egypt, the Turkish respondents refused access to necessary information, and/or failed to provide necessary information.

7.149 The IA explained its decision to resort to facts available in paragraph 1.6.5 of the *Final Report*, as follows:

"Because parties did not provide all the data required, the Investigating Authority decided to proceed with the investigation procedures and calculate margins of dumping in accordance with Article 6.8 of the Anti-dumping Agreement which provides that:

[quotation of Article 6.8 omitted]

Article 27 of the [Egyptian Anti-Dumping] Regulation provides that:

¹⁴⁴ Written Response, dated 7 December 2001, to Question 9 to Egypt of the *Written Questions by the Panel*, of 28 November 2001 – Annex 4-2.

'In case of absence of the data required, failure to submit data within the time-limit or non-cooperation with the Investigating Authority, the Investigating Authority may proceed in the investigation procedures and come to conclusions according to the best information available ...'

And Article 35 of the Regulation states that:

'In cases where there is no sufficient data to determine the export price or the normal value, the Investigating Authority may determine them on the basis of the best information available'.¹⁴⁵

7.150 These statements appear to confirm that the IA based its decision to resort to "facts available" in terms of Article 6.8 on respondents' "not provid[ing] ... necessary" information. We therefore start our analysis by examining the concept of "necessary information" in the sense of Article 6.8, and then consider whether necessary information in that sense was requested by the IA, but not provided by the respondents.

7.151 Article 6.8 refers to "necessary" information, and not to "required" or "requested" information. As this provision itself does not define the concept of "necessary" information, we consider whether there is guidance on this point anywhere else in the AD Agreement, in particular in Annex II, given Article 6.8's explicit cross-reference to it.

7.152 In this regard, we find significant the specific wording of that cross-reference: "[t]he provisions of Annex II *shall* be observed in the application of *this paragraph*" (emphasis added). In other words, the reference to "this paragraph" indicates that Annex II applies to Article 6.8 in its entirety, and thus contains certain substantive parameters for the application of the individual elements of that article. The phrase "shall be observed" indicates that these parameters, which address both when facts available can be used, and what information can be used as facts available, must be followed.

7.153 Our view of the relationship of Annex II to Article 6.8 is consistent with that of the Appellate Body in *United States – Hot-Rolled Steel*. In that case, the Appellate Body stated that Annex II is "incorporated by reference" into Article 6.8,¹⁴⁶ i.e., that it forms part of Article 6.8. In similar vein, the Appellate Body also referred to the "collective requirements" of Article 6.8 and certain provisions of Annex II.¹⁴⁷ The panel in *Argentina – Ceramic Tiles* came to a similar conclusion.¹⁴⁸

7.154 It is clear that the provisions of Annex II that address what information can be used as facts available (which, along with the other provisions of Annex II, "shall be observed") have to do with ensuring the reliability of the information used by the investigating authority. This view may further be confirmed, as foreseen in Article 32 of the Vienna Convention on the Law of Treaties¹⁴⁹, by the negotiating history of Annex II. In particular, this Annex was originally developed by the Tokyo Round Committee on Anti-Dumping Practices, which adopted it on 8 May 1984 as a

¹⁴⁵ Exh. TUR-16, *Final Report*, para.1.6.5.

¹⁴⁶ Appellate Body Report, *US – Hot-Rolled Steel*, para.75.

¹⁴⁷ *Ibid.*, para.82.

¹⁴⁸ Panel Report, *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy* ("*Argentina – Ceramic Tiles*"), WT/DS189/R, adopted 5 November 2001.

¹⁴⁹ Art. 32 of the Vienna Convention of the Law of Treaties provides:

"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable".

"Recommendation Concerning Best Information Available in Terms of Article 6:8".¹⁵⁰ During the Uruguay Round negotiations, the substantive provisions of the original recommendation were incorporated with almost no changes as Annex II to the AD Agreement. A preambular paragraph to the original recommendation, which was not retained when Annex II was created, in our view, provides some insight into the intentions of the drafters concerning its application. This paragraph reads as follows:

"The authorities of the importing country have a right and an obligation to make decisions on the basis of the best information available during the investigation from whatever source, even where evidence has been supplied by the interested party. The Anti-Dumping Code recognizes the right of the importing country to base findings on the facts available when any interested party refuses access to or does not provide the necessary information within a reasonable period, or significantly impedes the investigation (Article 6:8). However, all reasonable steps should be taken by the authorities of the importing countries to avoid the use of information from unreliable sources."

To us, this preambular language conveys that the *full* package of provisions in the recommendation, applicable in implementing Article 6:8 of the Tokyo Round Anti-Dumping Code, was intended, *inter alia*, to ensure that in using facts available (i.e, in applying Article 6:8), information from unreliable sources would be avoided.

7.155 On the question of the "necessary" information, reading Article 6.8 in conjunction with Annex II, paragraph 1, it is apparent that it is left to the discretion of an investigating authority, in the first instance, to determine what information it deems necessary for the conduct of its investigation (for calculations, analysis, etc.), as the authority is charged by paragraph 1 to "specify ... the information required from any interested party". This paragraph also sets forth rules to be followed by the authority, in particular that it must specify the required information "in detail", "as soon as possible after the initiation of the investigation", and that it also must specify "the manner in which that information should be structured by the interested party in its response". Thus, there is a clear burden on the authority to be both prompt and precise in identifying the information that it needs from a given interested party. In addition, paragraph 1 refers to a "reasonable" time-period for providing requested information. We note that in this dispute, we have resolved in connection with other claims Turkey's allegations that the IA's requests for cost information were not sufficiently prompt or precise, and that insufficient time was allowed for responding.¹⁵¹ Thus, we do not consider these issues further here.

7.156 Having concluded that, subject to the requirements of Annex II, paragraph 1, it is left to the discretion of the investigating authority to specify what information is "necessary" in the sense of Article 6.8, we now consider what provisions of Annex II are relevant in respect of determinations that an interested party has "refused access to" or "otherwise has failed to provide" such information. In terms of the issues raised in the present claim, we find that two of the key such provisions are paragraphs 3 and 5 of Annex II.

7.157 Annex II, paragraph 3 provides:

"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. If a party does not respond in the preferred medium or computer language but

¹⁵⁰ ADP/21.

¹⁵¹ See, Sections VII.D.5, VII.D.6 and VII.E.1, *infra*.

the authorities find that the circumstances set out in paragraph 2 have been satisfied, the failure to respond in the preferred medium or computer language should not be considered to significantly impede the investigation."

7.158 Annex II, paragraph 5 provides:

"Even 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."

7.159 These two paragraphs together thus provide key elements of the substantive basis for an IA to determine whether it can justify rejecting respondents' information and resorting to facts available in respect of some item, or items, of information, or whether instead, it must rely on the information submitted by respondents "when determinations are made". Some of the elements referred to in these paragraphs have to do with the inherent quality of the information itself, and some have to do with the nature and quality of the interested party's participation in the IA's information-gathering process. Where all of the mentioned elements are satisfied, resort to facts available is not justified under Article 6.8.

7.160 We consider that in the present dispute, the determining factor in the IA's decision to resort to facts available, and thus the central aspect of Turkey's claim in respect of this decision, is the "verifiability", in the sense of paragraph 3, of the cost information submitted by the respondents, and note in this regard Turkey's objection to what it sees as the IA's conducting a "mail-order verification".¹⁵² That is, there seems to be no issue in respect of appropriateness of the manner in which the information was submitted or whether thereby using it would involve undue difficulties, nor is there an issue in respect of the medium or computer language. We note that, in regard to the quality of the information, paragraph 5 provides that information that may not be "ideal in all respects" nevertheless should be used provided the submitter has acted to the best of its ability. We address Turkey's claim in respect of the language "to the best of its ability" in paras. 7.239, *et seq.*, *infra*, and focus here rather on the relationship of the phrase "not ... ideal in all respects" to the concept of "verifiability" in paragraph 3.

7.161 As we have noted, paragraphs 3 and 5, in addition to some of the other provisions of Annex II, have to do with assessing whether the information submitted by interested parties must be used. Thus, paragraph 5 is a complement to paragraph 3 and the two must be read together in considering the IA's obligations in respect of submitted information. In particular, we believe that under the pertinent phrases in these two paragraphs taken together, information that is of a very high quality, although not perfect, must not be considered unverifiable solely because of its minor flaws, so long as the submitter has acted to the best of its ability. That is, so long as the level of good faith cooperation by the interested party is high, slightly imperfect information should not be dismissed as unverifiable.¹⁵³

7.162 In the context of this dispute, we find the provisions of paragraph 1 also to be relevant as to the "verifiability" of the information ultimately submitted by each respondent. In particular, the factual issue that culminated in the IA's resort to facts available began with the IA's doubts as to the accuracy of the cost data as originally submitted, and its 19 August request for "source data and [] audited financial data *establishing the accuracy* of the summary data that you supplied".¹⁵⁴ In other

¹⁵² See, e.g., Section VII.E.1.

¹⁵³ We note that there is an interplay between the concepts of acting to the best of one's ability in Annex II, paragraph 5, and "refusing access to" necessary information or "significantly impeding" an investigation in Article 6.8. That is, the behaviour of the interested party is relevant to the right to use facts available in a given situation.

¹⁵⁴ Exh. TUR-11.

words, the IA specified in detail in the 19 August letter what information it considered necessary in order to be able to verify the cost data as reported in the respondents' questionnaire responses.

7.163 In assessing whether Article 6.8 was violated in this case, we also must consider whether the IA complied with paragraph 6 of Annex II. In particular, Turkey claims that the IA failed to notify two of the respondents, IDC and Icdas, that their information was being rejected, and failed to give them an opportunity to provide further explanations, as required by this provision. According to Turkey, for this reason as well, the IA's resort to facts available in respect to these respondents violated Article 6.8.

7.164 In sum, to understand in this dispute whether the IA was justified in relying on facts available for cost of production and constructed normal value, pursuant to Article 6.8, we will need to consider whether the information provided by each of the five respondents concerning their costs of production was "verifiable" in the sense of Annex II, paragraphs 3 and 5, and whether the IA provided the notice and opportunity for explanation required by Annex II, paragraph 6. To determine this, we will consider the following questions. In the first instance, did the IA clearly specify the information that it needed in order to satisfy itself as to the accuracy of the respondents' cost of production data (i.e., did the IA specify what it needed to verify the reported cost data)? Did each respondent provide the information that had been specified? In doing so, what were the nature and extent of any flaws in the information that was provided? Did each respondent, in providing information in response to the requests, act to the best of its ability? Finally, was each respondent informed that its information was being rejected, and given an opportunity to provide further explanations?

7.165 We now turn to a detailed review of the facts of the rebar investigation, including the nature of the information submitted by each of the Turkish respondents and the actions of those respondents and the IA. Only by applying the analytical framework that we have set out above to the specific facts of this case can we make a judgement as to whether for each respondent the IA respected the requirements of Article 6.8 in conjunction with the cited paragraphs of Annex II.

(i) *Colakoglu, Diler and Habas*

7.166 Colakoglu, Diler and Habas responded to the Manufacturers Questionnaire and on 7 April 1999 submitted to the IA their responses, through the same legal counsel.¹⁵⁵ Their responses to Appendix 2 of the Manufacturer's Questionnaire relating to sales in the domestic market to independent customers during the period 1 January 1998 to 31 December 1998 contained information relating only to those sales that were identical in physical characteristics, closest in time and closest in quantity to the Egyptian sales. Furthermore, these producers also reported in their responses monthly average costs of production of rebar only for the months in which they had sales to Egypt, in response to the information requested in Annex 9 to the Manufacturers Questionnaire.¹⁵⁶

7.167 On 10 May 1999 counsel for these three producers sent a fax to the IA regarding procedural issues, enquiring, *inter alia*, "[i]f there will be supplemental questions, when such questions would be issued".¹⁵⁷ The IA responded on 20 May 1999 that:

"Before the visit (verification), each company will be advised of the items which the Egyptian Authority wishes to verify and further information that will be sought. In general, the information which is missing is the supporting documentation on which claims for adjustments are based. It is usual for this type of information and explanations to be provided during the verification visit, where the information in the industry response has been sufficient, as it has in this case. Without the supporting

¹⁵⁵ First Written Submission of Turkey, p.26.

¹⁵⁶ *Ibid.*

¹⁵⁷ Exh. TUR-36.

data which is requested in the questionnaire however adjustments are not normally allowed."

7.168 The on-site verification of the information submitted by the three producers in response to the Manufacturer's Questionnaire was conducted in Turkey from 11 to 18 June 1999.¹⁵⁸ In the verification reports relating to these three producers, no discrepancies between the information submitted and the verified information were noted by the IA.¹⁵⁹ It is common cause that the verification was limited to export sales and domestic sales and that the reported data on cost of production were not verified.¹⁶⁰

7.169 On 12 August 1999 the IA sent faxes to all five respondents, including Habas, Diler and Colakoglu, regarding certain adjustments to their export prices and home market prices. These three producers responded to this fax and provided certain requested information and explanations, as well as comments, on 13 August 1999.¹⁶¹

7.170 On 19 August 1999 the IA sent letters by fax, the operational parts of which were identical, to all five Turkish producers.¹⁶² In these letters the IA informed the producers that:

"The Investigating Authority has reviewed the cost and sales data that [name of company] has submitted thus far in this proceeding. In reviewing this data, the Investigating Authority has identified a number of concerns that are identified below.

As a threshold matter, the Investigating Authority is aware that during the period of investigation, Turkey was experiencing hyperinflation on the order of roughly 5 percent per month. The Investigating Authority would, therefore, expect to see in the data submitted by [company name] a substantial increase during the period of investigation both in the home market sales prices and in the cost of production. The Investigating Authority has reviewed the data submitted by [company name], and it appears that the data is not consistent with the inflationary conditions experienced in Turkey during the subject period. [The IA then gives details of cost data of materials, labour, manufacturing overhead and selling, general and administrative costs ("SG&A") as submitted by the three producers and noted that these cost elements all showed a decrease during the subject period, despite the inflationary conditions.] The costs reported included no finance cost, yet the income statement that [company name] supplied indicated significant financing expenses. The costs reported include a deduction for "interest expense", the Investigating Authority would need an explanation for this cost and why it is deducted from cost of production.

...

The above data reported by [company name] indicate that your reported costs do not reflect the inflation in effect. The Investigating Authority, therefore, intends to adjust the cost data reported by [company name] and eliminate those home market sales that are determined to be not in the ordinary course of trade.

In the event you disagree with the proposed course of action, we require that you supply the Investigating Authority with source data and with audited financial data establishing the accuracy of the summary data that you supplied. We also require that

¹⁵⁸ First Written Submission of Turkey, p.29.

¹⁵⁹ Exh. TUR-6(Diler), TUR-7(Colakoglu) and TUR-8(Habas), respectively.

¹⁶⁰ Verification Reports by the IA, submitted by Turkey as Exh. TUR-4(Icdas), TUR-5(IDC), TUR-6(Diler), TUR-7(Colakoglu) and TUR-9(Habas), respectively.

¹⁶¹ Exh. TUR-25.

¹⁶² Exh. TUR-11.

you provide a full and complete explanation regarding the issues set forth above. In addition, you must reconcile the costs that you submitted to the audited financial statement. Attached hereto is a list of the data required by [company name] in the event you propose a modification of the Investigating Authority's approach.

The Investigating Authority intends to conclude this investigation in the near future. Therefore, any response to this letter must be accompanied by the data identified in the attached list and must be received by the Investigating Authority no later than September 1st, 1999. Any response received after that date may be rejected by the Investigating Authority.

List of supplemental materials required accompanying any response to this letter.

1. *Basic Source Documents.*

[Company's name] audited financial statements, including all footnotes, covering full calendar years 1997 and 1998, and any draft or interim financial statements and footnotes covering [different periods for different companies].

The annual or semi-annual submissions made to the Turkish tax authorities for full calendar years 1997 and 1998.

A chart of accounts for full year 1998 and the first half of 1999.

Cost of production data prepared in accordance with app. 9A for the months [different months for the different companies].

2. *Accounting Practices*

Provide a written summary of the basic books used in your accounting system. Use a diagram if possible.

Provide a review of the accounting system using the basic books summary, chart of accounts, and the financial statements. Show how sales and expenses are posted to the various ledgers and statements (*i.e.*, demonstrate the manner in which source documents for sales and expenses flow into the financial statements via accounting vouchers, journals, subsidiary ledgers, and general ledger accounts).

Provide a complete list of the types of computer reports generated and/or available in the ordinary course of business. Provide samples of each of these reports.

3. *Merchandise*

Provide a complete list of all products sold during the period of investigation, and a list of the internal accounting codes for these products that were used to record costs, sales, or expenses.

4. *Materials*

A. Provide the material inventory ledgers for the subject merchandise showing the raw materials, work in process, and finished goods inventory showing the balance and activity in the accounts for each month during 1998 and an explanation of

whether and how inventory values are adjusted for inflation in [company name] accounting records.

B. Reconcile the total value from the inventory ledgers for the months of [different months for each company] to [company name] general ledger and financial statement.

C. Provide a copy of all material purchase orders placed during the months of [different months for each company]. A copy of the appropriate pages from the payments ledger showing payment for those purchases.

D. A worksheet reconciling the materials costs that you submitted in your summary to the Investigating Authority to the company's audited financial statement.

5. *Labour*

A. Explain whether any adjustments have been made in [company name] accounting records to recognize the inflation that occurred during this time.

B. Explain the basis on which labour was allocated to the subject merchandise.

C. Reconcile the labour costs reported for [different months for each company] to the general ledger and to the financial statement, and provide supporting documents, including bank statements for those months.

6. *Overhead*

A. Explain whether any adjustments have been made to account for the inflation that occurred during this time.

B. Provide a complete list of all expenses included in the category "overhead" which you provided in your summary to the Investigating Authority.

C. Provide a complete list of all depreciation expenses and reconcile those expenses to the summary which you provided to the Investigating Authority for the months of [different months for each company].

D. Specifically explain whether your recorded depreciation expenses take into account the inflation that occurred during this time.

7. *Complete sales listing*

A. Provide the complete sales journal for the subject merchandise for the months of [different months for each company]. Provide a worksheet for [different months for each company] which reconciles the monthly sales total to the financial statement sales total.

B. Using the worksheets developed for the previous step, reconcile the total reported export and home-market sales to sales journal(s), summary entries in the general ledger based on sales journals, and the financial statements for [different months for each company]. Show how the sales listing flows to subsidiary ledgers, the general ledger, and the financial statements for 1998."¹⁶³

¹⁶³ Exh. TUR-11.

7.171 Counsel representing these three producers requested on 23 August 1999 an extension of 51 days, to 22 October 1999, of the time-period of 13 days originally provided for the submission of responses to the IA's letter. The stated reasons for requesting the extensions were that Turkey had suffered a major earthquake on 17 August 1999, with consequent absence of key employees attending to their families or helping with relief efforts, as well as the fact that these companies were scheduled to undergo verifications in EU and Canadian antidumping investigations within the following 35 days.¹⁶⁴ Icdas requested on 26 August 1999 an extension of 40 days, until 11 October 1999, and IDC requested an extension until 15 October 1999. The IA informed all five producers, on 26 August 1999, that an extension had been granted to 15 September 1999, that is, an extension of 14 days.

7.172 On 15 September 1999 the counsel for the three producers, Habas, Diler and Colakoglu, submitted their responses to the 19 August 1999 letter.

7.173 The IA informed these producers by letter dated 23 September 1999 that certain requested information and underlying documents had still not been submitted. In all three cases, for example, concerning material costs, for which the IA in the 19 August letter had requested data and supporting documents (purchase orders, payment ledgers, etc.) regarding raw material purchases, the respondents had submitted only information relating to billets, i.e., providing their internal transfer prices of the billets they themselves had produced, rather than the requested information on the raw materials used to make the billets.¹⁶⁵

7.174 In the 23 September 1999 letters, the IA requested the three producers to address the deficiencies in the responses they had submitted on 15 September 1999.

7.175 Specifically, with respect to **Habas** the IA requested the following:

"1. *Basic data:*" The IA requested Habas to provide the total monthly quantity of billets/rebars produced during the period of investigation.

"2. *Materials:*" According to the IA no information was submitted for auxiliary materials used in the production process in attachment no 4 (to the 15 September response) and the IA requested a complete monthly list of all raw materials used to produce rebars and the percentage each represent of the finished product. The information requested was set out in an annex. According to the annex, the information to be submitted under the heading "materials used" was to be broken down into scrap, graphite, ferro alloys, electrodes etc, and "labour" into sub-headings "From scrap to billet" and "From billet to rebar" and the same with regard to "overhead". The other cost items requested were the same as in the format attached to the original Manufacturer's Questionnaire."

7.176 The IA also requested that supporting documents such as purchase orders, purchase invoices, and production line documents that show the total cost of producing billets as well as rebars, be submitted and that all these documents should also be fully translated.

7.177 The IA requested that the allocation base of material used for each size, should also be submitted.

¹⁶⁴ First Written Submission of Turkey, p.37.

¹⁶⁵ According to Turkey "the original responses of each producer put the IA on notice that each company was reporting its internal cost of billet as the reported raw material cost. Footnote 91 in Turkey's First Written Submission.

"3. *Labour*:" The IA requested that the costs of goods sold (COGS – attachment no. 10 to the response of 15 September) be translated and that supporting documents like sample payroll records or time cards be furnished. These documents should also be translated.

"4. *Overhead*:" The IA requested that the total amounts of factory overhead (item by item) and how they were allocated to each size, be provided.

"5. *SG & A:I*" The IA requested that the total amount of SG & A (item by item) and the allocation basis of these amounts to each size, be submitted.

"6. *Complete sales listing*:" The IA requested the total sales quantity for each size.

"7. *Interest expense*:" The IA requested a list identifying separately interest expense from interest income."

7.178 The IA also informed Habas that:

"Generally speaking, most documents provided were in Turkish. A full translation should be attached to each document, for example, a detailed manufacturing cost and packing cost reconciliation.

Please provide us with a full explanation demonstrating how and where the high inflation rate is already included in all cost elements during the POI.

The above-mentioned items no. 4,7 should be submitted within 2 days."

7.179 The information other than items 4 and 7 was to be submitted within five working days from 23 September 1999. The IA did not indicate what the consequences would be if these deadlines were not met.

7.180 With respect to **Colakoglu**, the IA requested almost exactly the same information. The only difference was that under the heading "Overhead", Colakoglu was also requested to furnish a translation of documents that it had submitted in Turkish.

7.181 In the case of **Diler**, almost exactly the same information as that requested from Colakoglu, was requested, except that under the heading "Basic data", Diler was requested to provide the total monthly quantity of scrap purchased (domestic listed separately from imported scrap), billets produced, billets sold (domestic listed separately from exported billet) and rebars produced during the period of investigation (by size).

7.182 In response to the IA's requests, counsel to these three producers informed the IA on 28 September 1999 that:

"The previously submitted responses of Colakoglu, Diler and Habas to the ITPD questionnaire are complete and accurate.

Responses which were entirely complete in April 1999 remain so today.

....

The documents provided on 13 September in response to the questionnaire of 19 August 1999 are translated in sufficient detail to enable ITPD to ascertain their contents. Many of these documents had been previously given and translated in full;

for example, financial statements had been previously given in full translation, so we did not provide duplicative translation. Similarly, the packaging cost reconciliations sought in the 23 September letter were in fact provided during the verification, when ITPD fully verified packing costs and inspected, translated, and copied original documents.

If ITPD remains unable to locate the original translations or to identify the pages of the 15 September response where translations are provided, or if ITPD requires any additional explanations, we will be pleased to come to Cairo to review these documents with ITPD. Such a meeting could be arranged after the third week of November, if desired. Before that time, counsel's time is fully booked, but we would expect ITPD to afford us this scheduling courtesy in view of the events herein since verification was concluded.

With reference to ITPD's request for additional information in the ITPD letter of 23 September, we note that ITPD is requiring responses to the letter 'within 2 days' for certain items and 'no later than 5 working days' for other items.

International courier service from Turkey to Egypt requires 2 days. Therefore it is physically impossible to provide documentation within 2 days. Furthermore, even a 5-day time-limit is unreasonable; no respondent could possibly provide factual responses in such a period of time. Thus the time limits set for this questionnaire response are unreasonable and impossible to meet, and hence in violation of GATT AD Code [sic], Art 2.4 ('unreasonable burden of proof') and Art 6.1 (respondents shall be given 'ample opportunity to present evidence ...').

In particular, with reference to 'Attachment 1' of ITPD's 23 September letter, ITPD has not previously requested this type of information. It thus amounts to a new cost questionnaire. The question is extremely burdensome; respondents estimate that, if the questions were properly posed(sic), it would take at least a month to provide the answers.

..... Colakoglu, Diler and Habas object to what is blatantly a mail order verification.
...

If ITPD does not understand any of our submissions or wants more explanation, we are willing to meet with ITPD in Cairo to explain anything about which ITPD has questions.

Colakoglu, Diler and Habas have answered every question of the questionnaire, ...

As of the end of the verification, the factual record is complete.

In short, Colakoglu, Diler and Habas stand by their responses and demand a calculation based on their responses as submitted."

7.183 On 28 September 1999, the IA responded to this letter, informing the counsel for the three respondents that "we note that you did not fully respond to the following items: materials, labour, overhead, SG&A, interest expense and detailed cost sheet. Therefore, the ITPD will use other data provided by your clients which were satisfactory, but will use facts available for the above-mentioned items."¹⁶⁶

¹⁶⁶ Exh. EGT-13-6.

7.184 On 28 September 1999, counsel for these three companies responded to the IA's letter of 28 September, informing the IA that they:

"reiterate that they are absolutely entitled to a decision based on their own data. They answered the questionnaire, received no supplemental questions, and successfully underwent verification. Questionnaires subsequent to verification are *ultra vires* and cannot be the basis for facts available. ... Furthermore, respondents' submissions of 15 September fully support and verify the accuracy of respondents' reported costs. ... Colakoglu, Diler and Habas are therefore entitled to a margin calculation based on their own numbers, as submitted. Any other outcome – in particular, any 'facts available' outcome – would be unlawful."¹⁶⁷

7.185 In a letter dated 5 October 1999 to counsel for these three producers, the IA referred to that counsel's previous suggestion of a "possible" meeting in Cairo to explain the data submitted by Colakoglu, Diler and Habas and stated that "any further comments or explanations regarding the request of ITPD for supplemental information should have been included in your responses, the deadline for which has passed. We will consider any further information to be untimely."

7.186 Concerning the three respondents as a group, in the IA's Essential Facts and Conclusions Report of October 1999¹⁶⁸ under the heading: "The IA's Request for Supplemental Information", the IA stated that:

"On September 15, 1999, respondents Habas, Diler and Colakoglu responded to the Investigating Authority with some incomplete data and argued that the Investigating Authority's request for additional data was procedurally improper. These respondents argued that the Investigating Authority is prohibited from requesting further data and that, following a verification, the Investigating Authority is required to accept all data submitted by respondents that the Investigating Authority did not find to be inaccurate as a result of the verification. The data provided on September 15 were incomplete and some of them were untranslated, so on September 23, 1999, these respondents were requested to complete the data and translations required. On September 28, 1999, respondents replied that they had previously submitted all data required on September 15, 1999."¹⁶⁹

7.187 Under the heading "Normal Values" the IA commented as follows:

"The Investigating Authority applied partial facts available to calculate the normal value for Habas, Diler and Colakoglu. These respondents failed to respond completely to the Investigating Authority's requests for information. On this point, each of these respondents submitted responses to the Investigating Authority's initial questionnaire and participated in a verification of those responses. Following these verifications, the Investigating Authority issued follow-up requests for information seeking supplemental cost and sales data. These respondents did not provide complete responses to the Investigating Authority's requests. The Investigating Authority forwarded two additional requests for the respondents to complete the responses; however, the requested information was not provided. ... As part of this investigation, the Investigating Authority requested that respondents supply source documents supporting certain of its claims of material, labor and overhead costs. Respondents were also requested to reconcile certain costs to their financial

¹⁶⁷ Exh. EGT-9.

¹⁶⁸ Exh. TUR-15.

¹⁶⁹ Exh. TUR-15, *Essential Facts and Conclusions Report*, para. 1.6.2.

statements covering the investigations period. Respondents declined to provide the necessary data."¹⁷⁰

7.188 Concerning the three respondents individually, the IA commented as follows in the *Essential Facts and Conclusions Report* with regard to the failure of each to submit the requested information and/or supporting documentation.

7.189 Regarding **Habas**, the IA commented as follows:

"Although the Investigating Authority twice requested full costs of production for the entire POI, the company only provided costs for two selected months, and there is no evidence on the record that these were representative of the period."¹⁷¹

7.190 Regarding **Diler**, the IA commented as follows:

"... Diler did not provide sufficient information for the Investigating Authority to confirm the monthly specific costs of materials, labor, or overhead during the period of investigation despite being requested to do so."¹⁷²

7.191 Regarding **Colakoglu**, the IA commented as follows:

"... Colakoglu did not provide sufficient information for the Investigating Authority to confirm the monthly specific costs of materials, labor, or overhead during the period of investigation despite being requested to do so."¹⁷³

7.192 In comments on the *Essential Facts and Conclusions Report*, counsel for these three producers asserted that "... respondents have submitted complete sales and cost databases which were verified or reconciled to financial statements", "... the respondents' post-verification submissions were fully responsive to ITPD's inquiries – even though those inquiries were, themselves, ill-founded in law and in fact – and as such they provide compelling reason for ITPD to correct the manifest error in the use of facts available and, instead, to issue a final determination in accordance with respondents' databases as submitted and without change", and with reference to the information submitted on 15 September 1999, that "[i]ndeed, the submission was in many respects more than what ITPD had requested, and there were adequate translations for each and every single document".¹⁷⁴ Counsel did not address the specific issues raised by the IA regarding incomplete information.

7.193 In the *Final Report*, issued in October 1999, the IA stated, under the heading "Complete or Incomplete Sales/Cost Responses":

"We note that these three respondents' [referring to Colakoglu, Diler and Habas] repeated assertion that they 'have submitted complete sales and cost databases which were verified or reconciled to financial statements' is simply incorrect. The sales databases were verified. As for the cost databases being reconciled to financial statements, we requested their trial balances and, when the respondents provided them on September 15, 1999, along with a claim that '[t]rial balances do not contain quantity (tonnage) data, so they will not reveal any information concerning unit costs. Moreover, trial balances are company-wide, and will generally not reveal anything of particular relevance concerning rebar production'. We subsequently requested English translations but never received them. However, in their October 15, 1999

¹⁷⁰ *Ibid*, para.3.2.1.1.

¹⁷¹ *Ibid*, para.3.2.2.1.

¹⁷² *Ibid*, para.3.2.3.1.

¹⁷³ *Ibid*, para.3.2.4.1.

¹⁷⁴ Exh. TUR-20.

comments respondents assert that they 'clearly and unequivocally reconciled their monthly conversion – labor and overhead – to their trial balances, and thence to the general ledger'. This latter statement is somewhat disingenuous in light of the September 15 statement, regardless, since we never received the requested translations, this information was not usable. Thus, it is simply incorrect that the cost databases were reconciled to financial statements.

....

The Department points out that all cost information was requested for the entire 12-month period in the original questionnaire, but only selected costs were provided; one firm provided detailed cost data for only 4 months, corresponding to the 4 months of Egyptian sales, and a second firm provided detailed cost data for only 2 months of the period. Although the three firms provided 12 months of material, labor and overhead costs, for all three firms these responses were unusable for various reasons: they were limited to materials, labor, and overhead, there was no supporting evidence, no clarifications, and no narrative or further explanations, there were no detailed breakouts of these cost elements such as overhead, and various documents were not translated into English, all of which the Department had requested. Although in response to supplemental requests for information to cure these deficiencies the respondents provided various additional supporting evidence and further arguments about previously furnished data, they failed to provide much of the above necessary information, clarifications, supporting evidence and translations. In sum, the responses remained deficient in many respects; the Department used respondents' data whenever it was sufficient, and only used partial facts available for data that were missing, deficient, or inadequate. "

7.194 Under the heading "Normal Values", with reference to Colakoglu, Habas and Diler, the IA commented as follows:

"These respondents did not provide complete responses to the Investigating Authority's requests. As part of this investigation, the Investigating Authority requested that respondents supply source documents supporting certain of their claims of material, labor and overhead costs. Respondents were also requested to reconcile certain costs to their financial statements covering the investigation period. Respondents declined to provide the necessary data.

...

These respondents have argued that the data that they submitted was sufficient and those facts (sic) available should not be applied. However, the submissions of these respondents are deficient in several respects. For example, the Investigating Authority requested copies of invoices and purchase orders for purchases of scrap made by respondents during the investigation period. The Investigating Authority considers these source documents important to determine the reliability of the submitted data. These three respondents refused to provide any such evidence of the cost of scrap, or, in fact, of any other materials. ...

As another example the Investigating Authority requested that the respondents reconcile reported labor costs with the companies' financial statements. None of these respondents supplied the requested reconciliation or explained why such reconciliation could not be provided. Similarly, the Investigating Authority requested that the respondents reconcile monthly sales amounts to the companies' financial statements. Once again, neither the data nor an adequate explanation was provided

by these companies. Further, the Investigating Authority requested that translations be provided for the materials submitted by respondents, however, several of the documents were provided with no such translations."¹⁷⁵

7.195 In its *Final Report* the IA did not add to its comments in the *Essential Facts and Conclusions Report* relating to the individual producers.

(ii) *Icdas and IDC*

7.196 As indicated in paragraph 7.170, *supra*, these two companies received basically the same letter, dated 19 August 1999, as Colakoglu, Diler and Habas, from the IA. The contents of the letter are set forth in that paragraph.

7.197 Both of these companies also received, on request, an extension from the IA for the submission of their responses to the 19 August 1999 request, from 1 September 1999 to 15 September 1999.¹⁷⁶

Icdas

7.198 On 15 September 1999 Icdas submitted to the IA its response to the 15 August 1999 request.

7.199 The IA responded to Icdas's 15 September submission on 23 September 1999, by stating that:

"1. Attachment 8 has not been received

2. Attachment 9 is unclear, please provide us depreciation expenses for Sep., Oct. and Nov. 1998 translated into English.

The above-mentioned items should be submitted within five working days."

7.200 Attachment 8 (which concerned labour costs) and the depreciation expenses breakdown, translated into English, were faxed by Icdas to the IA on 27 September 1999 and sent by courier on 28 September 1999.¹⁷⁷ According to Turkey, Icdas "responded fully to this information request in a timely manner and received no other indication from the IA that its response on September 15, 1999 was otherwise incomplete or unusable".¹⁷⁸

7.201 In its *Essential Facts and Conclusions Report* of October 1999, the IA stated:

"Icdas ... provided incomplete data and most of the data submitted were not supported by evidence."¹⁷⁹

7.202 The IA further stated, under the heading "Comparison of the Net Home Market Price to the Cost of Production":

'... Icdas did not provide sufficient information for the Investigating Authority to confirm the monthly specific costs of materials, labor, or overhead during the period of investigation despite being requested to do so.'

¹⁷⁵ Exh. TUR-16, *Final Report*, para.3.2.1.1. to 3.2.1.5.

¹⁷⁶ See para.7.171, *supra*.

¹⁷⁷ Exh.TUR-40.

¹⁷⁸ First Written Submission of Turkey, p.68.

¹⁷⁹ Exh.TUR-15, para.1.6.2.

7.203 In response to these statements in the *Essential Facts and Conclusions Report*, Icdas stated in its 14 October 1999 comments thereon that:

"Icdas timely responded to the Department's additional request for information dated August 19, 1999 and provided all the necessary information to the Department. In its letter No. 629 dated September 23, 1999, the Department listed outstanding issues in Icdas' responses dated September 15, 1999 and this remaining items are timely submitted to the department. If there would have been any other missing information, the Department should have notified Icdas to provide this missing or incomplete information in its letter No. 629. In the Report the department does not clearly state what information is found missing or incomplete."¹⁸⁰

7.204 In its *Final Report* the IA stated that "Icdas and IDC provided incomplete data and most of the data submitted were not supported by evidence".¹⁸¹ Although, as recounted above, the IA addressed in detail in the *Final Report* the failure of Colakoglu, Diler and Habas to submit certain requested information, no such detail was included in respect of Icdas or IDC.¹⁸²

7.205 Instead, concerning Icdas' compliance with the 19 August request, the *Final Report* states:

"On September 23, 1999, the Department requested a missing document and several documents to be translated into English. ..."¹⁸³ (emphasis added)

...

As for Icdas' claim that it 'provided all the necessary information' in response to the Department's August 19, 1999 request and that the 'remaining items are[sic] timely submitted' in response to the Department's September 23, 1999 request, that is incorrect. In fact, the firm did not furnish (1) the requested breakdown of labour and overhead costs, (2) the requested supporting documents for labour and overhead costs, (3) the requested allocations and allocation methodologies for materials, overhead, and SG&A, and (4) the requested reconciliations of submitted data to its financial statement. In addition, its explanation of how inflation was reflected/included in its costs was inadequate and unsupported."¹⁸⁴

IDC

7.206 In response to IDC's submission of the information requested in the 19 August 1999 letter, on 23 September, the IA requested IDC to:

"... provide the following within five working days:

1. Interest expense: Furnish a list identifying separately interest expenses from interest income.

2. In worksheet 2 (factory cost and profit for domestic sales per ton) it is unclear whether the materials listed are scrap or billets, please specify.

3. Fill in the enclosed cost of production sheet for Aug., Sep., and Oct. 1998.

¹⁸⁰ Exh. TUR-26, p.3.

¹⁸¹ Exh. TUR-16, para.1.6.2.

¹⁸² *Ibid*, p.12-15.

¹⁸³ *Ibid*, para.3.1.7.10.

¹⁸⁴ *Ibid*, para.3.1.7.15.

Item 1 should be submitted within 2 days."^{185 186}

7.207 IDC faxed information on interest expense to the IA on 25 September, the due date. When informed by the IA that the fax had not been received, IDC resent it on 29 September 1999.¹⁸⁷

7.208 On 28 September 1999, IDC faxed the information on the cost of production for the months of August, September and October 1998 to the IA. In the fax IDC also noted that the "production costs given in Worksheet 2 are calculated from scrap to rebar basis" and that "[m]aterials listed are the same as the cost of production sheets attached for item 3 (Cost of production sheets)".¹⁸⁸

7.209 On 28 September 1999 the IA requested IDC to submit a list identifying separately interest expenses from interest income showing the difference between both interest expense and interest income per ton during 1998 on a monthly basis, with a note "[y]our effort will be appreciated if we receive the above-mentioned immediately". According to Turkey, IDC faxed the requested information to the IA on 29 September 1999.¹⁸⁹

7.210 As noted above, the IA issued its *Essential Facts and Conclusions Report* on 5 October 1999, applying "facts available" to IDC. In that report, as indicated above, the IA stated that "Icdas and IDC provided incomplete data and most of the data submitted were not supported by evidence". The IA also stated that:

"For materials, labor and overhead, since the company did not adequately demonstrate or support its claim that inflation was included, as facts available, since these costs varied significantly during the period, we used the highest cost for each element during the period to reflect the inclusion of inflation costs."¹⁹⁰

7.211 The IA did not identify in the *Essential facts and Conclusions Report* any particular document or other information that had been requested by the IA, but not submitted by IDC.

7.212 On 15 October 1999 IDC commented regarding the *Essential Facts and Conclusions Report* that:

"Up to today, IDC has always become(sic) cooperative with your Authority and have always given all information and supporting documents you requested. Therefore, facts available clause should not have been used. As you know, IDC has never refused your any request of any information. We have given all correct information and documents to you on time and informed you to contact us anytime you need more clarification and explanations."¹⁹¹

7.213 IDC attached to this letter "Worksheet 1: Cost of Production (From Billet to Rebar) for 1998", "Worksheet 2: Calculation of Financial Expenses for Constructed Normal Value Table and Constructed Normal Value table for IDC". Worksheet 1 contains the cost of production from billet to rebar for the months of August, September and October 1998 and is the same information that was faxed to the IA on 28 September 1999, except that in this document ex-factory sales prices and profits were added. Worksheet 2 contains information relating to interest expense (but not interest income), a

¹⁸⁵ Exh. EGT-13-1-2.

¹⁸⁶ The cost of production sheet referred to, is identical to Attachment No 1 to the 23 September letters to Colakoglu, Diler and Habas.

¹⁸⁷ First Written Submission of Turkey, p.44.

¹⁸⁸ Exh. TUR-41.

¹⁸⁹ *Ibid.*

¹⁹⁰ Exh. TUR-15, para.3.2.6.1.

¹⁹¹ Exh.TUR-27.

list of productions items subject to interest expense, and a constructed normal value for IDC for the three months of August, September and October 1998.

7.214 In its *Final Report* the IA repeated that:

"Icdas and IDC provided incomplete data and most of the data submitted were not supported by evidence."¹⁹²

7.215 Turkey takes strong issue with this characterization, alleging that all of the information requested by the IA, most importantly that provided on 15 September in response to the IA's 19 August request, as well as the further information provided in response to the IA's 23 September request, was submitted within the time-periods set by the IA.

7.216 The IA did not refer in the *Final Report* to any specific requested document or information not submitted by IDC. However, the IA stated that:

"With its comments on the Essential Facts Report Izmir (IDC) attached information which the Department, because it determines that this is new information untimely submitted, will not consider in this investigation."¹⁹³

(b) Was the cost information requested by the IA on 19 August and 23 September 1999 "necessary information"?

7.217 We recall that the parties have submitted extensive arguments regarding the validity of the IA's rationale for seeking the detailed cost information. Turkey claims that "because the basis for initially questioning and then rejecting Turkish respondents' costs was unfounded, resort to facts available was unjustified under Article 6.8 of the Agreement". On the other hand, we note that the IA justified its request for the cost data as necessary to enable it to determine whether the respondents had made sales of comparison merchandise in the home market at prices that were below the cost of production, in accordance with Article 34 of the Egyptian Regulations. This provision, which essentially mirrors the provisions of Article 2.2 and 2.2.1 of the Anti-Dumping Agreement, allows investigating authorities to construct a normal value if sales of the like product in the domestic market of the exporting country are below costs of production plus SG&A. Egypt argues that the IA was not in a position to make this determination because the required information to enable it to make the determination was not submitted by the respondents in their responses to the initial questionnaire. On its face, this justification for seeking the detailed cost information appears plausible to us, given, as noted, that a below-cost test is explicitly provided for in Articles 2.2 and 2.2.1 of the AD Agreement. Thus, the requested information would seem to be "necessary" in the sense of Article 6.8.

7.218 As to the specific basis for the IA's 19 August request, the IA stated in that request that it was seeking the additional, detailed cost data because it was aware that Turkey was a country with a hyperinflationary economy, with inflation averaging "roughly 5 per cent per month". The IA indicated that it would have expected to see the effect of this hyperinflation reflected in the different cost elements reported by the respondents in the original questionnaire responses. The IA maintained this position throughout the process.

7.219 The parties are in agreement that the cost figures reported by the respondents did not reflect the increases one would normally have expected in a hyperinflationary economy. However, in their responses to the 19 August and 23 September information requests, the respondents provided a number of explanations for this in respect of scrap, labour and depreciation, the main cost elements questioned by the IA as not reflecting hyperinflation. According to the respondents, the international

¹⁹² Exh.TUR-16, para.1.6.2.

¹⁹³ Exh.TUR-16, p.30.

price of steel scrap (accounting for 60 per cent of the cost of producing rebar), fixed in US dollar terms, declined substantially during the POI; labour rates were fixed once a year after negotiations with trade unions; and the revaluation of assets for purposes of depreciation was also done once a year through the application of "uplift factors" published by the Turkish Government. The respondents insisted that the cost data that they submitted were their actual figures, reflecting their actual costs of production during the POI. These arguments by the respondents were repeated in their respective comments on the *Essential Facts and Conclusions Report*¹⁹⁴, as well as by the Government of Turkey in its comments.¹⁹⁵

7.220 Turning first to scrap cost, the IA rejected the data and explanation on world steel scrap prices submitted by the three respondents, stating:

"... [r]espondents' information on world scrap prices was expressed in annual terms (prices at the end of a year were lower than prices at the beginning of the year), it was not useful in determining price movements during the investigation period (calendar 1998). When the Department examined monthly domestic rebar and purchased scrap prices throughout the period (another respondent in this investigation submitted monthly scrap prices), a very different picture emerged. ... The sharp decline, which respondents implied was sustained throughout the period, was in fact, limited to 3 out of 12 months of the investigation period,

Thus, the Department had a reasonable basis for its concern whether domestic costs fully reflected the high inflation."¹⁹⁶

7.221 As it was not clear to us to which company "another respondent in this investigation" referred, we requested Egypt during the Second Substantive Meeting of the Panel with the Parties to clarify the matter.¹⁹⁷ Egypt indicated that this "other respondent" was Alexandria National Steel, which had submitted the information in response to a telephonic request made by the IA "in order to verify the veracity" of the claim by the Turkish respondents that scrap prices had collapsed throughout the period of investigation.¹⁹⁸ At our request Egypt provided the scrap cost information as submitted by Alexandria National Steel.¹⁹⁹ The document consists of two parts: one part sourced, from the *Metal Bulletin* of March 1999, which reflects iron and steel scrap prices, fob Rotterdam, for three categories of scrap -- "HMS 1"²⁰⁰, "HMS 1&2" and "shredded" on specific dates covering the period January to December 1998, excluding March and June 1998. The price information gives a minimum and a maximum price per date and per category. The second part of the document consists of prices computed by Alexandria National Steel from the underlying *Metal Bulletin* data. According to Egypt, the IA's "assessment of the evolution of scrap prices was based on the 'source reference' in the second page of EX-EGT-12, and not on the prices mentioned on the cover page of the Alexandria National".

7.222 Egypt asserts before us that the evidence submitted by Alexandria National Steel reveals that the Turkish respondents' claim that scrap prices declined throughout the investigation period was factually wrong.²⁰¹ Egypt states:

¹⁹⁴ Exh. TUR-20 and TUR-27.

¹⁹⁵ Exh. TUR-30.

¹⁹⁶ Exh. TUR-16, p.12-13.

¹⁹⁷ Question 2 to Egypt of the *Written Questions by the Panel*, dated 27 February 2002 – Annex 8-2.

¹⁹⁸ Written Response of Egypt to the *Two Follow-Up Written Questions by the Panel* of 3 April 2002 – Annex 8-3.

¹⁹⁹ Exh. EGT-12.

²⁰⁰ Our understanding is that "HMS" refers to "heavy melting scrap".

²⁰¹ Written Response of Egypt to the *Two Follow-Up Written Questions by the Panel* of 3 April 2002 – Annex 8-3..

"Indeed, as explained in the *Final Report*, scrap prices were found to be fairly constant for the first seven months of the investigation period. During the next three months, prices collapsed. Then, prices started to recover in the last two months on the investigation period. In other words, the 'sharp decline' was in fact limited to three out of twelve months."

7.223 Turkey commented on Egypt's response on our questions and states that:

"As the panel can clearly see by a review of ... the second page of EX-EGT-12, HMS1&2 scrap prices declined steeply between January 1998 (\$114 – 116 per ton) and April 1998 (\$96 - \$97 per ton) and continued their decline into July 1998 (to \$92 - \$94 per ton). This is an overall decline of 19%, hardly evidence of scrap price stability during the first seven months of the year. Scrap prices for HMS 1 show similar declines – from \$123 - \$124 per ton in January 1998 to \$105 - \$107 per ton in April 1998 and \$98 – \$ 99 in July (an overall decline of 20%). Prices then dropped from August to October (\$70 - \$72 per ton) or a further decline of 23% from January levels. ..."²⁰²

7.224 We have a slightly different reading from that of Turkey of the scrap price data submitted by Alexandria National. In particular, we note that for each of the categories "HMS1" and HMS1&2", prices declined from January through end-February, then were essentially stable from March through mid-July, then declined again from mid-July through end-September, then rose from October through December. Prices in December 1998 were nevertheless considerably lower than in January 1998 in all categories. The IA's characterization that the trend in scrap prices as reported by Alexandria National Steel showed "sharp declines" in only three out of the twelve months of 1998, was essentially borne out by the data. Nevertheless, it is somewhat incomplete given the large end-point-to-end-point decline that took place over the period.

7.225 Turning to the evidence on scrap prices that was submitted by the Turkish respondents in questionnaire responses and other submissions, we note that in general these data also show considerable declines from the beginning to the end of the period of investigation, although again with a certain amount of fluctuation during that period. For example, the data reported by Icdas show that there was a sustained decrease in the scrap prices during the POI, with the month of August the only exception. The scrap price paid by Icdas for locally sourced and imported scrap decreased from US\$129.44 in January 1998, to US\$85.81 in November 1998.²⁰³ In particular, the price dropped between January and March, was relatively steady in April through July, then rose slightly in August, and dropped again in September through November. The prices of scrap reported by IDC (sourced in Turkey) also reflect a decrease from US\$134 in January 1998, to US\$85 in December 1998²⁰⁴. However, these data show a substantial decrease in April, some recovery in May, June and July, and then a monthly decrease to December 1998.²⁰⁵ The scrap cost data "sourced from Colakoglu"²⁰⁶ also reflect a decrease in scrap prices in Turkish Lira over the POI, although with increases in different months compared with the data reported by Icdas and IDC. The overall trend is the same, however, namely that the price of scrap decreased from the beginning to the end of the POI.

7.226 Turning to the questions of labour costs and depreciation, the IA stated here again that the expected effects of hyperinflation were not evident, causing it to doubt the accuracy of these costs as

²⁰² Written Comments by Turkey on Egypt's Response to Certain *Questions Posed by the Panel*, dated 9 April 2002, Annex 8-3 – Annex 8-3.

²⁰³ Exh. EGT-7.1.

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*

reported in the responses to the original questionnaire, and leading it to seek additional information and supporting documentation in respect of these costs.

7.227 Turkey argues that the three respondents, Colakoglu, Diler and Habas "explained" in their 15 September submissions and elsewhere that labour contracts are renegotiated once per year, and that depreciation expenses are adjusted at year-end for inflation, meaning that inflation would not be expected to cause these costs to vary from one month to another. According to Turkey, this "factual" information further undermines the IA's rationale for requesting the detailed cost information, as it "proves" that the effects of inflation on the three respondents' costs were not as presumed by the IA.

7.228 The parties also have divergent views concerning the general Turkish inflation rate during the POI. Throughout the process, the IA referred to an estimated inflation rate of 5 per cent per month in Turkey during that period,²⁰⁷ which it said was derived from statistics sourced from the Turkish State Institute of Statistics.²⁰⁸ In its comments on the *Essential Facts and Conclusions Report*, the Turkish Government objected to the use of an inflation rate of 5 per cent per month and submitted evidence (also from the Turkish State Institute of Statistics) showing that the inflation rate was less than 5 per cent per month during the POI.²⁰⁹ The IA rejected the evidence and argument put forward by the Turkish Government, stating that: "[s]ince the referenced exhibit constitutes new, untimely information, the Department will not consider it in this investigation." Nevertheless, it should be noted that Turkey did not at the time and does not now contest the fact that the Turkish economy was "hyperinflationary" during the POI. Thus, there seems to be no disagreement between the parties that the actual monthly rate of inflation during the POI, whatever its exact level, was high. We thus see no basis on which to conclude, as contended by Turkey, that the factual evidence submitted by the Government of Turkey, even if it had been accepted, would have "disproved" the IA's hyperinflation premise for seeking the detailed cost data.

7.229 Further, in reference to inflation, the parties have submitted arguments concerning the significance of the fact that the Turkish respondents do not prepare their financial statements in accordance with International Accounting Standards 29 ("IAS 29"), applicable to economies with hyperinflation. This issue was not raised by Egypt during the investigation, although the audited financial statements of Habas, Diler and Colakoglu, which indicate that they do not apply IAS 29, were submitted by those companies in their 15 September submissions.²¹⁰ No direct reference to IAS 29 relating to Icdas and IDC could be found in the documents of record submitted to us.²¹¹ Egypt argues that the auditors' reports support the view of the IA that the data submitted by the respondents did not reflect the effects of inflation²¹². However, the auditors' reports make clear in all instances that there was not consensus in Turkey on the use of IAS 29. The auditors' notes to the financial

²⁰⁷ Letter of 19 August 1999 to the respondents, p.21 and 23 of the *Essential Facts and Conclusions Report*, and p.16 of the *Final Report*.

²⁰⁸ Exh. EGT 7-7.

²⁰⁹ Exh. TUR 30.

²¹⁰ Exh. TUR-34A, TUR-43B and TUR-34C, respectively.

²¹¹ On page 56 of its First Written Submission, Egypt states that Icdas did not submit its audited accounts, although the IA did not request Icdas to submit its audited financial statements in its request of 19 August 1999, or in any subsequent requests. We could therefore not find any reference to IAS 29 with regard to Icdas in the record. In the case of IDC, we could not find any reference to IAS 29 in the translated sections of its audited financial statements, which were submitted by Egypt as Exh. EGT-15.

²¹² In its Rebuttal Submission (at p. 29), Turkey objects to Egypt's arguments regarding IAS 29 as being a *post hoc* rationalisation by Egypt of the anti-dumping determination, and requests the Panel to disregard it, as "errors made during the investigation cannot be rectified in subsequent submission before a WTO panel". As the relevance of IAS 29 to this dispute is at best dubious, there would seem to be no need for the Panel to further address this point. (In any case, the information regarding IAS 29 was submitted by the respondents themselves and is used by Egypt only as confirmation of the IA's view that the cost data of the respondents did not reflect hyperinflation and is only an argument in support of its position. That said, Turkey does appear to be correct factually that IAS 29 did not figure in the IA's reasoning as set forth in its reports.)

statements of two of the companies indicate that the accounts were prepared in US dollars which, being a stable currency, obviated the need to prepare the financial statements according to IAS 29. In any case, it seems to us that the main rationale behind IAS 29 (which requires presentation of three years of figures, together with certain indexes), is to give the reader a clear picture of the financial status of the company, compared to previous periods, undistorted by hyperinflation. It therefore seems that IAS 29 is primarily useful for comparison purposes.²¹³

7.230 We are therefore of the view that the application, or non-application, of IAS 29 by the Turkish respondents in preparing their financial statements is not relevant for our review of the measures taken by the IA. That said, it seems to us that the reference to IAS 29 is a *post hoc* justification by Egypt in respect of the IA's request for cost data, a justification which is in any case not required by Article 2.2 and Article 2.2.1.

7.231 While, as is evident from the above, the parties have argued extensively before us concerning the IA's rationale for seeking the detailed cost data, in our view this question is essentially irrelevant under Article 6.8, because that provision simply does not cover this question. Rather, as noted above, the relevant provisions are Articles 2.2 and 2.2.1. These provisions establish no preconditions for requesting cost data. Indeed, in this case, cost data were requested as a normal, integral part of the initial questionnaire, and Turkey raises no challenge in this regard before us. Rather, Turkey objects to the rationale for requesting additional details and supporting documentation that would allow the originally-reported data to be checked and verified. Given that the IA's overall concern about how the effects of hyperinflation were treated in the five respondents' accounting records was not unsubstantiated (in that there was no disagreement that Turkey was experiencing hyperinflation), and in view of the fact that cost data is a normal part of an anti-dumping investigation, there is in our view no basis in Article 6.8 or for that matter in any other provision of the AD Agreement, for a finding of any violation in respect of the IA's request for the detailed information. In this sense, we confirm our finding above that the requested information was "necessary" in the sense of Article 6.8.

(c) Did the respondents "refuse access to" or "otherwise fail to provide" "necessary information"?

7.232 We now consider whether the facts of record indicate, as asserted by Egypt that the Turkish respondents Habas, Colakoglu and Diler "refused access to" the necessary information and "failed to provide" such information, and that the other two respondents (Icdas and IDC) "otherwise failed to provide" the necessary information.²¹⁴ Turkey asserts that it does not claim that the five respondents "submitted all of the information and documents requested by the Investigating Authority after the original questionnaire responses were filed". In fact, Turkey admits that these companies did not submit all the requested information and/or reconciliations.²¹⁵ However, Turkey asserts they acted "to the best of their ability" in providing the information.²¹⁶ With regard to Icdas and IDC, Turkey claims that "the Investigating Authority itself found little fault with the responses filed by the respondents, requesting only a few follow-up documents and clarifications, which were promptly provided".

7.233 In light of the facts as set out above, it is clear that a distinction can be made between the information, in terms of both amount and quality, submitted by Colakoglu, Diler and Habas, on the one hand, and Icdas and IDC on the other. We thus conduct our factual analysis on this basis.

²¹³ We posed a question to Egypt on this point (Question 3 for Egypt of the *Written Questions by the Panel*, dated 27 February 2002). Egypt, while confirming that IAS 29 is useful for comparison purposes, also indicated that it requires restatement of the current year figures adjusted for inflation, and thus is useful for reflecting inflation in a single year as well – Annex 8-2.

²¹⁴ Written Response, dated 7 December 2001, to Question 9 to Egypt of the *Written Questions by the Panel*, of 28 November 2001 – Annex 4-2.

²¹⁵ *Ibid.*

²¹⁶ Written Response of Turkey, dated 14 March 2002, to Question 1 of the *Written Questions by the Panel*, of 27 February 2002 – Annex 8-1.

(i) *Colakoglu, Diler and Habas*

7.234 In reviewing the documentation submitted by Turkey as Exhibits TUR-34A, TUR-34B and TUR-34C, containing the full response of Diler, Colakoglu and Habas, respectively, to the IA's 19 August 1999 request for information, it is clear to us that a great deal of the requested information was not submitted. From the documents submitted by these three respondents, it appears that rather than submitting, or even attempting to submit, all of the information and documents requested by the IA, only selected information was submitted. In the case of Colakoglu and Habas, for example, Appendix 9A – Factory Cost and Profit for Domestic Sales, the sales price ex-factory and profit/loss before tax were not provided. In the case of Diler, only information on direct material, direct labor and factory overhead, but not the breakdown, as requested, was submitted. Of particular note, and emphasized by the IA in its reports, these companies did not submit underlying source documents (purchase orders, invoices, etc.).

7.235 Furthermore, very few of the headings of the submitted documents were translated and no reconciliation of the different cost elements to the audited financial statements were submitted. To clarify the exact situation concerning the requested reconciliations, we posed the following written question to Turkey:

"Turkey asserts that the respondents submitted all the requested information and documents, including the requested reconciliations of data to the financial statements. Could Turkey indicate for each of the respondent companies (Habas, Diler, Colakoglu, IDC and Icdas) where in the record these reconciliation could be found and for each one explain exactly, in a step-by-step fashion, how the reconciliations were done?"²¹⁷

7.236 In response to this question, Turkey submitted a detailed step-by-step explanation of how the reconciliations could be done for each of the producers²¹⁸. However, Turkey failed to indicate where in the record any such reconciliations could be found in the case of Colakoglu, Diler and Habas. It is thus clear that the reconciliations were not submitted to the IA.

7.237 Instead, the three Turkish producers submitted the raw data as is, without any explanatory narrative or translations, in spite of the IA's clear request. We are of the view that the request to translate the documents did not put an unreasonable burden on the exporters, as the narrative parts of the documents were quite limited. Furthermore, the translations could have been provided in hand-written form on the documents themselves without extraordinary effort.

7.238 The extent of the deficiencies of the responses of these three producers is evident from the follow-up requests sent by the IA to Colakoglu, Diler and Habas on 23 September 1999.²¹⁹ Then, in response to the IA's request of 23 September 1999, the three respondents made no attempt to provide the information identified as missing. Instead they claimed that that information constituted a "new" request (not previously made) to provide a break-down of the companies' billet costs into a number of separate components.²²⁰ However, a close reading of the requests of 19 August and 23 September 1999 shows that the request of 23 September 1999, which attached a list of the cost components for which information was required, was a follow-up request to the 15 September submissions of these respondents, requesting for a second time the details underlying the originally reported costs, including documentation of raw material purchases. The fact that this list was attached

²¹⁷ Question 1 to Turkey of the *Written Questions by the Panel*, dated 27 February 2002 – Annex 8-1.

²¹⁸ Written Response to Question 1 to Turkey, dated 14 March 2002, of the *Written Questions by the Panel*, of 27 February 2002 – Annex 8-1.

²¹⁹ Exh. TUR-13.

²²⁰ First Written Submission of Turkey, p.68.

only to the 23 September 1999 request does not detract from the fact that the very same information, albeit in a less explicit manner, had already been requested in the 19 August letter.

7.239 We next consider Turkey's claim that although these three respondents did not submit all of the information requested by the IA, they "acted to the best of their ability" in the sense of Annex II, paragraph 5, and that therefore the IA's resort to facts available was not justified. Turkey thus appears to argue that the fact of acting to the best of one's ability should override any substantive flaws in the information submitted, in determining whether resort to facts available is justified under Article 6.8.

7.240 Egypt argues that these respondents did not supply the requested information and did not act to the "best of their ability". Therefore, Egypt argues, the IA's resort to facts available in respect of these respondents was fully justified. In particular, Egypt states, these exporters explicitly informed the Investigating Authority that they refused to submit the information requested in the Investigating Authority's letter of 23 September 1999 which requested them to fill the gaps of their previous submission, thus effectively terminating their co-operation with the IA on that date. It is clear to Egypt that those respondents cannot therefore be considered to have acted to the best of their ability since they declined to submit information which was readily available to them. Egypt states in this regard that the evidence which Diler, Habas and Colakoglu refused to submit was provided by the two other respondents within the time-limit set by the Investigating Authority, confirming that the requested documentation could have been submitted by Diler, Habas and Colakoglu had they agreed to do so. In consequence, Egypt considers, the IA was fully entitled to make use of the provisions of Article 6.8 of the AD Agreement with respect to these respondents as they refused to provide necessary information and, as a consequence, significantly impeded the investigation.

7.241 Paragraph 5 of Annex II provides, in relevant part:

"[E]ven though 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.*" (emphasis added)

7.242 We recall that our finding above that the provisions of Annex II, paragraph 5 form part of the substantive basis for interpreting Article 6.8. That is, we found that this paragraph *in conjunction with* other paragraphs of Annex II provides certain substantive parameters that must be followed by an investigating authority in making its assessment of whether, in a particular case, resort to "facts available" pursuant to Article 6.8, in respect of certain elements of information, is justified. In other words, paragraph 5 does not exist in isolation, either from other paragraphs of Annex II, or from Article 6.8 itself. Nor, *a fortiori*, does the phrase "acted to the best of its ability". In particular, even if, with the best possible intentions, an interested party has acted to the very best of its ability in seeking to comply with an investigating authority's requests for information, that fact, by itself, would not preclude the investigating authority from resorting to facts available in respect of the requested information. This is because an interested party's level of effort to submit certain information does not necessarily have anything to do with the substantive *quality* of the information submitted, and in any case is not the *only* determinant thereof. We recall that the Appellate Body, in *US – Hot-Rolled Steel*, recognized this principle (although in a slightly different context), stating that "parties may very well 'cooperate' to a high degree, even though the requested information is, ultimately, not obtained. This is because the fact of 'cooperating' is in itself not determinative of the end result of the cooperation".²²¹

7.243 Furthermore, even if, *arguendo*, acting to the best of one's ability by itself were sufficient to preclude an investigating authority from resorting to facts available in respect of certain information, we do not find that Turkey has established as a *factual* matter that the three respondents – Habas,

²²¹ Appellate Body Report, *US – Hot-Rolled Steel*, para.99.

Diler, and Colakoglu – did act to *the best* of their abilities in responding to the IA's requests for cost-related information in the rebar investigation. We recall that the Appellate Body stated that the phrase "to the best of its ability" suggests a *high* degree of cooperation by interested parties²²², and we agree.

7.244 Considering in more detail the concrete meaning of the phrase to the "best" of an interested party's ability, we note that the *Concise Oxford Dictionary* defines the expression "to the best of one's ability" as "to the *highest level* of one's *capacity* to do something"²²³ (emphasis added). In similar vein, the *Shorter Oxford Dictionary* defines this phrase as "to the *furthest extent* of one's *ability*; so far as one can do". We note that in a legal context, the concept of "best endeavours", is often juxtaposed with the concept of "reasonable endeavours" in defining the degree of effort a party is expected to exert. In that context, "best endeavours" connotes efforts going beyond those that would be considered "reasonable" in the circumstances. We are of the opinion that the phrase the "best" of a party's ability in paragraph 5 connotes a similarly high level of effort.²²⁴

7.245 In applying this test to the actions of Diler, Habas and Colakoglu in responding to the IA's requests for cost information in the rebar investigation, in our view an unbiased and objective investigating authority could find that it *was* within the capacity of these respondents to submit the requested information (particularly the supporting documentation substantiating the reported costs, and the reconciliations of those costs to financial statements). The information undeniably was at their disposal, and they never argued, or submitted, that it was not, or that for some other reason it would be impossible to provide it, or even that it would cause them some hardship to do so. The fact that other respondents provided most, if not all, of the requested information (particularly concerning scrap costs) also indicates that provision of such information was within the three respondents' ability.

7.246 Indeed, these points were made by the IA in the *Final Report*. For example, concerning scrap, the IA stated:

"[t]hese three respondents refused to provide any such evidence of the cost of scrap, or, in fact, of any other materials. *The fact that other respondents supplied such information indicates that the materials are readily available; indeed, these respondents do not contend otherwise.*"²²⁵

Similarly, concerning labour cost, the IA stated:

"As another example, the Investigating Authority requested that the respondents reconcile reported labor costs with the companies' financial statements. None of these respondents supplied the requested *reconciliation or explained why such reconciliation could not be provided*. Similarly, the Investigating Authority requested that the respondents reconcile monthly sales amounts to the companies' financial statements. Once again, neither the *data nor an adequate explanation was provided by these companies.*"²²⁶

7.247 To summarize, we are of the view that the nature and extent of the deficiencies identified in the IA's 23 September letter, none of which any of the three respondents attempted to rectify, were

²²² *Ibid*, para.100. The Appellate Body further noted in this paragraph that "investigating authorities are entitled to expect a very significant degree of effort – to the 'best of their abilities' – from investigated exporters.

²²³ Pages 3 and 128 of *The Concise Oxford Dictionary* (10th ed).

²²⁴ Black's Law Dictionary, Revised 4th Edition, defines "best" as, *inter alia*: "of the highest quality", and states further that "[w]here one covenants to use his 'best endeavours,' there is no breach if he is prevented by causes wholly beyond his control and without any default on his part [reference omitted]". "Reasonable" is defined, *inter alia*, as "ordinary or usual".

²²⁵ Exh. TUR-16, para.3.2.1.4 (emphasis added).

²²⁶ Exh. TUR-16, para.3.2.1.5 (emphasis added).

such that the IA was justified in considering that information “necessary” to make an analysis of whether domestic sales were made below cost, as provided for in Article 2.2 and 2.2.1 of the AD Agreement, had not been provided. That is, the information submitted was substantially incomplete, lacking in particular underlying documentation and reconciliations to audited financial statements which the IA had identified as the information required to render “verifiable” the respondents’ reported cost data. Moreover, in addition to the substantive flaws in the information, we do not find that these companies acted to the best of their ability in responding to the IA’s requests of 19 August and 23 September, 1999.

7.248 For the foregoing reasons, we find that an unbiased and objective investigating authority could have found that Habas, Diler and Colakoglu failed to provide necessary information in the sense of Article 6.8. As a consequence, we find that Egypt did not violate Article 6.8 or paragraph 5 of Annex II in resorting to facts available in respect of these respondents’ cost of production calculations.

(ii) *Icdas and IDC*

7.249 In the case of Icdas and IDC it is clear from the record that these companies submitted almost all, if not all, of the requested information. Nor did the IA clearly indicate in the *Essential Facts and Conclusions Report* which specific information these companies had failed to provide, which in turn formed the basis of the IA’s decision to resort to facts available in respect of those companies. Indeed, in respect of IDC, neither the *Essential Facts and Conclusions Report* nor the *Final Report* identifies any single piece of requested information that was not submitted.

7.250 To clarify this issue in respect of Icdas, we posed the following written question to Egypt:

“... . Could Egypt please precisely identify the documents containing the IA’s requests for the information referred to in the *Final Report* as not having been submitted. Please describe the documents that were provided by Icdas on these points and indicate how, in the light of those documents, the IA was satisfied that AD Article 6.8 could be applied”.²²⁷

7.251 Although Egypt pointed out certain deficiencies in the information submitted by Icdas in response to our question, Egypt failed to identify the documents containing the IA’s requests for the information referred to in the *Final Report* as not having been submitted.²²⁸ In other words, the IA apparently never requested of Icdas the documents referred to in the *Final Report* as missing.

7.252 Moreover, looking at the evidence overall as submitted by Icdas and IDC, it is clear to us that these two producers responded quite comprehensively to the IA’s 19 August 1999 request. It is also clear from the record that after receipt of these companies’ responses, the IA on 23 September requested from each of them only two or three items of a minor nature, and identified no fundamental problems with, or deficiencies in, the information that they had submitted. These respondents complied with these follow-up requests within the time specified by the IA. In respect of IDC, neither of the IA’s published reports identifies any single requested document or piece of information that IDC failed to submit. In respect of Icdas, while the published reports refer to a few documents purportedly not submitted by Icdas, that company was never so informed by the IA.

7.253 This brings us to a further related element of Turkey’s claims in respect of the use of facts available for Icdas and IDC, namely, that in resorting to facts available, Egypt violated Annex II, paragraph 6, in that the IA failed to inform these companies that their cost information submitted in

²²⁷ *Written Questions by the Panel to the Parties*, 27 February 2002, Question 8 to Egypt – Annex 8-2.

²²⁸ *Written Response of Egypt*, dated 13 March 2002, to Question 8 of the *Written Questions by the Panel*, of 27 February 2002 – Annex 8-2.

response to the 19 August and 23 September requests was not accepted, and that the IA in addition failed to give them the opportunity to provide further explanations.

7.254 To recall the facts, on 23 September 1999, the IA sent letters to respondents IDC and Icdas identifying for each company a few items which according to the IA had not been submitted in these companies' responses to the 19 August questionnaire. According to Turkey, these companies submitted the requested information within the time allowed. Neither company received any further communication from the IA. These respondents' cost data as submitted were rejected by the IA, and certain "facts available" were used instead.

7.255 Egypt argues that in their responses to the 19 August request, these respondents had indicated that their costs of materials were not adjusted for inflation, and that IDC's response did not indicate that the financial statements had been prepared in accordance with International Accounting Standard 29 dealing with the effects of hyperinflation. According to Egypt, it was therefore clear to the IA that the reported costs did not reflect the hyperinflation and could therefore not be used to determine the costs of production and sale of rebar, and given this, it was not necessary to further investigate this matter. According to Egypt, the IA gave IDC and Icdas ample opportunity to present their views in writing, and the IA therefore acted in full compliance with Annex II, paragraph 6.

7.256 Annex II, paragraph 6 provides as follows:

"If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. 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 determinations."

7.257 At issue is first, whether the IA was under an obligation to inform IDC and Icdas that their evidence and information submitted in response to the 19 August request was being rejected and to give them an opportunity to provide further explanations, and second, if so, whether the IA did so.

7.258 Turning to the first aspect, we note that the applicability of this obligation to the responses to the 19 August request is somewhat ambiguous. In particular, it is clear on its face that the 19 August request itself is a communication of the type referred to in Annex II, paragraph 6, at least in so far as the original questionnaire responses on cost were concerned. That is, in that letter as sent to each respondent, the IA identified various problems that it perceived in the cost data originally reported by that respondent in its questionnaire response, indicated that the IA intended to adjust those data for hyperinflation, and then gave the respondent the chance to provide further information on cost of production if it wished to avoid the IA's performing the mentioned inflation adjustment. Thus, the 19 August request informed the respondents that their information was being rejected and provided them an opportunity to submit further explanations, as well as certain additional information.

7.259 The question is then whether the IA, having in the 19 August request informed respondents of its intention to reject their previously-submitted cost information and provided an opportunity for, *inter alia*, further explanations in respect of that information, was under a new obligation to take these steps again in respect of the responses to the 19 August letter. Put another way, was it sufficient at that point for the IA to simply explain in the *Final Report*, in accordance with the last sentence of Annex II, paragraph 6, why Icdas' and IDC's responses to the 19 August request were rejected?

7.260 Here again we believe that this issue can only be decided in the light of the particular situation at the time. While we have concluded in Section VII.D.5, *infra*, that the 19 August request was not a questionnaire in the sense of Article 6.1.1, there is nevertheless no doubt that it was a request *by the IA* for the provision of a great deal of detailed information. The responses to it by IDC and Icdas were

quite lengthy, and contained many pages of accounting and other documentation. The IA's 23 September letters following up on these responses identified no fundamental problems in them, but rather identified a few apparently minor missing items that were to be (and were) submitted within two to five days.

7.261 Given the nature of the 19 August communication and of these companies' responses thereto, in our view the IA continued to be bound by the obligation to inform the respondents that their information submitted in response to the 19 August request was being rejected and to give them a final opportunity to explain. For us, the determinative factor in this regard is that the 19 August letter not only gave respondents the opportunity to provide *explanations* concerning their originally-submitted cost data, it also requested them to submit extensive further *information*, which they in fact did. Because the 19 August request was a request for "information" as referred to in Annex II, paragraph 6 (and not just an opportunity for explanation), and because IDC and Icdas provided extensive "information" in response to it, the IA was bound by the first sentence of Annex II, paragraph 6 in respect of that "information". Thus, these companies should have been informed that their responses to the 19 August request were being rejected, and given an opportunity to "provide further explanations". This did not happen. On 23 September, these companies were simply requested to provide a few missing pieces of information, and thus certainly were left with the impression that their responses to the 19 August requests had been accepted by the IA.

7.262 We must emphasize in this connection that it was the IA itself that requested the information at issue (i.e., the information submitted in response to the 19 August letters). As we have found above, it is within the discretion of an investigating authority to determine, subject to the requirements of Annex II, paragraph 1, what information it needs from interested parties. Furthermore, there is nothing in the AD Agreement that precludes an investigating authority from requesting information during the course of an investigation, including after the questionnaire responses have been received.²²⁹ The fact that an investigating authority may request information in several tranches during an investigation cannot, however, relieve of it of its Annex II, paragraph 6 obligations in respect of the second and later tranches, as that requirement applies to "information and evidence" without temporal qualification.²³⁰

7.263 We note that, at least in respect of Habas, Diler and Colakoglu, the IA itself apparently considered that it had the obligation to explicitly indicate that the information submitted in response to the 19 August request was being rejected. In particular, the 23 September letters identify, as discussed above, a number of very serious inadequacies in the responses of these companies and contain long lists of missing items that would need to be submitted within two to five days. Given these companies' reactions to the 23 September letter, in their own letter of 28 September to the IA, it is evident that they were in no doubt that the IA intended to reject the cost information they had submitted. Nevertheless, the IA sent these three companies one final letter, dated 28 September 1999²³¹, informing them that they had not fully responded in respect of six items²³², and that therefore the IA "will use other data provided by your clients which were satisfactory, but will use facts available for the above-mentioned items". No similar communication was ever sent to IDC or Icdas.

²²⁹ See para.7.320, *infra*.

²³⁰ We do not mean to imply here that an interested party can impose on an investigating authority an Annex II, paragraph 6 requirement simply by submitting new information *sua sponte* during an investigation. Rather, the role of paragraph 6 of Annex II, namely that it forms part of the basis for an eventual decision pursuant to Article 6.8 whether or not to use facts available, makes it clear that its requirements to inform interested parties that information is being rejected and to give them an opportunity to provide explanations, pertain to "necessary" information in the sense of Article 6.8. As discussed above, "necessary" information is left to the discretion of the investigating authority to specify, subject to certain requirements, notably those in Annex II, paragraph 1.

²³¹ Exh. EGT-13.6.

²³² Materials, labour, overhead, SG&A, interest expense, and detailed cost sheet.

7.264 Finally, the IA gave no indication in the *Essential Facts and Conclusions Report* or in the *Final Report* that either Icdas and IDC had at any point failed to act to the best of its ability. To the contrary, the record shows that these companies responded on time and comprehensively to the 19 August request, and did so once again in response to the IA's 23 September follow-up requests.

7.265 To summarize in respect of Icdas and IDC, we have found that the IA in the 19 August request not only informed these respondents of problems with their originally-submitted cost data, but informed them of what information would be needed for their costs to be verifiable. Thus, in the 19 August letter, the IA established the standard for verifiability of the respondents' cost data. Icdas and IDC responded in a timely manner, and as evidenced by the narrow scope of the 23 September follow-up requests that they received, their responses also were largely complete. Furthermore, they supplied the further information requested on 23 September within the deadlines set by the IA. Thus, the record evidence indicates that as of their responses to the 23 September requests, these two respondents had submitted all of the information that the IA itself had defined as what was necessary to render their cost information "verifiable". There is no indication whatsoever that the IA considered either of these companies to have failed to act to the best of its ability. Nevertheless, the IA rejected the submitted cost information on the grounds that the IA still was not convinced that the cost data reflected hyperinflation – that is, in effect, it simply did not believe the costs reported by these companies, although the information they submitted complied fully with what the IA itself had defined as necessary to verify those costs. The IA failed to inform these companies that it was rejecting the information submitted in response to the 19 August and 23 September requests, and failed to give them an opportunity to provide further explanations.

7.266 For the foregoing reasons, we find that Egypt violated Article 6.8 and Annex II, paragraph 6, in respect of IDC and Icdas, because the IA, having identified to these respondents the information "necessary" to verify their cost data, and having received that information, nevertheless found that they had failed to provide "necessary information"; and further, did not inform these companies of this finding and did not give them an opportunity to provide further explanations.

4. Claim under Article 2.2.1.1, 2.2.2 and 2.4 due to alleged unjustified resort to facts available

7.267 Under this claim, Turkey cites Articles 2.2.1.1, 2.2.2 and 2.4 as being violated "because the IA was not justified in resorting to facts available". Article 2.2.1.1 requires that costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided such records are kept in accordance with generally accepted accounting principles of that country, and reasonably reflect the relevant costs. Article 2.2.2 deals with calculations of general, selling and administrative costs, and profits, and how these calculations should be done in the case of a constructed normal value. Turkey alleges that the methodologies set forth in those provisions were not followed by the IA. In response to a question from the Panel, Turkey clarified that this was an "alternative" claim to that under Article 6.8 and Annex II. In particular, Turkey stated that this claim was intended to avoid a situation where the Panel might find that even if resort to facts available had not been technically justified, the particular facts that were used could have been used, i.e., that only a harmless error had been committed.

7.268 Given Turkey's characterization and explanation of the rationale for this claim, we understand the claimed violations of Article 2.2.1.1 and Article 2.2.2 to be entirely subsidiary to the claimed Article 6.8 violation. In this regard, we recall that we have found that the IA was justified in resorting to facts available in respect of Habas, Diler and Colakoglu. This can only mean that the IA was justified to use facts *other than* those as submitted by the respondents, i.e., that Articles 2.2.1.1 and 2.2.2 do not apply. We also recall that we have found that the IA was not justified in resorting to facts available, in violation of Article 6.8 and Annex II, paragraph 6, as regards IDC and Icdas. For these two companies, we need not and do not reach the issue of which particular information of the

respondents was not used. We therefore exercise judicial economy in respect of the claimed violations of Articles 2.2.1.1 and 2.2.2 in respect of all of the respondents.

7.269 Concerning its Article 2.4 claim in this context, Turkey argues that "[e]ven if there were some basis to conclude that respondents did not respond fully to the IA's 19 August or 23 September information requests, the respondents provided a full explanation of how their submitted costs and prices reflected inflation in Turkey and [] the IA's rejection of those well-founded reasons imposed an unreasonable burden of proof in violation of Article 2.4". As discussed in Section VII.E.2, *infra*, Article 2.4 has to do with the *comparison* of export price to normal value, and does not create a generally applicable rule as to burden of proof, and we thus find that Article 2.4 is not applicable to the IA's decision to resort to facts available. Furthermore, even if this provision were applicable, we have found elsewhere²³³ that there is no basis in the evidence of record on which to conclude that the information requirements imposed by the IA in respect of costs were unreasonable. We therefore find that Turkey has not established that there is a violation of Article 2.4 under this claim.

5. Claim under Article 6.1.1, Annex II, paragraph 6, and Article 6.2 – Deadline for response to 19 August 1999 request

7.270 Turkey argues that Article 6.1.1 requires that a party must be given 37 days to reply "after receiving a questionnaire used in an anti-dumping investigation[]" and that "due consideration" must then be given to any request for an extension of the original period for a response. According to Turkey, Egypt violated these provisions by first setting a 13-day rather than a 37-day deadline, and then by granting an inadequately short extension.

7.271 Turkey claims in the alternative that Egypt violated Annex II, paragraph 6, which provides that parties receiving supplemental request for information should be given "an opportunity to provide further explanations within a reasonable period ...", and Article 6.2 which provides that "[t]hroughout an anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests". In particular, Turkey argues that the original 13-day deadline was plainly inadequate given the nature and magnitude of the 19 August request, and was more so in light of the earthquake that had occurred in Turkey on 18 August. Turkey argues that the "denial" of the respondents' requests for extensions to 11 and 22 October thus violated Annex II, paragraph 6 and Article 6.2.

7.272 Egypt responds that the 19 August requests did not constitute "new questionnaires", in that they were, in the first place, not "new". Rather, according to Egypt, they re-requested information that already had been requested in the foreign manufacturers' and exporters' questionnaires, which normally should have been readily available to the respondents. Nor, Egypt argues, were they "questionnaires" in the sense of Article 6.1.1, meaning that they were not subject to the minimum response time requirements of that provision. Rather, they were intended to provide an additional opportunity for respondents to report cost data for the full period of investigation, and to clarify whether and to what extent the reported costs reflected the effects of hyperinflation. Egypt further argues that the respondents were given a reasonable period of time in which to respond, noting in particular the 14-day extension that was granted by the IA, a more than doubling of the initial 13-day period.

(a) Claim under Article 6.1.1

7.273 We consider first Turkey's allegation of violation of Article 6.1.1. Article 6.1.1 provides as follows:

"Exporters or foreign producers receiving questionnaires used in an anti-dumping investigation shall be given at least 30 days for reply.¹⁵ Due consideration should be

²³³ Section VII.E.2, *infra*.

given to any request for an extension of the 30-day period and, upon cause shown, such an extension should be granted whenever practicable.

¹⁵ As a general rule, the time-limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representative of the exporting Member or, in the case of a separate customs territory Member of the WTO, an official representative of the exporting territory."

7.274 We note first, as a point of clarification, that the time-limit requirement specified in Article 6.1.1 is 30 days, not 37 days. Moreover, footnote 15 provides that (only) in the case of questionnaires sent to exporters is it necessary to count the time-limit from date of receipt, which in turn is deemed (only) for exporters to be seven days from transmittal. In effect, therefore, Turkey's statement that Article 6.1.1 requires a minimum time-limit of 37 days from date of receipt, is not entirely accurate.

7.275 This, however, is not the central issue in this claim. Rather, this claim turns on whether the 19 August requests were "questionnaires" in the sense of Article 6.1.1, because only if so would any specific minimum time-limit (whether 30 or 37 days) apply. Put another way, the question is whether "questionnaires" as referred to in Article 6.1.1 are only the original questionnaires in an investigation, or whether this term also includes all other requests for information, or certain types of requests, including requests in addition and subsequent to original questionnaires.

7.276 The term "questionnaire" as used in Article 6.1.1 is not defined in the AD Agreement, and in fact, this term only appears in Article 6.1.1, and in paragraphs 6 and 7 of Annex I. In our view, the references in Annex I, paragraphs 6 and 7 provide strong contextual support for interpreting the term "questionnaires" in Article 6.1.1 as referring only to the original questionnaires sent to interested parties at the outset of an investigation. In particular, both of these provisions refer to "the questionnaire" in the singular, implying that there is only one document that constitutes a "questionnaire" in a dumping investigation, namely the initial questionnaire, at least as far as the foreign companies (producers and exporters) that might be visited are concerned. Paragraph 6 refers to visits by an investigating authority to the territory of an exporting Member "to explain *the questionnaire*". Paragraph 7 provides that "on-the-spot investigation ... should be carried out after the response to *the questionnaire* has been received..."

7.277 If any requests for information other than the initial questionnaire were to be considered "questionnaires" in the sense of Article 6.1.1, a number of operational and logistical problems would arise in respect of other obligations under the AD Agreement. First, there is no basis in the AD Agreement on which to determine that some, but not all, information requests other than the initial questionnaire also would constitute "questionnaires". Thus, even if an investigating authority was not obligated to provide the minimum time-period in Article 6.1.1 in respect of every request for information, it would not be able to determine from the Agreement which of its requests were and were not subject to that time-period. On the other hand, if all requests for information in an investigation were "questionnaires" in the sense of Article 6.1.1, this could make it impossible for an investigation to be completed within the maximum one year (or exceptionally, 18 months) allowed by the AD Agreement in Article 5.10. Moreover, a 30- or 37-day deadline for requests for information made in the context of an on-the-spot verification -- i.e., the "obtain[ing of] further details" explicitly referred to in Article 6.7 to as one of the purposes of such verifications -- obviously would be completely illogical as well as unworkable. Finally, such an interpretation would render superfluous the requirement in Annex II, paragraph 6 to allow a "reasonable period ..." for the provision of any explanations concerning identified deficiencies in submitted information.

7.278 Considering the substance of the 19 August requests, particularly in comparison to the original questionnaires, further persuades us that the 19 August requests did not constitute new "questionnaires" in the sense of Article 6.1.1. In particular, as we have noted²³⁴, *supra*, while the questions posed are rather detailed, they are in the nature of follow-up questions to the original questionnaire responses, in that they request cost data for the months for which such data were not originally provided by certain respondents, and they request underlying documentation, reconciliations and explanations of the originally submitted cost data and of the additional cost data being requested.

7.279 For the foregoing reasons, we conclude that the 19 August requests did not constitute questionnaires in the sense of Article 6.1.1, and that therefore the deadline imposed for responses to those requests was not inconsistent with that Article.

(b) Alternative claim under Annex II, paragraph 6 and Article 6.2

7.280 We now turn to Turkey's alternative claim in respect of the deadline for responses to the 19 August requests, that the time allowed did not constitute a "reasonable period", in violation of Annex II, paragraph 6, and that therefore the IA failed to provide the Turkish respondents a "full opportunity for the defence of [their] interests", in violation of Article 6.2.

7.281 Because the claimed violation of Article 6.2 is entirely dependent on the claimed violation of Annex II, paragraph 6, we turn first to Annex II, paragraph 6. We note that the relevant part of this provision reads as follows:

"If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, *due account being taken of the time-limits of the investigation ...* ." (emphasis added)

7.282 This text makes clear that the obligation for an investigating authority to provide a reasonable period for the provision of further explanations is not open-ended or absolute. Rather, this obligation exists within the overall time constraints of the investigation. Thus, in determining a "reasonable period" an investigating authority must balance the need to provide an adequate period for the provision of the explanations referred to against the time constraints applicable to the various phases of the investigation and to the investigation as a whole.

7.283 We recall that in the rebar investigation, the IA initially set a 13-day deadline for any responses to the 19 August requests. After receiving the requests for extensions from the respondents, the IA extended by 14 days the time-period that was allowed for the responses.²³⁵ After the IA informed the respondents of the extended deadline, no respondent came back with any additional request for more time, nor did any respondent argue that the new deadline was unreasonable or otherwise object to it. All of the respondents in fact made lengthy submissions in response to the 19 August request on or before the deadline.

7.284 On the basis of the foregoing considerations, we do not find that, as a factual matter, the deadline for responses to the 19 August request was unreasonable. We note that this claim concerns in part Annex II, paragraph 6 outside the context of Article 6.8. Given our finding that the deadline established was not unreasonable, i.e., that the factual basis for this claim does not exist, we need not and do not rule on whether Annex II, paragraph 6 can be invoked outside the context of Article 6.8. As a consequence, we also do not find that in establishing a 27-day deadline for the provision of these

²³⁴ See para.7.238, *supra*.

²³⁵ Exh. EGT-14.1(Icdas), EGT-14.2(IDC) and EGT-14.3(Diler, Colakoglu and Habas), respectively.

responses, the IA failed to provide the respondents with a full opportunity for the defence of their interests, and we thus find no violation of Article 6.2 in this respect.

6. Claim under Article 6.1.1, Annex II, paragraph 6, and Article 6.2 - Deadline for the responses of Habas, Diler and Colakoglu to the 23 September letter of the IA

7.285 On 23 September, i.e., approximately one week after receiving the responses to the 19 August request, the IA sent letters to each respondent identifying information and documentation which, according to the IA, that particular respondent had "not yet furnished" in response to the 19 August request. The IA gave all of the respondents the same time-frame in which to furnish the identified information, namely 2 days for some of the listed items and 5 days for the rest.

7.286 Turkey claims that in the 23 September letter to Habas, Diler and Colakoglu, the IA for the first time required these companies to provide a monthly breakdown of all costs to produce billet, and also demanded that the companies translate each page of the hundreds of pages of documentation that they had been required to provide in their responses to the 19 August request. According to Turkey the two-to-five days allowed these three companies to respond to the 23 September letter was manifestly inadequate, and was contrary to Articles 6.1.1, 6.2 and Annex II, paragraph 6.

7.287 For the same reasons set forth in respect of the preceding claim, we do not find that the 23 September letters constituted "questionnaires" in the sense of Article 6.1.1, and thus we find no violation of that provision.

7.288 As for the claim of violation of the requirement in Annex II, paragraph 6 to provide a "reasonable period", we recall that this provision forms part of the required procedural and substantive basis for a decision as to whether resort to facts available pursuant to Article 6.8. We further recall that we have found, *supra*²³⁶, that the IA's decision to resort to facts available in respect of Habas', Diler's and Colakoglu's costs of production and constructed normal values did not violate Article 6.8, based on considerations under Annex II, paragraphs 3 and 5. Thus, we would not necessarily need to address this aspect of this claim for its own sake. Nonetheless, a full analysis of Annex II, paragraph 6 as it pertains to the factual basis of this claim, appears necessary to evaluate the merits of the claimed violation of Article 6.2 resulting from the deadline for responses to the 23 September requests. In performing this analysis, however, we note that we again do not here take a position on whether Annex II, paragraph 6 can be invoked separately from Article 6.8. We would need to do so only if we find that as a factual matter, the deadline in question was unreasonable.

7.289 We thus turn first to this factual question, i.e., whether the two-to-five day deadline as it applied to Habas, Diler and Colakoglu was unreasonable. We believe that this issue must be judged on the basis of the overall factual situation that existed at the time. Here, it appears that the key element raised by Turkey is whether the information requested was "new" information that was being requested for the first time. In this regard, Turkey complains in particular about the IA's request for a monthly breakdown of costs to produce steel billet (the feedstock used in rebar production).

7.290 In considering whether this was an entirely new information request, we note that item 4 of the "list of supplemental materials" in the 19 August letters requested detailed listings of raw material "purchases" as well as copies of payment ledgers showing payments for those purchases, and copies of the underlying purchase orders. The main information provided by these companies in response to the request for data on raw material costs was their internal transfer price data for billet, a product they make themselves, rather than purchasing it as a raw material. Thus, the 23 September request for a monthly breakdown of the costs to produce steel billet, rather than constituting a new request for previously-unrequested information, in fact, was in essence a restatement of the request in the 19 August letters for data and documentation on raw material *purchases*. The other items listed in the

²³⁶ Para. 7.248.

23 September letter similarly were items previously requested. Thus we conclude that the 23 September request was a follow-up to the responses to the 19 August request rather than a new request.

7.291 A further consideration concerning the "reasonableness" of the 23 September request is whether any of the other respondents received a longer period in which to respond to the letters they received from the IA on 23 September. Here the answer is "no"; all respondents were given the same amount of time to respond to those letters. The fact that more information was requested in the letter to Habas, Diler and Colakoglu than in the letters to the other two respondents, IDC and Icdas, is a reflection of the fact that, according to the record, the latter two companies' responses to the 19 August request were much more complete than those of the first three companies. For the IA to have given Habas, Diler and Colakoglu more time than IDC and Icdas to respond to the 23 September follow-up request arguably would have been less than fair, and indeed would have rewarded precisely the companies whose responses to the 19 August request were the least adequate.

7.292 In this context it must be remembered that all five respondents received essentially equivalent information requests on 19 August, and were given an identical period in which to respond. All five respondents then again were given an identical period in which to respond to the 23 September follow-up (deficiency) requests. Thus, for equivalent requests for information, the five respondents received, in total, equivalent (and considerable) time-periods to respond. Thus, the two-to-five-day deadline for responses to the 23 September simply forms part of the overall time granted for responses to the basic request for cost information that was sent on 19 August. The three respondents mentioned in this claim chose to use their initial 27-day response period in a different way from the other two respondents. It was these decisions by the two groups of respondents (not by the IA) that fundamentally gave rise to the different scopes of the 23 September follow-ups that they respectively received.

7.293 We note further that in any case, Habas, Diler and Colakoglu never even attempted to submit any of the information identified in the 23 September letters or sought any extension of the deadline for responding. To the contrary, they made it clear in their response to the IA²³⁷ that they had no intention of submitting further information.

7.294 The factual situation thus was: (1) that the 23 September letter was essentially a restatement of previous requests that had not been responded to in full, rather than a new request, (2) that all five respondents, including Habas, Diler and Colakoglu, received overall the same amount of time to provide the cost data specified in the 19 August request, and (3) that unlike Icdas and IDC, which had used the initial 27 day period to full advantage, these three respondents stated explicitly that they would not provide the information referred to in the 23 September request, (i.e., they made no attempt to comply with the request nor did they request an extension of the two-to-five day period).

7.295 As a consequence, we do not find that Turkey has established that the two-to-five day period provided to Habas, Diler and Colakoglu for responding to the 23 September request was unreasonable, and thus we do not find that Turkey has established the factual basis for a possible violation of Annex II, paragraph 6 in that regard. As a result, we also do not find that the IA failed to provide Habas, Diler and Colakoglu with a full opportunity for the defence of their interests, and thus find no violation of Article 6.2 in this respect.

7. Claim under Annex II, paragraph 7 due to the addition of 5 per cent for inflation to Habas' highest reported monthly costs

7.296 Turkey claims that the Investigating Authority violated Annex II, paragraph 7 by adding an arbitrary 5 per cent to Habas' reported costs when constructing Habas' normal value. Habas submitted

²³⁷ Exh. EGT-2.

cost data for only two of the 12 months of the period of investigation. As a proxy for the effects of hyperinflation, the IA constructed Habas' normal value by using the highest (of the two reported) monthly costs for each cost element as submitted by Habas, and then added to these 5 per cent, the monthly rate of inflation considered by the Investigating Authority as reflecting the ruling rate of inflation during the period of investigation. Turkey claims that in doing this, Egypt violated Annex II, paragraph 7, as this amount which was based on a "secondary source", was wholly arbitrary, was contradicted by data supplied to Egypt by the Government of Turkey, was not corroborated by any other data on the record, and thus was an inappropriate basis for facts available under the AD Agreement.

7.297 Egypt argues that it determined the "facts available" in such a manner that the respondents would still benefit from their own data, by taking the highest monthly cost of production reported by the respondents during the investigation period. In the case of Habas, because Habas had provided costs for two selected months only, and had failed to submit satisfactory evidence that these two months were representative of the period of investigation or had been adjusted for inflation, the IA added 5 per cent to each cost element except interest to account for inflation. For interest, no adjustment was made to the data reported by Habas, as it was found that Habas's interest cost was determined in the marketplace and therefore would reflect inflation. According to Egypt, the IA would have been entitled to reject entirely the reported cost data, and base its determinations on information from secondary sources, as explicitly contemplated by Annex II, paragraph 7, but instead it decided to use the respondents' submitted data to the extent possible.

7.298 Paragraph 7 of Annex II states, in relevant part:

"If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection. In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns and from the information obtained from other interested parties during the investigation. ..."

7.299 Concerning the "facts available" used in the case of Habas, the IA stated in its *Final Report*:²³⁸

"The Investigating Authority first attempted to compare the net home market to the cost of production. Although the Investigating Authority twice requested full costs of production for the entire POI, the company only provided costs for two selected months, and there is no evidence on the record that these were representative of the period. Therefore, as facts available for the COP, the Investigating Authority used for each cost element (except interest) the highest of the company's submitted costs and added 5 per cent to account for inflation during the period of each month."

7.300 We understand that the main issue raised by this claim is the factual validity and accuracy of the estimated 5 per cent for inflation that was used in the cost of production and constructed value calculations for Habas. In particular, Turkey argues that the official statistics published by the Government of Turkey show a lower monthly average rate of inflation, in that in only two months of 1998 did inflation exceed 5 per cent, fluctuating in the other months between 1.6 and 4.6 per cent.²³⁹ This issue was raised during the investigation, namely in the comments of the Government of Turkey on the *Essential Facts and Conclusions Report*. Along with these comments, the Turkish

²³⁸ Exh.TUR-16, para.3.2.2.1.

²³⁹ Written Response, dated 15 October 1999, of the Government of Turkey on the *Essential Facts and Conclusions Report*, submitted by Turkey as Exh. TUR-30, p.2.

Government, provided wholesale price index data published by the Turkish State Institute of Statistics. In its *Final Report*, the IA indicated that it had rejected the inflation information submitted by the Turkish Government as "new" and "untimely"²⁴⁰, and stated that it was continuing to apply the estimated 5 per cent inflation rate on the basis that it had other information at its disposal that showed an even higher monthly rate.

7.301 We requested Egypt to submit to us the information on inflation the IA had referred to in the *Final Report*,²⁴¹ and to explain how the IA had arrived at the 5 per cent figure based on the data at its disposal.²⁴² Egypt replied that it had used the same data source as that submitted by the Turkish Government (i.e., the price indices published by the Turkish State Institute of Statistics), but that the 5 per cent rate was the average of the official wholesale and consumer price indices during the period of investigation, whereas the Turkish Government had referred in its comments only to the wholesale price index.

7.302 We recall that the claim before the Panel is that the addition of 5 per cent to Habas' costs was arbitrary, finds no support anywhere in the record and, as information from a "secondary source", should have been used with "special circumspection", and in particular, should have been "check[ed] ... from other independent sources at [the IA's] disposal". Turkey also argues that under the AD Agreement, if data from a company cannot be used, they must be replaced with data from a secondary source. According to Turkey, there is no authority in the AD Agreement to make purely arbitrary adjustments to a respondent's costs. Turkey cites no provision of the AD Agreement in this context, however.

7.303 In considering this claim, we note that the 5 per cent figure was derived from a secondary source, in fact the same secondary source as was proffered by the Government of Turkey during the investigation. Thus, the source of the information as such is not at issue. Given this, there was no need for the IA to check the validity of that source. Rather, the only issue is whether the 5 per cent figure that was derived from that source was calculated and used with "special circumspection". In this regard, the relevant fact is that the 5 per cent figure represents an average of the 1998 wholesale and consumer price indices for Turkey.

7.304 Turkey asserted during this dispute that a consumer price index is "irrelevant" to rebar.²⁴³ Turkey offered no specific argumentation or information in support of this point, however. We note that in its communications with respondents during the investigation concerning the effects on the respondents of hyperinflation in Turkey, the IA appears to have been referring to the general, economy-wide rate of inflation. It is not illogical that such a broad measure of inflation should reflect both wholesale and consumer prices. Nor is it illogical that a company's cost to produce a product would be influenced by both consumer and wholesale prices. In short, to us it is not evident on its face that consumer prices would be wholly irrelevant to a company's production costs. Nor has Turkey advanced any argumentation or evidence to demonstrate that this is so, either as a matter of general principle or in respect of the companies that were respondents in the rebar investigation.

7.305 For these reasons, we do not find that the IA failed to use "special circumspection" in estimating inflation in Turkey at 5 per cent per month, and in applying this figure to Habas. We thus do not find that Egypt violated Annex II, paragraph 7 in this regard. We find, rather, that on the basis of the evidence of record, an objective and unbiased investigating authority could have reached the conclusion that 5 per cent was the approximate average monthly inflation rate in Turkey during the period of investigation. In this regard, it should be emphasized that applying "special

²⁴⁰ Exh. TUR-16, *Final Report*, p.21.

²⁴¹ Question 10 to Egypt of the *Written Questions by the Panel*, dated 28 November 2001 – Annex 4-2.

²⁴² Question 4 to Egypt of the *Written Questions by the Panel*, dated 27 February 2002 – Annex.8-2.

²⁴³ Written Comments, dated 14 March 2002, by Turkey on Question 4 to Egypt of the *Written Questions by the Panel*, of 27 February 2002 – Annex 8-1.

circumspection” does not mean that only one outcome is possible on a given point in an investigation. Rather, even while using special circumspection, an investigating authority may have a number of equally credible options in respect of a given question. In our view, when no bias or lack of objectivity is identified in respect of the option selected by an investigating authority, the option preferred by the complaining Member cannot be preferred by a panel.

8. Claim under Annex II, paragraphs 3 and 7 due to failure to use Icdas' September-October 1998 scrap costs

7.306 Turkey claims that in constructing Icdas normal value on the basis of facts available, the IA declined to use the scrap costs as reported by Icdas for September-October 1998 (the months in which it exported to Egypt), and instead used Icdas' January 1998 scrap cost (the highest in the period of investigation). Because, according to Turkey, Icdas had provided all of the requested data and documentation concerning its scrap costs in a timely manner and these data were "verified" (clarified by Turkey to mean "verifiable"²⁴⁴), the IA should have used those scrap costs as submitted. Its failure to do so, Turkey argues, was a violation of Annex II, paragraph 3. In addition, Turkey argues that the IA violated the spirit, if not the letter, of paragraph 7 of Annex II, in that a comparison with the "verified" data submitted by Icdas shows that the scrap cost data used by the IA in its calculations were "grossly distorted".

7.307 Egypt argues that Turkey's invocation of Annex II, paragraph 3 is misplaced. In Egypt's view, this provision is only concerned with the circumstances in which the data submitted by the respondents have to be accepted or can be rejected, and says nothing about the selection of appropriate facts available once the data submitted by respondents has been rejected.

7.308 Paragraph 3 of Annex II states, in relevant part:

"All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, ..., should be taken into account when determinations are made."

7.309 We recall that in our assessment of Turkey's claim that Egypt violated Article 6.8 in resorting to the use of "facts available", we found that the provisions of Annex II, paragraph 3 form part of the substantive parameters for the interpretation of Article 6.8. That is, we found that this paragraph *in conjunction with* other paragraphs of Annex II must be followed by an investigating authority in making its assessment of whether, in a particular case and in respect of certain elements of information, it is justified in resorting to "facts available" pursuant to Article 6.8. In other words, paragraph 3 applies to an IA's decision to use "facts available" in respect of certain elements of information. It does not have to do with determining which particular facts available will be used for those elements of information once that decision has been made. Thus, we find that this provision does not apply to the situation that is the subject of this claim. This said, we recall that we have found, *supra*, in part based on an analysis of Annex II, paragraph 3, that the IA was not justified in resorting to facts available in respect of Icdas. We thus do not need to address this claim further.

7.310 Turning to Turkey's claim of violation of Annex II, paragraph 7, given that we have found, in the context of Turkey's Article 6.8 claim, that the IA's resort to "facts available" in respect of Icdas was not justified, we do not need to address this claim, which concerns the selection of particular facts available.

²⁴⁴ Written Response, dated 14 March 2002, to Question 4 to Turkey of the *Written Questions by the Panel*, of 27 February 2002 – Annex 8-1.

9. Claim under Annex II, paragraphs 3 and 7 due to calculation of the highest monthly interest cost for IDC

7.311 Turkey claims that the IA violated Annex II, paragraph 3 in calculating the amount of interest expense to use as facts available in constructing IDC's normal value. In particular, according to Turkey, the IA calculated the interest expense by dividing IDC's total interest expense by rebar production in April 1998. Turkey states that because IDC produces and sells on the market other products (namely billets), and because the April rebar production figures were abnormally low, the result was a distorted, very high, interest component, which overstated the constructed normal value. Turkey argues that the IA should have divided total interest cost by total sales during the period of investigation, based on the audited financial statement, instead of choosing the month with the highest interest cost and dividing that cost by that month's rebar production, which was abnormally low. According to Turkey, IDC's audited financial statement shows that its interest expense expressed as a percentage of the total cost of manufacturing would be much lower. Because the IA failed to use verifiable information (the interest expense as reflected in the audited financial statement), in Turkey's view, the IA violated Annex II, paragraph 3.²⁴⁵

7.312 Egypt responds that there are no requirements in the AD Agreement for any particular methodology for calculating interest expense for a constructed value, and that therefore, provided that the methodology used is not partial or biased, the IA's calculation should be upheld. Moreover, Egypt disagrees with the calculation methodology proposed by Turkey, which in Egypt's view would have been totally inappropriate in the context of the rebar investigation, as IDC's reported costs had been found to be unreliable.²⁴⁶ Egypt argues, having selected April as the appropriate month for calculation of interest expense, it had to use the production for that month as the denominator, as any other choice for allocation would have been arbitrary.

7.313 Concerning Turkey's claim of violation of Annex II, paragraph 3, we find, for the same reasons as stated in Section VII.D.8, *supra*, that this provision does not apply to the situation that is the subject of this claim, and we similarly recall our findings, *supra*, in part based on an analysis of Annex II, paragraph 3, that the IA was not justified in resorting to facts available in respect of IDC. We thus do not consider this claim further.

7.314 Concerning Turkey's claim of violation of Annex II, paragraph 7, as was the case in respect of the claim concerning Icdas discussed in Section VII.D.8, *supra*, Turkey's exact claim is that Egypt violated the "considerations underlying Annex II, paragraph 7", i.e., once again, that this provision was violated "in spirit". In our view, the factual situation about which Turkey complains in respect of IDC is precisely analogous to that raised in respect of Icdas under the same provision. Our basic reasoning and conclusions therefore are the same.

7.315 In particular, given that we have found, in the context of Turkey's Article 6.8 claim, that the IA's resort to "facts available" in respect of IDC was not justified, we do not need to address this claim, which concerns the selection of particular facts available.

E. OTHER CLAIMS RELATING TO THE DUMPING INVESTIGATION

1. Claim under Annex II, paragraph 1; Annex II, paragraph 6; and Article 6.7, Annex I, paragraph 7 – Alleged failure to verify the cost data during the "on-the-spot" verification, and conduct of "mail order" verification instead

7.316 Turkey claims that by failing to request the basic cost data identified in its 19 August letter in its original questionnaire, the IA violated Annex II, paragraph 1. Turkey further claims that by

²⁴⁵ First Written Submission of Turkey, p.74-76 and Second Written Submission of Turkey, p.77-82.

²⁴⁶ First Written Submission of Egypt, p.87-88.

waiting until after the verification to raise these issues and then insisting that respondents provide full "mail order" verification of previously-submitted cost responses and the information requested on 19 August, Egypt violated Annex I, paragraph 7 and Article 6.7. According to Turkey, by taking these steps, Egypt also seriously prejudiced the rights of respondents and impaired their "opportunity to provide further explanations" in violation of Annex II, paragraph 6.

7.317 Egypt argues that the AD Agreement permits, but does not require, on-the-spot verification. Egypt further argues that the IA did request cost data from the outset, in the questionnaires, that the additional data was requested by the IA on 19 August due to possible problems in the cost data as originally reported by the Turkish respondents, and that nothing in the AD Agreement prevents an investigating authority from seeking information during the course of an investigation.

7.318 Turning first to the claim of violation of Annex II, paragraph 1, we note that the relevant text of this provision reads as follows:

"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."

7.319 We recall that in the context of Article 6.8, we found that the various provisions of Annex II contain substantive parameters for the application of Article 6.8.

7.320 In the rebar investigation, the IA sent questionnaires to the Turkish respondents shortly after initiating the investigation, and these questionnaires did request cost information. Furthermore, the import of the 19 August letter was to request certain supplemental cost information as well as explanations concerning certain of the cost information originally submitted in response to the questionnaires. We find no basis on which to conclude that an investigating authority is precluded by paragraph 1 of Annex II or by any other provision from seeking additional information during the course of an investigation.

7.321 We note that this claim concerns in part Annex II, paragraph 1 outside the context of Article 6.8. Given our finding that Annex II, paragraph 1 does not contain the obligation asserted by Turkey, we need not and do not rule on whether Annex II, paragraph 1, can be invoked separately from Article 6.8.

7.322 We turn next to Turkey's claim that Egypt violated Article 6.7 and Annex I, paragraph 7 by waiting until after the on-the-spot verification to raise the cost issues in the 19 August letters, and then by attempting to conduct what Turkey refers to as a "mail order" verification. In evaluating this claim we note that it depends on an interpretation of Article 6.7 and Annex I, paragraph 7 as *requiring* an on-the-spot verification. We thus consider these provisions in detail to determine whether they contain any such requirements.

7.323 Article 6.7 reads in relevant part as follows:

"In order to verify information provided or to obtain further details, the authorities *may* carry out investigations in the territory of other Members." (emphasis added)

7.324 Annex I, paragraph 7 provides in relevant part:

"As the main purpose of the on-the-spot investigation is to verify information provided or to obtain further details, it should be carried out after the response to the questionnaire has been received unless the firm agrees to the contrary and the

government of the exporting Member is informed by the investigating authorities of the anticipated visit and does not object to it;"

7.325 Concerning the relationship of Annex I to Article 6.7, we come to the same conclusion as in respect of Annex II and Article 6.8.²⁴⁷ In particular, we note Article 6.7's explicit cross-reference to Annex I: "[T]he procedures described in Annex I shall apply to investigations carried out in the territory of other Members". This language thus establishes that the specific parameters that must be respected in carrying out foreign verifications in compliance with Article 6.7 are found in Annex I. Thus, we must analyze the relevant provisions of Article 6.7 and Annex I together to determine if the requirement claimed by Turkey exists.

7.326 Considering Article 6.7, we find determinative the use of the word "may" (that is, that authorities "may" carry out investigations in the territory of other Members). This language makes clear that on-the-spot verifications in the territory of other Members are permitted, but not required, by Article 6.7.

7.327 The relevant portion of Annex I, paragraph 7 deals with the *timing* of a foreign verification visit, *if* one is made (i.e., "after the response to the questionnaire has been received"). This provision thus cannot be construed as containing a requirement to conduct such a visit *per se*. We note that our reading of these provisions is consistent with the findings of the panel in *Argentina – Ceramic Tiles*, which stated that the AD Agreement contains no requirement to conduct foreign verifications, but rather that Article 6.7 merely provides for this possibility, and that such on-site visits are neither the only way nor even the preferred way for investigating authorities to meet their obligation under Article 6.6 to "satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based".²⁴⁸

7.328 For the foregoing reasons, we find that Turkey has not established that Egypt violated Annex II, paragraph 1, Article 6.7, or Annex I, paragraph 7, as these provisions do not contain the obligations asserted by Turkey.

7.329 This brings us to Turkey's final allegation of a violation in connection with this claim, of Annex II, paragraph 6, regarding the alleged impairment of the respondents' "opportunity to provide further explanations". We note that this alleged violation is entirely dependent on and derivative from the other alleged violations raised by Turkey in connection with this claim. Given that we have found no violation of these provisions, we conclude in this instance as well that Turkey has not established the factual basis for the alleged violation by Egypt of violated Annex II, paragraph 6 in respect of the factual situation that is the subject of this claim.²⁴⁹

2. Claim under Article 2.4 – Request for detailed cost information late in the investigation allegedly imposed an unreasonable burden of proof on the respondents

7.330 Turkey claims that by waiting until late in the investigation to raise issues requiring the submission of new factual information and then imposing an unduly burdensome "mail order" verification requirement on the respondents, the IA imposed an "unreasonable burden of proof" upon respondents in violation of Article 2.4 of the AD Agreement.

7.331 Egypt argues that Article 2.4 pertains exclusively to the requirement to make a fair comparison between export price and normal value, and that its requirement not to impose an unreasonable burden of proof applies to the collection of information concerning allowances required

²⁴⁷ See paras.7.152-7.154.

²⁴⁸ Panel Report, *Argentina – Ceramic Tiles*, footnote 65.

²⁴⁹ Because of this, we again do not opine on whether it is possible to invoke Annex II, paragraph 6 outside the context of Article 6.8.

to ensure a fair comparison. Egypt argues in the alternative that should the Panel consider that Article 2.4 must be interpreted as being of general application to data collection in the course of an investigation, the claim of violation is factually incorrect and that the burden of proof imposed upon the respondents did not exceed the limits of reasonableness.

7.332 We start with the text of Article 2.4, which reads as follows:

"A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.⁷ In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties."

⁷ It is understood that some of the above factors may overlap, and authorities shall ensure that they do not duplicate adjustments that have been already made under this provision.

7.333 Article 2.4, on its face, refers to the *comparison* of export price and normal value, i.e., the calculation of the dumping margin, and in particular, requires that such a comparison shall be "fair". A straightforward consideration of the ordinary meaning of this provision confirms that it has to do not with the basis for and basic establishment of the export price and normal value (which are addressed in detail in other provisions)²⁵⁰, but with the nature of the comparison of export price and normal value. First, the emphasis in the first sentence is on the *fairness* of the *comparison*. The next sentence, which starts with the words "[t]his comparison", clearly refers back to the "fair comparison" that is the subject of the first sentence. The second sentence elaborates on considerations pertaining to the "comparison", namely level of trade and timing of sales on both the normal value and export price sides of the dumping margin equation. The third sentence has to do with allowances for "differences which affect *price comparability*", and provides an illustrative list of possible such differences. The next two sentences have to do with ensuring "price comparability" in the particular case where a constructed export price has been used. The final sentence, where the reference to burden of proof at issue appears, also has to do with "ensur[ing] a fair comparison". In particular, the sentence provides that when collecting from the parties the particular information necessary to ensure a fair comparison, the authorities shall not impose an unreasonable burden of proof on the parties.

7.334 The immediate context of this provision, namely Articles 2.4.1 and 2.4.2 confirms that Article 2.4 and in particular its burden of proof requirement, applies to the comparison of export price and normal value, that is, the calculation of the dumping margin. Article 2.4.1 contains the relevant provisions for the situation where "the *comparison* under paragraph 4 requires a conversion of currencies" (emphasis added). Article 2.4.2 specifically refers to Article 2.4 as "the provisions governing fair comparison", and then goes on to establish certain rules for the method by which that

²⁵⁰ In this regard, we note that earlier provisions in Article 2, namely Article 2.2 including all of its sub-paragraphs, and Article 2.3, have to do exclusively and in some detail with the establishment of normal value and export price, and in addition that Article 2.1 has to do in part with the establishment of the export price.

comparison is made (i.e., the calculation of dumping margins on a weighted-average to weighted-average or other basis).

7.335 In short, Article 2.4 in its entirety, including its burden of proof requirement, has to do with ensuring a fair comparison, through various adjustments as appropriate, of export price and normal value. Thus, we find that it does not apply to the investigating authority's establishment of normal value as such, which was the main (if not only) purpose of the Egyptian IA's 19 August request for certain cost-related information.

7.336 Moreover, even if the burden of proof requirement in Article 2.4 were considered to apply to requests for information for the establishment of normal value, and even if some of the information contained in the IA's 19 August request potentially could have been relevant to the fair comparison exercise that is the subject of Article 2.4, we do not find that Turkey has established that that request imposed an unreasonable burden of proof on the respondents. That is, we agree with Egypt that the factual basis for a claim of violation does not exist. In particular, we note that the request concerned the amplification or clarification of cost information provided or meant to have been provided in the questionnaire responses, and no respondent argued at the time that it received the 19 August request that it was unreasonably burdensome. Moreover, while all of the respondents requested (and received)²⁵¹ extensions of the original deadline for responses, and then on or before the deadline submitted responses including relatively voluminous documentation, in no case did any respondent indicate that more time was needed, or otherwise argue or attempt to justify that it simply did not find it possible to comply with the request. While respondents Habas, Diler and Colakoglu did present certain argumentation in their responses to the 19 August request, that argumentation had to do with the alleged illegality of the request under WTO rules, rather than with its burdensomeness.

7.337 For the foregoing reasons, we find that Turkey has not established that the IA's 19 August request for certain cost information imposed an unreasonable burden of proof in violation of Article 2.4.

3. Claim under Article 6.2 and Annex II, paragraph 6 – Alleged denial of requests for meetings

7.338 Turkey submits that the three respondents Habas, Diler and Colakoglu requested a meeting with the IA after receiving the IA's letter of 23 September 1999, during which "they could explain how the information submitted in their 15 September responses [to the 19 August request] replied to the Investigating Authority's information requests"²⁵². Turkey further argues that IDC stated that it was available for a further verification of its cost data if the IA so desired.²⁵³ According to Turkey, the denial of these requests violated Article 6.2, which Turkey quotes as "provid[ing], *inter alia*, that '[i]nterested parties shall ... have the right ... to present ... information orally'"²⁵⁴. In addition, Turkey claims, the denial of these requests violated Annex II, paragraph 6 by denying the Turkish respondents the basic right, where "evidence or information is not accepted", to be "informed forthwith of the reasons therefor, and ... given an opportunity to provide further explanations within a reasonable period"

²⁵¹ The extensions granted were, however, shorter than those requested.

²⁵² Written Response, dated 7 December 2001, to Question 1 to Turkey of the *Written Questions by the Panel*, of 28 November 2001 – Annex 4-1.

²⁵³ Turkey also initially argued that Icdas had requested a hearing as soon as it had reviewed the *Essential Facts and Conclusions Report*. In response to a question from the Panel as to where in the record that request was found, Turkey informed the Panel that Icdas had not in fact made such a request. (See Written Response, dated 14 March 2002, to Question 4 to Turkey of the *Written Questions by the Panel*, of 27 February 2002.)

²⁵⁴ Written Response, dated 7 December 2001, to Question 1 to Turkey of the *Written Questions by the Panel*, of 28 November 2001 – Annex 4-1.

7.339 Egypt counters that the IA was under no obligation to organize a meeting with Habas, Diler and Colakoglu at that stage of the investigation in the absence of any valid justification, in accordance with the last sentence of Article 6.2. Egypt further states that the meeting was requested after those respondents had informed the IA that they would not submit the information requested in the 23 September letter. Egypt argues that according to those respondents, the purpose of such a meeting would have been to explain the information in their responses to the 19 August request, but in Egypt's view that information was largely deficient, meaning that such a meeting was not justified. Egypt states that the IA indicated to those respondents that the explanation of the data submitted in response to the 19 August request should have been provided by submitting a written response to the 23 September letter, which the respondents had explicitly refused to do. Egypt notes that in any event, even if a meeting had been held, these respondents would not thereby have been excused from submitting in writing the explanations proffered orally. during such a meeting, due to Article 6.3's requirement that "[o]ral information provided under [Article 6.2] shall be taken into account by the authorities only in so far as it is subsequently reproduced in writing" Concerning IDC, Egypt argues that the IA's denial to conduct a verification visit at that company's premises cannot be examined under Article 6.2 of the AD Agreement, as that provision is not concerned with verification visits. Finally, Egypt argues that Annex II, paragraph 6 is inapplicable to the organizing of hearings, and that Egypt had demonstrated in connection with other claims that the IA had acted in full compliance with the obligations in that provision.

7.340 Turning first to the claim of violation of Article 6.2, we note that the full text of the relevant part of that provision, namely the last sentence, reads as follows:

"Interested parties shall also have the right, on *justification*, to present other information orally." (emphasis added)

7.341 We note that the words "also" and "other" in this sentence refer to other provisions of Article 6.2 concerning the right of interested parties to meet with opposing parties to present views and rebuttal arguments. Thus, with respect to the claim before us, the operative part of this sentence is the nature of the "right" of interested parties to "present information orally" outside the setting of an adversarial hearing. In this regard, while the partial quotation set forth by Turkey would imply that the right in question is open-ended and absolute, the full text of the provision makes clear that the right exists only upon "justification". It is perhaps axiomatic that an interested party seeking to invoke its Article 6.2 right must attempt to exercise that right before it can claim that it has been denied.

7.342 Thus, the first question that must be addressed is whether the respondents in question in fact requested meetings, and if so, whether any such requests were substantiated (i.e., whether justification was presented). Turning first to Habas, Diler and Colakoglu, their reference to a meeting was contained in their 28 September 1999 letter in which they indicated that they would not provide the additional information requested in the 23 September letter. The relevant passage concerning the possibility of a meeting is as follows:

"If ITPD remains unable to locate the original translations or to identify the pages of the 15 September response where translations are provided, or if ITPD requires any additional explanations, we will be pleased to come to Cairo to review these documents with ITPD. Such a meeting could be arranged after the third week of November, if desired. Before that time, counsel's time is fully booked, but we would expect the ITPD to afford us this scheduling courtesy in view of the events herein since verification was concluded."²⁵⁵

²⁵⁵ Exh EGT-2, p.3.

7.343 We do not consider that the above passage can be viewed as an attempt by these interested parties concerned to exercise their Article 6.2 rights to a meeting. Nor does it deal adequately, or at all, with the justification for such a meeting, upon which the right to have such a meeting is conditioned. Rather, it seems plainly to be an *offer* to travel to Cairo to participate in a meeting should the IA decide that such a meeting would be useful. Indeed, that this was an offer, rather than a request, was explicitly confirmed by these three respondents in their 15 October 1999 comments on the *Essential Facts and Conclusions Report*, in which they state that it was to provide the IA with an understanding of the "meanings and linkages" of the documents that they had submitted that their "counsel *offered* to come to Cairo to assist in the explanation of documents. That *offer* still stands"(emphasis added).²⁵⁶ Moreover, we question the seriousness of the offer that was made, given that the proposed earliest possible date for such a meeting, due to the stated unavailability of the companies' counsel, was fully two months later. Nor, even if a meeting was requested, do we find that these companies provided any justification for such a meeting. Indeed, while the express purpose of the last sentence of Article 6.2 is the oral provision of *information*, we note that these respondents raised the possibility of a meeting in the context of their informing the IA that they intended to provide *no* further information. Rather they were prepared only to assist the IA in locating any original translations that had been previously submitted or identify where additional translations had been provided, and to furnish any explanations that the IA might need. The IA in fact made these points in its response to these respondents' 28 September letter, as follows:

"In your letter dated 28 September, 1999, you referred to a possible meeting in Cairo to explain the data submitted by Habas, Diler and Colakoglu. Please note that any further comments or explanations regarding the request of ITPD for supplemental information should have been included in your responses, the deadline for which has passed. We will consider any further information to be untimely. Regarding your concern that ITPD may not understand the submission, the ITPD understands the data that has been submitted. The fact is your clients did not completely respond to the requests for supplemental information, which required the ITPD's use of facts available for portions of the submission."²⁵⁷

7.344 Concerning IDC, we note that here again, IDC did not in fact request a meeting with the IA. Rather, it informed the IA that it was available for a further verification at its premises if the IA so wished. In particular, the relevant passage from IDC's 15 October 1999 letter commenting on the *Essential Facts and Conclusions Report* reads as follows:

"Finally, we kindly request, the Authority to contact us anytime they wish and kindly note that all our files, reports, general ledgers are ready for verification by your authorised investigators."²⁵⁸

Here again, this passage cannot in any way be construed as containing a request for a meeting, nor a justification for any such request.

7.345 For the foregoing reasons, we do not find that the IA denied requests of respondents Habas, Diler, Colakoglu, and IDC for meetings, and thus did not act inconsistently with the last sentence of Article 6.2.

7.346 In view of our findings in the preceding paragraph, in respect of the claim under the last sentence of Article 6.2, that the IA did not reject requests for meetings, we also do not that Turkey has

²⁵⁶ Exh. TUR-20, p.10.

²⁵⁷ Exh. EGT-10.

²⁵⁸ Exh. TUR-27, p.3.

established the factual basis for a possible violation of Annex II, paragraph 6 resulting from the alleged rejection of such requests.²⁵⁹

4. Claim under Article 2.4 – Alleged failure to make an adjustment to normal value for differences in terms of sale

7.347 Turkey claims that Egypt violated Article 2.4 in that the IA failed to make a credit cost adjustment to normal value for differences in payment terms between home market sales and exports sales to Egypt. According to Turkey, an imputed credit cost adjustment was claimed by the respondents to adjust export prices and home market prices with deferred payment terms to a common sight price basis in order to ensure an "apples-to-apples" comparison. Turkey argues that such a credit cost adjustment is normally granted by the United States, the European Communities, Canada, Chile and Australia. According to Turkey, the Third Party Submission of the European Communities states that it is EC policy to make such an adjustment where constructed normal value is used because that constructed normal value "will typically include an element for costs relating to the granting of credit terms". Turkey argues in this respect that the interest expense that is included in the Turkish companies' administrative, selling and general costs includes interest expenses related to the financing of outstanding receivables, and therefore that a credit cost adjustment should have been made to normal value, as was done to the respondents' export prices to Egypt. Turkey considers that by making a credit cost adjustment to the export price, but not to normal value, Egypt produced a distorted comparison in violation of Article 2.4.

7.348 Egypt argues that the absence of an adjustment for credit expenses to the normal value is based on a permissible interpretation of the AD Agreement. In particular, Egypt notes, due allowances should be made for differences that affect price comparability, and with respect to terms and conditions of sale, in Egypt's view an allowance is normally warranted when normal value is based on actual domestic sales prices, as only then would the prices be affected by contractual conditions and terms of sales. By contrast, constructed normal value is based on cost of production, i.e., items which cannot be influenced by conditions and terms of sale. According to Egypt, this is particularly true with respect to credit terms, as when negotiating a price, the buyer and seller will in principle take into account the credit period granted for deferred payment compared with payment in cash. Thus, according to Egypt, by comparing export price net of credit costs and a constructed normal value without an adjustment for credit costs, the IA compared prices on a comparable basis. Furthermore, Egypt argues, should the Panel consider that Article 2.4 requires that constructed normal value be adjusted for credit costs, all Turkish domestic rebar sales were made at a loss and therefore there were no domestic sales with relevant credit terms in the ordinary course of trade that the IA could have used to determine the credit cost adjustment. Lastly, for Egypt, the fact that some other jurisdictions may deduct credit costs from constructed normal values does not render Egypt's practice inconsistent with Article 2.4.

7.349 We view both parties as arguing that this issue can be resolved purely as a matter of legal interpretation. That is, Turkey argues, in essence, that in *all* cases, constructed normal value should be adjusted for credit costs. By contrast, Egypt argues in essence that it is permissible as a matter of policy *never* to adjust constructed normal value for credit costs.

7.350 We recall that Article 2.4 provides as follows:

"A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price

²⁵⁹ Once again, we need not and do not opine on whether it is possible to invoke Annex II, paragraph 6 outside the context of Article 6.8.

comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability [footnote omitted]. In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties."

7.351 In considering this claim, we note the parties' arguments that Article 2.4 *always* requires on the one hand, or permits a policy of *never* making, on the other hand, a credit cost adjustment to constructed normal value. To us, reading Article 2.4 in this way is not possible, i.e., this claim cannot be resolved on the basis of a judgement as to whether a given legal interpretation of that provision is permissible, in the abstract, and without considering the specific facts of an individual case.

7.352 To the contrary, we read Article 2.4 as explicitly requiring a fact-based, case-by-case analysis of differences that affect price comparability. In this regard, we take note in particular of the requirement in Article 2.4 that "[d]ue allowance shall be made *in each case, on its merits*, for differences which affect price comparability" (emphasis added). We note as well that in addition to an illustrative list of possible such differences, Article 2.4 also requires allowances for "any other differences which are also *demonstrated* to affect price comparability" (emphasis added). Finally, we note the affirmative information-gathering burden on the investigating authority in this context, that it "shall indicate to the parties in question *what information is necessary* to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties" (emphasis added). In short, where it is demonstrated by one or another party in a particular case, or by the data itself that a given difference affects price comparability, an adjustment must be made. In identifying to the parties the data that it considers would be necessary to make such a demonstration, the investigating authority is not to impose an unreasonable burden of proof on the parties. Thus, the process of determining what kind or types of adjustments need to be made to one or both sides of the dumping margin equation to ensure a fair comparison, is something of a dialogue between interested parties and the investigating authority, and must be done on a case-by-case basis, grounded in factual evidence.

7.353 Our analysis of this claim thus focuses on whether the IA met its burden under Article 2.4 in the process that ultimately resulted in its decision not to adjust constructed normal values for credit costs, i.e., whether that decision was justified on the basis of the evidence of record, and whether, including in the light of the respondents' actions and submissions concerning the issue of credit costs, the IA fulfilled its obligations in developing that evidence. We start by considering the chronology of relevant events during the investigation, beginning with the questionnaires that were sent to the foreign manufacturers and the exporters. Here we note that both of these questionnaires contain questions concerning possible allowances for certain differences that might affect price comparability, including credit costs. In the manufacturer's questionnaire, the question of terms of trade, including credit, is raised in sections 4.3 and 4.4 (domestic sales) and 5.2 and 5.3 (exports to Egypt). In the exporter's questionnaire, the same questions are contained in sections 3.6 and 3.7 (domestic sales) and 4.4 and 4.5 (exports to Egypt). Thus, the IA invited the Turkish respondents' input on the issue of credit at the outset of the investigation, and each respondent included in its questionnaire response certain information and argumentation concerning how a credit cost adjustment should be calculated and applied.²⁶⁰ The issue of credit costs also was addressed in the verification reports, and was further referred to in letters dated 12 August 1999 from the IA concerning certain problems identified by the

²⁶⁰ In response to a request from the Panel, Turkey provided certain excerpts from the respondents' questionnaire responses (Exh. TUR-42) which according to Turkey reflect the requests made by the respondents for a credit cost adjustment to normal value.

IA after verification, and in the 13 August 1999 response on behalf of three respondents to those letters.

(a) Factual background

7.354 A chronology of the references to imputed credit costs from all of these documents is set forth below for each respondent separately.

(i) *Icdas*

Questionnaire response

7.355 The relevant portion of Icdas' questionnaire response reads as follows:

"Payments of domestic sales of reinforcing bars are usually received at a later date than [sic] the date on the invoice. The duration between the date of invoice and the date of the receipt of the payment usually varies between 7 and 90 days.

While deciding on the price, the date the customer will make the payment are taken into account and an additional charge is included in the price to offset the depreciation of Turkish Lira. (All sales in domestic market are made in Turkish Lira).

Exact date receipt of payment can not be determined in the recording procedure of Icdas since the accounts receivable are followed by customer basis rather than invoice basis. Therefore we based our calculations on average number of days outstanding.

For calculation of average number of days outstanding for the six months reported, we obtained the accounts receivable balance of and total sales to each customer on a monthly basis. Then we indexed these figures to the end of period of investigation i.e. to December 1998. (Republic of Turkey State Institute of Statistics Wholesale Price Indexes and calculated indexation figures to end of period of investigation are provided as Attachment 2.

After indexation of these figures to the end of period of investigation we added up monthly indexed figures and finally by dividing the total indexed monthly accounts receivable to total indexed sales, we determined an average number of days outstanding for the reported period. For calculation of these figures please see Table 4.

To get a unit interest expense by transaction basis, we used actual short term TL borrowing rate of Icdas. During the reported period Icdas used only one short term loan. Copies of the documents showing the usage of this loan are provided in Attachment 3.

With this interest rate by using the following equation we calculated the unit cost of credit computed at the actual cost of short-term debt borrowed:

(Average number of days outstanding x Average interest rate x Gross unit price)/360).²⁶¹

²⁶¹ Exh. TUR-42, p.4-5.

Verification report

7.356 The verification report for Icdas contains the following text concerning credit cost in respect of home market sales:

"Cost of Credit

The accounts for sales in Turkey can be received later than the date of the invoice. ... The period between due date of settlement of the account and the actual date of payment was established from the accounts outstanding ledger. The average days outstanding per ton was calculated and an adjustment made. The interest used was established from the company records of short term loans."²⁶²

12 August 1999 letter from the IA

7.357 In its 12 August letter to Icdas, the IA stated in respect of credit cost:

"With regard to the cost of credit for normal values, the investigating authority decided not to adjust this cost for lack of reliable evidence concerning this adjustment."²⁶³

Response to the 12 August 1999 letter

7.358 Turkey states that on 17 August 1999, Icdas submitted a response to the IA's 12 August, challenging, among other things, the IA's stated intention not to make a credit cost adjustment. Although in its first written submission Turkey quoted what it indicated were excerpts from that letter, it did not submit that letter to the Panel, either as an exhibit to that submission or otherwise. Thus, we have not seen the 17 August letter in original. According to Turkey, Icdas argued that the proposed denial of a credit cost adjustment was contrary to Article 2.4 of the AD Agreement, and noted that all of its home market sales were on "deferred payment terms", such that not making a credit cost adjustment to home market prices would "seriously deteriorate the fair comparison between the export and domestic prices".²⁶⁴

19 August request; 15 September response to the 19 August request; 23 September follow-up request from the IA; 28 September letter from the IA; *Essential Facts and Conclusions Report*; 15 October comments on *Essential Facts and Conclusions Report*; and *Final Report*

7.359 There is no reference to the issue of a credit cost adjustment in any of the above-captioned documents. That is, once the cost and constructed value issue arose (as reflected in the 19 August request), this issue was not mentioned further, either by Icdas or by the IA.

(ii) *IDC*

Questionnaire response

7.360 The relevant portion of IDC's questionnaire response reads as follows:

²⁶² Exh. TUR-4, p.6.

²⁶³ Exh. TUR-10.

²⁶⁴ First Written Submission of Turkey, Section IV.A, para.20-23.

"Other (credit) expenses: As explained in response to 4.3 which is credit expenses due to deferred payments in home market sales. IDC used the following equation to calculate home market credit expenses:

$$\frac{\text{No. of days} \times \text{Interest Rate} \times (\text{Gross Invoice Value} - 1.5\% \text{ Discount})}{360}$$

IDC calculated the weighted average number of days between invoice date and payment date for sales of rebar for each month. Based on the monthly calculations, IDC calculated the average number of days between invoice date and payment date during the investigation period. A worksheet summarizing the results of these calculations is attached in Exhibit B-1. Weighted-average short-term in the home market interest rate is shown in the worksheets attached to Exhibit B-1".²⁶⁵

7.361 We note that in IDC's Appendix 9A concerning cost of production of rebar, IDC reported no data for the line item entitled "Financing Costs".²⁶⁶ Other documents of record clarify that this was because IDC reported no interest cost component of cost of production. We note Turkey's explanation that IDC was indicating thereby that it had no net financial expense after the application of interest income.²⁶⁷

Verification report

7.362 The verification report contains the following passage concerning IDC's credit cost on home market sales:

"Cost of Credit

Izmir has stated that its terms of sale are ex-works. The invoice is issued the same day as the goods are picked up from the mill. The company provided details of the credit period for the sales under review in Turkey. The verification team verified the days credit outstanding from the company records. The interest rate applying was verified from a bank document. The [illegible] used in the calculation was clarified and an adjustment for the cost of credit on local sales was made."²⁶⁸

12 August letter

7.363 In its 12 August letter to IDC, the IA stated in respect of credit cost:

"With regard to the cost of credit for normal values, the investigating authority decided not to adjust this cost for lack of reliable evidence concerning this adjustment."²⁶⁹

Response to the 12 August letter

7.364 Turkey states that on 13 August 1999, IDC submitted a faxed response to the IA's 12 August letter, expressing "surprise" at the IA's stated decision not to grant a credit cost adjustment to normal value, and indicating that " 'on your verification report (sent to us on 17.07.1999) you have already verified the cost of credit and your verification team confirmed [the adjustment at the verification]' ".²⁷⁰ Although Turkey's first written submission presents these passages as verbatim excerpts from

²⁶⁵ Exh. TUR-42, p.7-10.

²⁶⁶ Exh. TUR-42, p.29.

²⁶⁷ See para.7.399, *infra*.

²⁶⁸ Exh. TUR-5, Section 4.3.

²⁶⁹ Exh. TUR-10.

²⁷⁰ First Written Submission of Turkey, Section IV.A, para.24.

IDC's 13 August fax to the IA, Turkey did not submit that fax to the Panel, either as an exhibit to that submission or otherwise. Thus, we have not seen the 13 August fax in original.

19 August request; 15 September response to the 19 August request; 23 September follow-up request from the IA; 28 September letter from the IA; *Essential Facts and Conclusions Report*; 15 October comments on *Essential Facts and Conclusions Report*; and *Final Report*

7.365 There is no reference to the issue of a credit cost adjustment in any of the above-captioned documents. That is, once the cost and constructed value issue arose (as reflected in the 19 August request), this issue was not mentioned further, either by IDC or by the IA.

(iii) *Diler*

Questionnaire response

7.366 The relevant portion of Diler's questionnaire response concerning imputed credit reads as follows:

"We add a field (column M) in which we calculate the imputed interest expense according to the formula:

$$(T1-T2)/360 \times INT \times UNIT PRICE$$

where T1 is the date of invoice, T2 is the date of receipt of payment, INT is the short-term commercial interest rate in Turkey (80% per annum), and UNIT PRICE is the unit price on the invoice. This field, then, is the unit imputed interest expense for the given line item in the database, and it should be subtracted from the domestic market selling price.

We add a field showing the net price for the cost test (column N). This field reports the gross unit price minus movement charges (i.e., minus inland freight). Under usual antidumping methodologies, the administering authority tests whether the home market sale is above cost of production. To do this, one uses the ex-factory price exclusive of the imputed interest expense. Imputed interest is excluded from price for purposes of the cost test because a company's financial statement and cost accounts do not contain any entry for imputed expenses, and so the sales price for cost test purposes should also be without imputed interest."²⁷¹

7.367 In another section of its questionnaire response, Diler further elaborates on selling expenses, general and administrative expenses, and interest expense, as follows:

"Selling expenses is the total indirect selling expenses incurred in the sale of rebar in the stated months of 1998, divided by the total cost of goods sold for rebar for the stated months of 1998. We have subtracted direct selling expenses from total selling expenses, since the direct expenses (freight, handling charges and the like) are reported in Apps. 3B and 5 as adjustments to price. Keeping the direct expenses in the cost would result in comparison of a selling-expense-included cost with a selling-expense-excluded price, which would be inappropriate.

General and administrative expenses are the Diler G&A for the full year 1998, divided by total COGS for 1998. We report this on an annual basis because G&A

²⁷¹ Exh. TUR-42, p.12-13.

expenses are 'period' costs, i.e., costs which vary greatly in particular months and therefore must be analyzed on an annual basis.

Interest expense is reported in a manner similar to G&A expense, i.e., on an annual basis, since it is also a period cost. Interest expenses is on a consolidated basis (Group interest expense, offset by Group interest income), as this is the practice in antidumping investigations, because of the fungibility of money."²⁷²

Verification report

7.368 The passage from the verification report on Diler contains the following passage concerning credit cost on home market sales:

"Cost of Credit

The company provided details of the credit period for the sales under review in Turkey. The team verified the difference between the date of sale and the date of payment from accounting records. Because the company has no short-term loan finance on its books the short-term loan interest rate from the Economist was taken as an independent source, and used for the applicable interest rate. The result of the calculation using this data gave the cost of credit for local sales. An adjustment for the cost of credit on local sales was made."²⁷³

12 August letter from the IA

7.369 In its 12 August 1999 letter to Diler, Habas and Colakoglu, the IA stated concerning credit cost:

"With regard to the cost of credit for normal values for the three companies (Habas, Diler and Colakoglu) the investigating authority decided not to adjust this cost for Habas and Colakoglu for lack of evidence concerning this adjustment. The purchase order provided by Diler as an evidence for credit period is unreliable."²⁷⁴

Response to 12 August letter

7.370 On 13 August 1999, counsel for the three respondents (Diler, Habas and Colakoglu) responded to the IA's 12 August letter.²⁷⁵ Concerning the IA's indication that it was rejecting the claimed credit cost adjustment for each of the companies, these companies complained that such a rejection was unjustifiable given that the credit cost figures had been verified. In particular, they argued that the verification reports' indications that adjustments for credit costs had been made constituted legally binding findings of fact by the IA. They noted further that the stated reason for rejecting the adjustment was lack of evidence, and they argued that the evidence had been fully verified as to the number of days credit granted by each company on its home market sales and as to the prevailing interest rate.²⁷⁶

19 August request; 15 September response to the 19 August request; 23 September follow-up request from the IA; 28 September letter from the IA; *Essential Facts and Conclusions Report*; 15 October comments on *Essential Facts and Conclusions Report*; and *Final Report*

²⁷² Exh. TUR-42, p.21.

²⁷³ Exh. TUR-6, p.7.

²⁷⁴ Exh. TUR-10.

²⁷⁵ Exh. TUR-25.

²⁷⁶ *Ibid*, p.14-16.

7.371 There is no reference to the issue of a credit cost adjustment in any of the above-captioned documents. That is, once the cost and constructed value issue arose (as reflected in the 19 August request), there was no further mention of this issue, either by Diler or by the IA.

(iv) *Colakoglu*

Questionnaire response

7.372 The relevant portion of Colakoglu's questionnaire response reads as follows:

"We add a field in which we calculate the net interest expense according to the formula:

$$(T1-T2)/360 \times INT \times UNIT PRICE$$

where T1 is the date of invoice, T2 is the date of receipt of payment, INT is the short term commercial interest rate in Turkey (equal to 80% per annum – see Exhibit 4 hereto), and UNIT PRICE is the unit price on the invoice. This field, then, is the unit imputed interest expense for the given line item in the database. Under typical antidumping practice, the imputed credit should be subtracted from unit price for purposes of making price-to-price comparisons between domestic price and export price (since both such prices have, or can have, imputed credit). However, imputed credit should *not* be subtracted from unit price in determining whether a sale is above cost, since there is not imputed credit component of cost of production, and both sides of the comparison should be viewed *in pari materia*."²⁷⁷

Verification report

7.373 The verification report concerning Colakoglu contains the following passage concerning credit cost:

"Cost of Credit

The credit cost for the sales in Turkey during the period of export (April-August 1998) has been calculated for the domestic sales sold on deferred payment. The deferred payment refers to the waiting time for payment the company has before the post-dated cheque can be presented for payment. The investigating team obtained the details of the maturity date for individual sales over the period thus establishing the period of credit from the firm's records. The interest rate was established from the published rate found in the Economist for the period. The company had no short-term borrowing during the period".²⁷⁸

12 August letter from the IA, and Response to the 12 August letter

7.374 The passages from the 12 August letter from the IA, and the response thereto, pertaining to Colakoglu are as reflected, *supra*, in respect of Diler.

19 August request; 15 September response to the 19 August request; 23 September follow-up request from the IA; 28 September letter from the IA; *Essential Facts and Conclusions Report*; 15 October comments on *Essential Facts and Conclusions Report*; and *Final Report*

²⁷⁷ Exh. TUR-42, p.15-16.

²⁷⁸ Exh. TUR-7, p.6.

7.375 There is no reference to the issue of a credit cost adjustment in any of the above-captioned documents. That is, once the cost and constructed value issue arose (as reflected in the 19 August request), there was no further mention of this issue, either by Colakoglu or by the IA.

(v) *Habas*

Questionnaire response

7.376 The relevant portion of Habas' questionnaire response reads as follows:

"We add a field for the interest component of the invoice price, since, as explained above, the interest component depends on the terms of payment and is a material part of the price.

We add a field showing the number of days from invoice to payment (the time-period for imputed interest expense).

We add a field in which we calculate the net interest expense (credit expense, column M) according to the formula:

$$N/360 \times \text{INT} \times \text{UNIT PRICE}$$

where N is the imputed credit period, INT is the short-term commercial interest rate in Turkey (80%), and UNIT PRICE is the unit price on the invoice. This field, then, is the unit imputed interest expense for the given line item in the database, and it should be subtracted from the domestic market selling price.

We add a field for comparing price with cost of production, namely, column J. This is the invoice value without imputed credit. This is the appropriate figure to use for the cost test, since cost data are also exclusive of imputed credit."²⁷⁹

7.377 Habas' questionnaire also contains the following passage concerning selling, general and administrative expenses:

"Selling expenses is the total indirect selling expenses incurred in the sale of rebar in November and December 1998, divided by the cost of goods sold for rebar for November and December 1998. We have subtracted directed selling expenses from total selling expenses, since the direct expenses (freight, handling charges and the like) are reported in Apps. 3B and 5 as adjustments to price. Keeping the direct expenses in the cost would result in a comparison of a selling-expense-included cost with a selling-expense-excluded price, which would be inappropriate.

General and administrative expenses are the G&A of the Iron and Steel plant for the full year 1998, divided by total COGS for 1998. We report on this on an annual basis because G&A expenses are 'period' costs, i.e., costs which vary greatly in particular months and therefore must be analyzed on an annual basis.

Interest expense is reported in a manner similar to G&A expense, i.e., on an annual basis, since it is also a period cost. Interest expense is on a consolidated basis (Group interest expense, offset by Group interest income)."²⁸⁰

²⁷⁹ Exh. TUR-42, p.18-19.

²⁸⁰ Exh. TUR-42, p.26.

Verification report

7.378 The verification report for Habas contains the following passage concerning credit cost:

"Cost of Credit

The credit cost for the sales in Turkey during the period of export (Nov-Dec 1998) was verified from the company's records. The method of calculation using the formula, $N/360 \times \text{interest rate} \times \text{unit price}$, was accepted. As the company had no short-term borrowings, the short-term borrowing rate published in the *Economist* was accepted as the interest rate used. An adjustment for the cost of credit on local sales was made".²⁸¹

12 August letter from the IA, and Response to the 12 August letter

7.379 The passages from the 12 August letter from the IA, and the response thereto, pertaining to Habas are as reflected, *supra*, in respect of Diler.

19 August request; 15 September response to the 19 August request; 23 September follow-up request from the IA; 28 September letter from the IA; *Essential Facts and Conclusions Report*; 15 October comments on *Essential Facts and Conclusions Report*; and *Final Report*

7.380 There is no reference to the issue of a credit cost adjustment in respect of Habas in any of the above-captioned documents. That is, once the cost and constructed value issue arose (as reflected in the 19 August request), there was no further mention of this issue, either by Habas or by the IA.

(b) Assessment by the Panel

7.381 We recall that this claim can only be resolved on the basis of the facts of record as to whether, during the course of the investigation, the respondents demonstrated on the merits (subject to the requirement that the IA not impose an unreasonable burden of proof in respect of such an adjustment) that constructed normal value needed to be adjusted for credit costs to ensure a fair comparison of normal value and export price. Here, we take note that at the outset of the investigation, the IA invited respondents to identify in their questionnaire responses any adjustments which they felt the IA should make to the reported domestic and export prices and to provide information concerning such adjustments including explicitly for credit costs. We also note that all of the respondents asserted in their questionnaire responses that a credit cost adjustment should be made to domestic selling prices to account for the number of days of delay in receiving payment after invoices were issued. All of them provided formulas by which such credit cost could be calculated, and information on the values of certain of the variables in those formulas. That information was discussed in the verification reports, and then, when informed that ultimately it had been rejected, at least three of the respondents submitted comments complaining about that course of action. All of these exchanges of information and correspondence between the respondents and the IA took place in the context of the examination of normal value based on domestic selling prices in Turkey.

7.382 Once the focus of the dumping investigation shifted to constructed value, however, no further reference was made to the question of a credit cost adjustment to normal value, either by any respondent or by the IA. Thus, in the context of the constructed value phase of the investigation, it is clear that no explicit request for or claim of such an adjustment was made by any respondent. The question for us thus becomes whether, in the light of the information of record concerning this issue from the earlier phase of the investigation, the respondents had demonstrated that such an adjustment

²⁸¹ Exh. TUR-8, p.7.

should apply regardless of whether normal value was determined based on price or based on constructed value.

7.383 Here we recall that the IA on 12 August informed the respondents that their claims of credit cost adjustment (to domestic selling prices) would be rejected essentially for lack of evidence, and we also recall that the three respondents who shared the same counsel (Diler, Colakoglu and Habas) protested this decision of the IA, insisting that their credit cost information had been verified, and that the IA was legally bound by the verification findings. We note as well Turkey's representation that Icdas and IDC also submitted written responses to the 12 August letters that they received from the IA in which they argued that a credit cost adjustment should be made to their domestic selling prices, as such an adjustment had been verified.

7.384 Considering further the credit cost information submitted by Diler, Colakoglu and Habas, we note the references to this issue in their original questionnaire responses concerning the cost of production information to be used for the below-cost sales test (which they refer to as the "cost test"). They indicated that there was no credit cost included, and that therefore cost of production should be compared with a domestic selling price unadjusted for credit expense, to ensure a correct comparison. In particular, Diler stated:

"Imputed interest is excluded from price for purposes of the cost test because a company's financial statement and cost accounts *do not contain* any entry for imputed expenses, and so the sales price for cost test purposes should also be without imputed interest." (emphasis added)²⁸²

Colakoglu stated:

"However, imputed credit should *not* be subtracted from unit price in determining whether a sale is above cost, since there is not imputed credit component of cost of production, and both sides of the comparison should be viewed *in pari materia*." (underline emphasis added; italic emphasis in original)²⁸³

Habas stated:

"We add a field for comparing price with cost of production, namely, column J. This is the invoice value without imputed credit. This is the appropriate figure to use for the cost test, since cost data are also *exclusive of* imputed credit." (emphasis added)²⁸⁴

7.385 The way in which the question of determining normal value in this case evolved had the potential to cause the IA to consider a number of important technical issues about the differences between the normal value assessed on the basis of domestic selling prices and the constructed normal values arrived at, and the need for any adjustment as between the constructed normal value and the export price. As it turned out, the consideration undertaken by the IA appears to have been limited to the context of credit cost adjustment to domestic selling prices, in which context the credit term information submitted by the respondents was rejected, because it was (in the view of the IA) insufficient and/or unreliable. The Turkish respondents objected to this in communications to the IA. No further consideration of the question of a credit cost adjustment after this point in time in the investigation appears in any document of record provided to the Panel, whether submitted by the respondents or created by the IA. The IA appears not to have considered whether an adjustment for credit cost should be made to the constructed normal values at all. In this dispute, the parties did not provide us with evidence of the consideration of that issue as it might relate to constructed normal

²⁸² Exh. TUR-42, p.12.

²⁸³ *Ibid*, p.15.

²⁸⁴ *Ibid*, p.18.

values, and we thus must proceed on the basis that the final interchange on the issue was notification to the respondents of rejection of the claim for an adjustment to the domestic selling price-based normal values, and their complaints which then followed.

7.386 Beyond this factual analysis of what actually happened in the investigation, the parties have engaged in a debate about adjustments to constructed normal values, and whether Article 2.4 applies to require such adjustments to be made. Comparative precedent from various jurisdictions has been presented to the Panel, and arguments about economic rationale and the correct appreciation of what a constructed normal value should be taken to represent have been made. It seems to us that these issues are being raised for the first time by the parties before us: they were not dealt with before the IA. The Panel is not the IA, nor does it stand in the shoes of the IA. In this regard we recall our discussion about the relationship between what an investigating authority is obligated by the AD Agreement to do with regard to procedural issues in an anti-dumping investigation, and what interested parties must themselves contribute, in the way of evidence and argumentation, for issues of concern to them to be considered and taken into account in the authority's determinations.²⁸⁵ In this case, when confronted with the *Essential Facts and Conclusions Report*, which clearly identified that a constructed normal value had been applied without any adjustment for credit terms, the respondents did not take any action to protect their interests.

7.387 This claim by Turkey is an example of the difficulty which is presented for a complaining Member where it comes before a Panel and claims that an investigating authority committed a breach of a merits-based matter, but the merits were not addressed with the investigating authority. The facts and circumstances of each case will vary. Here we find that certain information concerning the respondents' imputed credit costs, and how those costs should be treated, was before the IA. This information was requested in the Exporter's Questionnaire, no doubt for consideration as a possible adjustment to be taken into account at some point in the investigation. However, the issue of an adjustment was then dealt with between the parties in relation to a normal value based on domestic selling prices. When the IA's normal value assessments shifted to a constructed approach, and this was communicated to the respondents, nothing more was said by either the respondents or the IA about the question of whether a credit cost adjustment to the constructed value was necessary, and if so, how it should be calculated. On balance, we consider that the respondents should have raised their concerns at that point in time. In the absence of such a claim and, we reiterate, within the confines of the facts of this case, we do not think that a *prima facie* violation of its obligations by the IA has been made out by Turkey.

7.388 Having said that, and in deference to the efforts of the parties in researching and presenting their respective arguments to the Panel on this point, we would add that we do not think that the construction of a normal value under Article 2.2 precludes consideration of the making of various adjustments as between that normal value and the export price with which it is to be compared. A constructed normal value is, in effect, a notional price, "built up" by adding costs of production, administrative, selling and other costs, and a profit. In any given case, such a built-up price might or might not reflect credit costs. Thus, what might be necessary to take into account by way of due allowance in a particular investigation in order to comply with the obligation to ensure a fair comparison under Article 2.4 cannot be limited by the simplistic characterisation of a normal value as being one arrived at by way of a construction under Article 2.2.

5. Claim under of Articles 2.2.1.1 and 2.2.2 – Interest income offset

7.389 Turkey claims that by failing to deduct short-term interest earnings from interest expense in computing the net interest expense which it included in the cost of production and constructed normal value, the IA violated Article 2.1.1.1, which provides that "costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in

²⁸⁵ Section VII.A, *supra*.

accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with production and sale of the product under consideration' ". Turkey claims in addition that the IA's failure to deduct short-term interest expense also violated Article 2.2.2, which provides that " 'amounts for administrative, selling and general costs ... shall be based on actual data pertaining to the production and sales in the ordinary course of trade by the exporter or producer under investigation' ". According to Turkey, the respondents' financial statements were prepared in accordance with generally accepted accounting practices in Turkey, and these statements separate operating and non-operating income, classifying short-term interest income as operating income. Turkey argues that this classification means that this income is related to the companies' core operations involving production and sale of rebar. Furthermore, Turkey argues, short-term interest income is offset against interest expense and other expenses in arriving at the companies' net income, meaning that to arrive at an accurate picture of the fully distributed cost of production, this income must be deducted. Finally Turkey argues that such an interest income offset is given in other jurisdictions because companies commonly maintain a working capital reserve in interest-bearing accounts in order to meet daily case and working capital requirements. Turkey states in this regard that a NAFTA panel reviewing a decision by Revenue Canada instructed Revenue Canada to offset interest expense with short-term interest income, explaining that under generally accepted accounting rules, short-term interest income is considered part of the current operating cycle. Turkey also argues that a US court decision also supports Turkey's point of view.

7.390 Egypt contends that the IA's decision to disallow interest income in the calculation of cost of production, because these revenues were found not to be sufficiently related to the respondents' costs of production was consistent with Articles 2.2.1.1 and 2.2.2 of the AD Agreement, and that Turkey's claims are both legally incorrect and based on a misunderstanding of the practice of other jurisdictions. Egypt notes that the text of Article 2.2.1.1 refers to "costs associated with the production and sale of the product concerned", and that the text of Article 2.2.2 instructs investigating authorities to use, when determining the amounts of administrative, selling and general costs, and profits, "data pertaining to production and sales". Egypt notes that Article 2.2.1.1 also authorises investigating authorities to adjust cost of production for non-recurring items during the period of investigation. For Egypt, the cited provisions confirm that an authority must determine the cost of production normally incurred, and must disregard exceptional items. For Egypt, the exclusion from the cost calculation of expenses that are not related to the production or sale of the product, but which pertain to the financial activities of a company as a whole is based on a permissible interpretation of the provisions at issue and therefore is consistent with the AD Agreement. Furthermore, Egypt argues, other jurisdictions (namely the United States, the EC and Canada) allow an offset for short-term interest income only when it is demonstrated that it is related to production or sale of the product concerned.

7.391 The full text of Article 2.2.1.1 reads as follows:

"For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. Unless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations." (footnote omitted)

7.392 The relevant part of Article 2.2.2 reads as follows:

"For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation"

7.393 We note that both of these provisions emphasize two elements, first, that cost of production is to be calculated based on the actual books and records maintained by the company in question so long as these are in keeping with generally accepted accounting principles but that second, the costs to be included are those that reasonably reflect the costs *associated with* the production and sale of the product under consideration. While Egypt argues in the first instance that the IA's decision not to offset interest expense with interest income was based on a permissible interpretation of the relevant provisions, we do not believe that the issue raised by this claim can be resolved on this basis. Rather, here again, we believe that the provision itself makes clear that the calculation of costs in any given investigation must be determined based on the merits, in the light of the particular facts of that investigation. This determination in turn hinges on whether a particular cost element does or does not pertain, in that investigation, to the production and sale of the product in question *in that case*. Thus, in particular, we must consider the details of the evidence of record in order to reach a conclusion as to whether, in the rebar investigation, there was evidence in the record that the short-term interest income was "reasonably" related to the cost of producing and selling rebar, and that the IA thus should have included it in the cost of production calculation.

(a) Factual background

(i) *Icdas*

Questionnaire response

7.394 The relevant part of Icdas' questionnaire response reads as follows:

"Interest revenue

For late payments Icdas usually charges a new invoice. This invoices are collected under account numbers 602 7000003 and 602 7000004 in the recording procedure of Icdas. This late payment invoices cannot be tied to invoices therefore we distributed this total figures on a monthly basis. Total monthly figure is distributed to all transactions in a given month respecting the quantity. For calculation and allocation of these expenses please see Table 5".

7.395 This particular passage is not referred to in any of the other documents of record that have been submitted to us, and thus it is not clear to what it refers specifically, and how if at all it relates to this claim.

19 August request; response to 19 August request; 23 September follow-up request, reply to 23 September follow-up request

7.396 There is no reference, in any of the above-captioned documents that were sent to or submitted by Icdas, to the issue of interest income.

Essential Facts and Conclusions Report

7.397 The *Essential Facts and Conclusions Report* contains the following text in respect of Icdas' interest expense:

"To the above costs the Investigating Authority added an amount for interest expense. The Investigating Authority did not offset this amount by interest revenue, as the Investigating Authority does not consider interest revenue as sufficiently related to production to be includable in the calculation of constructed value."²⁸⁶

Final Report

7.398 The text in the *Final Report* concerning Icdas' interest expense²⁸⁷ is identical to that in the *Essential Facts and Conclusions Report*.

(ii) IDC

Questionnaire response

7.399 Turkey has provided no narrative excerpt from IDC's questionnaire response referring to interest income, so we must presume that no such narrative was included in that response. Turkey has simply provided IDC's Appendix 9A to its questionnaire response, which contains no entries whatsoever for the line item entitled "Financing Costs". According to Turkey, this indicates that IDC thereby was indicating that it had no net financial expense after the application of interest income. Turkey notes in this regard that the income statement attached to IDC's 9 September 1999 response to the 19 August request shows that interest revenues offset virtually all of the company's interest expense.²⁸⁸

23 September follow-up request

7.400 In its 23 September 1999 request based on IDC's response to the 19 August request, the IA made the following request in respect of interest expense:

"1 – Interest Expense:

Furnish a list identifying separately interest expenses from interest income."²⁸⁹

28 September follow-up request

7.401 In its 28 September 1999 letter to IDC following up on IDC's response to the IA's 23 September request, the IA requested the following in respect to interest:

"Please furnish a list identifying separately interest expenses from interest income showing the difference between both interest and interest income per ton during 1998 on monthly basis."²⁹⁰

Essential Facts and Conclusions Report

7.402 Concerning IDC, the *Essential Facts and Conclusions Report* states as follows in respect to interest expense, in paragraph 3.2.5.2:

"To the above costs the Investigating Authority added an amount for interest expense. The Investigating Authority did not offset this amount by interest revenue, as the

²⁸⁶ Exh. TUR-15, p.23(para.3.2.5.2).

²⁸⁷ Exh. TUR-16, p.29.

²⁸⁸ Written Response, dated 14 March 2002, to Question 10 to Turkey of the *Written Questions by the Panel*, of 27 February 2002 – Annex 8-1.

²⁸⁹ Exh. EGT-13.1.2.

²⁹⁰ Exh. EGT-13.1.3.

Investigating Authority does not consider interest revenue as sufficiently related to production to be includable in the calculation of constructed value"291

IDC's comments on the *Essential Facts and Conclusions Report*

7.403 In its 15 October comments on the *Essential Facts and Conclusions Report*, IDC makes the following statement concerning the IA's treatment of IDC's interest expense and income²⁹²:

"3 – We disagree with you that the Authority does not consider interest revenue as sufficiently related to production.

Even if, we suppose that this argument is correct, the Authority should not have taken the figure out of the period of investigation and long term interest expenses.

As you requested, we separated all our interest expenses at the worksheet given to you on 29th September 1999. As seen from the worksheet, our long term interest expenses are related to ship procurement of which bank documents for both ships "IDC-1" and "IDC-2" are attached. (Attachment 1)

Most importantly, as you know interest expenses must be related to all products which can be sold, such as plain bars, deformed bars, billets, non-quality products, products in short length, scrap products and miss rolled products. Additionally, interest expenses can not be related to deformed bars only, this can not be understood.

The Authority should have considered the months of the period of investigation.

Also, the Authority has taken *the profit figure* from our income statement. This figure includes our *financial profits* which was not taken into consideration by the Authority in the cost of production. This is also contradictory and not understandable."

Final Report

7.404 In the *Final Report*, the text concerning IDC's interest expense is identical to that in the *Essential Facts and Conclusions Report*.²⁹³

(iii) *Diler*

Questionnaire response

7.405 Diler's questionnaire contains the following text concerning interest expense in the section pertaining to cost of production:

"Interest expense is reported in a manner similar to G&A expense, i.e., on an annual basis, since it is also a period cost. Interest expense is on a consolidated basis (Group interest expense, offset by Group interest income), as is the practice in antidumping investigations, because of the fungibility of money."²⁹⁴

²⁹¹ Exh. TUR-15, p.23.

²⁹² Exh. TUR-27, p.2-3.

²⁹³ Exh. TUR-16, p.29.

²⁹⁴ Exh. TUR-42, p.21.

Diler's Appendix 9A to its questionnaire response²⁹⁵ contains a column for "Interest Expense (revenue)" which contains negative numbers (i.e., indicating net revenue) for all of the months for which data are provided.

19 August request

7.406 The 19 August request sent to Diler contains the following passage pertaining to interest income and expense:

"The costs reported included no finance cost, yet the income statement that Diler supplied indicated significant financing expenses. The costs reported include a deduction for 'interest expense', the Investigating Authority would need an explanation for this cost and why it is deducted from cost of production."²⁹⁶

15 September response to 19 August request

7.407 Diler replied on 15 September to the 19 August request. This response included a joint cover letter on behalf of Diler, Habas and Colakoglu. That letter contained the following statement in respect of the negative interest expense that these companies had reported in their questionnaire responses:

"Regarding the issue of negative interest expense, the fact is that interest income exceeded interest expense. Companies regularly invest their working capital in very short-term interest income instruments, such as overnight ("repo") loans, on which the interest income can be as high as 120% per year."²⁹⁷

....

Regarding respondents' interest expense factors, each respondent has provided its financial statements in the file "mfr income stmt" included in Exhibit 2 of the questionnaire response (the data base submissions). [footnote omitted.] From these income statements, as well as worksheets embedded in the cost submissions (dlsapp9A), it is apparent that short-term interest income exceeded total interest expense. This is the reason respondents' interest expense for purposes of cost of production is a net negative figure.

As for ITPD's question of why respondents deduct short-term interest income from the interest expense component of cost of production, the answer is simply that, in any reasonable measure of cost, interest income is netted against interest expense. This is true in dumping cases as well as in any other accounting exercise. If a company pays out \$100 in interest expense and earns \$120 in interest income, then the company obviously has a net interest expense of -\$20, that is, net interest income of +\$20. Just as a positive interest expense is an element of cost, so a negative interest expense is an element of cost. The former increases cost, and the later [sic] reduces cost, but there is no reason in accounting or in law why an adjustment to cost may be only made on the upward side. Indeed, scrap revenue is always deducted from material cost, in the same way interest revenue is deducted from interest cost.

...

²⁹⁵ *Ibid*, p.22.

²⁹⁶ Exh. TUR-11.

²⁹⁷ Exh. TUR-34 A, B and C, cover letter at p.2.

Indeed, we point out that Colakoglu, Diler and Habas have each submitted not only complete cost databases on a monthly basis – exceeding the requirements of the questionnaire – but they have also provided their financial statements and detailed analyses of their selling, general and administrative, and interest expenses to enable ITPD to evaluate each of these elements. See each company's Exhibit 2 of the questionnaire response, containing tables of financial statements and detailed SGA expense tables."²⁹⁸

23 September follow-up request from the IA

7.408 In its 23 September 1999 follow-up request to Diler's response to the 19 August request, the IA made the following request in respect of interest expense:

"7. *Interest Expense:*

Please, furnish a list identifying separately interest expenses from interest income."²⁹⁹

28 September letter from the IA

7.409 In its letter to Diler, Habas and Colakoglu dated 28 September, the IA indicated the following:

"With reference to your fax messages of 15th and 28th September 1999, we note that you did not fully respond to the following items:

...

- Interest expense, and

..."³⁰⁰

Essential Facts and Conclusions Report

7.410 At section 3.2.1.6, the *Essential Facts and Conclusions Report* states:

"In addition, these respondents [Diler, Habas and Colakoglu] have asserted that the COP should be reduced in an amount by which investment income exceed finance expenses. The Investigating Authority believes that such an adjustment would not be appropriate. Decisions by respondents to invest funds in interest-bearing accounts do not, in the Investigating Authority's view, bear a sufficiently close relationship to the company's cost of producing the subject products. As such, the Investigating Authority disregarded such income in the calculation of COP."³⁰¹

7.411 For each of the three respondents the *Essential Facts and Conclusions Report* indicates that an amount for interest expense was included in cost of production, and that no offset was made for interest income, for the same reason as outlined in section 3.2.1.6, quoted above. These statements appear at sections 3.2.2.1 and 3.2.2.2 (Habas)³⁰², 3.2.3.2 (Diler)³⁰³, and 3.2.4.2 (Colakoglu) of the *Final Report*.³⁰⁴

15 October comments on the *Essential Facts and Conclusions Report*

²⁹⁸ *Ibid*, p.7 and 8.

²⁹⁹ Exh. TUR-12.

³⁰⁰ Exh. EGT-13.6.

³⁰¹ Exh. TUR-15, p.20.

³⁰² *Ibid*, p.21.

³⁰³ *Ibid*.

³⁰⁴ *Ibid*, p.22.

7.412 In their joint comments on the *Essential Facts and Conclusions Report*³⁰⁵, Diler, Habas and Colakoglu state:

"Regarding §3.2.1.6 and cognate paragraphs, Colakoglu, Diler and Habas reject as a matter of law the Report's statement that interest income should not offset interest expense for cost purposes. This is a universal practice; see, for example, the US *Rebar* case cited above. The Report states that a company's purchase of short-term instruments does not 'bear a sufficiently close relationship to the cost of the company's producing the subject products' to warrant the offset. This test, namely, a 'sufficiently close relationship to the cost of the company's producing the subject merchandise', is not the appropriate test. If the respondent's interest *expense* were unrelated to production, ITPD would surely consider the expense to be an expense for purposes of antidumping cost accounting. In other words, ITPD would not use a linkage-to-production test mathematically, and there is no reason to apply to interest income a test different from the test applied to interest expense. In sum, ITPD's exclusion of interest income from the calculation of net interest expense violates precedents in other GATT countries, is contrary to accounting practices, and is without justification on any normative ground."³⁰⁶

Final Report

7.413 The statements in the *Final Report* on this issue are identical to those in the *Essential Facts and Conclusions Report*.

(iv) *Colakoglu*

Questionnaire response

7.414 Turkey has provided no narrative excerpt from Colakoglu's questionnaire response referring to interest income, so we must presume that no such narrative was included in that response. Turkey has simply provided Colakoglu's Appendix 9A to its questionnaire response, which contains one column entitled "Interest Expense", in which positive numbers are reported, and another column entitled "Short-term interest income", in which (larger) negative numbers are reported.³⁰⁷

19 August request

7.415 The 19 August request sent to Colakoglu contains the following passage pertaining to interest income and expense:

"The costs reported included interest expenses that does not reflect the inflation rate. The costs reported include a deduction for 'short term interest income', the Investigating Authority would need an explanation for this cost and why it is deducted from cost of production."³⁰⁸

15 September response to the 19 August request; 23 September follow-up request from the IA; 28 September letter from the IA; *Essential Facts and Conclusions Report*; 15 October comments on the *Essential Facts and Conclusions Report*; and *Final Report*

³⁰⁵ Exh. TUR-20.

³⁰⁶ *Ibid*, p.15 and 16.

³⁰⁷ *Ibid*, p.24.

³⁰⁸ Exh. TUR-11.

7.416 The relevant passages concerning Colakoglu in the 15 September response to the 19 August request, the 23 September follow-up request from the IA, the 28 September letter from the IA, the *Essential Facts and Conclusions Report*, the 15 October comments on the *Essential Facts and Conclusions Report*, and the *Final Report*, are identical to those set forth above in respect of Diler.³⁰⁹

(v) *Habas*

Questionnaire response

7.417 Habas' questionnaire response contains the following text pertaining to interest expense in the section pertaining to cost of production:

"Interest expense is reported in a manner similar to G&A expense, i.e., on an annual basis, since it is also a period cost. Interest expense is on a consolidated basis (Group interest expense, offset by Group interest income)."³¹⁰

7.418 Habas's Appendix 9A contains a column entitled "Interest Expense", in which negative numbers are reported.

19 August request

7.419 The 19 August request sent to Habas contains the following passage pertaining to interest income and expense:

"The costs reported included no finance cost, yet the income statement that Habas supplied indicated significant financing expenses. The costs reported include a deduction for 'interest expense', the Investigating Authority would need an explanation for this cost and why it is deducted from cost of production."³¹¹

23 September follow-up request

7.420 In its 23 September 1999 follow-up request to the Habas's response to the 19 August request, the IA made the following request concerning interest expense:

"Interest Expense:

Please furnish a list identifying separately interest expense from interest income."³¹²

15 September response to the 19 August request; 23 September follow-up request from the IA; 28 September letter from the IA; *Essential Facts and Conclusions Report*; 15 October comments on the *Essential Facts and Conclusions Report*; and *Final Report*

7.421 The relevant passages concerning Habas in the 15 September response to the 19 August request, the 23 September follow-up request from the IA, the 28 September letter from the IA; the *Essential Facts and Conclusions Report*, the 15 October comments on the *Essential Facts and Conclusions Report*, and the *Final Report*, are identical to those set forth above in respect of Diler.³¹³

³⁰⁹ See paras.7.407, *et seq.*, *supra*.

³¹⁰ Exh. TUR-42, p.26.

³¹¹ Exh. TUR-11.

³¹² Exh. TUR-12.

³¹³ See paras.7.407, *et seq.*, *supra*.

(b) Assessment by the Panel

7.422 We recall that to resolve this claim, we must consider whether the evidence of record indicates that the short-term interest income is related to the production and sale of rebar in the Turkish home market. In this regard, we note that it was the respondents who initially advocated (at least implicitly) for an interest income offset, by reporting in their questionnaire responses on cost their net interest expense figures, which ranged from zero to negative numbers (the latter indicating net interest income). With two exceptions -- Diler and Habas -- the respondents simply reported the net figures without indicating how they were arrived at or what their components were. Diler and Habas, for their part, indicated that their reported interest figures were "consolidated" item reflecting "Group" interest expense offset by "Group" interest income (suggesting that it was broader than the companies or operations producing rebar), but did not offer further explanations or breakdowns.

7.423 Concerning Diler, Habas and Colakoglu, the IA requested in its 19 August requests explanations of why interest expense was reported as a negative number. These companies provided the narrative explanations noted above³¹⁴, (which does not address the relationship of the interest income to production and sale of rebar)³¹⁵. Rather, this narrative simply explains, in some detail, the mathematical reason for interest having been reported by each company as a negative figure, i.e., that interest income exceeded interest expense. The narrative then asserts that just as a positive interest expenses is an element of cost, so too is a negative interest expense, and that there is no accounting or legal reason why an adjustment to cost can be made only on the upward side. The IA then requested in its 23 September follow-up requests that these companies provide lists separately identifying the interest income and expense items. As discussed above, these companies provided no information on any item in response to the 23 September requests. Then, in their comments on the relevant portion of the *Essential Facts and Conclusions Report* that indicates that no interest income offset was allowed because that income was not sufficiently closely related to the companies' costs to produce rebar, these companies made no attempt to demonstrate, or even to argue, that the IA was factually incorrect and that indeed the interest income was related to the cost of producing rebar. To the contrary, they argued that the "sufficiently close relationship to the cost of the company's producing the subject merchandise" is *not* the appropriate test" (emphasis added).³¹⁶ We note however, that the "relationship" test is precisely the test articulated by the relevant provisions of the AD Agreement.

7.424 Concerning IDC, the IA requested in the 19 August request that IDC requested a list separately identifying interest income and interest expense, and in its 28 September letter to IDC, the IA requested a list separately identifying interest income and interest expense showing the difference on a per ton basis monthly for 1998. IDC, in commenting on the indication in the *Essential Facts and Conclusions Report* that no interest income offset would be made due to the insufficient relationship to cost of producing rebar, noted that long-term interest expense should not have been used, that IDC had provided the breakout that the IA had requested on 28 September, which showed that long-term interest expenses were related to ship procurement, and that interest expenses were related to all products of the company, not just rebar. In addition, IDC argued that the profit figure that was used by the IA in constructed value included the company's financial profits, but had not been included in the cost of production, which according to IDC was "contradictory". These comments thus clearly are aimed at demonstrating the weakness or absence of any relationship to production of the interest *expense* that was used in the constructed value calculation, rather than at demonstrating any relationship of interest *income* to production.

7.425 Concerning Icdas, other than a passage in its original questionnaire response entitled "Interest Revenue" (having to do with invoices for late payments), to which there is no further reference in the record before us, there is no indication that Icdas asserted any particular approach to or data regarding

³¹⁴ *Ibid.*

³¹⁵ We note that this issue was raised by the IA later in the investigation (*See para.7.426*).

³¹⁶ *Ibid.*

an interest income offset. Nor did the IA pose any specific questions to Icdas in this regard. While the IA noted briefly in the *Essential Facts and Conclusions Report* that no such offset was made in the constructed value calculation, Icdas made no comment on this point. We see, moreover, no evidence in the record otherwise that appears relevant to the existence of a relationship, if any, between interest income and the cost of producing and selling rebar. We note in this regard that when we asked Turkey to identify any such evidence, Turkey replied:

"Specific information was not requested by the Investigating Authority on the nature of the interest income at issue. If the Investigating Authority had any doubt as to the validity of the offset in question, it was incumbent upon the Investigating Authority to request additional information. The Investigating Authority cannot justify the denial of an adjustment based on the failure to provide clarifications or supporting evidence that it itself did not seek. We note that the Investigating Authority never cited any evidence that the interest income was not related to production, nor has Egypt produced such evidence to the Panel".³¹⁷

7.426 We note in this regard that three of the respondents simply refused to provide even a breakout of interest income from interest expense, when such a breakout was specifically requested by the IA. Then, in their comments on the *Essential Facts and Conclusions Report* they advanced an incorrect legal argument concerning the relationship-to-production test applied by the IA in deciding not to make an interest income offset, rather than trying to establish factually that their accounting records of the interest income reasonably reflected costs associated with the production and sale of rebar, and not some other aspect of the respondent's operations. The IA thus explicitly identified this issue during the course of the investigation, and provided the respondents with an opportunity to address it, which these companies chose to do in a certain way. The other respondent that commented on this aspect of the *Essential Facts and Conclusions Report* tried to *disprove* the relationship between interest *expense* and the cost of producing rebar, rather than trying to *prove* the existence of a relationship between interest *income* and cost of production. The fifth respondent made no comments or arguments at all on this issue at any point during the investigation (other than the somewhat ambiguous paragraph in its questionnaire response concerning "Interest Revenue"). In short, Turkey has not identified, and we have not found, evidence of record that would demonstrate any relationship of short-term interest income to the cost of producing rebar, nor any indication that any respondent attempted to submit such evidence or advance such an argument during the course of the investigation, in spite of the IA's providing them the opportunity to do so. We therefore find that Turkey has not established a *prima facie* case that the IA violated Article 2.2.1.1 or 2.2.2 in deciding not to make an interest income offset in calculating cost of production and constructed normal value.

F. CLAIM UNDER ARTICLE X:3 OF GATT 1994

7.427 Turkey claims a violation of Article X:3 of GATT 1994 in "connection with Egypt's refusal to schedule a meeting with the Turkish respondents to discuss the adequacy of their responses on September 15, 1999."³¹⁸ Turkey contends that this decision was "administrative" in nature and based directly on a substantive law or rule.³¹⁹

7.428 Article X:3 of GATT 1994 provides:

³¹⁷ Written Response, dated 14 March 2002, to Question 10 to Turkey of the *Written Questions by the Panel*, of 27 February 2002.

³¹⁸ First Written Submission of Turkey, Section IV.D.2.

³¹⁹ Written Response, dated 7 December 2001, to Question 2 to Turkey of the *Written Questions by the Panel*, of 28 November 2001.

"(a) Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article."

7.429 We recall that in the present dispute, we have found that Turkey has not established that the respondents "requested" a meeting with the IA, but rather that they offered to travel to Cairo if the IA would find it useful. We see nothing non-uniform, non-impartial or unreasonable in the IA's decision not to accept this offer of the respondents. Accordingly, we find that Turkey has not established that Egypt violated Article X:3.

VIII. CONCLUSIONS

8.1 In light of the foregoing findings, we conclude that Egypt did not act inconsistently with its obligations under:

- (a) Article 3.4 of the AD Agreement, as Turkey has not established that the Egyptian Investigating Authority was required to examine and evaluate the particular factors identified by Turkey as "relevant factors and indices having a bearing on the state of the domestic industry";
- (b) Article 3.2 of the AD Agreement, as Turkey has not established that there was a legal obligation on the Egyptian Investigating Authority to perform the price undercutting analysis in the way asserted by Turkey;
- (c) Article 3.1 of the AD Agreement, as Turkey has not established that the Egyptian Investigating Authority's price undercutting finding was not based on positive evidence;
- (d) Articles 6.1 and 6.2 of the AD Agreement in respect of the alleged change in scope of the injury investigation from threat of material injury to present material injury and notice thereof to the Turkish exporters;
- (e) Articles 3.1 and 3.5 of the AD Agreement, as Turkey has not established that the Egyptian Investigating Authority violated the positive evidence requirement of Article 3.1 by virtue of the Investigating Authority not developing certain specific kinds of evidence, nor has Turkey established that, as a consequence, Egypt violated the requirement of Article 3.5 to demonstrate a causal relationship between the dumped imports and the injury to the domestic industry;
- (f) Article 3.5 of the AD Agreement, as Turkey has not established that the Egyptian Investigating Authority's evaluation of the possible causation of injury by factors other than the dumped imports was inconsistent with Article 3.5;
- (g) Article 3.1 and 3.5 of the AD Agreement, as Turkey has not established that the Egyptian Investigating Authority was obligated by Articles 3.1 and 3.5 to perform an analysis and make a finding of the type asserted by Turkey in respect of whether the imports caused injury "through the effects of dumping";
- (h) Article 6.8 of the AD Agreement and paragraph 5 of Annex II thereto, with regard to three of the Turkish exporters, as an unbiased and objective investigating authority could have found that these three exporters failed to provide necessary information and that resort to facts available was therefore justified in calculating the cost of production in respect of these three exporters;

- (i) Article 6.1.1 of the AD Agreement, as the request for information at issue was not a "questionnaire" in the sense of this provision, and the minimum time-period provided for in Article 6.1.1 was therefore not applicable to this request for information;
- (j) Article 6.2 of the AD Agreement, or paragraph 6 of Annex II thereto, with regard to the 19 August 1999 request for information, as Turkey has not established that the time-period allowed by the Egyptian Investigating Authority for submission of the requested information was unreasonable or, as a consequence, that the Egyptian Investigating Authority failed to provide the Turkish exporters with a full opportunity for the defence of their interests;
- (k) Article 6.2 of the AD Agreement, or paragraph 6 of Annex II thereto, with regard to the 23 September 1999 request for information, as Turkey has not established that the time-period allowed by the Egyptian Investigating Authority for the submission of the requested information was unreasonable or, as a consequence, that the Egyptian Investigating Authority failed to provide the Turkish exporters with a full opportunity for the defence of their interests;
- (l) Paragraph 3 of Annex II to the AD Agreement, as this provision does not apply to the selection of particular information as "facts available";
- (m) Paragraph 7 of Annex II to the AD Agreement, as Turkey has not established that the Egyptian Investigating Authority failed to use "special circumspection" in estimating the prevailing inflation rate in Turkey, which was applied to the data reported by one respondent, at 5 per cent per month;
- (n) Article 6.7 of the AD Agreement, paragraph 7 of Annex I thereto, and paragraphs 1 and 6 of Annex II thereto, as Turkey has not established that these provisions contain the obligations asserted by Turkey, i.e., Turkey has not established that it is mandatory for investigating authorities to conduct "on-the-spot" verification of information submitted, that investigating authorities are precluded from requesting additional information during the course of the investigation, that the rights of the Turkish exporters were seriously prejudiced, or that the actions of the Egyptian Investigating Authority impaired their "opportunity to provide further explanations";
- (o) Article 2.4 of the AD Agreement, as Turkey has not established that the burden of proof requirement of that provision is applicable to the request for certain cost information by the Egyptian Investigating Authority in its letter of 19 August 1999, nor, even if that requirement were applicable, that the request imposed an unreasonable burden of proof on the Turkish respondents;
- (p) Article 6.2 of the AD Agreement and paragraph 6 of Annex II thereto, as Turkey has not established that the Egyptian Investigating Authority denied requests of Turkish exporters for meetings;
- (q) Article 2.4 of the AD Agreement, as Turkey has not made a *prima facie* case that the Egyptian Investigating Authority violated this provision in failing to make an adjustment to normal value for differences in terms of sale;
- (r) Articles 2.2.1.1 and 2.2.2 of the AD Agreement, as Turkey has not made a *prima facie* case that the Egyptian Investigating Authority violated these provisions in deciding not to make an interest income offset in calculating cost of production and constructed normal value; and

- (s) Article X:3 of GATT 1994 as Turkey has not established that Egypt administered its relevant laws, regulations, decisions or rulings in a non-uniform, non-impartial or unreasonable manner in deciding not to accept an offer of certain respondents to travel to Cairo for a meeting with the Investigating Authority.

8.2 In the light of the foregoing findings, we conclude that Egypt acted inconsistently with its obligations under:

- (a) Article 3.4 of the AD Agreement, in that while it gathered data on all of the factors listed in Article 3.4, the Egyptian Investigating Authority failed to evaluate all of the factors listed in Article 3.4 as it did not evaluate productivity, actual and potential negative effects on cash flow, employment, wages, and ability to raise capital or investments; and
- (b) Article 6.8 of the AD Agreement, and paragraph 6 of Annex II thereto, with regard to two of the Turkish exporters, as the Egyptian Investigating Authority, having received the information that it had identified to these two respondents as being necessary, nevertheless found that they had failed to provide the necessary information, and further, did not inform these two exporters of this finding and did not give them the required opportunity to provide further explanations before resorting to facts available.

8.3 With respect to those of Turkey's claims not addressed above, we have:

- (a) concluded that the claim was not within our terms of reference (claim under AD Article 17.6(i), claim under Article X:3 of GATT 1994 in respect of selection of particular facts available), or was abandoned by Turkey (claim under Article X:3 in respect of resort to facts available); or
- (b) concluded that, in the light of considerations of judicial economy, it is neither necessary nor appropriate to make findings.

8.4 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that Agreement. Accordingly, we conclude that to the extent Egypt has acted inconsistently with the provisions of the AD Agreement, it has nullified or impaired benefits accruing to Turkey under that Agreement.

IX. RECOMMENDATION

9.1 In accordance with Article 19.1 of the DSU, we recommend that Egypt brings its definitive anti-dumping measures on imports of steel rebar from Turkey into conformity with the relevant provisions of the AD Agreement.
