

## ANNEXES

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## ANNEX 1-1

### FIRST WRITTEN SUBMISSION OF TURKEY EXECUTIVE SUMMARY

1. Based on a petition filed by Al Ezz Rebars Co. and Alexandria National Iron and Steel Co., the Egyptian Ministry of Trade and Supply, International Trade Policy Department (“Investigating Authority” or “IA”) commenced an anti-dumping duty investigation with respect to imports of concrete steel reinforcing bar (“rebar”) from Turkey in February 1999.<sup>1</sup> The investigation was completed by the same office, then within the Ministry of Economy and Foreign Trade, in October 1999. As a result of the investigation, anti-dumping duties were imposed, ranging from 22.63 per cent - 61.00 per cent *ad valorem*.<sup>2</sup>

2. It is the view of the Government of Turkey that Egypt’s anti-dumping duty investigation and final anti-dumping determination was inconsistent with Articles VI and X:3 of the General Agreement on Tariffs and Trade 1994 (“GATT 1994”) and with several provisions of the Agreement on Implementation of Article VI of the GATT 1994 (the “Anti-Dumping Agreement” or the Agreement”), including 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.

3. In summary, Turkey’s claims are as follows:

- (a) Egypt made determinations of injury and dumping in the rebar investigation without a proper establishment of the facts and based on an evaluation of the facts that was neither unbiased nor objective.
- (b) During the investigation of material injury, Egypt failed to develop “positive evidence” linking imports from Turkey to the adverse trends that it found within the Egyptian rebar industry. Egypt did not investigate whether there were any specific sales lost by the domestic industry to imports from Turkey, or whether in specific transactions involving head-to-head competition the domestic producers were forced to lower their prices to meet Turkish import competition. Nor did Egypt investigate whether domestic purchasers considered imports from Turkey, imports from some other source, or domestic companies themselves as the price leaders in the market. Egypt did not investigate whether or not there was a temporary supply disturbance in the fast-growing Egyptian market, such that imports from Turkey were needed to meet demand. Indeed, there is no evidence on the public record of head-to-head competition between imports and the domestic producers other than the bare, conclusory allegations submitted by the domestic industry in their application for

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<sup>1</sup> See Arab Republic of Egypt, Ministry of Trade and Supply, International Policy Department, *Initiation Report – Steel Reinforcing Bars from Turkey* (Feb. 1999) (“Initiation Report”)(reproduced in Ex. TUR-1).

<sup>2</sup> See Arab Republic of Egypt, Ministry of Economy and Foreign Trade, Foreign Trade Sector, International Trade Policies Department, Anti-Dumping, Subsidy and Safeguards Department, *Rebar from Turkey – Final Report – Dumping Investigation* (Oct. 1999) (“Final Report”)(reproduced in Ex. TUR-16) and Notice No. (6) 1999, *Imposition of Definitive Anti-dumping Duties on the Dumped Imports of Steel Rebars Originating in or Exported From Turkey*, Official Gazette No. (238)(Supplemental), Oct. 21, 1999(reproduced in Ex. TUR-17).

anti-dumping measures. Egypt's imposition of definitive anti-dumping measures despite its failure to develop "positive evidence" specifically linking the adverse trends in the domestic industry to imports from Turkey is inconsistent with Articles 3.1 and 3.5 of the Agreement.

- (c) Moreover, Egypt failed to investigate or to take account of the effect of several factors -- other than imports from Turkey -- that had a substantial adverse effect on the Egyptian industry. Egypt also failed to take account of other, neutral factors that caused prices for rebar to fall. These factors included the effects of a large capacity expansion within the domestic industry during the period of investigation on the industry's cost structure and on price competition between the Egyptian producers; the effect of falling steel scrap input prices on the worldwide and domestic price of rebar; the effect of a sudden contraction in domestic demand in January 1999 just when domestic prices fell; and the effect of a larger volume of comparably priced, non-dumped imports from third countries. The effect of these factors was either ignored, or improperly discounted, or improperly attributed to imports from Turkey in Egypt's final anti-dumping determination in violation of Articles 3.1, 3.4 and 3.5 of the Agreement.
- (d) The public record of the injury investigation indicates that Egypt failed to compare the prices of domestic products and the prices of imports on a comparable, delivered basis to the customers who had to choose between imports and domestic rebar to meet their requirements. Egypt therefore failed to establish properly whether there was price undercutting by imports as required by Articles 3.1 and 3.2 of the Agreement.
- (e) Egypt changed the scope of its injury investigation without giving adequate notice to the Turkish respondents, and without giving them an opportunity to submit evidence on the present material injury issue, in contravention of Articles 6.1 and 6.2 of the Agreement.
- (f) Egypt relied on evidence of injury for its affirmative injury determination which was taken from a period that was subsequent to, and therefore did not coincide with, its finding that there were sales at less than normal value. In so doing, Egypt failed to establish, consistent with the requirements of Article 3.5 of the Agreement, that the dumped imports were, "through the effects of the dumping", causing injury to a domestic industry within the meaning of the Agreement.
- (g) During the sales-at-less-than-normal-value investigation, Egypt's request for substantial new cost information, and substantiation of the accuracy of respondent's prior responses, late in the anti-dumping duty proceeding, after the time for issuing questionnaires and well after the verification, severely prejudiced respondents. Furthermore, this action was inconsistent with Annex II, paragraph 1, Annex I, paragraph 7 and Articles 2.4, 6.1, 6.6 and 6.7 of the Agreement.
- (h) The deadlines imposed for responses to Egypt's supplemental requests for information were unreasonably short, resulting in an improper determination to resort to "facts available", in violation of Articles 6.1.1 and 6.2 and Annex II, paragraph 6 of the Agreement.
- (i) The factual basis cited by Egypt for seeking large amounts of supplemental cost information late in the anti-dumping duty proceeding was speculative and unfounded, as shown in subsequent submissions by the respondents. Given the explanations

provided by respondents on this score, Egypt's decision to rely on "facts available" was based on an improper determination of the facts and on an evaluation of the facts that was biased or lacked objectivity. In addition, that determination was inconsistent with Article X:3 of the GATT 1994 and Articles 2.4, 2.2.1.1, 2.2.2, and 6.8 and Annex II, paragraphs 3, 5, 6 and 7 of the Agreement.

- (j) Egypt's refusal to schedule a meeting during which respondents could explain their responses to the supplemental questionnaires was inconsistent with Article X:3 of the GATT 1994, as well as Article 6.2 and Annex II, paragraph 6 of the Agreement.
- (k) Egypt's selection of particular data as "facts available" in the case of each respondent was also improper and lacked objectivity. The costs employed were, in most cases, much higher than the actual contemporaneous costs experienced by the respondents, as shown by other, reliable data developed during the investigation. As a result, the costs selected as "facts available" produced an unfair and unreasonable comparison between normal value and the export price in violation of Articles 2.4, 2.2.1.1, 2.2.2 and 6.8 and Annex II, paragraphs 5 and 7 of the Agreement.
- (l) Egypt's refusal to offset interest expenses with short-term interest income in determining cost of production was inconsistent with Articles 2.2.1, 2.2.1.1 and 2.2.2 of the Agreement.
- (m) And finally, Egypt's failure to make an adjustment to the normal value for imputed credit expenses between the date of shipment and the date of payment was inconsistent with Article 2.4 of the Agreement.

4. Consultations were held between the Governments of Turkey and Egypt in Cairo, Egypt on 3-5 December 2000 and again in Ankara, Turkey on 3-4 January 2001, but no resolution to this dispute could be reached. Subsequently, on 11 June 2001, following Turkey's request for the establishment of a panel, the Governments of Turkey and Egypt again held consultations with a view to settlement of the dispute, again to no avail.

5. The panel is respectfully requested to find that Egypt's anti-dumping duty investigation and final determination were inconsistent with the GATT 1994 and with the Anti-Dumping Agreement. Egypt should either revoke the definitive anti-dumping measure imposed on imports of rebar from Turkey or suspend the application of that measure pending a reopening of its investigation for the purpose of addressing the deficiencies identified above.

## ANNEX 1-2

### FIRST WRITTEN SUBMISSION OF EGYPT EXECUTIVE SUMMARY

#### I. BACKGROUND

1. On 6 November 2000, the Government of Turkey requested consultations at the WTO with the Government of Egypt regarding definitive anti-dumping measures imposed by Egypt on steel rebar from Turkey.<sup>1</sup> Consultations were held in Cairo and Ankara on 3-5 December 2000 and 3-4 January 2001 respectively. The consultations did not lead to a mutually satisfactory resolution of the matter and Turkey requested that the establishment of a Panel be placed on the agenda of the DSB meeting of 16 May 2001.<sup>2</sup> Egypt opposed the request for the establishment of a Panel at the DSB meeting of 16 May 2001 in order to permit further consultations between the parties, which took place on 11 June 2001. However, consultations again failed to resolve the dispute. Accordingly, a Panel was established at the DSB meeting of 20 June 2001 in which the United States, Japan, the European Communities and Chile reserved their third party rights.

2. In its request for the Establishment of a Panel, Turkey considers that the measures imposed by Egypt on steel rebar from Turkey are inconsistent with Article X:3 of the General Agreement on Tariffs and Trade 1994 (GATT 1994); Articles 2.2, 2.4, 3.1, 3.2<sup>3</sup>, 3.4, 3.5, 6.1, 6.2, 6.6, 6.7, 6.8 and Annex II, paragraphs 1, 3, 5, 6 and 7 and Annex I, paragraph 7 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (the "AD Agreement" or "Agreement"). As a result, Turkey considers that the measures nullify and impair the benefits accruing to it under the GATT 1994 and the Anti-Dumping Agreement.

3. The claims submitted by Turkey are individually addressed below, together with an analysis of Egypt's rights and obligations under the relevant provisions of the AD Agreement and the GATT 1994. An examination of the relevant provisions will demonstrate that Egypt applied the measures in question only pursuant to an investigation that was initiated and conducted in accordance with Egypt's rights and obligations as provided for in Article VI of GATT 1994 and the Anti-Dumping Agreement.

#### II. INJURY AND CAUSAL LINK

##### A. OPENING STATEMENT

4. Steel is, by its very nature, a commodity product. When imports of this kind arrive in the marketplace in very substantial volumes and at very low prices, the domestic industry is bound to suffer injury. As demonstrated below, Egypt was careful to distinguish and to separate other factors than the dumped imports that may have contributed to the injury.

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<sup>1</sup> WTO Doc. WT/DS211/1.

<sup>2</sup> *Id.*, at p. 2.

<sup>3</sup> This provision was inserted at a later date via a corrigendum (WTO Doc. WT/DS211/2/Corr.1).

**1. Turkey has not demonstrated that the Investigating Authority failed to establish by “positive evidence” a causal link between imports from Turkey and injury to the domestic industry**

5. Turkey alleges that Egypt failed to establish by “positive evidence” that there was a causal link between imports from Turkey and declining prices in the domestic market. The “positive evidence” to which Turkey refers is “that consumers purchased imported rebar supplied by the domestic manufacturers for price reasons”. Turkey therefore alleges that Egypt’s imposition of definitive anti-dumping measures was inconsistent with Articles 3.1 and 3.5 of the Agreement.

6. Contrary to Turkey’s allegation, the Investigating Authority determined on the basis of the data and information available that the volume of dumped imports increased over the period considered and that this had a significant effect on prices of locally produced rebar as required under Article 3.1(a). The Investigating Authority also examined the consequent impact of the dumped imports on the domestic producers as required under Article 3.1(b) 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 in order to retain sales.

7. With regard to the establishment of a causal link, the Investigating Authority considered all evidence that was provided by interested parties and 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. Moreover, at the time of the investigation, the Investigating Authority was not aware of any “known factors”, other than those that it did consider, which would be likely to cause injury to the domestic industry.

8. Article 3.5 of the AD Agreement clearly states that factors listed therein “*may be relevant*” in the establishment of a causal link. Accordingly, unlike Article 3.4, which mandates that “[t]he examination of the impact of the dumped imports *shall* include an evaluation of all relevant economic factors”, it is clear from the wording of Article 3.5 that consideration of the factors listed therein is *not* mandatory.

9. It follows that Egypt is under no obligation to investigate whether domestic manufacturers lowered their prices *specifically* in response to competing offers by suppliers of Turkish rebar or whether *specific* sales were lost by the domestic industry to imports from Turkey. In addition, the AD Agreement does not require that the Investigating Authority investigate whether the dumped imports are the price leaders in the market, as such is not relevant to the establishment of a causal link. As to contraction in demand or changes in the patterns of consumption, these factors were examined during the course of the investigation and found to be irrelevant to the Investigating Authority’s determination of a causal relationship.

10. Turkey incorrectly alleges that the Investigating Authority failed to take account of the effect of other factors that had a substantial adverse effect on the Egyptian industry

11. Turkey alleges that the Investigating Authority failed to take account of, and improperly attributed to rebar imports from Turkey, the effect of other factors that had a substantial adverse effect on the Egyptian industry as well as of other neutral factors that caused the price of rebar in Egypt to fall.

12. It is clear that the above allegation relates to **causation**. The relevant provision of the AD Agreement is Article 3.5. Turkey’s claim under Article 3.4 should therefore be **rejected**, as it is not relevant to the issue under consideration.

13. Turkey has not established that the Investigating Authority failed to take account of the effect of other factors that had a substantial adverse effect on the Egyptian industry in violation of Article 3.5 of the AD Agreement. Throughout the course of the investigation, the Investigating Authority examined all evidence that was provided by interested parties. To this end, the Investigating Authority examined 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, the Investigating Authority 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.

**3. Turkey’s argument with regard to capacity expansion and the establishment of a causal link is fundamentally flawed**

14. Turkey’s argument with regard to the capacity expansion of the Egyptian rebar industry in the establishment of a causal link is fundamentally flawed in a number of respects. First, the Panel should reject all new evidence that was not before the Investigating Authority during the course of the investigation. Second, contrary to Turkey’s allegation, the Investigating Authority did consider the capacity expansion of the domestic industry as required under the AD Agreement. Third, the capacity expansion of the Egyptian industry was invoked during the investigation by the Turkish exporters as an economic factor indicating the *absence of injury*, rather than a factor that was *known* to be contributing to the injury incurred by the domestic industry.

**4. Turkey has failed to demonstrate that Egypt’s application of Article 3.5 of the AD Agreement was incorrect**

15. Turkey is concerned that Egypt improperly attributed to imports from Turkey the decline in prices that took place in 1999. In particular, Turkey alleges that by attributing falling prices caused by declining demand, increased domestic competition and falling raw material costs to imports, the Investigating Authority violated Articles 3.4 and 3.5 of the AD Agreement.

16. It is evident that the issue raised here is yet again one of *causation*. Turkey is not alleging that Egypt failed to examine the impact of the dumped imports on the domestic industry as required under Article 3.4. To this end, Turkey has not provided any legal argumentation to support this claim. The invocation of Article 3.4 in this manner is thus without legal foundation and should therefore be dismissed by the Panel.

17. With regard to Article 3.5 of the AD Agreement, the Panel must ask whether the Investigating Authority considered the effect upon price, factors such as declining demand, increased domestic competition and falling raw material costs.

18. During the investigation, the Investigating Authority found no evidence to prove the existence of a contraction of demand of the product concerned. To the contrary, demand increased. Moreover, there was insufficient evidence before the Investigating Authority to conclude that capacity expansion could have been a factor contributing to the injury. However, the Investigating Authority did examine whether there was any increased competition as a result thereof. As to declining cost of raw materials, the Investigating Authority found that the alleged decline in the price on steel was not a sufficient factor to break the causal link between the dumped imports and the injury to the domestic industry.

**5. Turkey's analysis and establishment of the facts as regards the comparison of imports from non-dumped sources is flawed**

19. Turkey's analysis and establishment of the facts concerning the comparison of imports from non-dumped sources is flawed in two respects. First, Turkey implies that the AD Agreement requires that the Investigating Authority determine whether the dumped imports were the price leaders in the market in the establishment of a causal relationship under Article 3.5. Second, Turkey falsely accuses the Investigating Authority of failing to investigate the effects of non-dumped imports from third countries when reaching its determination that the dumped imports were, through the effects of dumping, causing injury to the domestic rebar industry.

20. While the prices of non-dumped imports from third countries *may* be relevant in the establishment of a causal link under Article 3.5, nowhere in the Agreement is there the requirement that Egypt consider whether the Turkish imports were acting as the price leaders in the market. What is relevant in this regard is that the Investigating Authority investigate *known* factors which at the same time are injuring the industry. To this end, Turkey has not presented a *prima facie* case that non-dumped imports from third countries were a factor that was known to the Investigating Authority to be simultaneously causing injury to the domestic industry.

21. Nonetheless, the Investigating Authority was careful to consider any potential effects of third country imports, both in terms of volume and of price, upon the domestic industry. There is no particular method prescribed by the AD Agreement that Egypt must employ to separate and distinguish the injurious effects of dumped imports from the injurious effects of other causal factors. Thus, the Investigating Authority examined *all* sources of non-dumped imports and found that the fall in domestic prices was caused by the dumped imports rather than imports from other sources.

22. With respect to Saudi Arabia and Libya, the examination of the import volumes from these countries in Q1-1998 and Q1-1999 demonstrated that their individual import volumes were declining sharply. This is in contrast to the dumped imports from Turkey, which increased significantly during the same period. Moreover, the Investigating Authority reviewed the prices of imports from both Saudi Arabia and Libya and found them to be much higher than the prices of Turkish imports. As a result, the Investigating Authority concluded that other sources of imports were not the cause of injury suffered by the domestic industry.

**6. Turkey incorrectly asserts that the Investigating Authority's finding of price undercutting was based on a flawed price comparison**

23. Turkey alleges that by comparing domestic prices and imported prices on a basis that was neither truly comparable nor at the appropriate level of trade, the Investigating Authority's finding of price undercutting was based on a flawed price comparison in violation of Articles 3.1, 3.2 and 3.5 of the Agreement.

24. It is clear that the Investigating Authority's comparison of import price with domestic price was indeed made at the same level of trade (i.e. the ex-factory price for the local industry and ex-importer's store levels for the dumped imports). Turkey, on the other hand, would prefer that the comparison take place on a delivered-price basis. There is, however, no legal foundation to require the Investigating Authority to confine its analysis in this manner.

**7. The task of the Panel is not to conduct a *de novo* review of the Investigating Authority's determination with respect to domestic sales, but to determine whether the Investigating Authority's establishment of the facts was unbiased and objective**

25. Turkey alleges that the Investigating Authority misinterpreted certain data. In particular, Turkey alleges that the Investigating Authority sought to blame the increase in domestic sales on imports from Turkey and that the Investigating Authority concluded that this increase was the result of reducing domestic prices significantly to compete with the dumped product and to retain market share.

26. By alleging that the Investigating Authority misinterpreted certain data, Turkey is in fact challenging the Investigating Authority's determination with respect to that data. Article 17.6(i) of the AD Agreement, however, makes it very clear that the task of the Panel is solely to assess whether the Investigating Authority's establishment of the facts was proper and the evaluation thereof unbiased and objective. If affirmative, the evaluation shall not be overturned even if the Panel might have reached a different conclusion. In any event, *Turkey has not alleged any particular violation of the AD Agreement and thus there is no legal basis to support this claim.*

**8. The AD Agreement does not require an Investigating Authority to inform interested parties that it has changed the legal basis for its injury determination during the course of the investigation**

27. Turkey claims that by failing to give notice of the change in the scope of the investigation from threat of material to present material injury, the Investigating Authority violated Articles 6.1 and 6.2 of the AD Agreement. Egypt is not, however, under any obligation under the AD Agreement to inform the respondents that it had changed the legal basis for its injury determination during the course of the investigation.

**9. Turkey has not shown that the Investigating Authority failed to demonstrate that the imports caused injury to the Egyptian Industry "through the effects of dumping found"**

28. Turkey is of the opinion that because the only dumping occurred in 1998 and the injury found by the Investigating Authority occurred in 1999, the Investigating Authority failed to show that the imports were, through the effects of the dumping, causing injury to the domestic industry. According to Turkey, "the resulting determination is, therefore, inconsistent with Articles 3.1 and 3.5".

29. Two points will be addressed. The first is that the AD Agreement does not require that any specific period of time be established for the purpose of data collection with regard to the investigations of dumping and of injury. Second, the Investigating Authority found that the injury that occurred in Q1-1999 confirmed the injury that took place in 1998 as a result of the dumped imports. Thus, in setting the periods of data collection for both dumping and injury, the Investigating Authority included the first quarter of 1999 for injury in order to give adequate consideration to the effects of the dumping that primarily took place, in terms of volume, in 1998. Moreover, the period of data collection for injury included the full period of data collection established by the Investigating Authority for dumping.

**B. DUMPING DETERMINATION**

**1. Opening Statement**

30. The Investigating Authority made numerous attempts to obtain the requisite information from the respondents, but was met with insufficient co-operation and unreliable data. As a consequence, the Investigating Authority had no other alternative but to base its determinations on the information

at its disposal. In determining the appropriate facts available, the Investigating Authority primarily used the data submitted by each respondent, thereby giving respondents the benefit of their own data to the extent possible.

**2. The requests for additional information were made in full compliance with the relevant provisions of the AD agreement**

31. Turkey claims that the request for cost information sent to the respondents on 19 August and 23 September 1999 violated Articles 6.1, 6.1.1, 6.2, 6.6 and 6.7 as well as paragraph 7 of Annex I and paragraphs 1 and 6 of Annex II of the AD Agreement. Lastly, Turkey alleges that these requests also contravene Article 2.4 of the AD Agreement dealing with the comparison between normal value and export price. Those claims are without merit.

32. Contrary to Turkey's allegations, the letters of 19 August 1999 did not constitute "a long, supplemental cost questionnaire that was, in fact, an entirely new cost questionnaire". The Investigating Authority's requests for additional information on cost of production of rebar were sent as a result of two undisputed facts:

- (a) All respondents with the exception of IDC had submitted incomplete and partial replies to the section of the Manufacturers' Questionnaire concerning cost of production. Contrary to the explicit requirements of the Manufacturers' Questionnaire, they reported monthly costs data only for those months during which they had export sales of rebar to Egypt. Since this limited information was largely insufficient to verify whether domestic sales were made in the ordinary course of trade, the respondents were requested to provide cost data for the entire investigation period.
- (b) During the investigation period, Turkey experienced hyperinflation at an average rate of 5 per cent per month. Since this factor was likely to have a major impact on cost of production, the Investigating Authority asked the respondents to explain whether their cost of production had been adjusted to reflect inflation and to provide supporting evidence, pursuant to paragraph 1 of Annex II and Article 2.2.1.1 of the AD Agreement.

33. In Egypt's view, this course of action is in accordance with the provisions of Articles 2.4, 6.1, 6.1.1, 6.2, 6.6 and 6.7 as well as with paragraph 7 of Annex I and paragraphs 1 and 6 of Annex II of the AD Agreement.

34. The Investigating Authority complied with paragraph 1 of Annex II when it sent to each respondent in February 1999 a Manufacturers' Questionnaire specifying the information required and the manner in which the information should be structured. The Questionnaire also drew the attention of the respondents to the fact that the Investigating Authority could make determinations on the basis of facts available if the required information was not supplied in a reasonable period of time. As demonstrated in this submission, the same level of assistance was provided in all subsequent requests for additional information.

35. The compliance with Article 6.1 is evident since the purpose of the requests for additional information was precisely to give notice to the interested parties of the information which the Investigating Authority required to make its determinations.

36. The Investigating Authority did not contravene Article 6.2. This Article is irrelevant to the requests for additional information since it only concerns the submission of oral information. Furthermore, Egypt considers that the Investigating Authority was under no obligation to accede to

the request for a meeting which was presented at a late stage of the investigation and at a time when it had already been established that the costs data submitted by the respondents were not reliable.

37. As explained in this submission, the requests for additional information were sent in accordance with Article 6.6 which entitles, and in fact obliges, the Investigating Authority to satisfy itself as to the accuracy of the information used as a basis for its determinations.

38. The Investigating Authority furthermore informed the respondents of the reasons why the information submitted on costs of production could not be accepted, and granted them ample opportunity to present in writing the evidence required, in accordance with Article 6.1 and paragraph 6 of Annex II. In Egypt's view however, the provisions of Article 6.1.1 are inapplicable to requests for additional information and clarifications such as those sent by the Investigating Authority in the rebar investigation. Indeed, Article 6.1.1 concerns only the deadline to be granted for the response to questionnaires, which clearly the requests for additional information were not.

39. With respect to the claim under Article 6.7 and paragraph 7 of Annex I, Egypt considers that, contrary to Turkey's allegations, the AD Agreement does not suggest that the Investigating Authority must verify information solely through on-the-spot verification visits nor that verification visits should be preferred over other means of verification. Furthermore, the AD Agreement does not prevent the Investigating Authority from requesting the submission of additional information and documentary evidence after having carried out verification visits.

40. Lastly, the claim of violation of Article 2.4 is ill-founded since this Article, and the burden of proof requirement contained therein, only concern the issue of fair comparison between export price and normal value. In any case, it is submitted that the Investigating Authority never imposed an unreasonable burden of proof on the respondents since the data requested consisted of readily available accounting records and the clarifications required were essentially descriptive.

### **3. The decision to use partially facts available was fully justified by the respondents' failure to submit reliable costs data**

41. Contrary to Turkey's allegations, the decision to use facts available is in full compliance with Egypt's obligations under the provisions of the AD Agreement and, in particular, of the provisions of Article 6.8 and Annex II of the AD Agreement. As demonstrated in this submission, the costs data submitted by the respondents were incomplete, unsubstantiated by sufficient supporting evidence and did not demonstrate that they duly reflected the costs associated with the production and sale of rebar, in accordance with Article 2.2.1.1 of the AD Agreement. In consequence, the Investigating Authority was entitled to make its determinations on facts available in accordance with Article 6.8 and paragraph 5 of Annex II. Pursuant to paragraph 6 of Annex II, the Investigating Authority informed the respondents of the reasons why their costs data could not be accepted and gave them ample opportunity to provide further explanations. The Investigating Authority furthermore stated in the Final Report the reasons why the explanations and the information provided were not satisfactory, therefore justifying the use of facts available.

42. As explained in this submission, the claims of violation of Articles 2.2.1.1, 2.2.2 and 2.4 are redundant since they rely on the assumption that the Investigating Authority was not entitled to use facts available. They are furthermore based on the wrong premise that the Investigating Authority calculated monthly cost production and constructed normal value, whereas they were calculated for the entire investigation period. They are lastly without merit as a matter of law and would lead to absurd results in the circumstances of this case.

**4. The investigating authority used data submitted by the respondents as appropriate facts available**

43. The circumstances briefly described in points 1 and 2 above would have entitled the Investigating Authority to disregard the reported costs data altogether and to make full use of facts available for the determination of the normal value. Instead, the Investigating Authority decided to use the data submitted by the respondents as appropriate facts available. This methodology is considered to be reasonable and fair since, in spite of the poor quality of the reported costs data, the respondents were given the benefit of their own data. This is furthermore fully in line with the relevant provisions of the AD Agreement.

44. The cost of production and constructed normal value of the respondents were calculated in accordance with the above methodology. Turkey contends that the Investigating Authority violated various provisions of the AD Agreement in the reconstruction of the cost of production and normal value of Icdas, Habas, IDC and Diler. No claim is presented concerning the calculations pertaining to Colakoglu. It is explained in this submission that those claims are without any merit and must, therefore, be rejected.

**5. The disallowance of interest revenue in the reconstruction of the cost production and normal value is in line with the AD Agreement**

45. The relevant provisions of the AD Agreement make it clear that the cost of production must correspond to the costs associated to the production and sale of the product concerned, to the exclusion of any other cost item which bears no relationship to production or sale. In consequence, Egypt considers that interest income, which is generated by the financial activities of the respondents, should not be included in the computation of the cost of production. This is in line with the provisions of Article 2.2 of the AD Agreement as well as with the usual practice of other jurisdictions, such as, for instance, the United States and the European Communities.

**6. The absence of a credit cost adjustment to the reconstructed normal value does not violate the AD Agreement**

46. Turkey alleges that the Investigating Authority's denial of an adjustment for credit costs to the reconstructed normal value while such adjustment was made to the export price contravenes Article 2.4 of the AD Agreement. This claim has no merit as a matter of law. Egypt considers that, unlike actual selling prices that are negotiated between seller and buyer on the basis of, among other things, the conditions and terms surrounding the sale, the construction of the normal value produces a notional price, the level of which cannot be influenced by any conditions and terms of the relevant sales. In consequence, Egypt considers that the constructed normal value does not need to be adjusted for differences in credit terms, since such normal value is not affected by any credit terms. In any case, since all domestic sales were made at a loss, the Investigating Authority could not use any credit terms granted in the ordinary course of trade to calculate the adjustment. For the foregoing reasons, Egypt considers that the absence of an adjustment for credit costs to a reconstructed normal value is based on a permissible interpretation of Article 2.4 of the AD Agreement and should therefore be upheld by the Panel.

**7. Egypt did not contravene Article X:3 of GATT 1994 in the conduct of the rebar anti-dumping investigation**

47. Lastly, Turkey alleges that some of the actions of the Investigating Authority violated Article X:3 of GATT 1994. This claim is redundant and without any merit.

48. In Egypt's view, actions taken by an Investigating Authority in one single anti-dumping case should only be reviewed under the obligations of Article X:3 if such actions had a significant impact on the overall administration of the law, and not simply on the outcome of the single case in question. Furthermore, a conclusion that Article X:3 is violated could in any case not be reached where the actions in question are found to be consistent with more specific obligations of the applicable WTO Agreement.

## ANNEX 2-1

### FIRST ORAL STATEMENT OF TURKEY EXECUTIVE SUMMARY

1. The Government of Turkey considers that the imposition of definitive anti-dumping measures in this case is inconsistent with Articles VI and 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 of the Agreement, as well as Annex I, Paragraph 7 and Annex II paragraphs 1, 3, 5, 6 and 7.

#### I. INJURY CLAIMS

2. During the injury investigation in the Turkish rebar case, the Investigating Authority found that both domestic production and sales within Egypt *increased* during the period of investigation, capacity utilization either remained constant or increased, and the domestic industry was able *to increase* its market share. In particular, domestic sales volume increased by 46 per cent in 1997 and by 19.5 per cent in 1998. Domestic market share increased by 5.7 per cent in 1998 and by 22.9 per cent in the first quarter of 1999, as compared to 1996 levels. The principal *indicia* of injury cited in the Final Report were evidence of falling prices, significant declines in domestic industry profitability in both 1998, and the first quarter of 1999, and rising inventories.

3. It is the view of the Government of Turkey that the Investigating Authority improperly attributed the declining prices, declining profitability, and rising inventories to the effects of imports from Turkey. In this regard, the Final Report found evidence of price underselling by imports from Turkey and attributed a price decline of 1.6 per cent in 1998 and 10.8 per cent in the first quarter of 1999 to such price underselling. However, there is no “positive evidence” linking imports from Turkey to these effects. Increases in the volume of imports cannot be injurious when the domestic industry is itself increasing the volume of its sales, maintaining capacity utilization, and increasing its domestic market share. The existence of some price underselling is also insufficient positive evidence of injury causation. Positive evidence of injury causation would include evidence that purchasers considered Turkish imports to be the price leaders in the market, evidence of lost sales, or evidence that the domestic industry dropped its prices or was unable to raise prices in specific response to the prices of imports from Turkey. None of this evidence is on the record. Where there is no specific, “positive evidence” that imports caused prices to fall, the price declines could just as well have been caused by other factors, as has been claimed elsewhere by Turkey. Because Egypt failed to establish, by “positive evidence,” that imports from Turkey caused the price and profitability declines experienced by the Egyptian rebar industry, the imposition of definitive anti-dumping measures in this case was contrary to Articles 3.1 and 3.5 of the Agreement.

4. Turkey considers that the Investigating Authority failed to examine all relevant economic factors and indices having a bearing on the state of the industry in violation of Article 3.4 and that it improperly attributed to imports from Turkey the effects of other factors and conditions of competition in violation of Article 3.5. Specifically, the Investigating Authority failed to consider the adverse effects on domestic profitability and pricing produced by five factors: (a) the dramatic capacity expansion at the two major Egyptian rebar producers and its likely, temporary effects on the producers’ cost structure, as well as its effects on competition between the Egyptian producers to fill newly expanded order books; (b) 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; (c) falling prices for steel scrap, the primary raw material input into finished rebar produced

by Al Ezz; (d) a sharp contraction in domestic demand in January 1999, when prices for rebar fell; and (e) the effect of comparably priced, fairly traded imports.

5. Turkey also notes that the Investigating Authority did not evaluate all of the mandatory factors identified in Article 3.4. These factors include productivity, actual and potential negative effects on cash flow, employment, wages, growth, and ability to raise capital or investments. Furthermore, the public version of the Essential Facts and Conclusions Report provides no evidence that there was sufficient examination or evaluation of capacity, capacity utilization, or return on investment.

6. Turkey considers that Egypt failed to determine accurately whether there was price undercutting by imports of rebar from Turkey because the Investigating Authority failed to make price comparisons on a delivered-price-to-the-customer basis. The Essential Facts and Conclusions Report does not reveal the channels of distribution for domestic and imported product or where in the chain of distribution any actual price competition between imported product and domestic product takes place. Without knowing these facts, it is impossible to ascertain whether the Investigating Authority measured price competition between imported and domestic products at the correct level of trade. The Investigating Authority's findings in this regard are contrary to Articles 3.1, 3.2 and 3.5.

7. Turkey considers that the Investigating Authority violated Article 6.1 and 6.2 of the Agreement by changing the scope of its injury investigation – from an investigation solely concentrated on threat of injury to an investigation of present material injury – after the deadline for submission of factual information and comment and without adequate notice to the Turkish respondents. Failure to give this notice deprived the Turkish interested parties of their right to submit relevant information and comment on the present material injury question.

8. By investigating the existence of dumping during calendar year 1998 and relying on evidence of injury taken from the first quarter of 1999, the Investigating Authority violated Article 3.5, which requires a showing that “imports are, through the effects of the dumping, . . . causing injury with the meaning of [the] Agreement.” No linkage was shown to exist between dumping in 1998 and injury in 1999.

## **II. DETERMINATION OF DUMPING**

9. Egypt turned the normal sequence of events in an anti-dumping duty investigation on its head, and in so doing seriously prejudiced the rights and interests of the Turkish respondents. Normally, it is anticipated that the anti-dumping duty questionnaire will contain all basic questions setting forth the format in which home market sales and costs of production will be reported as well as requesting all basic documentary support for such costs that must be submitted outside of the on-the-spot investigation. Furthermore, such questionnaires must be sent out as soon as possible after initiation of the investigation.

10. In the Egyptian rebar investigation, more than a month after the verification took place, more than four months after the questionnaire responses were filed, and when, in the Investigating Authority's own words, the end of its investigation was “near”, the Investigating Authority suddenly issued a long, supplemental cost questionnaire that was, in fact, an entirely new and much more complex cost questionnaire. Much of the data requested was basic preliminary data that should have been requested either in the original questionnaire or at verification. Moreover, the Investigating Authority required that the respondents provide substantial new cost information. And then, instead of extending its investigation in order to conduct a new cost verification, the Investigating authority asked respondents to do the impossible – to respond to a substantially expanded and more complex cost questionnaire than was contained in its original questionnaire and to submit tables and charts tying each aspect of cost and sales responses to their books and records, together with adequate source

documentation to verify each and every sales price and cost. All of the source documentation was, of course, supposed to be fully translated, organized, explained and tied together in English so that the Egyptian authorities could follow the trace from the response to the books. Literally thousands of pages would have had to have been translated, organized and explained in order to respond fully to the questionnaire.

11. As explained by three of the Turkish respondents at the time, this attempt at a “long-range” or “mail order” verification was doomed to failure from the start. In fact, given the tone, content and deadline set by the 19 August letter, the fact that nearly identical letters were sent to each of the five respondents notwithstanding the absence of evidence that they had coordinated their responses, the timing of this letter just 24 hours after a major earthquake hit Turkey and the absurd deadline imposed for a response, it seems that Egypt hoped and expected that respondents would be unable to respond providing a pretext for a final determination with margins based on “facts available”.

12. By failing to request the basic cost data identified in its 19 August letter in its original questionnaire, the Egyptian Authorities violated Paragraph 1 of Annex II of the Agreement. By waiting until after the verification to raise these issues and then insisting that respondents provide full “mail order” verification of their previously submitted cost responses and the new information that the Investigating Authority for the first time requested on August 19, Egypt seriously prejudiced the rights of respondents and their ability to provide the data required in violation of Paragraph 6 of Annex II. Egypt also imposed “an unreasonable burden of proof” on respondents in violation of Article 2.4 of the Agreement.

13. This prejudice was compounded by the absurd deadlines imposed for responses to the Investigating Authority’s 19 August 1999 and 23 September 1999 questionnaires. The deadline of 13 days in which to respond to the 19 August questionnaire was plainly inadequate in the best of circumstances in light of the expansive new requests for information and for self-verification that that questionnaire contained. It was utterly devoid of consideration for the actual circumstances respondents faced in light of the massive earthquake that hit Istanbul the day before.

14. Respondents reasonably requested extensions to 11 October 1999 and 22 October 1999 in which to respond to this questionnaire. But the Investigating Authority granted an extension only to 15 September 1999, just 27 days after the questionnaire was issued. Failure to provide a full 37 days in which to respond to this questionnaire, and failure to grant respondents’ reasonable requests for extension of the initial 37-day deadline violated Article 6.1.1. In the alternative, these actions violated Article 6.2 and Annex II, paragraph 6.

15. On 23 September 1999, the Investigating Authority, for the first time, required of these companies a break-down of all costs to produce billet, supplied on a monthly basis. The Investigating Authority also demanded that these three companies translate each and every page of the hundreds of pages of documentation that they were required to provide in their 15 September responses. The period given for a response to this questionnaire, just two to five days, was manifestly inadequate and contrary to Articles 6.1.1 and 6.2 of the Agreement, as well as Annex II, paragraph 6.

16. After receiving the Investigating Authority’s letter of 23 September 1999, Colakoglu, Diler and Habas requested a hearing during which they could explain how the information submitted in their 15 September 1999 responses replied to the Investigating Authority’s information requests. The denial of this request violated Article 6.2, which provides, *inter alia*, that “[i]nterested parties shall . . . have the right . . . to present . . . information orally.” Icdas requested a hearing as soon as it reviewed the Essential Facts and Conclusions Report. The denial of this request also violated Article 6.2.

17. The Investigating Authority's rationale for requesting additional cost data after the verification was that respondents' costs and prices for rebar did not increase as the Investigating Authority had anticipated given high inflation in Turkey. However, this reasoning was purely speculative. The only support for the Investigating 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 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.

18. Respondents showed in their responses, filed on 15 September 1999, that the Investigating Authority was incorrect in assuming that constant, slightly declining or slightly increasing costs meant that there was something missing from respondents' reported costs of production. Specifically, respondents showed that their scrap prices declined by 30 per cent-40 per cent in dollar terms during 1998. The TL was also devaluing against the dollar during this period. However, where the constant currency cost declines by this much, the cost in TL could decline as well, or stay stable, or rise only a bit, but by much less than inflation.

19. Moreover, respondents explained that labour contracts are renegotiated once per year, such that one would not expect changes in the unit labour cost throughout the year all other things being equal. What causes unit labour costs to rise and fall in these circumstances are changes in the volume of production. Similarly, in the case of depreciation expenses, respondents showed that the expense is adjusted at year-end for inflation. Some companies used the year-end total depreciation to calculate their monthly depreciation costs. Other companies used their monthly values but explained that annual inflation is predicted at the beginning of the year and included in the monthly depreciation expenses in the companies' books. Therefore, while 1998 depreciation costs were certainly higher than 1997's, all other things being equal, the unit depreciation expense would not vary from month to month during 1998. Finally, the Government of Turkey provided official import statistics showing that inflation did not increase at 5 per cent month as had been assumed by the Investigating Authority. During many months, including the May-August 1998 period, inflation did not exceed 2.5 per cent *per annum*. Thus, in the context of this industry, it is not at all surprising that neither costs nor home market prices increased at 5 per cent per month.

20. The Investigating Authority's findings that respondents' costs did not include the effects of inflation, which the Investigating Authority put at 5 per cent per month, were contrary to all of the facts on the record. For this reason, the Investigating Authority's determination of the facts was not "proper," nor was its evaluation of the facts objective and unbiased. (See Article 17.6 (i)). Furthermore, resort to facts available was unjustified under Article 6.8 and 2.4 of the Agreement.

21. The Investigating Authority sought to characterize the Colakoglu's, Habas's and Diler's responses to the 19 August and 23 September letters as a "refusal" to provide necessary information. However, given the enormous amounts of information and analysis requested and the limited amount of time provided for a response, the voluminous responses provided, and the respondents' expressed willingness to come to Cairo to explain the information submitted, this panel should conclude that each respondent, at a minimum, "acted to the best of its ability". Accordingly, resort to facts available violated paragraph 5 of Annex II. Furthermore, if the responses received by the Investigating Authority from IDC and Icdas were considered inadequate, it was incumbent upon the Investigating Authority to notify these companies that additional information or explanations were required. No such notice was ever provided. See Annex II, paragraph 6.

22. As noted in our submission at page 9, because the Investigating Authority's resort to Facts Available was not justified, the final determination was not compliant with Articles 2.2.1.1, 2.2.2 or 2.4.

23. The facts available used to calculate respondents' costs were severely distorted and inconsistent with other reliable information in the record in violation of Annex II, paragraph 3.

24. The failure to deduct short-term interest income from interest expense violates Articles 2.2.1.1 and 2.2.2 of the agreement. Turkish respondents' financial statements were prepared in accordance with generally accepted accounting practices in Turkey. There is a separation in respondents' financial statements between operating income and non-operating income. Operating expense and income is expense and income that relates directly to the companies' core operations involving the production and sale of rebar. Short-term interest income is fungible and it is classified as operating income in the companies' financial statements. Therefore, as a matter of generally accepted accounting principles, such income is related to the production and sale of the product under investigation.

25. The failure to make an adjustment to normal value for differences in credit terms violates Article 2.4 of the Agreement. The credit cost adjustment claimed by respondents is normally granted by the United States, EU, Canada, Chile and Australia. Such adjustments are made both to the normal value and the constructed normal value.

## ANNEX 2-2

### FIRST ORAL STATEMENT OF EGYPT EXECUTIVE SUMMARY

#### I. INTRODUCTION & SCOPE OF REVIEW

1. A number of claims have been raised by Turkey under Articles 2, 3, 6, and Annexes I & II of the AD Agreement, together with Article X:3 of GATT 1994. In response, Egypt submits that it applied the definitive measures on rebar from Turkey pursuant to an investigation that was initiated and conducted in accordance with Egypt's rights and obligations as required under the relevant provisions of the Anti-dumping Agreement and the GATT 1994.

2. Most of Turkey's claims rely on a different interpretation of the factual circumstances of the rebar investigation; however, this is not sufficient to demonstrate the existence of a violation under the AD Agreement. Facts may be evaluated in different ways. What matters under Article 17.6 of the AD Agreement is whether the establishment of the facts by the Investigating Authority was unbiased and objective and whether its determinations are based on a permissible interpretation of the applicable provisions of the AD Agreement. Also of key importance under Article 17.5(ii) is that when reviewing the Investigating Authority's determinations, the Panel must only consider facts made available to the Investigating Authority during the course of the investigation.

#### II. INJURY

##### A. CAUSATION

3. Turkey has failed to demonstrate that Egypt's application of Article 3.5 of the AD Agreement was incorrect. Turkey's case appears to be based upon a fundamental misconception under the AD Agreement that dumping must be the sole cause of injury. Since the conclusion of the Tokyo Round, however, it is not even required that dumping be the principle cause of injury.

4. During the course of the investigation, Egypt was careful to distinguish and to separate factors other than the dumped imports that may have contributed to the injury experienced by the domestic industry. The Investigating Authority considered all evidence that was provided by interested parties, including any "known factors" other than the dumped imports likely to cause injury to the domestic industry. On the basis of this examination, the Investigating Authority 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. To the contrary, the Investigating Authority found that the volume and price of dumped imports had a direct impact upon the domestic rebar industry in terms of price, profitability and inventories.

5. There is no express requirement in Article 3.5 that investigating authorities seek out and examine in each case on their own initiative the effects of all possible factors other than imports that may be causing injury (*Thailand – Steel*, Panel at 7.273). The Agreement does not require that Egypt examine whether specific sales were lost by the domestic industry to imports from Turkey or whether domestic manufacturers lowered their prices specifically in response to competing offers by suppliers of Turkish rebar. While consideration of the prices of non-dumped imports from third countries may be relevant in the establishment of a causal link under Article 3.5, nowhere in the Agreement is there the requirement to consider whether the Turkish imports were acting as the price leaders in the

market. In any event, as detailed in Egypt's First Submission, the Investigating Authority was careful to consider the effects of third country imports, including those of Saudi Arabia and Libya, both in terms of volume and price, upon the domestic industry.

6. Consideration of contraction in demand or changes in the patterns of consumption is not mandatory under Article 3.5 unless relevant to the Investigating Authority's determination of a causal relationship. Article 3.5 of the AD Agreement therefore does not, as alleged by Turkey, impose any obligation on the Investigating Authority to investigate "whether there was a supply-demand gap that could not be filled by domestic production". The Panel should note, however, that (a) demand in the Egyptian market was considered by the Investigating Authority and found to have increased; and (b) the injury incurred to the domestic industry was not in the form of lost sales. Indeed, in the *Submission of Turkish Respondents Concerning Threat of Injury* (attached as TUR – 18), the respondents point to the fact that demand is, in fact, increasing.

7. As to the declining cost of raw materials, the Investigating Authority considered the evidence and found that it did not prevent the domestic industry from suffering losses. Given that the injury to the domestic industry included a decline of profit, the falling cost of raw materials is even more poignant to the establishment of the causal relationship between the dumping and the injury that occurred to the domestic industry.

8. Turkey alleges that the Investigating Authority failed to investigate the capacity expansion of domestic rebar producers. This is incorrect: the capacity expansion of the domestic industry was considered by the Investigating Authority during the course of the investigation as required under Article 3.4. The Investigating Authority also examined whether there was any increased competition in the domestic industry as a result of capacity expansion any found that it was not a factor that was relevant to the establishment of a causal relationship under Article 3.5. The capacity expansion was not, however, a factor that was known to be contributing to the injury. Indeed, the capacity expansion of the Egyptian industry was presented by the respondents as an economic factor demonstrating the absence of any injury to the domestic industry.

9. As demonstrated in Egypt's First Submission, the invocation by Turkey of Article 3.4 to matters pertaining to the examination of a causal link under Article 3.5, is legally incorrect. Turkey is alleging that Egypt improperly attributed the injury (i.e. falling prices and a decrease in profitability) to imports from Turkey. According to Turkey, the injury was "produced", that is to say that it was caused, by factors other than the dumped imports, such as increased domestic capacity and domestic competition, a decline in the price of raw materials and domestic demand, and the effect of non-dumped imports. The examination of injury differs from that of a causal link. The injury analysis under Article 3.4 does not involve an examination of other potential factors contributing to injury, which is the sole prerogative of Article 3.5.

10. In any event, Turkey has provided neither the legal argumentation nor the evidence to support a claim under Article 3.4. It is not sufficient for Turkey to simply allege, without more, any particular violation under the AD Agreement. Turkey must present a *prima facie* case of inconsistency. To this end, Turkey has failed.

## B. METHOD AND INTERPRETATION OF DATA

### 1. Price undercutting

11. Turkey alleges that, by comparing domestic prices and imported prices on a basis that would be neither truly comparable nor at the appropriate level of trade, the Investigating Authority's finding of price undercutting was based on a flawed price comparison in violation of Articles 3.1, 3.2 and 3.5 of the Agreement. This is wrong: the level of trade that the Investigating Authority considered

appropriate in this context is the ex-factory price for the local industry and ex-importer's store levels for the dumped imports, which are two perfectly comparable prices for the determination of price undercutting. Turkey, on the other hand, would prefer that the comparison take place on a delivered-price basis. There is, however, no legal foundation on which to base this claim. In addition, such a comparison would ignore the fact that importers and exporters do not sell on a delivered basis.

## **2. Sales and prices**

12. By alleging that the Investigating Authority misinterpreted certain data with respect to sales and prices, Turkey is in fact challenging the Investigating Authority's evaluation of that data. We will recall that Article 17.6(i) makes it very clear that the task of the Panel is solely to assess whether the Investigating Authority's establishment of the facts was proper and the evaluation thereof unbiased and objective. If affirmative, the evaluation cannot be overturned, even if the Panel might have reached a different conclusion. In any event, Turkey has not alleged any particular violation of the AD Agreement and thus there is no legal basis whatsoever to support this claim.

## **3. Period of time established**

13. Turkey is of the opinion that, because dumping occurred in 1998, and the injury to the domestic industry in 1999, Egypt failed to show that the imports were, through the effects of dumping, causing injury to the domestic industry in violation of Articles 3.1 and 3.5. Contrary to Turkey's allegation, however, the injury to the domestic industry took place in 1998 and Q1-1999. Moreover, the AD Agreement does not require that any specific period of time be established for the purpose of data collection with regard to the investigations of dumping and of injury. As noted in Egypt's First Submission, the period of data collection for dumping and injury is consistent with the *Recommendation of the Committee on Anti-Dumping Practices Concerning the Periods of Data Collection for Anti-Dumping Investigations* adopted 5 May 2000. Indeed, the period of data collection for injury, which examined the period of 1997 to Q1-1999, included the full period of data collection established by the Investigating Authority for dumping, which covered 1998.

## **4. Scope of the Investigation**

14. Turkey claims that, by failing to give notice of the change in the scope of the investigation from threat of material to present material injury, the Investigating Authority violated Articles 6.1 and 6.2 of the AD Agreement. However, no 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 (*Guatemala – Cement II*, Panel at 8.237).

## **III. DUMPING**

15. The Investigating Authority made numerous attempts to obtain the requisite information from the respondents, but was met with insufficient co-operation and unreliable data. As a consequence, the Investigating Authority had no other alternative but to base its determinations on the information at its disposal.

### **A. REQUESTS FOR ADDITIONAL INFORMATION**

16. Contrary to Turkey's allegations, the letters of 19 August 1999 did not constitute "a long, supplemental cost questionnaire that was, in fact, an entirely new cost questionnaire". The Investigating Authority's requests for additional information on cost of production of rebar were sent as a result of two facts. First, all respondents with the exception of IDC had submitted incomplete and partial replies to the section of the Manufacturers' Questionnaire concerning cost of production,

and second, the reported costs data were inconsistent with the hyperinflation experienced by Egypt during the investigation period.

17. In Egypt's view, the letter of 19 August 1999 is consistent with the provisions of Articles 2.4, 6.1, 6.1.1, 6.2, 6.6 and 6.7 as well as with paragraph 7 of Annex I and paragraphs 1 and 6 of Annex II of the AD Agreement.

18. The Investigating Authority complied with paragraph 1 of Annex II when it sent to each respondent in February 1999 a Manufacturers' Questionnaire specifying the information required and the manner in which the information should be structured. The Questionnaire also drew the attention of the respondents to the fact that the Investigating Authority could make determinations on the basis of facts available if the required information was not supplied in a reasonable period of time. The same level of assistance was provided in all subsequent requests for additional information. Compliance with Article 6.1 is evident since the purpose of the requests for additional information was precisely to give notice to the interested parties of the information which the Investigating Authority required to make its determinations. The Investigating Authority did not contravene Article 6.2. This Article is irrelevant to the requests for additional information since it only concerns the submission of oral information. The requests for additional information were sent in accordance with Article 6.6 which entitles, and in fact obliges, the Investigating Authority to satisfy itself as to the accuracy of the information used as a basis for its determinations. The Investigating Authority furthermore informed the respondents of the reasons why the information submitted on costs of production could not be accepted, and granted them ample opportunity to present in writing the evidence required, in accordance with Article 6.1 and paragraph 6 of Annex II. In Egypt's view, however, Article 6.1.1 is not applicable as it relates solely to the deadline to be granted for the response to questionnaires, which clearly the requests for additional information were not. With respect to the claim under Article 6.7 and paragraph 7 of Annex I, Egypt considers that, contrary to Turkey's allegations, the AD Agreement does not suggest that the Investigating Authority must verify information solely through on-the-spot verification visits nor that verification visits should be preferred over other means of verification. Furthermore, the AD Agreement does not prevent the Investigating Authority from requesting the submission of additional information and documentary evidence after having carried out verification visits.

19. Lastly, the claim of violation of Article 2.4 is ill-founded since this Article, and the burden of proof requirement contained therein, only concern the issue of fair comparison between export price and normal value.

#### B. THE USE OF PARTIALLY FACTS AVAILABLE WAS FULLY JUSTIFIED

20. Contrary to Turkey's allegations, the decision to use facts available is in full compliance with Egypt's obligations under the relevant provisions of the AD Agreement. The costs data submitted by the respondents were incomplete, unsubstantiated by sufficient supporting evidence and did not demonstrate that they duly reflected the costs associated with the production and sale of rebar, in accordance with Article 2.2.1.1 of the AD Agreement. In consequence, the Investigating Authority was entitled to make its determinations on facts available in accordance with Article 6.8 and paragraph 5 of Annex II. Pursuant to paragraph 6 of Annex II, the Investigating Authority informed the respondents of the reasons why their costs data could not be accepted and gave them ample opportunity to provide further explanations. The Investigating Authority furthermore stated in the Final Report the reasons why the explanations and the information provided were not satisfactory, therefore justifying the use of facts available. It was furthermore demonstrated that the claims of violation of Articles 2.2.1.1, 2.2.2 and 2.4 are redundant.

### C. DATA SUBMITTED BY THE RESPONDENTS

21. The Investigating Authority decided to use the data submitted by the respondents as appropriate facts available. This methodology is considered to be reasonable and fair since, in spite of the poor quality of the reported costs data, the respondents were given the benefit of their own data. The cost of production and constructed normal value of the respondents were calculated in accordance with the above methodology. Turkey contends that the Investigating Authority violated various provisions of the AD Agreement in the reconstruction of the cost of production and normal value of Icdas, Habas, IDC and Diler. No claim is presented concerning the calculations pertaining to Colakoglu. It was explained that those claims are without any merit and must, therefore, be rejected.

### D. DISALLOWANCE OF INTEREST REVENUE

22. Egypt considers that interest income, which is generated by the financial activities of the respondents, should not be included in the computation of the cost of production. This is in line with the provisions of Article 2.2 of the AD Agreement as well as with the usual practice of other jurisdictions, such as the United States and the European Communities.

### E. ABSENCE OF A CREDIT COST ADJUSTMENT

23. Egypt considers that, unlike actual selling prices that are negotiated between seller and buyer on the basis of, among other things, the conditions and terms surrounding the sale, the construction of the normal value produces a notional price, the level of which cannot be influenced by any conditions and terms of the relevant sales. As such, Egypt considers that the constructed normal value does not need to be adjusted for differences in credit terms, since such normal value is not affected by any credit terms. In any case, since all domestic sales were made at a loss, the Investigating Authority could not use any credit terms granted in the ordinary course of trade to calculate the adjustment. For the foregoing reasons, Egypt considers that the absence of an adjustment for credit costs to a reconstructed normal value is based on a permissible interpretation of Article 2.4 of the AD Agreement and should therefore be upheld by the Panel.

### F. ARTICLE X:3 OF GATT 1994

24. In Egypt's view, actions taken by an Investigating Authority in one single anti-dumping case should only be reviewed under the obligations of Article X:3 if such actions had a significant impact on the overall administration of the law, and not simply on the outcome of the single case in question. Furthermore, a conclusion that Article X:3 is violated could in any case not be reached where the actions in question are found to be consistent with more specific obligations of the applicable WTO Agreement.

## ANNEX 3

### RESTATEMENT BY TURKEY OF ITS CLAIMS IN RESPONSE TO A REQUEST FROM THE PANEL

#### I. INJURY CLAIMS

##### A. ARTICLE 3.1

1. According to the Appellate Body, the phrase “positive evidence”, as used in Article 3.1, means “the evidence must be of an affirmative, objective and verifiable character, and that it must be credible”.<sup>1</sup>

#### 1. Failure to Develop Specific Evidence Linking Imports to Adverse Volume and Price Effects Upon the Domestic Industry

2. As noted in the Executive Summary of the Statement of Turkey at the First Substantive Meeting (paras. 1 & 2), the principal *indicia* of injury relied upon by Egypt for its affirmative injury determination was falling prices and profitability in 1998 and 1999. In this connection, the Final Report attributed the price decline to price underselling by imports from Turkey. Turkey claims that Egypt violated Article 3.1 by failing to develop “positive evidence” that dumped imports had an effect on domestic prices or, indeed, that dumped imports had any impact on the domestic industry.

3. The mere existence of increases in the volume of allegedly dumped imports is insufficient evidence of an injurious impact on the domestic industry where the domestic industry is substantially increasing the volume of its own sales, and experiencing strong increases in market share. The existence of some price underselling is also insufficient “positive evidence” of injury causation. Without something more, the Investigating Authority “may mistake a coincidence in time for a causal relationship”.<sup>2</sup>

4. “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, the availability of rebar from Turkey at lower prices. None of this evidence was developed by the Investigating Authority. Indeed, there is no “positive evidence” on the administrative record that there was any head-to-head competition between imports and the domestic industry.

#### 2. Failure To Make a Proper Determination of Price Undercutting

5. Egypt also failed to make a proper determination of price undercutting. (See Section D below and First Submission of Turkey at III.G.). By failing to establish properly that imports from Turkey were priced below comparable sales prices charged by the domestic industry, the Investigating Authority failed to develop “positive evidence” of, and failed to undertake an “objective examination” of the “effect of the dumped imports on prices in the domestic market” in violation of Article 3.1.

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<sup>1</sup> *Hot Rolled Carbon Steel Products from Japan* at 192.

<sup>2</sup> *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS 184/R, 28 Feb. 2001, at para 7.252.

**3. Failure To Link the Imports Which Were Specifically Found To Be Dumped to the Injury**

6. Egypt 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. This was a violation both of Article 3.5 (see Section C below and First Submission of Turkey at III.J) and of Article 3.1.

7. During its investigation, the Investigating Authority found most of the injury upon which it relied for its affirmative injury determination in the first quarter of 1999. Specifically, the largest price and profitability declines occurred during that period. But the Investigating Authority made no findings that imports were sold at less than normal value during that period and there is no evidence or reasoning that would link the injury found in 1999 to the dumped imports in 1998. By failing to establish such a linkage, the Investigating Authority failed to develop “positive evidence” linking “the effect of the dumped imports on prices in the domestic market for like products”. The Investigating Authority also failed to develop “positive evidence” linking the imports which were dumped to the “impact of these imports on domestic producers of such products”. In both respects, the Investigating Authority violated Article 3.1.

**B. ARTICLE 3.4**

**1. Failure to Examine “All Relevant Economic Factors and Indices Having a Bearing on the State of the Industry,” Affecting “Profits” and “Affecting Domestic Prices”**

8. The Investigating Authority failed to “evaluate[] . . . all relevant economic factors and indices having a bearing on the state of the industry”, including all relevant economic factors and indices “affecting domestic prices”. Specifically, the Investigating Authority failed to examine, or failed to examine adequately, the following factors which had a direct bearing on the state of the domestic industry:

- (a) The dramatic capacity expansion at the two major Egyptian rebar producers and its likely temporary effects on their cost structures;
- (b) The effect 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; and
- (f) The effect of comparably priced, fairly traded imports.<sup>3</sup>

9. Factor (a) has a bearing on the costs of production experienced by the domestic industry. It is, therefore, a “relevant factor[] or indice[] having a bearing on the state of the industry”. It is also a

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<sup>3</sup> See First Submission of Turkey at III.B, III.C, III.D, III.E.

factor that affects the domestic industry's profits. "[P]rofit[]" is a factor specifically mentioned in Article 3.4.

10. Factors (b)-(e) are factors "affecting domestic prices", yet they were either not mentioned in the Final Report or their effects on domestic prices were not examined by the Investigating Authority or were not given any weight in the Authority's analysis of why prices fell. While the Investigating Authority noted that falling raw material prices should increase profits, rather than vice-versa, the Investigating Authority failed to consider that falling scrap prices affected only Al Ezz, and not Alexandria National, and that the increase in Al Ezz's cost advantages might have allowed it to reduce prices and gain market share from Alexandria National without sacrificing profitability. Al Ezz's growing cost advantages and growing market share must have been evident in the cost data received by the Investigating Authority.

11. Factor (f) may or may not have had an effect on domestic prices. However, given that there were comparably priced non-subject imports in the market at the same time as imports from Turkey, and there was no support for a finding that imports from Turkey had materially different effects on domestic prices than imports from other sources, the Investigating Authority's finding that imports from Turkey caused price declines, while imports from other sources did not, is inconsistent at least.

## **2. Failure to Examine Factors Specifically Listed in Article 3.4**

12. Moreover, the Investigating Authority did not evaluate all of the factors specifically listed in Article 3.4. These factors include productivity, actual and potential negative effects on cash flow, employment, wages, growth, and ability to raise capital or investments.<sup>4</sup>

13. As held by the Panel in *European Communities – Anti-dumping duties on Imports of Cotton-Type Bed Linen from India*, the list of factors enumerated in Article 3.4 of the Agreement "must be evaluated by the investigating authorities in each case in examining the impact of the dumped imports on the industry concerned".<sup>5</sup> While the investigating authority may determine that some of the Article 3.4 factors are not relevant in a particular case, it may not disregard those factors, and must explain the lack of relevance such that its objective consideration of all factors is apparent in the final determination.<sup>6</sup> Egypt failed to meet that requirement in this case.

## **3. Failure of the Public Final Report to Disclose Adequate Examination of Certain Factors Listed in Article 3.4**

14. The public version of the Essential Facts and Conclusions Report provides no evidence that there was a sufficient examination or evaluation of capacity utilization or return on investment. This also violated Article 3.4 because the record does not permit the Panel to discern an objective and complete consideration of these factors.<sup>7</sup>

### **C. ARTICLE 3.5**

#### **1. Absence of Positive Evidence That Imports Were Having an Adverse Volume or Price Effect on the Domestic Industry**

15. The absence of any positive evidence that imports were having an adverse volume or price effect on the domestic industry, as discussed in Section I.A above in connection with the violation of

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<sup>4</sup> Statement by Turkey at the First Substantive Session at 12.

<sup>5</sup> WT/DS141/R, 30 Oct. 2000 at para. 6.159

<sup>6</sup> *Id.* at para 6.162.

<sup>7</sup> *Id.*

Article 3.1, also represents a violation of Article 3.5. By failing to develop “positive evidence” that imports were having a volume or price effect on the domestic industry, the Investigating Authority also failed to demonstrate “a causal relationship between the dumped imports and the injury to the domestic industry” as required in Article 3.5.<sup>8</sup>

## **2. Failure to Separate and Distinguish the Effects of Known Factors Other Than Imports Which Were, or May Have Been, Causing Injury to the Domestic Industry**

16. The factors listed above in Section I.B were “known factors other than the dumped imports which at the same time” were, or may have been, causing injury to the domestic industry. The failure to “appropriately separate[] and distinguish[]” the effects of those factors from the effects of the dumped imports violated Article 3.5.<sup>9</sup> This failure resulted in improper attribution of the effects of those factors to imports from Turkey.<sup>10</sup>

## **3. Failure to Demonstrate that the Imports Caused Injury to the Domestic Industry “Through the Effects of the Dumping” Found**

17. As discussed above in connection with Article 3.1, Egypt 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. This was a violation both of Article 3.1 (see Section I.A above and First Submission of Turkey at III.J) and of Article 3.5.

18. During its investigation, the Investigating Authority found most of the injury upon which it relied for its affirmative injury determination in the first quarter of 1999. Specifically, the largest price and profitability declines occurred during that period. But the Investigating Authority made no findings that imports were sold at less than normal value during that period and there is no evidence or reasoning that would link the injury found in 1999 to the dumped imports in 1998. By failing to establish such a linkage, the Investigating Authority failed to demonstrate “that the dumped imports are, *through the effects of the dumping*, . . . causing injury within the meaning of this Agreement”, as required by Article 3.5.

19. Whatever else this clause may mean, it must mean that the injury must be found to have been caused by imports which have been shown to have been dumped, *i.e.*, sold at less than normal value. While there was a finding of dumping with respect to imports from Turkey in 1998, there was no comparable finding with respect to imports in 1999. Nor was there any information or analysis in the Final Determination linking imports in 1998 with the injurious impacts to the domestic industry found in the first quarter of 1999. Therefore, the Investigating Authority failed to meet the requirements of Article 3.5, first sentence.

## **D. ARTICLE 3.2**

20. Egypt failed to determine accurately whether there was price undercutting by imports of rebar from Turkey because the Investigating Authority failed to make price comparisons on a delivered-to-

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<sup>8</sup> See First Submission of Turkey at III.A.

<sup>9</sup> “In order that the investigating authorities, applying 3.5, are able to ensure that the injurious effects of the other known factors are not ‘attributed’ to dumped imports, they must appropriately assess the injurious effects of those other factors. Logically, such an assessment must involve separating and distinguishing the injurious effects of other factors from the injurious effects of the dumped imports. If the injurious effects of the dumped imports are not appropriately separated and distinguished from the injurious effects of other factors, the authorities will be unable to conclude that the injury they ascribe to the dumped imports is actually caused by those imports, rather than by other factors.” *Hot-Rolled Carbon Steel Products from Japan*, at para. 223.

<sup>10</sup> See First Submission of Turkey at III.B, III.C, III.D, III.E, and III.F.

the-customer basis. 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 the imported product and the domestic product takes place. Without knowing these facts, it is impossible to ascertain whether the Investigating Authority measured price competition between the imported and domestic products at the correct level of trade.

21. If, for example, the manufacturer sells directly to end users and the importers sell to middlemen who then sell to end users, the real competition is at the end user level. The importer's price to the middle man will have no effect on the domestic producer's price if the middleman mark-up is greater than the difference between the importer's price to the middleman and the producer's price to the end-user. Price undercutting, in this situation, must be measured at the end-user level where there is direct competition between the price of the imported rebar and the price of the domestic rebar.

22. Similarly, if the domestic manufacturer and the importer sell on a delivered basis, comparison of domestic and import prices on an ex-factory basis will mask differences in transportation costs that are included in the price to the customer and that affect price comparability. Because the Final Report does not disclose whether price comparisons were made on an appropriate basis, Egypt failed to make a proper determination that import prices were undercutting domestic prices, in violation of Article 3.2 ("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 in the importing country . . . .")

#### E. ARTICLES 6.1 AND 6.2

23. Article 6.1 of the Agreement provides that "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." Article 6.2 provides: "Throughout the anti-dumping investigation, all interested parties shall have a full opportunity for the defence of their interests."

24. Turkey considers that Egypt violated Articles 6.1 and 6.2 of the Agreement by changing the scope of its injury investigation – from an investigation solely concentrated on threat of injury to an investigation of present material injury – after the deadline for submission of factual information and comment and without adequate notice to the Turkish respondents. Failure to give this notice deprived the Turkish respondents of their right to submit relevant information and comment on the present material injury question. It also deprived them of their fundamental due process right to know what allegations were being lodged against them at the time that they were called upon to submit information and comment.

25. The Investigating Authority clearly indicated in its Initiation Report that the allegations received from the domestic industry were allegations of threatened material injury only. Under "Other Causes of Injury", for example, the Initiation Report states that "[t]he industry indicated that there were no other causes of a threat of injury other than the allegedly dumped imports. Therefore, the Investigating Authority did not consider other factors that are likely to threaten to cause material injury".<sup>11</sup> The Investigating Authority did consider it necessary to mention that there were no causes of current injury, other than the allegedly dumped imports, no doubt because the allegations of injury contained in the domestic industry's application were limited to allegations of threat of injury. In its questionnaires to the Turkish interested parties, the Investigating Authority also stated that "[t]he application by the Egyptian industry for an investigation was based on threat of material injury resulting from importation of the allegedly dumped goods from Turkey. Therefore, the Department

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<sup>11</sup> TUR-1 at 19.

must examine whether the Egyptian industry is likely to suffer material injury in the near future if the dumped imports continue.”<sup>12</sup>

26. Later in the investigation, after the time for submitting factual information and argument on the injury question had passed, the Investigating Authority changed the scope of its investigation in order to examine the present material injury question. By failing to give adequate notice of the change in the scope of its investigation and by failing to give the Turkish interested parties an adequate opportunity to submit information and comment on this issue, the Investigating Authority violated Articles 6.1 and 6.2.

## II. CLAIMS REGARDING DETERMINATION OF DUMPING

A. ANNEX II, PARAGRAPH 1; ANNEX II, PARAGRAPH 6; ARTICLE 6.7; ANNEX 1, PARAGRAPH 7

27. Egypt turned the normal sequence of events in an anti-dumping duty investigation on its head in this case, and in so doing seriously prejudiced the rights and interests of the Turkish respondents.

28. Normally, it is anticipated that the anti-dumping duty questionnaire will contain all basic questions setting forth the format in which home market sales and costs of production will be reported as well as requesting all basic documentary support for such costs that must be submitted outside of the on-the-spot investigation. Furthermore, such questionnaires must be sent out as soon as possible after initiation of the investigation. Thus, paragraph 1 of Annex II to the Anti-Dumping Agreement states:

*"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 way in which that information should be structured by the interested party in its response."*

29. The Investigating Authority also has an obligation to examine the responses to that questionnaire closely and to inform the respondents promptly if it has rejected any part of that information or if supplemental information is required. Thus, paragraph 6 to Annex II to the Anti-Dumping Agreement states:

*"If evidence or information is not accepted, the supplying party shall be informed forthwith of the reasons thereof and have an opportunity to provide further explanations within a reasonable period . . ."*

30. Following this step, an on-the-spot verification may be scheduled at respondents' place of business. See Article 6.7 and Annex I. The purpose of the verification is to check the information reported in the responses to the company's books and records in order to determine its accuracy. Once the verification is completed, the factual record of the investigation is ordinarily closed. According to Paragraph 7 of Annex I, "[a]s the main purpose of the on-the-spot verification is to verify the information provided or to obtain further details, it should be carried out after the response to the questionnaire has been received". Further, paragraph 8 of Annex I provides that "[e]nquiries or questions put by the authorities . . . and essential to a successful on-the-spot investigation should, whenever possible, be answered before the visit is made".

31. In the Egyptian rebar investigation, the anti-dumping duty questionnaire was issued to each of the six Turkish exporters and each of the exporters, with the exception of Ekinciler's supplier,

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<sup>12</sup> TUR-2 at 9.

responded in full to that questionnaire. The cost questionnaire contained in the original questionnaire was a relatively simple one, requesting just one figure for all raw materials costs and failing to specify the period over which costs should be reported. Respondents were directed to report home market sales as near as possible at the same time as their sales to Egypt, and given the hyperinflationary character of the Turkish economy and common practice in other jurisdictions, the Turkish respondents reported their monthly costs of production for the same months in which they reported home market sales.

32. The responses to the original questionnaire filed by Colakoglu, Diler, Habas, Icdas and IDC were found to be complete by the Investigating Authority and no supplemental questionnaire was issued prior to verification. Verification was conducted and it found no discrepancies between the reported information and the companies' books and records. Preliminary margin calculations were made as to each of respondents' export sales to Egypt and they found margins ranging from zero to 4.17 per cent.

33. Then, more than a month after the verification took place, more than four months after the questionnaire responses were filed, and when, in the Investigating Authority's own words, the end of its investigation was "near", the Investigating Authority suddenly issued a long, supplemental cost questionnaire that was, in fact, an entirely new and much more complex cost questionnaire. Much of the data requested was basic preliminary data that might be used to evaluate a cost response but which should have been requested either in the original questionnaire or at verification.

34. Moreover, the Investigating Authority required that the respondents provide substantial new basic cost information by requiring that monthly cost data be provided not only for the months during which sales were made to Egypt but for all other months as well. And then, instead of extending its investigation in order to conduct a new cost verification, the Investigating authority asked respondents to do the impossible – to respond to a substantially expanded and more complex cost questionnaire than was contained in its original questionnaire and to submit tables and charts tying each aspect of cost and sales responses to their books and records, together with adequate source documentation to verify each and every sales price and cost. All of the source documentation was, of course, supposed to be fully translated, organized, explained and tied together in English so that the Egyptian authorities could follow the trace from the response to the books. Literally thousands of pages would have had to have been translated, organized and explained in order to respond fully to the questionnaire.

35. As explained by three of the Turkish respondents at the time, this attempt at a "long-range" or "mail order" verification was doomed to failure from the start. In fact, given the tone, content and deadline set by the August 19 August letter, the fact that nearly identical letters were sent to each of the five respondents notwithstanding the absence of evidence that they had coordinated their responses, the timing of this letter just 24 hours after a major earthquake hit Turkey and the absurd deadline imposed for a response, it seems that Egypt hoped and expected that respondents would be unable to respond providing a pretext for a final determination with margins much higher than preliminarily calculated based on "facts available".

36. By failing to request the basic cost data identified in its 19 August letter in its original questionnaire, the Egyptian Authorities violated Paragraph 1 of Annex II of the Agreement. The Investigating Authorities failed "as soon as possible after the initiation of the investigation, . . . [to] specify in detail the information required from any interested party, and the way in which that information should be structured". Moreover, Egypt had no excuse for waiting until the investigation was nearly over to issue its supplemental request for information. All of the information upon which the Egyptian Authorities based their request for supplemental cost information was contained in the responses filed by respondents on 7 April 1999. If the Egyptian Authorities wished to question aspects of those responses, they should have done so by issuing supplemental questionnaires at that

time, given the Turkish respondents time to respond, and then conducted a full verification of both the price and cost issues.

37. By waiting until after the verification to raise these issues and then insisting that respondents provide full “mail order” verification of their previously submitted cost responses and the new information that the Investigating Authority for the first time requested on 19 August Egypt violated Annex 1, paragraph 7 and Article 6.7. “In order to verify information”, on-site verifications are permitted under the agreement, “mail order” verifications are not authorized. By taking these steps, Egypt also seriously prejudiced the rights of respondents and impaired their “opportunity to provide further explanations” in violation of Paragraph 6 of Annex II.

## B. ARTICLE 6.1.1, ANNEX II, PARAGRAPH 6, AND ARTICLE 6.2

### 1. **Deadline for August 19, 1999 Questionnaire Response**

38. Under Article 6.1.1, a party must be given 37 days to reply after “receiving a questionnaire used in [an] anti-dumping investigation[.]” “Due consideration” must then be given to any request for an extension of the original period for a response. Turkey contends that Egypt failed to meet this obligation when it gave only 13 days for a response to the questionnaire issued on 19 August 1999, and when it extended the deadline upon request to no more than 27 days after the questionnaire was issued.

39. Although the questionnaire issued on 19 August 1999 was not the first questionnaire issued in this proceeding, it amounted to an entirely new cost questionnaire, requesting several new kinds of information, various basic documents that would ordinarily be requested, if at all, in an original cost questionnaire (such as a chart of accounts, income tax returns, a written summary of the company’s books and records, a flow-chart of the accounting system, a list of each type of accounting record kept, lists of all products manufactured and their accounting codes, lists of depreciable assets, and an explanation of how inflation is taken into account in the company’s accounting system), the reporting of costs of production over a much larger number of months, and the preparation of detailed tables and charts tying each aspect of the cost sales responses to the companies’ books and records, together with adequate source documentation to verify each and every sales price and cost.

40. The document issued on 19 August 1999 was certainly in the form of a “questionnaire” for use in anti-dumping investigations. By the plain terms of Article 6.1.1, therefore, the Investigating Authority was obliged to give the respondents at least 37 days in which to respond and to give “due consideration” to any extensions requested by the respondents.

41. In the alternative, the Investigating Authority violated Annex II, paragraph 6 and Article 6.2 by failing to give the respondents a reasonable period of time in which to respond to the 19 August 1999 questionnaires. Annex II, paragraph 6 provides that that parties receiving supplemental requests for information should be given “an opportunity to provide further explanations within a reasonable period. . . .”. Article 6.2 provides that “[t]hroughout an anti-dumping investigation all interested parties shall have a full opportunity for the defense of their interests”.

42. The initial deadline of just 13 days in which to respond to the 19 August questionnaire was plainly inadequate in the best of circumstances in light of the expansive new requests for information and for self-verification that that questionnaire contained. It was utterly devoid of consideration for the actual circumstances respondents faced in light of the massive earthquake that hit Istanbul the day before. Respondents reasonably requested extensions to 11 October 1999 and 22 October 1999 in which to respond to the questionnaire in light of its contents, the disruption to normal business operations caused by the earthquake and the fact that, in several instances, competing verification

were scheduled in Canadian and European anti-dumping investigations being conducted at the same time. The denial of these requests violated Annex II, paragraph 6 and Article 6.2.

## **2. Deadline for September 23, 1999 Questionnaire Response**

43. On 23 September 1999, the Investigating Authority, for the first time, required of Colakoglu, Habas and Diler to provide a monthly break-down of all costs to produce billet, supplied on a monthly basis. The Investigating Authority also demanded that these three companies translate each and every page of the hundreds of pages of documentation that they were required to provide in their 15 September responses. The period given for a response to this questionnaire, just two to five days, was manifestly inadequate and contrary to Articles 6.1.1 and 6.2 of the Agreement, as well as Annex II, paragraph 6.

## **3. Failure to Notify Icdas and IDC of Continuing Deficiencies After Receipt of Their Responses to the 19 August 1999 and 23 September 1999 Follow-Up Questionnaires**

44. Icdas and IDC provided full and complete responses to the 19 August 1999 questionnaire. The Investigating Authority only had a few, minor follow-up questions, which were answered in a timely fashion. No other communications were received from the Investigating Authority noting any other deficiencies or missing data. The Investigating Authority's subsequent decision to rely for its determination completely on facts available is plainly contrary to Annex II, paragraph 6. If information is "not accepted", that section requires that the supplying party be informed "and have an opportunity to make further explanations". Icdas and IDC were deprived of that right in this case.

## **4. Denial of Requests for Meetings**

45. After receiving the Investigating Authority's letter of 23 September 1999, Colakoglu, Diler and Habas requested a hearing during which they could explain how the information submitted in their 15 September 1999 responses replied to the Investigating Authority's information requests. The denial of this request violated Article 6.2, which provides, *inter alia*, that "[i]nterested parties shall . . . have the right . . . to present . . . information orally". Icdas requested a hearing as soon as it reviewed the Essential Facts and Conclusions Report. IDC stated that it was available for further verification of its cost data if the Investigating Authority desired one. The denial of these requests also violated Article 6.2.

46. The denial of these requests also violates paragraph 6 of Annex II, which provides: "If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should be given an opportunity to provide further explanations within a reasonable period . . ." In this case, the Turkish respondents were denied that basic right.

## **C. ARTICLE X:3**

47. The denial of respondents' requests for meetings at which they could explain how their responses to the Investigating Authority's request for information were complete and accurate and show that their responses could be tied to their books and records was abusive, discriminatory and unfair to respondents in violation of Article X:3 of the GATT.

48. The calculation of an interest charge for IDC that overstated IDC's interest expenses as a percent of cost of goods manufactured by a factor of eight was also abusive and discriminatory in violation of Article X:3.<sup>13</sup>

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<sup>13</sup> See First Submission of Turkey at 74-76.

D. ARTICLE 6.8 AND 17.6 (I)

49. The Investigating Authority's rationale for requesting additional cost data after the verification was that respondents' costs and prices for rebar did not increase as the Investigating Authority had anticipated given high inflation in Turkey. However, this reasoning was purely speculative. The only support for the Investigating 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.

50. Respondents showed in their responses, filed on 15 September 1999, that the Investigating Authority was incorrect in assuming that constant, slightly declining or slightly increasing costs meant that there was something missing from respondents' reported costs of production. Specifically, respondents showed that their scrap prices declined by 30 per cent-40 per cent in dollar terms during 1998. The TL was also devaluing against the dollar during this period. However, where the constant currency cost declines by this much, the cost in TL could decline as well, or stay stable, or rise only a bit, but by much less than inflation.

51. Moreover, respondents explained that labour contracts are renegotiated once per year, such that one would not expect changes in the unit labour cost throughout the year all other things being equal. What causes unit labour costs to rise and fall in these circumstances are changes in the volume of production. Similarly, in the case of depreciation expenses, respondents showed that the expense is adjusted at year-end for inflation. Some companies used the year-end total depreciation to calculate their monthly depreciation costs. Other companies used their monthly values but explained that annual inflation is predicted at the beginning of the year and included in the monthly depreciation expenses in the companies' books. Therefore, while 1998 depreciation costs were certainly higher than 1997's, all other things being equal, the unit depreciation expense would not vary from month to month during 1998.

52. Finally, the Government of Turkey provided official import statistics showing that inflation did not increase at 5 per cent month as had been assumed by the Investigating Authority. During many months, including the May-August 1998 period, inflation did not exceed 2.5 per cent *per annum*. Thus, in the context of this industry, it is not at all surprising that neither costs nor home market prices increased at 5 per cent per month.

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

E. ANNEX II, PARAGRAPH 5

54. Annex II, Paragraph 5 provides that "[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*". The Investigating Authority sought to characterize the Colakoglu's, Habas's and Diler's responses to the 19 August and 23 September letters as a "refusal" to provide necessary information. However, given the enormous amounts of information and analysis

requested and the limited amount of time provided for a response, the voluminous responses provided, and the respondents' expressed willingness to come to Cairo to explain the information submitted, this panel should conclude that each respondent, at a minimum, "acted to the best of its ability". Accordingly, resort to facts available violated paragraph 5 of Annex II.

F. ARTICLES 2.2.1.1, 2.2.2 AND 2.4

**1. Breach of Article 2.4 by Imposing an Unreasonable Burden of Proof on Respondents**

55. As discussed in Section II.A, the Investigating Authority waited until the last minute to raise issues requiring the submission of new factual information and then imposed an unduly burdensome "mail order" verification requirement upon the respondents. In so doing, it imposed an "unreasonable burden of proof" upon respondents in violation of Article 2.4 of the Agreement.

**2. Breach of 2.2.1.1 and 2.2.2 and 2.4 Due to Unjustified Resort to Facts Available**

56. As noted in our First Submission at page 69, because the Investigating Authority's resort to facts available was unjustified, its final determination was not compliant with Articles 2.2.1.1 or 2.2.2 or 2.4.

57. Article 2.2.1.1 states that "costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation". The Investigating failed to meet this requirement reasonably by picking the very highest cost for each cost element from among the monthly costs supplied. Article 2.2.2 provides that "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. . .". The Investigating Authority failed to meet this requirement when it included in constructed normal value interest expenses from months other than the month in which the constructed value was being calculated. Finally, Article 2.4 requires "a fair comparison" "between the export price and the normal value". The Investigating Authority breached this provision by comparing a constructed value based on higher costs incurred in months other than the months in which the sales to Egypt took place, distorting the dumping margin calculation.

**3. Breach of Articles 2.2.1.1 and 2.2.2 Due to Failure to Deduct Short-Term Interest Offset**

58. The Investigating Authority did not 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 Investigating Authority claimed that "decisions by respondents to invest funds in interest-bearing accounts do not, in the Investigating Authority's view, bear a sufficiently close relationship to a company's cost of producing the subject products". This finding is inconsistent with generally accepted accounting principles and thus with the Agreement. It also inconsistent with generally accepted dumping practice in other jurisdictions.

59. Article 2.2.1.1 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 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". Article 2.2.2 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".

60. In this case, Turkish respondents' financial statements were prepared in accordance with generally accepted accounting practices in Turkey. There is a separation in respondents' financial statements between operating income and non-operating income. Operating expense and income is

expense and income that relates directly to the companies' core operations involving the production and sale of rebar. Non-operating expense and income is expense and income that is divorced from the production and sale of the companies' main products.

61. In each case, short-term interest income is classified as an operating income in the companies' financial statements. Therefore, as a matter of generally accepted accounting principles, such income is related to the production and sale of the product under investigation. Moreover, in each case, in arriving at net income, short-term interest income is offset against interest expense and other expenses. Therefore, in order to arrive at an accurate picture of the fully distributed cost to produce the product under consideration, this income must be deducted.

62. The United States, the EU and Canada all give such an allowance because companies commonly maintain a working capital reserve in interest-bearing accounts in order to meet daily cash requirements and working capital requirements. A NAFTA panel reviewing a decision by Revenue Canada in this area reversed and remanded with instructions to offset interest expense with short-term interest income. It explained in doing so that, under generally accepted accounting rules, short-term interest income is considered part of the current operating cycle. As a US court has explained, moreover, a company that chooses to invest short-term funds rather than use them to pay off or avoid short-term debt should not be penalized in the calculation of net overhead expenses. It is the net cost (interest income minus interest expense) that represents a company's true interest financing expense.

63. Because each of the companies' records show that short-term interest income is operating income and because that income is fungible, the Investigating Authority's failure to offset interest expense with interest income violates Article 2.2.1.1 and 2.2.2 of the Agreement.

#### **4. Breach of Article 2.4 Due to Failure to Make An Adjustment to Normal Value for Differences in Terms of Sale**

64. The Investigating Authority also failed to make a credit cost adjustment to the normal value for differential payment terms on home market and export sales to Egypt. The Government of Turkey considers that this inaction violated Article 2.4 of the Agreement.

65. Article 2.4 provides that the comparison between the export price and the normal value "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 . . . for differences which affect price comparability, including differences in . . . terms of sale. . . ."

66. 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 make an apples-to-apples comparison. Where prices carry different payment terms, a credit cost adjustment is necessary in order to adjust for "differences in terms of sale". The credit cost adjustment claimed by respondents is normally granted by the United States, EU, Canada, Chile and Australia. Such adjustments are made both to the normal value and the constructed normal value. As noted by the Third-Party Submission of the EU, it is EU policy to make such adjustments where the normal value is based on constructed normal value, because the constructed normal value "will typically include an element for costs relating to the grant of credit terms".<sup>14</sup> Specifically, the interest expense that is included in administrative, selling and general costs includes interest expenses related to the financing of receivables. Consequently, in order to make an apples-to-apples comparison, an adjustment should be made and that adjustment should be based on the imputed credit cost computed on contemporaneous identical or similar home market sales.

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<sup>14</sup> Third-Party Submission of the European Communities, 1 Nov. 2001, at para. 32.

67. The Investigating Authority did make a credit cost adjustment to the export sales to Egypt. By making an adjustment to the export price but not to the normal value, Turkey considers that Egypt produced a distorted comparison in violation of Article 2.4 of the Agreement.

G. ANNEX II, PARAGRAPHS 3 AND 7

68. The Investigating Authority selected as facts available costs that were highly distorted in several instances and used that data in place of more reliable, verified data. In so doing, the Investigating Authority violated the letter of Annex II, paragraph 3 and the spirit of Annex II, paragraph 7.

69. Annex II, paragraph 3 provides that “All information which is verifiable . . . [and] which is supplied in a timely fashion . . . should be taken into account when determinations are made.” This provision was violated when the Investigating Authority declined to use Icdas’ scrap costs for the period September–October 1999 for purposes of constructing normal value for comparison to that company’s sales to Egypt. Icdas provided detailed monthly scrap costs to the Investigating Authority, as well as invoices and purchase orders verifying the accuracy of its submitted scrap costs. Icdas also showed that its scrap cost in September–October 1999 was substantially lower than its scrap cost in January 1999.<sup>15</sup> Because these facts were provided in a timely fashion and were verified, the Investigating Authority’s determination to use Icdas’ January scrap cost in these circumstances violated Annex II, paragraph 3.

70. This action also violated the spirit, if not the letter, of Annex II, paragraph 7. That paragraph provides: “If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, . . . they should do so with special circumspection”. Although this paragraph refers to data taken from a secondary source, rather than data taken directly from the responses, it expresses the drafters’ intent that data used in place of specific data supplied by the respondents for a particular cost be checked for its fundamental fairness and accuracy. In this case, reference to verified data reveals that the data used was grossly distorted. Its use was therefore in conflict with the considerations underlying Annex II, paragraph 7.

71. A similar error was made in the case of IDC. There, the Investigating Authority managed to compute an interest expense that amounted to [XX] per cent of the company’s cost of manufacturing. However, IDC’s audited financial statement shows that the company’s interest expense should be no more than [XX]% of the company’s cost of manufacturing. Once again, the failure to use verified information to calculate this expense violated Annex II, paragraph 3 and the considerations underlying Annex II, paragraph 7.

72. The interest expense computed for Diler is similarly overstated by comparison to the expenses shown in that company’s audited financial statement.<sup>16</sup>

73. Finally, the addition of an arbitrary 5 per cent to Habas’ reported costs finds no support anywhere in the record. This amount was, if anything, based on a “secondary source”. Therefore, in making this adjustment, the Investigating Authority violated Annex II, paragraph 7 and made an improper finding of fact.

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<sup>15</sup> See TUR-28, First Submission of Turkey at 70-71.

<sup>16</sup> See First Submission of Turkey at 76.

## ANNEX 4-1

### RESPONSES OF TURKEY TO QUESTIONS POSED IN THE CONTEXT OF THE FIRST SUBSTANTIVE MEETING OF THE PANEL

#### QUESTIONS POSED BY THE PANEL TO TURKEY

##### Question 1

Could Turkey 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 the 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. For example, [cites to claims in brief/oral statement]

##### Response

1. Please see Appendix (reproduced in Annex 3).

##### Question 2.1

*Claim 2: Failure to take account of, and attribution to dumped imports of, the effect of other factors:* In Turkey's Request for Establishment of a Panel (WT/DS211/2 and Corr. 1) at para. 3, and its Executive Summary of its First Submission, (at para. I.3.c) Turkey cites Article 3.1, along with Articles 3.4 and 3.5, in connection with the non-attribution claim, but in the text of the argument on this claim, there is no mention of Article 3.1. Could Turkey please clarify.

##### Response

2. We do not rely on Article 3.1 in making this claim.

##### Question 2.2

*Claim 4: Finding of price undercutting based on a flawed price comparison:* It is noted that in paragraph 5 of its Request for Establishment of a Panel, Turkey claims a violation of Articles 3.1 and 3.2 with regard to price undercutting. However, in its First Written Submission, Turkey also alleges a violation of Article 3.5 in connection with this claim (see page 21 of Submission).

Should the Panel regard the violation of Article 3.5 as a separate claim, and if so, what is the legal basis for the claim, as a violation of Article 3.5 was not claimed in the context of this specific claim in WT/DS211/2?

##### Response

3. Our claim that Egypt has made a flawed finding of price undercutting does not depend on reference to Article 3.5.

4. We have, however, claimed that the Investigating Authority failed to establish by “positive evidence” a causal link under Article 3.5 between imports from Turkey and injury to the domestic industry in Egypt.<sup>1</sup> The absence of valid evidence of price undercutting, as discussed in Section III.G., could be viewed as further support for this claim.

### Question 2.3

***Claim 9: Factual basis to seek additional information was unfounded and therefore basis to resort to facts available improper:*** In its Request for Establishment of a Panel Turkey cites Article X:3 of GATT 1994, and AD Agreement Articles 2.4, 2.2.1.1, 2.2.2 and 6.8 and Annex II, paragraph 3, 5, 6 and 7. However, in its First Written Submission, Turkey cites only Article 2.2.1.1, 2.2.2, 2.4 and 6.8 and Annex II, paragraph 5 and 6 in connection with this claim.

**Could Turkey confirm that the scope of this claim is as set forth in its First Written Submission, i.e., Articles 2.2.1.1, 2.2.2, 2.4 and 6.8, and Annex II, paragraphs 5 and 6?**

### Response

5. We did make claims as to Article X:3, paragraph 3 of Annex II and Annex II, paragraph 7. See Appendix and response to Question 2.4, below.

### Question 2.4

***Claim 11: Selection of particular data as facts available was not proper, biased and not objective:*** In the Request for Establishment of a Panel, Turkey cites Articles 2.4, 2.2.1.1, 2.2.2 and 6.8 and Annex II, paragraphs 5 and 7. However, in its First Written Submission, Turkey cites only Article 2.4 and Annex II, paragraphs 5 and 7, but claims, in addition, a violation of Article X:3(a) of GATT and Annex II, paragraph 3.

**Could Turkey confirm that the scope of this claim is as set forth in its First Written Submission, i.e., Article 2.4 and Annex II, paragraph 5 and 7, and clarify its position regarding the claims relating to a violation of Article X:3(a), and Annex II, paragraph 3, i.e., whether the reference to these two provisions should be regarded as separate claims by the Panel, and if so, what is the legal basis thereof, as they were not cited in the Request for Establishment of a Panel in the context of this specific claim?**

### Response

6. We reference Article X:3, paragraph 3 of Annex II and Annex II, paragraph 7 in claim number 9 which broadly asserts that resort to facts available was a violation of Article X:3 and several provisions of the Agreement. Claim number 9 is integrally related to claim number 11. In particular, we question in claim 11 the selection and use of particular facts available in place of information the accuracy of which should not be in question, i.e., data in audited financial statements and scrap cost data that was supported by invoices, raw material ledgers and other such documentation. The argument that data from audited financial statements or data verified to source documentation should have been used by the Investigating Authority instead of facts available relies on paragraph 3 of Annex II and the considerations underlying paragraph 7 of Annex II. Article X:3 is also cited in claim 9 as having been violated because the selection of facts available in particular circumstances was so distorted as to be abusive and discriminatory.

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<sup>1</sup> See Claim 2, Request for Establishment of a Panel by Turkey; Section III.A, First Submission of the Government of the Republic of Turkey (“First Submission of Turkey”).

### **Question 2.5**

***Claim under Article VI of GATT 1994:*** At page 81, section V, "Conclusion" of its First Submission, and at page 1 of its First Oral Statement, Turkey asks the Panel to find that Egypt's final anti-dumping determination was inconsistent with, *inter alia*, Article VI of GATT 1994. There is no reference to a claim under this provision in Turkey's Request for Establishment of a Panel, and there is no other reference to any such claim elsewhere in the First Submission or the Oral Statement. Could Turkey please clarify.

#### **Response**

7. Our citation to Article VI of GATT 1994 is in recognition of the fact that the Anti-Dumping Agreement interprets the obligations contained in GATT Article VI and that we have made an argument that several provisions of the Antidumping Agreement have been violated. Turkey does not purport to set out any separate claim by its reference to Article VI in this context.

### **Question 2.6**

***Reference to Annex I, para. 8:*** At page 27 of its First Oral Statement, Turkey refers to Annex I, paragraph 8. Could Turkey please indicate whether it is claiming a violation of this provision. If so, could Turkey provide the legal basis for this claim, as it is not referred to in Turkey's Request for Establishment of a Panel.

#### **Response**

8. Turkey is not claiming a violation of Annex I, paragraph 8. In Turkey's view this provision sheds light on the normal sequence of events in antidumping investigations, but Turkey does not claim that Annex I, paragraph 8 has been violated in this case.

### **Question 3**

***Claim 1: Failure to establish by positive evidence a causal link:*** Is Turkey claiming that under Articles 3.1 and 3.5, only evidence of the specific kinds that it lists at III.A.4, could "demonstrate" a causal link between imports and injury?

#### **Response**

9. No, there may be other ways to link imports to injury. These examples are illustrative. However, we do think that it was incumbent upon the Investigating Authority to secure this kind of information pursuant to Article 3.5 in order to determine whether or not there was a causal link between dumped imports and injury. The absence of any lost sales or confirmed examples of price reductions due to competing offers from import sources would be "positive evidence" that no such link exists.

10. The Investigating Authority bears a special burden to collect this data – it is uniquely available from the petitioners in Egypt and cannot be secured through other means by the Turkish respondents.

#### Question 4

**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 submitted to the Egyptian Investigating Authority ("IA"), and if so, when? If not, please provide legal argumentation regarding the basis on which the Panel could take these documents into consideration.**

#### Response

11. The documents referenced in this question were not submitted to the Investigating Authority. As discussed in the Additional Comments Made at the First Substantive Meeting by the Turkish Delegation (at 1-2), Turkey believes that these documents should be taken into account in this proceeding.

12. First, we note Egypt concedes in its submission that nothing in the DSU prevents consideration by the Panel of evidence not presented to the competent authorities at the time of their investigation.<sup>2</sup>

13. Second, the additional evidence contained in our submission on factors causing present material injury was not presented by Turkish respondents to the Investigating Authority during the course of the investigation because respondents had been advised that the Investigating Authority's investigation was limited to the question of threat of material injury.<sup>3</sup> Moreover, the allegations submitted by the Egyptian industry to the Investigating Authority in their application for the imposition of anti-dumping measures was apparently limited to allegations of threat of future material injury as well.<sup>4</sup> Turkish respondents had no reason to believe that evidence on possible causes of present material injury was relevant to the investigation. This understanding also informed the manner in which respondents presented certain injury information early in the proceeding (e.g., information regarding the capacity expansions at ANSDK and Al Ezz).<sup>5</sup>

14. It would have been unusual, to the say the least, for the Turkish side to present evidence showing that other factors were causing *present* material injury the domestic industry where there had been no claim by the domestic industry of current material injury and where the Egyptian authorities plainly stated at the outset that their conduct of the investigation was based on allegations of threatened injury only.

15. Third, if the Panel decides, under Article 17.5(b) (as argued by the EU and the United States), that the record should ordinarily be limited to the facts "made available" to the Investigating Authority during the course of its investigation, then Turkey requests the Panel to adopt the legal principle that the Panel can take "judicial notice" of certain other facts. Both at 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

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<sup>2</sup> See First Written Submission of Egypt at 18.

<sup>3</sup> See, e.g., Initiation Report, TUR-1, at 1-1 and 4-5-7; Manufacturers Questionnaire, at 6, p. 10-11.

<sup>4</sup> *Id.*

<sup>5</sup> Compare TUR-18 at 9-10 with TUR- 20 at 18.

accuracy cannot be reasonably questioned.<sup>6</sup> Appellate courts may take judicial notice of such facts even though they were not before, or were not considered by, the trial court.<sup>7</sup>

16. 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”.<sup>8</sup> The second type of fact is “one that is capable of ready verification through sources whose reliability cannot reasonably be questioned”.<sup>9</sup> This type of fact is “the one more often relied upon, because a fair argument can be made that most facts are not generally known, but yet that many of these facts can be reliably verified”.<sup>10</sup>

17. The requirement that panels base their review on facts presented to the competent authorities ensures that the competent authorities have the ability to test and pass judgement on the validity of the facts presented. But the same considerations would not preclude a Panel from considering facts that can be judicially noticed – such facts can be reliably and easily verified by reference to public sources.

18. In our case, the fact that Alexandria National and Al Ezz were engaged in major expansion projects, and the timing and size of those projects, were widely reported in the press. The Turkish respondents supplied some articles on this subject to the Investigating Authority.<sup>11</sup> The Investigating Authority must have received other information directly from the Egyptian industry on these capacity expansions, although none of this information appears directly in the public record. Additional press articles with respect to these expansions are cited in Turkey’s first written submission.<sup>12</sup> The Panel should take judicial notice of these articles and the information they contain regarding the expansion projects.

19. The Panel should also take judicial notice of the Form 10Q filed by Birmingham Steel Corporation with the Securities and Exchange Commission cited in the First Submission of Turkey (at note 20) with reference to start-up problems associated with that company’s new melt shop at Memphis, Tennessee. There are severe penalties for making false or misleading statements in such reports to the SEC. Moreover, Birmingham would have had no conceivable motive for mentioning these embarrassing difficulties other than its statutory obligation to disclose all events having a material effect on its operations.

20. The Panel may also take judicial notice of the decline in scrap prices as presented in the *American Metal Market* and *Metal Bulletin* articles presented in our submission.<sup>13</sup> *American Metal Market* and *Metal Bulletin* are the most widely read periodicals in the steel industry worldwide. Each regularly publishes scrap prices.

21. The Panel should also take judicial notice of the fact that Al Ezz uses the electric arc furnace technology. (The fact that Alexandria National relies on the DRI technology to make rebar was specifically made known to the Investigating Authority by Turkish respondents.<sup>14</sup>) Once again, the fact in question is readily verifiable from public sources.<sup>15</sup>

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<sup>6</sup> See Rule 201, Federal Rules of Evidence – Judicial Notice of Adjudicative Facts.

<sup>7</sup> See Rule 201(f).

<sup>8</sup> Federal Rules of Evidence Manual, Editorial Explanatory Comment, Rule 201, at 122; *Wooden v. Missouri Pac. R.R.*, 862 F.2d 560 (5<sup>th</sup> Cir. 1989).

<sup>9</sup> Fed. R. Ev. Man. at 122.

<sup>10</sup> *Id.*; *Terrabone v. Blackburn*, 646 F.2d 997 (5<sup>th</sup> Cir. 1981).

<sup>11</sup> See *infra*.

<sup>12</sup> See First Submission of Turkey, n. 16, 17, 19.

<sup>13</sup> See TUR-13, 14.

<sup>14</sup> See TUR 18 at Exhibit 4, page 5.

<sup>15</sup> See *Iron and Steel Works of the World*, Metal Bulletin Books Ltd., 13<sup>th</sup> Edition (1999) at 104.

22. Finally, even if the Panel declined to consider information not presented to the Investigating Authority in reviewing this matter, we believe that there is sufficient evidence on the record to support each of our claims. The fact that there was a capacity expansion at Al Ezz and Alexandria National was certainly known to the Investigating Authority and it was mentioned in submissions made by the Turkish respondents.<sup>16</sup>

23. The decline in scrap prices was also made known to the Investigating Authority and was documented in respondents' submissions.<sup>17</sup>

24. The contraction in domestic demand in January 1999 was noted by respondents in their submission of 19 May 1999 and is documented in the exhibits to that submission.<sup>18</sup> The fact that comparably priced non-dumped imports were in the market at greater volumes than imports from Turkey was also specifically brought to the Investigating Authority's attention.<sup>19</sup>

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<sup>16</sup> See Letter from Law Offices of David Simon to the Investigating Authority, May 21, 1999, (reproduced in TUR-18)(hereafter "TUR-18") at 9, 10 and Exhibit 4 at page 5 ("The Ezz Group, one of the country's fastest growing private conglomerates, manufactures 600,000 tones of long products annually. It plans to increase production to 1.1 million tonnes by the end of 1998 . . . ."); *id.* at Exhibit 4, pages 7-8 ("Other expansion projects of the steel sector include an increase in output capacity of 1.55 million tons at Alexandria National Iron and Steel Company at the cost of \$170 million for a second direct reduction unit and \$225 million to expand and upgrade its existing steel plant (MEED, April 1996). In Sadat City, the El Ezz Group is also investing about \$130 million in a new steel plant"); Letter from Law Offices of David Simon to Investigating Authority, 15 October 1999 (reproduced in TUR-20)(hereafter "TUR-20") at 18 ("[I]t is evident there has been no consideration of whether petitioners' declining profitability might be due to . . . petitioners' capital investment . . . . As we have explained, the imports had no volume effect and no price effect, so it is not appropriate to conclude that petitioners' profit picture is the result of imports"); Views and Comments of the Turkish Government on "Essential Facts and Conclusions Report," 15 October 1999 (reproduced as TUR-30)(hereafter "TUR-30") at 4 ("The decline in domestic producers' profits and return on investment can not be related to Turkish exports either. . . .[T]his decline can only be associated with the new investments made by the Egyptian producers in recent years, which the ITPD mentioned in paragraph 4.3.2.4 of the Report").

<sup>17</sup> See TUR-18 at 13 ([F]alling prices are not the result of price suppression, but, rather, flow from the decline in world scrap prices . . . .), 11, n. 7, 14 and Exhibit 3, page 3; TUR-20 at 17 ("If scrap goes down, the domestic industry's prices should also go down . . . . Hence, to suggest that in March 1999 the Turkish prices suppressed prices in Egypt is an unwarranted conclusion without evidentiary support"), 18 ("Scrap prices were substantially down during Q-1 (see Table on page 4, above), and the pricing in Egypt was simply reflecting the drop in input prices"); TUR-30 at 4 (According to the provisions of the GATT 1994 Anti-Dumping Agreement, the investigating authorities should examine any known factors other than imports in question, which at the same time are injuring the domestic industry, and the injuries caused by these factors must not be attributed to the dumped imports. ITPD fails to comply with these provisions as it does not take into consideration decreasing international market prices for scrap in 1998 . . . . In fact, as the prices of scrap -- 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"). See also Letter from Law Offices of David Simon to IA, 15 September 1999 (TUR-21)("[W]e are submitting data -- tallies of Colakoglu, Diler and Habas raw material purchases -- which show that the input (scrap) costs for these companies declined from [[\$XX/MT to \$XX/MT, thence to \$XX/MT and thence even to \$XX/MT]] during {1998}; First Written Submission of the Government of the Republic of Turkey at 63 (reproducing scrap cost data from 15 September 1999 response of Icdas showing steady decline in scrap costs totaling 33.93 per cent during 1998).

<sup>18</sup> See TUR-18 at 13 ("Regarding the allegation of price depression, we have three comments. First, the rebar industry is seasonal, as is apparent from the monthly Egyptian sales figures in Exhibit 3 hereto, with a distinct seasonal trough in January. . . .") and Exhibit 3, page 3.

<sup>19</sup> See TUR-18 at 5-6 (Saudi Arabia and Libya characterized by Turkish respondents as the "largest [foreign] suppliers" of rebar to Egypt), 11 ("Egyptian import statistics clearly establish that Turkish imports were at the same price level as other major suppliers to the Egyptian market in 1998, on a duty-paid basis"), and Exhibit 2 (chart showing imports from Saudi Arabia increased in volume by more than imports from Turkey).

25. The fact that Al Ezz was increasing its market share at the expense of Alexandria National and had a much lower unit cost of production should have been apparent from the domestic manufacturer responses filed by the two parties with the Investigating Authority.

26. With respect to TUR-13 and TUR-14, we note that we supplied this information to refute a finding made by the Investigating Authority for the first time in this proceeding in the Final Report that scrap prices were relatively constant during 1998. In the context in which this finding was explained, the false impression was given that scrap prices in constant currency were relatively constant during this period. This finding is clearly contrary to fact, as can be easily determined by reference to the scrap prices published in *Metal Bulletin* and *American Metal Market*.

27. In sum, this Panel should consider the additional evidence presented in our briefs on injury because Turkish respondents had no advance warning prior to the deadline for submission of new factual information that the Investigating Authority would change the focus of its investigation and find current material injury. They also had no notice of any allegations that current material injury existed and thus nothing to rebut. In the alternative, the Panel should take “judicial notice” of those facts which are capable of ready verification by reference to public sources and whose accuracy cannot be reliably questioned. The Panel should also take judicial notice of the information contained in TUR-13 and TUR-14 for the same reasons.

28. Finally, the basic facts and argument with respect to Turkey’s claims regarding improper attribution of other causes of injury to imports from Turkey were made available to the Investigating Authority during the investigation itself, contrary to Egypt’s claims. Therefore, the Panel should address those claims even if it decides to exclude evidence not available before the Investigating Authority during its original investigation.

### **Question 5**

**What in Turkey's view legally falls under the term "any known factors other than the dumped imports which at the same time are injuring the domestic industry"?**

#### **Response**

29. Article 3.5 of the Antidumping Agreement provides that “[t]he authorities shall also examine any *known* factors other than the dumped imports which are at the same time injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports.”

30. Turkey agrees with the European Communities’ position that such factors are, in the first place, factors that are brought to the attention of the investigating authority by the interested parties in the domestic procedure. In addition, Turkey agrees with the European Communities that there are circumstances where an interested party can raise other factors but cannot itself prove conclusively that those factors are causing injury. In such a case, such factors are “known” to the investigating authority and should be examined.<sup>20</sup>

31. Moreover, Turkey believes that other factors and conditions of competition which are evident in the factual record before the Investigating Authority and are having a large effect on the domestic industry, are “known” factors that should be examined, regardless of whether or not a specific allegation has been made by an individual party that those factors are injuring the domestic industry.

32. There is, in Turkey’s view, a special burden on the competent authorities to identify other known factors that, at the same time, may be causing present material injury when the competent

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<sup>20</sup> See Third Party Submission of the European Communities, 1 November 2001, at 3.

authorities commence their investigation based on allegations filed by the domestic industry that are confined to threatened future material injury and the authorities subsequently, after the time for notice and comment has expired, discovers evidence of what they consider supports a finding of current material injury. In such a case, the respondents, not having had notice of any allegation of present material injury, cannot be expected to have researched and briefed that theoretical possibility. The protection of the non-attribution requirement in Article 3.5 would lose its force if the Investigating Authority could, in such a situation, decline to investigate any factor other than the subject imports that might at the same time be causing injury to the domestic industry.

33. The obligation to identify other factors, which at the same time may be causing injury to the domestic industry, also stems from Article 3.4, which, regardless of what is “known” by the investigating authority, requires a full investigation “of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, . . . productivity, return on investments, or utilization of capacity [and] factors affecting domestic prices. . . .”

34. In interpreting a parallel provision in the Agreement on Safeguards, the Appellate Body ruled that:

[the central role played by interested parties in the investigation] does not mean that the competent authorities may limit their examination of “all relevant factors,” under Article 4.2(a) of the Agreement on Safeguards, to the factors which the interested parties have raised as relevant. The competent authorities must, in every case, carry out a full investigation to enable them to conduct a proper evaluation of all the relevant factors expressly mentioned in Article 4(2)(a) of the Agreement on Safeguards. Moreover, Article 4(2)(a) requires the competent authorities -- and *not the interested parties* -- to evaluate fully the relevance, if any, of “other factors.” If the competent authorities consider that a particular “other factor” may be relevant to the situation of the domestic industry, under Article 4(2)(a), their duties of investigation and evaluation preclude them from remaining passive in the face of possible shortcomings in the evidence submitted, and views expressed, by the interested parties. In such cases, if the competent authorities do not have sufficient information before them to evaluate the possible relevance of such an “other factor,” they must investigate fully that “other factor”, so that they can fulfill their obligations of evaluation under Article 4(2)(a).<sup>21</sup>

35. In that case, the Panel had ruled that Article 4.2(a) required an examination of only those factors, other than those enumerated in Article 4.2(a), that were clearly raised as relevant by the interested parties in the domestic investigation.<sup>22</sup> The Appellate Body disagreed, holding that “the investigating authorities must undertake additional investigative steps, when the circumstances so require, in order to fulfill their obligation to evaluate all relevant factors.”<sup>23</sup>

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<sup>21</sup> Appellate Body Report, *United States – Definitive Safeguard Measures on Import of Wheat Gluten From the European Communities*, WT/DS166/AB/R, adopted 19 January 2001 (hereafter “*Wheat Gluten*”), para. 55. Accord Third Party Submission of the European Communities, at 4. See also *United States – Anti-dumping Measures on Certain Hot-Rolled Carbon Steel Products from Japan*, WT/DS184/AB/R, 24 July 2001 (hereafter “*Hot-Rolled Carbon Steel Products from Japan*”), at para. 230 (causation requirements under Antidumping Agreement and Safeguards Agreement are sufficiently similar that adopted panel and Appellate Body Reports on the injury causation requirements under the Safeguards Agreement can provide guidance in interpreting the language of the Antidumping Agreement).

<sup>22</sup> *Wheat Gluten* at para. 46.

<sup>23</sup> *Id.* at para. 55.

36. The same analysis should apply to the Antidumping Agreement. The competent authorities have an obligation under Article 3.4 to examine “all relevant factors and indices having a bearing on the domestic industry”. Therefore, where the record before the competent authorities indicates that a particular factor is having a significant effect on the domestic industry, such as the capacity expansion in this case, increasing market share by a new, low-cost entrant (which should have been evident from Al Ezz’s questionnaire responses), falling scrap prices, high volumes of comparably priced non-subject imports, and falling demand coincident with the fall in domestic prices, the Investigating Authority has an obligation under Article 3.4 to investigate that factor fully, regardless of whether or not interested parties have brought those factors specifically to its attention. And where that factor is causing injury to the domestic industry, the Investigating Authority has an obligation under Article 3.5 to isolate the effects of that factor and not to attribute those effects to the subject imports.

#### **Question 6**

**Turkey lists four important factors which it says are relevant to consider under Article 3.5: (1) a capacity expansion of the domestic industry; (2) non-subject imports; (3) declining scrap prices; and (4) contraction in domestic demand. Is it Turkey's case that these were "known factors" which were before the IA, or is it Turkey's case that they were not factors placed before the IA but should have been "known factors" nevertheless?**

#### **Response**

37. As stated above, these factors were “known” to the Investigating Authority during the investigation.

#### **Question 7**

**Is Turkey arguing, in respect of third country imports, that the reference at para. 4.3.2 of the Essential Facts and Conclusions Report and para. 4.5.2 of the Final Report is the IA's only reference to such imports. If not, what are Turkey's arguments, especially in the light of the reference to third country imports in para. 4.3.4 of the Essential Facts and Conclusions Report and paras. 4.3.4 and 4.3.5 of the Final Report.**

#### **Response**

38. Turkey is not taking the position stated in the first sentence of this question. Paragraph 4.3.2 of the Essential Facts and Conclusions report concerns domestic production and makes no reference to non-subject imports.

39. First, we note that imports from Latvia, Ukraine and Romania, previously found by the Investigating Authority to be dumped and injurious, remained in the market until 22 June 1998, when antidumping duties were imposed.<sup>24</sup> However, there was no attempt to discern and segregate the effects of these imports in order to assess their effects on prices in 1998. That is, the Investigating Authority found that prices fell in 1998, but did not state whether that price decline occurred in the first half of 1998 when imports from Latvia, Ukraine and Romania were in the market, or the second half of 1998 when Turkish imports were in the market. If it was during the first half of 1998, then it would have been incumbent upon the Investigating Authority to segregate the effects of imports from Latvia, Ukraine and Romania so as not to attribute those effects, already found to be injurious, to imports from Turkey.

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<sup>24</sup> See TUR-1 at 10 (4.1.6) and TUR-18 at Exhibit 2-1.

40. With respect to the second half of 1998, we believe that the Investigating Authority should have examined the other import sources which remained in the market after the exit of imports covered by the first round of antidumping cases. These included imports from Saudi Arabia, the largest import source, and imports from Libya. According to published statistics, imports from Saudi Arabia increased in volume in 1998 by 136 per cent of the increase in the volume of imports from Turkey and, on a landed, duty-paid basis, were comparably priced.<sup>25</sup> Imports from Turkey were higher priced than imports from Libya.

41. Notwithstanding the presence of comparably priced imports of greater volume simultaneously in the market with imports from Turkey just prior to the price decline in the first part of January, 1999, the Investigating Authority "examined other economic factors but concluded that such factors were not causing injury to the domestic industry".<sup>26</sup> Presumably, those other economic factors included non-subject imports. Egypt has also asserted that the Investigating Authority found material injury both in 1998 and in the first quarter of 1999.

42. As discussed in our First Written Submission (at III.A), the Investigating Authority made no findings that imports from Turkey were causing any specific injury to the domestic industry or were having different effects than imports from Saudi Arabia and Libya. Because non-subject imports of comparable or even more pronounced volume trends and comparable or lower prices were in the market at the same time as imports from Turkey, in the absence of any more specific information, it must be assumed that they were having comparable effects. The failure of the Investigating Authority to identify and distinguish those effects violated Article 3.5.<sup>27</sup>

43. While it is true that the market share of imports from Turkey, Saudi Arabia and Libya increased in 1998, the market share of imports from third countries declined by a greater amount. Put another way, the market share of *all* import sources, including Turkey, declined in 1998. Does this mean that imports from Turkey were non-injurious? One could conclude so. What one cannot conclude from this data is that there is any logical basis upon which to distinguish the effects of imports from Turkey in 1998 from imports from Saudi Arabia and Libya in 1998, as was done by the Investigating Authority.

44. It is unreasonable and unsound to base a determination of current material injury on a period as short as one calendar quarter. However, an objective review of the facts from the first quarter of 1999 discloses, once again, no basis to conclude that imports from Turkey were causing the effects claimed. According to the Investigating Authority, imports from Turkey undersold the domestic product by only 0.3 per cent in March 1999, an insignificant amount.<sup>28</sup> The price effects of imports from Turkey in the first quarter of 1999 were, therefore, negligible. If it is the position of the Investigating Authority that the price decline which took place in January 1999<sup>29</sup> was caused by the volume and pricing of imports in 1998, then it is essential that the Investigating Authority segregate the effects of imports from Turkey from the effects of imports from other, comparably priced sources prior to making that determination.

45. Furthermore, Saudi Arabia lost its duty-free status in Egypt at the beginning of 1999, possibly explaining its declining shipments in the first quarter of 1999.<sup>30</sup> Imports as a whole in that quarter,

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<sup>25</sup> See TUR-18 at 5-6 and Exhibit 2-1.

<sup>26</sup> TUR-16 at 4.5.1.

<sup>27</sup> See *Hot-Rolled Carbon Steel Products from Japan* at paras. 223 and 226.

<sup>28</sup> Final Report, TUR-16, at 4.2.1.2.

<sup>29</sup> We know from the Initiation Report that the price decline in fact took place early in January 1999. See TUR-1 at 4.1.9.

<sup>30</sup> TUR-32 at 20.

including imports from Turkey, stood at 117,000 tons.<sup>31</sup> This converts an annual import level of 468,000 tons. This is a drop of 50 per cent as compared to annual import levels in 1998! Therefore, while imports from Turkey increased in the quarter, they merely replaced a small part of the volume formerly represented by imports from other sources. Using the same trend analysis employed by the Investigating Authority, one should reach the conclusion that imports as a whole were not causing material injury to the domestic industry in the first quarter of 1999. The Investigating Authority's focus on the increase in imports from Turkey and its failure to take into account the countervailing effect of the decline in imports from other sources underlines the lack of an objective and reasoned analysis by the Investigating Authority.

46. Finally, domestic market share also increased by 23 per cent in the first quarter of 1999, at the same time that imports from Turkey increased.<sup>32</sup> Thus, imports from Turkey in the first quarter of 1999 did not displace one ton of rebar formerly shipped by the Egyptian industry. Imports of rebar from Turkey cannot be said to have had a significant volume effect upon the domestic industry in the first quarter of 1999.

### **Question 8**

**The focus of Turkey's arguments regarding third country imports is on imports from Libya and Saudi Arabia. The IA's references to third country imports seem to cover total imports from third countries. Is Turkey arguing that the IA committed a legal error in not looking separately at imports from Libya and Saudi Arabia? If so, what is the legal basis for such an allegation?**

### **Response**

47. Yes, because these imports were large volume players in the market in the second half of 1998 when the injury allegedly occurred. Also Turkish respondents specifically showed that, according to published statistics, Saudi Arabia's volume increased by more than Turkey's and that Turkish prices were within 2 per cent of Saudi Arabia's and were higher than Libya's.<sup>33</sup> Therefore the price effects of these imports and the volume effects of these imports were comparable to Turkey's and yet the IA found that non-subject imports were not injuring the domestic industry.

48. We should note at this point that there is an unexplained discrepancy in the import statistics from Turkey that were used by the Investigating Authority for its investigation. The Investigating Authority cites an import figure of 210,000 tons in its Final Report (4.1.1.1). However, according to import statistics published by the Government of Egypt, total imports of rebar from Turkey amounted to only 116,194 tons in 1998.<sup>34</sup> According to the same, published import statistics, imports from Saudi Arabia totaled 239,749 tons in that year, up from 86,227 tons in the prior year.<sup>35</sup> Egypt acknowledged the discrepancy between its official import statistics and the figures used in the investigation during negotiations with Turkey, but claimed that there was an error in the published statistics with respect to imports from Turkey. Egypt further claimed that it had computed total imports from Turkey by reference to actual import documentation, but that documentation has never been provided to respondents. Nor do respondents believe that any comparable effort was made to correct the import database for imports from third countries, such as Saudi Arabia and Libya.

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<sup>31</sup>Final Report, TUR-16, at 4.3.4.1.

<sup>32</sup>*Id.*

<sup>33</sup>TUR-18 at 5-6.

<sup>34</sup>TUR-18 at Exhibit 2, page 6.

<sup>35</sup>*Id.*

49. We are doubtful that the number ultimately stated in the Final Report is accurate, for the following reasons. The figure 210,000 was initially described to the Egyptian Authorities in their initiation report as an “estimate” of total imports from Turkey.<sup>36</sup> This report is dated 26 January 1999. Egyptian Government import statistics would not have been finalized as of that date. The estimated number is, moreover, a very round number – it looks like an estimate by comparison to the published import statistics and the figures published in the Final Report for non-subject imports. The same number, without modification, appeared in the Essential Facts and Conclusions report in October 1999 and in the Final Report that same month. In addition, this figure exceeds the figure shown for total exports by Turkey to Egypt in 1998 and 1997 by more than 5 per cent.<sup>37</sup> There were substantial exports from Turkey in December 1998 and, given shipping times, it is unlikely that all of the exports from Turkey in December were entered into Egypt before the end of the year. Hence, the figure used appears to be significantly overstated and appears to overstate the volume of imports from Turkey as compared to the volume of imports from Saudi Arabia and Libya.

### **Question 9**

**Please respond to Egypt’s argument that Turkey has not alleged any particular violation in its claim that Egypt misinterpreted certain data on domestic sales (Egypt’s First Submission at pp. 39-40, section III.B.7).**

#### **Response**

50. This is not a separate claim; it is part of our claims under 3.1, 3.4 and 3.5. This section shows that the finding that Turkish imports caused injury to the domestic industry by causing domestic shipments to rise in 1998 is illogical and improper and thus cannot constitute a separate basis for finding that the Egyptian authority’s injury determination was supported by the facts found. This argument should be considered in connection with Turkey’s other claims in Section III.B of the First Written Submission.

### **Question 10**

**Please identify the factors listed in Article 3.4, if any, that in your view were (1) not evaluated properly; or (2) not evaluated at all.**

#### **Response**

51. The Article 3.4 factors not addressed at all in the Final Report are productivity, actual and potential negative effects on cash flow, employment, wages, growth, and ability to raise capital or investments. Furthermore, the public information in the Essential Facts and Conclusions Report and in the Final Report does not reveal whether or not the Investigating Authority conducted a sufficient examination of capacity, capacity utilization or return on investment.

52. We also maintain, in Section III.B of our First Written Statement, that the following factors were not evaluated at all or were not evaluated adequately:

1. Capacity expansion at the two major Egyptian rebar producers.
2. Effects of the capacity expansion on the producers’ costs of production.
3. Effects of the capacity expansion on intra-industry competition.
4. Falling prices for steel scrap.
5. Contraction in demand in 1999

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<sup>36</sup> TUR-1 at 17.

<sup>37</sup> TUR-18 at Exhibit 1.

6. Effect of comparably priced, fairly traded imports

53. While these factors, other than contraction in demand, are not specifically listed in Article 3.4, that Article does require “an evaluation of all relevant economic factors and indices having a bearing on the state of the industry”, and it is Turkey’s position that each of these factors falls into that category. Moreover, it is Turkey’s position that Factors 1, 3, 4, 5 and 6 are potential “factors affecting domestic prices”, a factor specifically listed in Article 3.4.

54. Factors 1, 4 and 6 were evaluated, but not properly. It would appear from the public record made available to the Government of Turkey that factors 2, 3 and 5 were not evaluated at all.

**Question 11**

**Turkey states in its First Submission that "the two prices [of the domestic goods and the imported goods] must be compared on a delivered basis to a customer who is in a position to choose between purchasing domestic or imported products". Is it Turkey's case that the importers are not actual or prospective customers for the domestic manufacturers?**

**Response**

55. Since the price undercutting was measured by comparing the importer’s ex-warehouse price to the domestic manufacturer’s price, we presume this not to be the case. If the importer were a customer of the manufacturer, its resale price would not be the appropriate basis for a comparison – the importer’s acquisition price would be the appropriate basis for a comparison. However, the facts on the record do not disclose whether the importers also purchased from the manufacturers, so we do not know whether this was the case or not.

**Question 12**

**How broadly does the burden of proof requirement of Article 2.4 apply in anti-dumping investigations. What is your legal reasoning in support of your view, based on a "Vienna Convention" analysis of that provision?**

**Response**

56. Article 31 of the Vienna Convention on the Law of Treaties provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose”.

57. The first sentence of Article 2.4 provides that “a fair comparison shall be made between the export price and the normal value”. This is a general obligation imposed upon the parties. The last sentence of Article 2.4 is also general in nature: “The authorities shall indicate to the parties in question the information that is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on the parties”. Turkey believes that this obligation extends to all aspects of fact finding necessary to determine the export price and the normal value and to ensure a fair comparison between the two. That is, in collecting information with respect to the export price and the normal value or information necessary to adjust these values to a common basis, the authorities are prohibited from “impos[ing] an unreasonable burden of proof”.

58. This is consistent with the Appellate Body’s statement in *Hot-Rolled Carbon Steel Products from Japan*, albeit interpreting other sections of the Agreement, that “[t]he Investigating Authorities

are not entitled to insist upon absolute standards or impose unreasonable burdens upon . . . exporters”.<sup>38</sup>

### **Question 13**

**In relation to the issue of the alleged change in the grounds for action to be taken against dumped imports being considered by the IA (from threat of injury to present injury). Could Turkey comment on the Panel report in *Guatemala-Cement II*, which appears to support the proposition that no obligation to notify arose in a similar circumstance? Should this Panel adopt the same view? Is it Turkey's view that the statement in paragraph 1.8 of the Manufacturers' Questionnaires (page 6) (Exh. TUR-3) in any case did not constitute notification that present injury would be investigated?**

#### **Response**

59. Turkey disagrees with the *Guatemala-Cement* panel decision on this issue and we urge this Panel to consider the inequity of applying that decision in this case.

60. Moreover, the specific finding of the panel in *Guatemala-Cement* is that there is no obligation in the Agreement upon investigating authorities to inform interested parties “of the legal basis for its final determination on injury”.<sup>39</sup> We are not arguing that Egypt was obliged to inform us in advance that its final determination would be based on a finding of current material injury. Our claim is that, where Egypt initiated its investigation based on alleged threat of material injury and advised respondents in its questionnaires that its injury investigation was limited to consideration of whether there was a threat of material injury, it was incumbent upon Egypt to give the parties notice when it expanded its investigation to consider the question of present material injury. It was also obliged at that time to give the parties an opportunity to submit factual comment and argument on this question. As a matter of fundamental due process, a party accused of engaging in unfair trade practices should know, prior to the due date for its submission of factual information and argument, what the nature of the charges are that have been lodged against it and that are being investigated by the competent authorities. That notice and opportunity to submit information was not provided in this case.

61. In light of the clearly expressed passages in the Manufacturers Questionnaire and in the Initiation Report, we do not consider the passage in paragraph 1.8 as a clear indication that the IA would investigate present material injury.

### **Question 14**

**At page 6 of its First Oral Statement, Turkey argues that capacity expansion by the Egyptian industry would have caused an increase in the industry's per unit cost of production, due to low start-up levels of production. How does this argument reconcile with the statements in the Essential Facts and Conclusions Report and the Final Report that capacity utilization was stable during the period of investigation?**

#### **Response**

62. We have no idea how capacity utilization figures were developed or what they show as none of these data have been released to the public. Specifically, we do not know what capacity level was reported by the domestic industry. Was it the level at the beginning of 1998 or end of 1998? It does

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<sup>38</sup> *Hot-Rolled Carbon Steel Products from Japan*, at para. 102

<sup>39</sup> *Guatemala – Antidumping Investigation Regarding Portland Cement from Mexico*, WT.DS 60/AB/RW, 2 Nov. 1998 at para. 8.238.

not appear that monthly data were provided, so which was it? Conceivably, the value reported by the domestic industry was the value at the beginning of the year, in which case the data reported masked what was really going on.

63. This points up a broader problem with the record that the Panel must examine. So little data has been disclosed that it is impossible to discern whether a proper factual determination was made with respect to the trend in capacity utilization, as required in Article 3.4, and whether the determination noted in the Panel's question is truly inconsistent with our claim.

64. We know, in the case of Al Ezz, that it took 2-3 months for its rebar expansion project to reach full production.<sup>40</sup> Thus, unit costs must have been affected, if only for a short period of time. We do not have similar information for Alexandria National but it would be truly extraordinary if one day the expansion projects were opened and they immediately achieved full capacity utilization. This simply never happens in real life.

### **Question 15**

**At page 20 of Turkey's First Oral Statement, Turkey states that the questionnaire provided no direction concerning how to respond to the questionnaire concerning costs of production. Some of the Turkish respondents took the decision to provide certain information on a monthly basis, and only for certain months during the period of investigation. Under the circumstances in which Appendix 9 to the questionnaire did not indicate any particular basis for the provision of the cost of production information, while the questionnaire did specify the period of investigation for the dumping investigation, what justified these respondents in selecting periods less than the full period of investigation for provision of cost data?**

### **Response**

65. Turkey's economy is acknowledged to be hyperinflationary. During 1998, annual inflation exceeded 40 per cent per annum. In such cases, on average, it would be grossly distortive to compare an annual average cost of production to individual sales prices. Assuming constant monthly production and constant cost increases, the use of a single, average annual cost of production would tend to understate, by as much as 20 per cent, the cost to produce goods sold at the end of the period and would overstate, by as much as 20 per cent, the cost to produce goods at the beginning of the period.

66. It should be noted that the last sentence of Article 2.2.1 of the Anti-Dumping Agreement contemplates separate calculations of costs of production for comparison to sales prices during sub-periods of the period of investigation when costs vary over the investigation period. Thus, that sentence states: "If prices which are below costs of production at the time of sale are above weighted average costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time." This sentence contemplates different results depending on whether one is comparing sales prices to cost of production "at the time of sale" or sales prices to "average costs of production for the period of investigation". If sales prices are above cost of production "at the time of sale," they may not be treated as "outside the ordinary course of trade," within the meaning of the first sentence of Article 2.2.1.

67. Because the use of average costs of production for comparison to individual sales prices can be so distortive in a hyperinflationary economy, many jurisdictions, including the United States, the European Communities and Israel, require respondents in hyperinflationary economies to calculate

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<sup>40</sup> First Submission of Turkey at 14.

monthly costs of production and then limit cost-to-price comparisons to sales prices on sales transactions in the same month that costs are calculated.<sup>41</sup>

68. The Egyptian questionnaire requested respondents to report only those sales prices in the home market that were contemporaneous with respondents' export sales to Egypt. Respondents complied with this request. Because it would have been distortive to compare an annual average cost of production to these sales, and because the common practice in other jurisdictions is to limit cost comparisons to sales prices and monthly costs in the same month, respondents reported monthly costs only for those months for which they reported sales. If Egypt followed the same practice as these other jurisdictions, it would have no use of costs for the other months because there were no sales reported in those other months.

69. Respondents were very clear about what they were doing in their April 7, 1999 responses and what they did was reasonable under the circumstances. There was no complaint from the Investigating Authority prior to verification about incompleteness in the responses. Indeed, when, after the responses were filed, counsel for Colakoglu, Habas and Diler inquired of the Investigating Authority regarding the timetable for supplemental questionnaires, the Investigating Authority replied that the responses filed were "sufficient" and that no supplemental questionnaires would be issued.<sup>42</sup> It seems that early in the investigation, prior to its u-turn in August, the Investigating Authority found respondents' response methodology reasonable as well.

### **Question 16**

**Is interest income properly considered as a cost under Article 2.2.2? Assuming that interest income can be part of the cost of production calculation, is the accounting definition of operating and non-operating income a sufficient determinant of whether the cost is associated with or pertaining to the production of the goods?**

### **Response**

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<sup>41</sup> See, e.g., *Certain Steel Wire Ropes and Cables from Turkey*, Regulation No. 230/2001 (2/2/2001), Official Journal of the European Communities, No. L34/4 (3/2/2001) at 11:

In line with the general methodology, it was possible, for some of the product types, to establish normal value on the basis of the domestic price of comparable types in accordance with Article 2(1) of the Basic regulation. Representativeness and ordinary course of trade tests for the domestic sales of comparable types were carried out on a monthly basis given the high inflation in Turkey during the IP.

For all other types of the product concerned sold for export to the Community by the cooperating companies, normal value was constructed in accordance with Article 2(3) of the basic Regulation. The companies' own domestic SG&A expenses and the profit margin realised on the domestic market in the ordinary course of trade were added to the manufacturing cost. To account for the high inflation, constructed normal values were calculated for each month of the IP.

*See also Notice of Final Results of Anti-Dumping Duty Administrative Review: Certain Welded Carbon Steel Pipe and Tube From Turkey*, 62 Fed. Reg. 51,629 (2 Oct. 1997) (Comment 3) (citing *Final Results of Anti-Dumping Duty Administrative Review: Ferrosilicon from Brazil*, 61 Fed. Reg. 59,407, 59,408 (22 November 1996)). The reporting of cost data in this manner "reflects the increases in materials costs from month to month due to inflation." *Notice of Final Results of Antidumping Duty Administrative Review: Certain Welded Carbon Steel Pipe and Tube From Turkey*, 62 Fed. Reg. 51,629 (Oct. 2, 1997) (Comment 3) (emphasis added).

<sup>42</sup> Facsimile from IA to Law Offices of David Simon, 20 May 1999, TUR-31.

70. Interest income must be considered a negative cost or a normal cost offset. There are other kinds of offsets as well, including revenue from sales of byproducts. In rebar production there are some very short ends of billets, some very short ends of rebars and some shavings from the rebar in the rolling process. These scraps or byproducts are either returned to the production process and credited to the cost of manufacturing or sold to customers and credited to the cost of manufacturing or reported as other income by the producers. These revenues also must be taken into account in calculating the true net cost of production.

71. Another example is foreign exchange gain on loans. Foreign exchange loss on loans is normally considered a financing expense, while foreign exchange gain on loans is ordinarily considered an offset to financing costs. It is a common practice in the EU and the United States at least to recognize these offsets. If the agreement were read to include only those items that involve cash outlays, it would have to be read to require calculation of a fully distributed cost of production that was far in excess of the true net cost of production. It is very unlikely that that this was the original intent of the Contracting Parties in drafting the language of Article 2.

72. The accounting definition of operating income and non-operating income is a sufficient determinant of whether the cost is associated with or pertains to the production of the particular goods in question when the income is a fungible item, like short-term interest income on working capital accounts. There might be non-fungible items of income for which further investigation is required. For example, income from the provision of shipping services on ships that are also used to transport the subject merchandise or which constitute a separate line of business, might be considered not sufficiently related to the production and sale of the subject merchandise to take into account. But interest income on working capital accounts is a fungible item – it cannot be segregated to any particular business line. Therefore, it benefits all production activities of the firm.

### **Question 17 -- Additional Documents To Be Submitted**

**Could Turkey please submit the following documents:**

- 1. Documents referred to in footnote 16 and 17 (except TUR-32).**
- 2. Annexes to letter of 15 September 1999 from the Law Offices of David Simon to IA.**
- 3. Letter of 10 May 1999 from the Law Offices of David Simon to the IA to which the IA responded on 20 May 1999.**
- 4. IDC's comments on the Verification Report.**
- 5. Turkey states on page 43 of its First Written Submission that the Law Offices of David Simon requested an extension to submit information required and to hold a meeting in Cairo. Please submit request and response by the IA.**
- 6. Letter of 23 September 1999 from the IA to IDC.**

### **Response**

73. Please see the attachments to this submission.

74. Please note that we did not state, as implied in Question 17.5, that the Law Offices of David Simon requested a specific period of time as an extension in which to submit the information required by the Investigating Authority in its letter of 23 September 1999. We stated that "Colakoglu, Habas and Ekinciler (*sic* – should be Diler) sent a letter to the IA noting that it would be impossible to respond to the request for additional information sent on 24 September 1999 within the 2-5 day time-

frame requested by the Administering Authority”.<sup>43</sup> This could be taken as an implicit request for an extension. However, there was no explicit request for a particular period of time.

75. We further stated: “The IA did not provide an extension of time for Colakoglu, Habas and Diler to respond to the 23 September 1999 letter . . .”. There was no letter to this effect. The IA simply did not respond to Mr. Simon’s letter dated 28 September 1999.

## **QUESTIONS POSED BY THE PANEL TO BOTH PARTIES**

### **Question 1**

**Concerning the period of data collection, what is the legal status and relevance of the recommendation of the Anti-Dumping Committee for the interpretation of the Anti-Dumping Agreement?**

#### **Response**

76. Article 31 of the Vienna Convention on the Law of Treaties states:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - (a) any agreement relating to the treaty which was made between all the parties in connection with conclusion of the treaty;
  - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
  - (a) any subsequent agreement between the parties regarding interpretation of the treaty or the application of its provisions;
  - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
  - (c) any relevant rules of international law applicable in the relations between the parties.

77. A recommendation by the Antidumping Committee does not qualify as “a subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions”, nor does it qualify as “a subsequent practice in the application of the treaty”. We note in this regard that there was a proposal before the Antidumping Committee at its meeting in April 2001, that the Committee adopt a decision concerning the legal status of adopted recommendations. No

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<sup>43</sup> First Submission of the Government of the Republic of Turkey, at 43.

consensus could be reached on this proposal. Nor could a consensus be reached at the Committee's meeting in October 2001.<sup>44</sup> It is clear, therefore, that the legal status of the Committee's recommendations remains controversial even among members of the Committee. Consequently, recommendations of the Committee should have no bearing on the Panel's consideration of the legal issues presented in this case.

78. We further note that Recommendation of the Anti-Dumping Committee does not specifically address the issue that Turkey has raised in this case. The recommendation of the Committee that there be a three-year period of investigation for injury does not endorse findings by Investigating Authorities in violation of the requirement in Article 3.5 that there be a demonstration that "the dumped imports are, through the effects of the dumping, causing injury within the meaning of this Agreement".

## Question 2

**Could the parties comment on the significance for this dispute, if any, of the ruling of the Panel in the *Argentina – Bovine Hides* dispute on the claims under Article X:3 of the GATT 1994.**

### Response

79. We believe that the *Argentina-Bovine Hides* panel decision offers the following guidance to this Panel's consideration of Turkey's claims under Article X:3:

- (a) Article X applies to the *administration* of the laws, regulations, decisions and rulings. It does not apply to inconsistency between the letter of the law and the GATT 1994 or the Anti-Dumping Agreement. (paras. 11.60-11.61)
- (b) There is "no requirement that Article X:3(a) be applied only in situations where it is established that a Member has applied its Customs laws and regulations in an inconsistent manner with respect to the imports of or exports to two or more Members". (para 11.67)
- (c) "A WTO Member may challenge the substance of a measure under Article X. The relevant question is whether the substance of such a measure is administrative in nature or, instead, involves substantive issues more properly dealt with under other provisions of the GATT 1994." (para. 11.70)
- (d) Resolutions which do not establish substantive Customs rules for enforcement of export laws are administrative in nature and may be challenged under Article X:3. (para. 11.72)
- (e) "It would seem that any rule of "general application" would be deemed a substantive rule by Argentina based on its use of that term elsewhere in its arguments. This would then leave a situation where any rule of general application could not come under Article X because it would involve substantive rules rather than administrative ones. On the other hand an administrative rule, as that would appear to be defined, could not be a rule of general application. This also would render Article X effectively a nullity, which obviously cannot be the case." (para. 11.75)

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<sup>44</sup> *Report (2001) 1 of the Committee on Antidumping Practices*, G/L/495 (31 October 2001) at Section V, para. 15 (Possible Committee Decision on the Status of Adopted Recommendations).

80. Turkey has alleged violations of Article X:3 in connection with Egypt's refusal to schedule a meeting with Turkish respondents to discuss the adequacy of their responses on 15 September 1999 and in connection with Egypt's calculation of a "highly inflated and distorted interest charge" for IDC.<sup>45</sup> Both of these decisions were clearly "administrative" in nature. Furthermore, neither was based directly on a substantive law or rule. While Egypt may have a rule permitting resort to facts available in cases in which a party fails to respond adequately to a questionnaire, that rule certainly cannot be said to have dictated the selection of facts available in IDC's case. That action was purely administrative in nature. Moreover, the decision not to grant a hearing to various parties was clearly an administrative decision.

81. Egypt seeks to avoid review by this Panel of Turkey's claim under Article X:3, claiming that no review is warranted unless the actions complained of had a significant impact on the overall administration of the law. This interpretation, like Argentina's in *Bovine Hides*, would run the risk of rendering Article X a nullity, because actions which have general application, similar to rules of general application, would likely be reviewable under the other substantive rules of the GATT and thus would not be reviewable under Article X.

82. Article X is focused on administration of the laws and on particular administrative rulings and decisions. It thus covers an area not covered by the formal rules of the Anti-Dumping Agreement – the administration of the anti-dumping rules. Turkey has challenged Egypt's application of its rules in this case in two respects as inherently unreasonable. Turkey maintains that this was precisely the sort of conduct intended to be reached under Article X, as confirmed by the Panel in *Argentina – Bovine Hides*.

### **Question 3**

**In relation to the claim of a breach of Annex II, paragraph 1 by reason of the alleged late request for cost information, what is the relevance of Annex II, paragraph 1 at a time in an investigation prior to the decision to use facts available?**

#### **Response**

83. The first sentence of Annex II, paragraph 1 clearly imposes an independent obligation upon the parties. Failure to meet this obligation invalidates the subsequent use of "facts available" under the Agreement.

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<sup>45</sup> See First Submission of Turkey at IV.D.2 and IV.J.8.

## ANNEX 4-2

### RESPONSES OF EGYPT TO QUESTIONS POSED IN THE CONTEXT OF THE FIRST SUBSTANTIVE MEETING OF THE PANEL

#### QUESTIONS POSED BY THE PANEL TO EGYPT

##### Question 1

Egypt argues at p. 30 of its first submission (section III.B.3.b) that the IA examined SG&A and COP of the industry as potential sources of injury to the domestic industry. Where in the Essential Facts and Conclusions Report, the Final Report, and any other documents of record is this examination found?

##### Response

1. The information requested by the Panel as regards the Investigating Authority's examination of SG&A and COP is contained in the *Public File*, which is specifically referred to in the Notice of Initiation at paragraph 12 (attached as EX-EGT-7.3) and in the Essential Facts and Conclusions Report (see TUR-15) and the Final Report (see TUR-16) at Section 1.7.
2. A copy of the relevant report of the public file is provided for the Panel's reference in EX-EGT 6 (see in particular paragraph V).
3. In the examination of material injury during the investigation period, the SG&A and COP of ANSDK and EZZ were analyzed (1) individually on a company basis; and (2) together as part of the examination of the total domestic industry.

##### Question 2

Concerning Egypt's argument that new evidence that was not before the investigating authority cannot be taken into account by the Panel, what if anything is the significance of the recent ruling by the Appellate Body in the *US – Cotton Yarn* dispute (WT/DS192/AB/R at para. 77 et. seq.); and the ruling of the Panel in *US – Hot-rolled steel* (WT/DS184/R, paras. 7.6-7.7)? Does Egypt view these rulings as complementary or contradictory? Please explain. Is the *Cotton Yarn* ruling applicable or relevant in the context of anti-dumping?

##### Response

4. The rulings of the Panel in *US-Hot-rolled Steel* and of the Appellate Body in *US-Cotton Yarn* confirm that the role of the DSB is not to conduct a *de novo* review of the facts of the case. Article 17.5(ii) effectuates this general standard of review in the context the AD Agreement and directs the DSB to disregard evidence that was not made available to the Investigating Authority during the course of the domestic proceeding.
5. The findings of the Appellate Body in *Cotton Yarn* concern a panel's review of the authority's determination under Article 6.2 of the ATC Agreement. In particular, the ruling addresses the issue of whether the DSB may consider evidence relating to facts which predate the determination, but which did not exist at the time the determination was made. In other words, the question is whether a panel

is entitled to take into account evidence that could not possibly have been examined by that Member when it made that determination. To this, the Appellate Body replied in the negative, emphasizing that in connection with the investigative obligations of Members, “[t]he exercise of due diligence by a Member cannot imply, however, the examination of evidence that did not exist and that, therefore, could not possibly have been taken into account when the Member made its determination”.<sup>1</sup>

6. Egypt considers the above rulings to be complementary as they both rely on the basic principle that the Panel is not to conduct a *de novo* review of the facts of the case. In Egypt’s view, however, the *Cotton Yarn* ruling is not applicable in the context of anti-dumping for two fundamental reasons.

7. *First*, unlike anti-dumping investigations, interested parties are not involved in the context of ATC investigations and, in particular, do not normally have the opportunity to actively participate in the data collection exercise carried out by the Investigating Authority. Accordingly, Egypt considers that, in the context of an ATC investigation, the exercise of due diligence by a Member is all the more important in reaching a determination under Article 6 of the ATC.<sup>2</sup>

8. *Second*, the ATC does not contain a similar provision to Article 17.5(ii) of the AD Agreement, which expressly limits the review of the Panel to the evidence that was made available to the Investigating Authority in conformity with the appropriate domestic procedures. Thus, the standard of review to be applied by a panel in the content of an ATC investigation is higher than that applied under the Anti-Dumping Agreement. The standard of review to be applied by a panel in the context of an ATC investigation is not limited to the evidence as presented to the investigating authority during the course of the investigation. To the contrary, under the ATC Agreement a panel may consider evidence that existed during the investigation, but which was not presented to the Investigating Authority.

### **Question 3**

**Egypt also argues at p. 31 of its first submission that no new claims can be raised before the Panel that were not before the IA during the course of the investigation. What are the legal basis and any relevant precedents for this assertion?**

#### **Response**

9. As stated before the Panel on 28 November 2001, the term “new claims” does not refer to new “legal” claims in the context of this sentence, but to new factual considerations that were not presented to the Investigating Authority during the course of the investigation.

### **Question 4**

**Section II.B of Egypt's First Submission deals with the standard of review. Is it correct that an IA can arrive at a decision that is factually incorrect as long as it properly established the facts and evaluated them without bias and objectively? What is the legal test for a panel to determine whether an evaluation of facts by an Investigation Authority was "unbiased and objective" under Article 17.6(i)?**

#### **Response**

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<sup>1</sup> WT/DS192/AB/R, at para. 77.

<sup>2</sup> WT/DS192/AB/R, at para. 76.

10. Egypt submits that it is conceivable that an Investigating Authority can arrive at a decision that is factually incorrect even though it properly established the facts and evaluated them without bias and objectively. It must be borne in mind that the Investigating Authority essentially relies on information provided by interested parties. As illustrated in the Rebar case, the quality of such information may be poor and the Investigating Authority's ability to verify the accuracy thereof limited. Moreover, the possibility to resort to facts available in the circumstances contemplated by the AD Agreement is evidently another factor that will affect the factual correctness of the Investigating Authority's decision.

11. As regards the legal test for a Panel to determine whether an evaluation of facts was "unbiased and objective", Egypt wishes to refer to the findings of in *US-Hot-rolled Coils*, where the Appellate Body held that:<sup>3</sup>

*"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 those facts was unbiased and objective" (emphasis added). Although the text of Article 17.6(i) is couched in terms of an 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 inconsistently 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. Thus, panels must assess if the establishment of the facts by the investigating authorities was proper and if the evaluation of those facts by those authorities was unbiased and objective. If these broad standards have not been met, a panel must hold the investigating authorities' establishment or evaluation of the facts to be inconsistent with the Anti-Dumping Agreement."*

12. In consequence, the Panel may only reject the factual findings made by the national authorities in special cases, such as where the conclusions drawn by the authorities are not supported by the evidence examined or where there is a clear indication of bias in their evaluation of the facts. As explained by the Appellate Body in *Thailand – Steel*, "Article 17.6(i) places a limitation on the panel in the circumstances defined by the Article. The aim of Article 17.6(i) is to prevent a panel from "second-guessing" a determination of a national authority when the establishment of the facts is proper and the evaluation of those facts is unbiased and objective."<sup>4</sup>

### **Question 5**

**Could Egypt direct the Panel to where in the record of the investigation each of the factors listed in Article 3.4 was examined.**

### **Response**

13. The following table shows the factors that the Investigating Authority considered relevant to the injury determination under Article 3.4, which are referred to in the Essential Facts & Conclusions Report as well as in the Final Report.

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<sup>3</sup> WT/DS184/AB/R, at para. 56.

<sup>4</sup> WT/DS122/AB/R, at para. 117.

Economic Factor	EFCR	FR
Sales	Section 2.4.1 Section 4.3.1 Section 4.5.2 Section 4.5.4	Section 2.4.1 Section 4.3.1 Section 4.6.2 Section 4.6.4
Profits	Section 4.3.5 Section 4.5.2 Section 4.5.4	Section 4.3.5 Section 4.6.2 Section 4.6.4
Output	Section 2.4.2 Section 4.3.2	Section 2.4.2 Section 4.3.2
Market Share	Section 2.4.1 Section 4.3.4 Section 4.5.4	Section 2.4.1 Section 4.3.4 Section 4.6.4
Return on investments	Section 4.3.7 Section 4.5.2	Section 4.3.7 Section 4.6.2
Capacity utilization	Section 4.3.6	Section 4.3.6
Prices	Section 4.2.1.2 Section 4.2.2.1 Section 4.5.1 Section 4.5.2 Section 4.5.3 Section 4.5.4	Section 4.2.1.2 Section 4.2.2.1 Section 4.6.1 Section 4.6.2 Section 4.6.3 Section 4.6.4
Dumping margin	Section 3.3	Section 3.3 Section 4.4 Section 4.6.2
Inventories	Section 4.3.3 Section 4.5.2	Section 4.3.3 Section 4.6.2

EFCR = Essential Facts & Conclusions Report

FR = Final Report

14. The fact that the injury analysis of the Investigating Authority was thorough and indeed covered all the factors listed in Article 3.4 is evident in the *Confidential Injury Analysis* of the Rebar Investigation. A copy of the *Confidential Injury Analysis* is available only for the Panel's review and upon request. If required, a non-confidential summary will be provided for Turkey's review.

### **Question 6**

The test of causation referred to in the Egyptian submission is to ask whether any "other factor was sufficient to break the causal relationship between the dumped imports and the injury to the domestic industry" (e.g., Section III.B.1, page 24). This (a) assumes that a causal link between the dumped imports and the injury has been found; but then (b) tries to find a cause, or at least a different cause, to replace dumping as a cause. Turkey says that other causes of injury were improperly discounted. First, can Egypt direct the Panel to where the causal link finding is reported by the IA? Second, is the test Egypt has enunciated ("to break the causal relationship") one which is consistent with either the words of the Anti-Dumping Agreement or the way in which it has been interpreted (c.f., *US – Hot-rolled steel* (WT/DS184/AB/R at paras. 226 et. seq.)?

Response

(a) Causal link finding

15. The conclusions regarding the causal link between the dumped imports and the material injury to the domestic industry can be found in the Essential Facts & Conclusions Report at Sections 4.4 and 4.5 (see TUR-15) and in the Final Report at Sections 4.5 and 4.6 (see TUR-16). The specific findings upon which these conclusions are based are indicated in the following table.

Causal link factor	EFCR	FR
Volume of dumped imports	Section 2.3.1 Section 4.1.1.1 Section 4.1.1.2 Section 4.1.2.1 Section 4.1.2.2 Section 4.1.2.3	Section 2.3.1 Section 4.1.1.1 Section 4.1.1.2 Section 4.1.2.1 Section 4.1.2.2 Section 4.1.2.3
Price undercutting	Section 4.2.1.2 Section 4.2.1.3 Section 4.2.1.4 Section 4.2.1.5	Section 4.2.1.2 Section 4.2.1.3 Section 4.2.1.4 Section 4.2.1.5
Price suppression and depression	Section 4.2.2.1 Section 4.2.2.2 Section 4.2.2.3	Section 4.2.2.1 Section 4.2.2.2 Section 4.2.2.3
Sales	Section 4.3.1.1 Section 4.3.1.2	Section 4.3.1.1 Section 4.3.1.2
Production	Section 4.3.2.1 Section 4.3.2.2 Section 4.3.2.3 Section 4.3.2.4	Section 4.3.2.1 Section 4.3.2.2 Section 4.3.2.3 Section 4.3.2.4
Inventory	Section 4.3.3.1 Section 4.3.3.2 Section 4.3.3.3	Section 4.3.3.1 Section 4.3.3.2 Section 4.3.3.3 Section 4.3.3.4
Market share	Section 2.4.1 Section 4.3.4.1 Section 4.3.4.2 Section 4.3.4.3 Section 4.3.4.4	Section 2.4.1 Section 4.3.4.1 Section 4.3.4.2 Section 4.3.4.3 Section 4.3.4.4 Section 4.3.4.5
Price of raw materials		Section 4.3.5.3
Profits	Section 4.3.5.1 Section 4.3.5.2 Section 4.3.5.3	Section 4.3.5.1 Section 4.3.5.2 Section 4.3.5.3 Section 4.3.5.4
Return on investment	Section 4.3.7.1 Section 4.3.7.2	Section 4.3.7.1 Section 4.3.7.2
Margin of dumping	Section 3.3.2	Section 3.3.2 Section 4.4.1 Section 4.4.2 Section 4.4.3

EFCR = Essential Facts & Conclusions Report

FR = Final Report

(b) Causal link test

16. The causal link test referred to by Egypt does not imply that the dumped imports as a cause of injury are subsequently replaced by other causes of injury. Indeed, the AD Agreement does not require that dumped imports be the sole or even the principal cause of injury. To the contrary, the purpose of the examination of other factors of injury is to determine whether the impact of other factors on the state of the domestic industry is such that the dumped imports are not contributing to the existence of the injury of the domestic industry. If, conversely, the dumped import remain a cause of material injury in spite of the impact of other factors, the causal link test is positive.

17. In Egypt's view, this is consistent with Article 3.5 of the AD Agreement and the findings of the Appellate Body in *US-Hot-rolled Steel*.<sup>5</sup> Indeed, under Article 3.5 of the AD Agreement, the Investigating Authority must separate the injuries caused by other factors in order to ensure that they are not attributed to the dumped imports. As noted by the Appellate Body in *US-Hot-rolled Steel*, "[t]his requires a satisfactory explanation of the nature and extent of the injurious effects of other factors, as distinguished from the injurious effects of the dumped imports".<sup>6</sup>

18. The non-attribution obligation of Article 3.5, in practice, means that the Investigating Authority must determine whether the injury experienced by the domestic industry is caused entirely by other factors, to the exclusion of the dumped imports. In other words, that there is no injury that can be attributed to the dumped imports. Accordingly, the non-attribution obligation should not be interpreted to mean that the injury caused by the dumped imports must be greater than the injury caused by other factors. Indeed, such an interpretation would mean that the injury caused by dumped imports must be the principal or sole cause of the material injury to the domestic industry, which as explained above, the AD Agreement does not require. Indeed, that the dumped imports must be the principal cause of injury was specifically deleted from the Anti-Dumping Code during the *Tokyo Round*.

19. Egypt's position is furthermore consistent with the Appellate Body's interpretation of Article 4.2(b) of the Agreement on Safeguards in *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*<sup>7</sup> and in *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*.<sup>8</sup>

20. In *United States – Wheat Gluten*, the Appellate Body noted that:<sup>9</sup>

*"The word "link" indicates simply that increased imports have played a part in, or contributed to, bringing about serious injury so that there is a causal "connection" or "nexus" between these two elements. Taking these words together, the term "the causal link" denotes, in our view, a relationship of cause and effect such that increased imports contribute to "bringing about", "producing" or "inducing" the serious injury. Although that contribution must be sufficiently clear as to establish the existence of "the causal link" required, the language in the first sentence of Article 4.2(b) does not suggest that increased imports be the sole cause of the serious injury, or that "other factors" causing injury must be excluded from the determination of serious injury. To the contrary, the language of Article 4.2(b), as a whole, suggests that "the causal link" between increased imports and serious injury may*

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<sup>5</sup> WT/DS184/AB/R.

<sup>6</sup> WT/DS184/AB/R, at para. 226.

<sup>7</sup> WT/DS166/AB/R.

<sup>8</sup> WT/DS178/AB/R.

<sup>9</sup> WT/DS166/AB/R.

exist, even though other factors are also contributing, "at the same time", to the situation of the domestic industry." (emphasis added)

21. Given the considerable similarities between Article 4.2(b) of the Safeguards Agreement and Article 3.5 of the Anti-Dumping Agreement, the Appellate Body's interpretation of Article 4.2(b) is indeed relevant to the interpretation of the non-attribution language in Article 3.5, as emphasized by the Appellate Body in *US-Hot-rolled Steel*.<sup>10</sup>

22. In any event, as a final point Egypt wishes to stress that the non-attribution obligation is relevant only in cases where the Investigating Authority has found that there were factors other than the dumped imports that caused injury to the domestic industry. If, as in the Rebar case, the Investigating Authority has found that the other factors alleged to cause injury are in fact not causing injury to the domestic industry, the non-attribution obligation does not apply. In such cases, there is no injury that could possibly be mistakenly attributed to the dumped imports. In this respect, Egypt would like to direct the Panel's attention to the Appellate Body's finding in *US-Hot-rolled Steel*.<sup>11</sup> The Appellate Body stated very clearly that:

*"The non-attribution language in Article 3.5 of the Anti-Dumping Agreement applies solely in situations where dumped imports and other known factors are causing injury to the domestic industry at the same time."* (emphasis added)

#### **Question 7**

**At pp. 37-38 of its first submission (Section III.B.5.b(i)-(iii)), Egypt refers to an analysis of the price of non-dumped imports, the volume of non-dumped imports, and consideration of price and volume over the period of 1996-1998. Where in the Essential Facts Report, the Final Report, and any other documents of record are these analyses found?**

#### **Response**

23. These analyses can be found, *inter alia*, in Section 4.3.4.1 of the Final Report. See also the Public File, in particular EX-EGT-6 at paragraph III.

#### **Question 8**

**At page 9 of its First Oral Statement, Egypt states that the IA considered increased domestic competition. Where can this consideration be found in the Essential Facts and Conclusions Report, the Final Report, and any other documents of record?**

#### **Response**

24. As stated at page 34 of our First Submission, which is based on, *inter alia*, the conclusions reported in Section 4.3.4 of the Final Report, when examining whether there was any increased competition in the domestic industry, the Investigating Authority found that the individual market shares of the domestic producers from 1996 to Q1-1999 had increased<sup>12</sup>, together with an increase of sales.<sup>13</sup> At the same time, the market share of non-subject imports decreased by 80 per cent.<sup>14</sup> Thus,

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<sup>10</sup> WT/DS184/AB/R, at para. 229.

<sup>11</sup> WT/DS184/AB/R, at para. 223.

<sup>12</sup> See Essential Facts & Conclusions Report and Final Report at Section 4.3.4.

<sup>13</sup> *Id.*, at Section 4.3.1.

<sup>14</sup> *Id.*, at Section 4.3.4.

the increase of market share of the domestic industry and sales volume was gained at the expense of the non-subject imports and also as a result of the increase in consumption during that period.<sup>15</sup>

25. Supporting documentation is contained in the Public File, which is provided for the Panel's reference in EX-EGT-6 at paragraph VIII.

### **Question 9**

**Egypt seems to imply in its arguments concerning the use of “partial facts available ” that it was not selecting facts so as to arrive at an outcome “less favourable” than would have been the case had the Turkish companies “cooperated” (p. 62, section IV.B.1.e). Rather, Egypt argues (p. 58, section IV.A.13) that the “most appropriate” approach was to choose the highest monthly cost of production reported by the respondents to verify whether there were below-cost sales and to calculate constructed normal values. What was, specifically, the IA’s basis under Article 6.8 for the use of partial facts available? That the Turkish companies “refused access to” necessary information, “ otherwise failed to provide” such information, or “significantly impeded the investigation”? (For example, at page 22, section D.1, of Egypt's First Oral Statement, reference is made to both insufficient cooperation and to failure to provide information.)**

**Where is this basis for resort to facts available reflected in the Essential Facts and Conclusions Report, the Final Report, and any other documents of record?**

**How was it that only the highest monthly costs were found to be “reliable ” (see heading of Section IV.A.13)?**

**In connection with Egypt’s argument that the IA used “favourable” facts available by using the data of respondents in spite of insufficient co-operation (p. 62, section IV.B.1.e), where in the text of the AD Agreement is it provided that “adverse facts available” would by definition exclude any and all data provided by investigated companies, no matter how such data were employed in dumping calculations?**

**What is meant by the expression "facts available" as referred to in Article 6.8 and paragraph 1 of Annex II of the Anti-Dumping Agreement?**

### **Response**

26. Egypt confirms that, when making use of “partial facts available”, it was not seeking to arrive at an outcome less favourable than would have been the case had the Turkish companies offered satisfactory cooperation. The Investigating Authority resorted to “partial facts available” for the sole purpose of arriving at appropriate and meaningful determinations in view of the lack of or insufficient probative value of the information provided by the Turkish respondents.

(a) **Basis under Article 6.8 of the AD Agreement for the use of partial facts available**

27. The basis for the Investigating Authority’s use of partial facts available is that three respondents “refused access to necessary information” and “failed to provide necessary information (Habas, Colakoglu and Diler); and that the other two respondents “otherwise failed to provide” the necessary information (IDC and Icdas).

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<sup>15</sup> *Id.*, at Section 2.4.1.

28. The basis for resort to facts available can be found, *inter alia*, in Section 3.2 of the Essential Facts & Conclusions Report as well as page 15 (General issues, para. 4) and 3.2 of the Final Report.

(b) Use of the highest monthly costs

29. In its First Submission at Section IV.A.13, Egypt is not suggesting that “only the highest monthly costs were found to be ‘reliable’”. The heading of Section IV.A.13 explains that, when calculating the margin of dumping of the respondents, the Investigating Authority used the data provided by the respondents to the extent that such data were found to be reliable. Thus, the export sales data and adjustments thereto were found reliable and therefore used in the determination of the export price. For the determination of the normal value, the Investigating Authority had to resort to facts available because the costs data submitted by the respondents were found unreliable. As facts available, the highest monthly costs data was in this respect found to be “the most appropriate approach in the circumstances of the case”.

(c) Notion of “favourable” facts available

30. In connection with the Panel’s question concerning the notion of “favourable” facts available, Egypt does not suggest that the use of the party’s own data necessarily leads to a good result, e.g. a finding of no dumping or a low margin of dumping. The use of the party’s data only ensures that the Investigating Authority’s findings will reflect as closely as possible the actual situation of the company. In anti-dumping investigations, the most favourable result to which an investigated company is legitimately entitled is a dumping determination based on the data it submitted. This presupposes that the company provided verifiable and reliable data within a reasonable period of time. If the investigated company fails to meet these requirements, the Investigating Authority is entitled to resort to “facts available” in order to rectify the deficiencies of the information provided by the companies concerned.

31. The AD Agreement does not provide and Egypt did not suggest that “ ‘adverse facts available’ would by definition exclude any and all data provided by investigated companies, no matter how such data were employed in dumping calculations” (emphasis added). It should be noted that the AD Agreement contains no guidance on how data used as “facts available”, whatever their origin (the respondent or secondary sources), must be *employed* by the Investigating Authority. It is however conceivable that, when resorting to “facts available”, an Investigating Authority decides to use the data provided by the investigated companies in such a way that it intentionally seeks to reach adverse determinations.

32. This is not the case in the Rebar investigation. In this case, the Investigating Authority used the costs data submitted by each company in order to calculate the cost of production and to construct the normal value of the companies concerned. This ensured that the determinations made with respect to those companies were as close as possible to the findings that would have been reached, had those companies offered sufficient cooperation and provided verifiable and reliable data on cost. This is what Egypt means by “favourable facts available” in this case.

33. As explained in Egypt’s First Submission at Section IV.B.1.e, the decision of Habas, Diler and Colakoglu to terminate their cooperation with the Investigating Authority would have entitled the Investigating Authority to seek to reach adverse results in accordance with paragraph 7 of Annex II.

(d) Meaning of “facts available” in Article 6.8 and paragraph 1 of Annex II of the AD Agreement

34. In Egypt’s view, the notion of “facts available” covers information that is available to the Investigating Authority and that needs to be used in order to make appropriate determinations in a situation where interested parties do not supply reliable and verifiable information within a reasonable

period of time, as requested. Two sets of circumstances are therefore envisioned, namely (1) the investigated parties refuse to provide the requested data, and (2) the investigated companies submit the requisite data, but these data are found unreliable and, therefore, unsuitable to reach meaningful determinations.

### **Question 10**

**Additional documents to be submitted:**

**Could Egypt please submit the following documents:**

1. **Information on scrap steel prices on a monthly basis on which the final determination was based.**
2. **Cover letter of the Essential Facts and Conclusions Report which was sent to interested parties in October 1999.**
3. **The Notice of Initiation of the Investigation.**
4. **Letter of 17 July 1999 to Habas, Diler and Colakoglu.**
5. **Letter to Law Offices of David Simon on 28 September 1999 to advise of the use of facts available.**
6. **Egypt states on page 56 of its First Written Submission that the auditors of the respondents certified that their financial statements were not prepared according to IAS 29. Please submit documentation to substantiate the allegation.**
7. **Documentary evidence on which the calculation of the 5 per cent Turkish inflation rate was based, and the other sources of information on inflation in the IA's possession as referred to in the Final Report.**
8. **Letter of 21 September 1999 by the IA to the Law Offices of David Simon.**
9. **The reply by IDC and Icdas referred to in the second paragraph of section III.E.2 (page 24) of Egypt's First Oral Statement.**

### **Response**

35. A copy of the documents requested by the Panel is attached as EX-EGT-7.

## **QUESTIONS POSED BY THE PANEL TO BOTH PARTIES**

### **Question 1**

**Concerning the period of data collection, what is the legal status and relevance of the recommendation of the Anti-Dumping Committee for the interpretation of the Anti-Dumping Agreement?**

### **Response**

36. Egypt agrees with the Panel in *Guatemala – Cement II* that the *Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations* adopted by the Committee on 5 May 2000 is non-binding, but constitutes relevant indication of the understanding of WTO Members as to the selection of the appropriate period of data collection for the injury and dumping determinations.<sup>16</sup>

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<sup>16</sup> Guatemala–Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico, WT/DS156/R, at footnote 68.

## **Question 2**

**Could the parties comment on the significance for this dispute, if any, of the ruling of the Panel in the *Argentina – Bovine Hides* dispute on the claims under Article X:3 of the GATT 1994.**

### **Response**

37. In Egypt's view, the findings in *Argentina – Bovine Hides*<sup>17</sup> confirm Egypt's position that the Investigating Authority's actions in the context of an anti-dumping investigation should not be reviewed under Article X:3 of GATT 1994.

38. Indeed, the Panel stated:

*"In our view, Argentina has attempted to stretch the Appellate Body finding that Article X is not applicable when the alleged inconsistency involves the substance of another GATT 1994 provision, to argue that Article X cannot be referred to when challenging the substance of any measure. Of course, a WTO Member may challenge the substance of a measure under Article X. The relevant question is whether the substance of such a measure is administrative in nature or, instead, involves substantive issues more properly dealt with under other provisions of the GATT 1994."(underline added)*

39. This finding confirms that actions that are covered by other WTO provisions do not fall within the scope of Article X:3(a). In the Rebar case, the actions of the Investigating Authority are evidently covered by Article VI of GATT 1994 and the WTO AD Agreement. Accordingly, Article X:3 does not apply.

## **Question 3**

**In relation to the claim of a breach of Annex II, paragraph 1 by reason of the alleged late request for cost information, what is the relevance of Annex II, paragraph 1 at a time in an investigation prior to the decision to use facts available?**

### **Response**

40. Annex II, paragraph 1 imposes upon the Investigating Authority the obligation to specify in detail the information required from any interested party, and the manner in which that information should be structured, as soon as possible after the initiation of the investigation. The Investigating Authority must furthermore inform the party that, if information is not supplied within a reasonable time, determinations will be made on the basis of facts available.

41. In Egypt's view, Annex II, paragraph 1 applies only to the issuance of the initial questionnaire, where the information the Investigating Authority requires to base its determinations must be specified. This interpretation is consistent with the requirement that the notification should be made as soon as possible after the initiation of the investigation. Conversely, Annex II, paragraph 1 does not apply to requests for clarification and additional information that the Investigating Authority might send in the course of the investigation. Indeed, such requests will be sent after a preliminary review of the information provided in the questionnaire responses. Contrary to Turkey's suggestions, it goes without saying that Annex II, paragraph 1 does not prevent the Investigating Authority from

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<sup>17</sup> Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather, WT/DS155/R, at para. 11.70

requesting additional information in the course of the investigation, if necessary. To decide otherwise would contradict the possibility for an Investigating Authority to verify the information submitted in response to the initial questionnaire and to seek further details, as explicitly provided in Article 6.7 of the AD Agreement. In any event, assistance was provided for all requests for additional information and/or clarification. The letters of 19 August 1999 and 23 September 1999, for instance, provided detailed guidance to the exporters as to the nature of the information sought and the manner in which that information should be structured.

42. Egypt considers that requests for clarification and additional information might fall within the scope of Annex II, paragraph 6 of the AD Agreement, which requires the Investigating Authority to inform interested parties of the reasons why the information submitted is not accepted and to give them an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. As demonstrated in Egypt's First Submission, the Investigating Authority fully complied with those requirements in the course of the Rebar investigation.

## ANNEX 5-1

### REBUTTAL SUBMISSION OF TURKEY EXECUTIVE SUMMARY

1. The Panel should not consider evidence, purportedly of a public nature, that was not supplied to all interested parties during the course of Egypt's anti-dumping investigation. The "Report of Other Causes of Injury" in EGT-6 was not supplied to interested parties and was not "available" to Turkish respondents during the investigation. It should therefore be disregarded under Article 6.4 of the Anti-Dumping Agreement.
2. The Panel should not consider the confidential information on injury, referred to in Egypt's Response to Panel Question #5, if Turkey is denied access to the information in the same form. To do otherwise would involve an impermissible *ex parte* communication.
3. Turkey is not seeking *de novo* review by the Panel. Turkey is seeking a determination of whether Egypt's "establishment" of the facts was "unbiased" and "objective," as required by Article 17.6(i), and whether its injury findings were based on "positive evidence" under Article 3.1. Article 17.6(i) requires panels to make an assessment of the facts. In order to determine whether an injury finding is supported by "positive evidence", a panel must examine the factual basis for the findings to determine whether the Investigating Authority properly identified the appropriate facts, and whether the stated factual basis reasonably supported the findings.
4. The Panel should consider the so-called "new" information supplied in Turkey's First Submission because respondents were deprived of adequate notice that the scope of the investigation had changed from consideration of threat of injury to consideration of present material injury. The respondents would have or could have submitted this information had they had adequate notice that it would be relevant to the Investigating Authority's determination. Alternatively, the Panel should take "judicial notice" of those facts.
5. The Panel need not accept the Investigating Authority's interpretation of the agreement unless the Panel finds that that interpretation is "permissible". This standard is less deferential than one requiring deference to interpretations that are merely "reasonable".
6. The only "positive evidence" cited by Egypt as support for its finding that a "causal link" existed between imports from Turkey and injury to the domestic industry is (a) an increase in the volume of imports; and (b) a finding by the Investigating Authority of price undercutting by imports. However, increases in the volume of imports cannot be said to be injuring the domestic industry when the domestic industry is, itself, experiencing strong increases in both sales volume and market share. In the first quarter of 1999, when the Investigating Authority claims that most of the injury occurred, the domestic producers increased their market share by 22 per cent! Moreover, imports overall, including imports from Turkey, declined in volume by 50 per cent in the first quarter of 1999. Contrary to a finding by the Investigating Authority, imports from Turkey did not increase by 40 per cent in the first quarter of 1999 over import levels in the second half of 1998. Rather, the volume of imports from Turkey declined in the first quarter of 1999 as compared to import levels in the second half of 1998.
7. A finding of price undercutting, standing alone, without other evidence that import prices are having an adverse effect on domestic prices, is not sufficient "positive evidence" that import pricing is having any effect on domestic prices. Because of long lead times for import shipments, uncertainties

regarding delivery or the condition of the merchandise when delivered, and difficulties in making returns or quality claims, imports of commodity products must nearly always be priced below domestic prices. But that does not mean that they are having any impact on domestic prices. Where there is no specific “positive evidence” that imports caused prices to fall, the price declines could just as well have been caused by other factors (as Turkey claims has occurred in this case).

8. Turkey does not claim that imports must be the “sole” cause of injury to the domestic industry. Turkey claims that Egypt has not established that the dumped imports were even a “contributing cause” of the injury found to the domestic industry.

9. Turkey does not claim that Egypt had to consider and evaluate each and every factor listed in Article 3.5 as Egypt contends, only that Egypt had to consider those factors that were “relevant” to the case before it. Article 3.5 requires a “demonstration of a causal relationship between the dumped imports and injury to the domestic industry”. This demonstration must be made based on “an examination of all relevant evidence before the authorities”. Injuries caused by “known factors” other than the dumped imports must be “separated” and “distinguished” so that they are not attributed to imports.

10. Contrary to Egypt’s claims, “known factors” does not include solely those factors that the foreign interested parties have brought to the attention of the Investigating Authority. Nor is there an obligation that the foreign interested parties make a *prima facie* case that those factors are injuring the domestic industry. The foreign interested parties may not be in possession of the information necessary to make such a case. Furthermore, “known” factors should include factors that are having a large, and discernible, effect on the conditions of the competition or on the size and shape of the domestic industry. *Wheat Gluten* indicates that the Investigating Authority has an independent obligation to conduct a full investigation in order to identify all factors having a bearing on the state of the domestic industry, including other factors that might be, at the same time, causing injury to the domestic industry. The Investigating Authority bears a special burden to identify such factors where there has been no public allegation that the domestic industry is suffering from current “material” injury, and the final determination is based upon an affirmative finding of present “material” injury.

11. The Investigating Authority failed to engage in an objective and thorough investigation of causes of injury other than imports. In this case, the other causes of injury include (1) large capacity expansions at the two major Egyptian producers; (2) the effects of the capacity expansion on the producers’ costs of production; (3) the effects of the capacity expansion on intra-industry competition; (4) increasing competition between Al Ezz and Alexandria National; (5) falling prices for steel scrap; (6) a sharp contraction in demand in January 1999; and (7) the effect of comparably priced, fairly traded imports. Each of these other factors was identified by the Turkish interested parties or known to the Investigating Authority.

12. With respect to the capacity expansions, Egypt alternately claims that it did investigate the expansion, citing a finding in the Final Report with respect to capacity utilization, and that the Investigating Authority did not “know” that the capacity expansions were causing injury. However, this was a factor that was known to the Investigating Authority and it should have been obvious that a change in the size and shape of the domestic industry of this magnitude (700,000 new tons of capacity) could have had an adverse effect upon the domestic cost structure during start-up and on intra-industry competition after start-up. The findings in the Report on Other Causes of Injury, if they are to be considered by this Panel, do not contradict this analysis.

13. With respect to contraction in demand, the investigating authority noted a demand increase from 1997 to 1998 but ignored a decline in demand of 33 per cent in January 1999, the very month in which domestic prices fell. While demand picked up after January, the demand decline in January coincided with a number of other factors that acted to depress prices, including: (a) the

commencement of operations at two capacity expansion projects; (2) falling scrap prices that permitted Al Ezz to reduce prices while maintaining profitability; and (3) sharpening competition between Al Ezz and Alexandria National.

14. With respect to non-dumped imports, Egypt claimed that (a) imports from Saudi Arabia and Libya declined in the first quarter of 1999, while imports from Turkey increased; (b) prices from Turkey are below those from Saudi Arabia and Libya; and (c) additions should be made to the Saudi and Libyan prices prior to comparison with prices from Turkey. These claims ignore the fact that Saudi Arabia was the largest foreign supplier in 1998, with volume increases exceeding those from Turkey, according to published statistics. In addition, the published data, when corrected for an error in Egypt's brief, show that Turkey's prices were comparable to those of imports from Saudi Arabia and above those for Libya. The published data are reported on a CIF basis, so there is no basis for further adjustment for transportation expenses. And, while the volume of imports from Saudi Arabia fell in the first quarter of 1999, after that country lost duty-free treatment, this meant that imports overall, including those from Turkey, declined substantially in the first quarter of 1999.

15. With respect to the decline in raw material prices, Egypt noted that, because of a simultaneous decline in profits, that factor cannot explain falling prices. However, this analysis ignores the fact that declining scrap prices affected Al Ezz, but not Alexandria National. Thus Al Ezz could reduce prices without sacrificing profitability, which was strong during the period. Al Ezz had an incentive to do so, with the confluence of declining demand in January and the start-up of a new, 400,000-ton facility.

16. The Investigating Authority failed to examine all of the mandatory factors listed in Article 3.4, including productivity, actual and potential negative effects on cash flow, employment, wages, growth and ability to raise capital. The Investigating Authority also failed to provide a sufficient examination of capacity, capacity utilization and return on investment. In *High Fructose Corn Syrup*, the Panel found that Article 3.4 requires more than the mere recitation of the Article 3.4 factors in the final determination – it requires a meaningful analysis.

17. Egypt claims that its determination of price undercutting was made by comparing prices at the same level of trade. This is, however, insufficient unless the level of trade at which prices are compared happens to be the level where those prices are in actual competition with each other. There is insufficient information to establish whether that was the case in the rebar investigation.

18. Egypt argues that Turkey's claim with respect to lack of adequate notice of a change in the scope of the injury investigation was considered and rejected by the Panel in *Guatemala-Cement II*. Turkey considers the decision in *Guatemala-Cement II* to be highly inequitable and, in effect, a denial of fundamental due process. Parties cannot defend themselves adequately if they do not know what allegations are being investigated. Turkey therefore urges this Panel to reach its own determination on the issue.

19. With respect to Turkey's claim that Egypt violated Article 3.5 by failing to find a linkage between the imports found to be dumped in 1998 and the injury found in 1999, Egypt asserts that the Agreement does not contain any requirements for the period over which data should be collected. But that is not the issue. The issue is the absence of a finding of a link between the imports specifically found to be dumped and the injury to the domestic industry. Egypt also claims that such a finding was made but provides no citation to the Final Report. In fact, there was no such finding.

20. Egypt contends that the original manufacturers' questionnaire requested cost data for a full twelve-month period. Egypt further contends that the Investigating Authority's letter of 20 May 1999, characterizing the responses filed by Colakoglu, Habas and Diler as "sufficient," such that no supplemental questionnaires or requests for information would be issued, as being confined to the price and sales aspects of respondents' questionnaire responses. This bit of historical revisionism

does not match the facts. Respondents were instructed to report only those home market sales that were contemporaneous with their reported sales to Egypt. Costs are ordinarily compared to sales on a transaction-by-transaction basis. Respondents operate in hyperinflationary conditions. Investigating authorities in other jurisdictions limit their price-cost comparisons to sales prices and costs computed in the same month so as to limit the potential distorting effect of inflation. Respondents reasonably reported costs for those months in which they reported sales in Egypt and sales in the home market. The Investigating Authority was initially satisfied with this methodology as indicated in its letter of 20 May 1999. Neither the inquiry to which that letter responded nor the letter itself was limited to the price and sales aspects of the response. Moreover, the 19 August letter, where cost data was requested for additional months, did not predicate its request on the rationale that this information should have been supplied in response to the initial questionnaire. Rather, the Investigating Authority justified its request for the data on the rationale that respondents' submitted cost data did not appear to reflect mounting inflation in Turkey.

21. Egypt claims that respondents' limit on the reporting of their costs to the month in which they reported sales transactions was "tantamount to an absence of a response". If so, why did the Investigating Authority wait for four months, until the end of the investigation was, in the Investigating Authority's own words, "near," to notify the respondents of the deficiency? Even if this explanation were accepted, the Investigating Authority's delay in notifying respondents that it considered their responses deficient violated Paragraph 6 of Annex II. By failing to obtain the necessary information in advance of verification, moreover, and then requiring respondents to self-verify all of their submitted costs and prices on paper, the Investigating Authority imposed an "unreasonable burden of proof" in violation of Article 2.4, and violated Annex I, paragraph 7 (verification "should be carried out after the response to the questionnaire has been received") and Article 6.7.

22. Contrary to Egypt's claims, the calculations attached to the verification reports were clearly tentative dumping calculations. The calculation sheet for Icdas, for example, states at the top "ICDAS DUMPING CALCULATION". While a dumping margin was not calculated in the document itself, it can easily be done with the data shown in the table.

23. Egypt questions why Turkey would claim it "extraordinary" that the Investigating Authority would question in its 19 August letter whether respondents' costs of production included the effects of inflation. While there are many "extraordinary" elements to that letter, Turkey characterized as "extraordinary" the Investigating Authority's questioning of respondents' sales prices, and whether those prices reflected inflation, when, in fact, the Investigating Authority had just verified those sales prices to respondents' books and records without discrepancy.

24. Egypt raises, for the very first time in its written submission to the Panel, the claim that respondents' financial statements did not comply with IAS-29, which deals with financial reporting in hyperinflationary economies, as evidence that their submitted costs did not reflect to the effects of inflation. This argument is nothing more than *post-hoc* rationalization of Egypt's anti-dumping determination. "[E]rrors made during the investigation cannot be rectified in subsequent submissions before a WTO Panel." (*Hot-Rolled Carbon Steel Products from Japan* – Report of the Panel.) The Final Report does not mention IAS-29 and it is evident that the Investigating Authority never asked any questions about it. Moreover, the evidence on the record shows that complying with IAS-29 is not required by generally accepted accounting principles in Turkey. None of the respondents comply with IAS-29 and one of the auditors noted that "there is currently no consensus in Turkey on the application of IAS-29". Under Article 2.2.1.1 "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 generally accepted accounting principles in the exporting country". Since respondents costs were kept in accordance with generally accepted accounting principles in Turkey, they should have been used under the Agreement.

25. Egypt states throughout its written submission that the information submitted by Icdas and IDC did not demonstrate that their costs reflected inflation. But Egypt has not shown that their submitted costs do not reflect the costs shown in their books and records, or that their books and records were not kept in accordance with generally accepted accounting principles in Turkey. Nor has Egypt shown how it complied with the requirements of Annex II, paragraph 6. That paragraph provides that if information is “not accepted”, the supplying party must be informed and it must be given “an opportunity to make further explanations”. Neither Icdas, nor IDC, were so informed or given such an opportunity.

26. Egypt claims that there is no “normal sequence of events” contemplated by the Agreement. However, the provisions we have cited, Annex II, paragraph 1, Annex II, paragraph 6, Article 6.7 and Annex I, paragraph 7, certainly appear to contemplate a normal sequence events – i.e., questionnaire, supplemental questionnaire, verification (if there is one), preliminary determination, argument, final determination. This sequence is, in fact, how anti-dumping investigations are conducted throughout the world. The provisions cited also contemplate that, if there is to be a verification, it will be conducted on-site, and if there are further details to be gathered after the questionnaire responses have been filed, they will be collected during the verification. The respondents in this case were severely prejudiced by the Investigating Authority’s failure to request the additional cost information it later considered necessary early in the investigation, the Investigating Authority’s failure to take advantage of the on-site verification to test the submitted data submitted, and the Investigating Authority’s demand that respondents engage in a full “mail order” verification in order to compensate for the Investigating Authority’s earlier failures to identify and ask questions at verification about the data with respect to which it had questions or concerns.

27. Contrary to Egypt’s claims, and those of the United States, the obligations stated in the first and last sentence of Article 2.4 (requirement of a “fair comparison” between the export price and the normal value and prohibition against imposing an “unreasonable burden of proof”) apply to all of Article 2. The Appellate Body took the position in *Hot-Rolled Carbon Steel Products from Japan* that the first sentence of Article 2.4 (“fair comparison”) “informs all of Article 2”. The last sentence of Article 2.4 is as general in its language and intended effect as the first sentence and so should be read equally broadly.

28. Contrary to claims by Egypt, the United States and the EU, the 37-day period established in Article 6.1.1 for responses to “questionnaires used in an anti-dumping investigation” does not apply only to the initial questionnaires issued in those investigations. It applies, by its terms, to any “questionnaire” the response to which is to be “used in an anti-dumping investigation”. Nor does the context of Article 6.1.1 indicate that this provision is intended to be applied only to initial questionnaires. In the absence of an express limitation in the language or an implied limitation in the context in which that language appears, Article 6.1.1 should be given its full effect. It should therefore be read to apply to questionnaires such as the one contained in the 19 August 1999 letter.

29. In the alternative, the deadlines established for a response to the 19 August questionnaire were unreasonable, in violation of Annex II, paragraph 6. “[W]hat constitutes a reasonable period or a reasonable time, under Article 6.8 and Annex II of the Anti-Dumping Agreement, should be defined on a case-by-case basis, in light of the specific circumstances of that investigation”. (*Hot-Rolled Carbon Steel Products from Japan* – Report of Appellate Body). In this case, even the extended deadline was clearly insufficient in light of the mass of detail, documentation and analysis required for a response to the 19 August questionnaire. And the specific circumstances facing the respondents – a massive earthquake hitting Istanbul the day before the questionnaire was issued causing widespread devastation and loss of life – made the deadlines even more unreasonable. The deadlines for the 23 September 1999 supplemental information request to Habas, Colakoglu and Diler were also

plainly insufficient. It would have been literally impossible to provide the requested data in just 2-5 days.

30. Egypt claims that it properly denied a request by Colakoglu, Habas and Diler for an oral hearing because that request came after respondents supposedly informed the Investigating Authority that they would not submit information in response to the information request of 23 September 1999. Turkey notes, first, that Colakoglu, Habas and Diler did not refuse to answer the supplemental information request of 23 September 1999 – they noted that the deadline for doing so was impossible to meet. Second, those companies' failure to respond to the 23 September information request does not excuse Egypt's decision not to grant an opportunity to "present other information orally". If Egypt wanted to get at the truth – whether or not respondents' submitted costs matched the costs shown in their books and records, and whether and how respondents' booked costs reflected inflation – it would have granted respondents an opportunity to come and explain these issues to it. By refusing that request, and a similar request by Icdas, Egypt violated Article 6.2 of the Agreement.

31. The inflation statistics provided in EGT-7.7 plainly show that inflation was significantly lower than 5 per cent per month in 1998, and that inflation did not exceed 2.5 per cent per month in the June-August period. The Investigating Authority prominently relied on an assumption that inflation was running at 5 per cent per month throughout the investigation period in its determination to resort to facts available. This represented an improper establishment of the facts.

32. The Investigating Authority has also provided Icdas' scrap costs to the Panel as evidence of scrap costs during the investigation period. These scrap costs are the same costs that are discussed in Turkey's First Submission (at 63). They in fact show that the conclusions reached by the Investigating Authority with respect to the movement of the scrap costs were unfounded. Specifically, the Investigating Authority's finding that scrap costs (in dollar terms) declined in only three months of the period of investigation is unsupported by the facts.

33. Turkey's claims of violations of Articles 2.2.1.1, 2.2.2 and 2.4 are intended to demonstrate that the normal value calculated in this case is inappropriate in the event that the Panel concludes that resort to facts available was unjustified.

34. Turkey agrees that if data has been properly rejected because it cannot be verified or is inaccurate, that data need not be used in the Investigating Authority's determination. However, when some data is unverified and other data is verified or otherwise reliable, the verified or reliable data should be used in accordance with Annex II, paragraph 3. Moreover, the Investigating Authority should endeavor, in finding other "gap filling" data, to approximate, as closely as possible, the costs that would have been submitted or verified had the party cooperated completely with the investigating authority. Nothing in the agreement permits an investigating authority to "punish" respondents with adverse "facts available."

35. Egypt claims that the Investigating Authority was "solely concerned with the reasonableness, neutrality and consistency of its approach" and that the IA was actually acting leniently by using respondents' own data as "facts available". This claim is ludicrous. Egypt could not have constructed a financial expense from secondary information equal to 64 per cent of IDC's cost of manufacture as it did in this case. Nor could it have justified, based on secondary sources, the use of a January 1998 scrap cost to compute the cost of producing rebar sold by Icdas to Egypt in the last half of the year. The Investigating Authority has also not provided a rational basis for arbitrarily increasing Habas' costs by 5 per cent. Why not 10 per cent or 50 per cent?

36. Egypt incorrectly claims Turkey has conceded that the short-term interest income claimed by Turkey as an offset to interest expense was not related to the production or sale of the subject merchandise. To the contrary, Turkey claims that (a) this income *was* related to the production and

sale of rebar; (b) evidence on the record supports such a classification (interest income is classified as “operating income” on the companies’ financial statements); and (c) there is no information on the record supporting the Investigating Authority’s conclusion that that revenue was *not* related to the production or sale of rebar.

37. Turkey has argued that Egypt should have made an adjustment to the constructed normal value for differences in imputed credit costs. Egypt argues that the adjustments mandated by Article 2.4 for differences in “conditions and terms of sale” are limited to situations in which the normal value is based on sales prices and does not apply when the normal value is based on costs of production. Turkey notes that the United States, the EU and Canada make these adjustments when the normal value is based on constructed normal value. Moreover, Egypt deducted imputed credit costs from the export price to Egypt. Comparison of a “sight” price to Egypt with a cost of production that includes the full cost of financing receivables in the home market and export market is like comparing apples to oranges. A “fair comparison” requires that the cost of financing receivables be deducted from the constructed normal value or that an adjustment be made based on the imputed credit costs included in the prices of comparable sales transactions in the home market.

38. Egypt notes that some Panels have expressed doubt as to whether the actions of an Investigating Authority in the context of one single anti-dumping investigation could be considered a measure of “general application” contemplated in Article X:1 of the GATT 1994. However, Turkey has alleged a violation of Article X:3(a), not Article X:1. Article X:3(a) obliges each contracting party to “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”. Paragraph 1 includes “laws [and] regulations . . . of a general application . . . pertaining to . . . rates of duty, taxes or other charges”. Turkey’s claim in this case is that Egypt was administering its anti-dumping law in manner that violated Article X:3(a). Thus, Turkey needed to show only that the anti-dumping laws of Egypt were laws of “general application” not that the administration complained of was “of general application”. Administration of laws of general application normally has a limited application to the case before the investigating authority. No requirement of “general application” should be read into this language.

39. Turkey agrees with the United States that the Agreement does not require a verification. However, evaluation of Egypt’s refusal to conduct a second verification must be examined in the context of the entire case and in consideration of the degree of “cooperation” extended by the respondents.

40. Turkey agrees with the views expressed by Japan in this proceeding.

## ANNEX 5-2

### REBUTTAL SUBMISSION OF EGYPT EXECUTIVE SUMMARY

#### I. PRELIMINARY REMARK

1. Turkey has, 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. Accordingly, those claims are not within the terms of reference of the Panel and must be rejected. In particular, Turkey alleges that:

- the Investigating Authority did not consider factors affecting domestic prices under Article 3.4;
- the Investigating Authority violated Paragraph 6 of Annex II of the AD Agreement by sending the letter of 19 August 1999 to the Turkish respondents;
- the Investigating Authority violated Article 17.6(i) of the AD Agreement;
- the Investigating Authority violated Paragraph 3 of Annex II and Article X:3 of GATT 1994 in its selection of facts as facts available.

2. Moreover, the majority of evidence upon which Turkey relies to substantiate its claims, which themselves lack the requisite legal basis under the AD Agreement, have not been presented to the Investigating Authority during the course of the investigation. In fact, what Turkey is attempting is to persuade the Panel to conduct a *de novo* review of the Investigating Authority's determinations. The obligations of the Panel under Article 17.5(ii) and 17.6 are very clear in this respect. Article 17.5(ii) of the AD Agreement expressly limits the review of the Panel to the evidence that was *made available*, and thus made *known* to the Investigating Authority in conformity with the appropriate domestic procedures.

3. Turkey urges the Panel to ignore these provisions by taking "judicial notice" (a concept which has no foundation in DSB practice) of facts that were not before the Investigating Authority during the course of the proceeding. However, the reference to facts "*made available*" in Article 17.5(ii) is significant as it precludes a panel from taking "*judicial notice*" of facts that were not *made available* to the Investigating Authority during the course of the investigation.

#### II. INJURY

##### A. OBLIGATIONS OF THE INVESTIGATING AUTHORITY UNDER ARTICLE 3.4

4. An important distinction must be made. That distinction is between the *final determination* as from the *Final Report* of the Rebar Investigation. Whereas the former reviews all factors listed in Article 3.4 in its examination of the impact of the dumped imports on the domestic industry, the latter focuses on the conclusions central to the Investigating Authority's determination of material injury.

5. The fact that the injury analysis of the Investigating Authority was thorough and indeed covered all the factors listed in Article 3.4 is apparent in the *Confidential Injury Analysis* of the Rebar Investigation. Thus, in addition to factors specifically referred to in the *Essential Facts & Conclusions Report* and the *Final Report*, the following Article 3.4 factors were explicitly examined by the Investigating Authority during the course of the investigation:

- Sales volume and revenue;
- Cost of production, selling & administrative costs, cost of sales and finance costs;
- Gross profit, pre-tax profit and profit after cost;
- Output (i.e. volume of production);
- Market share (i.e. total sales of all Egyptian producers, including subject and non-subject countries);
- Productivity (i.e. output per employee);
- Return on investments;
- Capacity utilization;
- Cash flow;
- Inventories;
- Employment (i.e. number of employees);
- Wages;
- Domestic prices;
- Growth (i.e. in terms of sales volume and market share);
- Ability to raise capital (i.e. pre-tax profit as a % of shareholders funds)

An analysis of the magnitude of the margin of dumping is clearly evident in Section 3.3 of the *Essential Facts & Conclusions Report* and Sections 3.3, 4.4 and 4.6.2 of the *Final Report*.

6. Accordingly, Egypt submits that during the investigation of material injury, the Investigating Authority did indeed examine “*all relevant economic factors and indices having a bearing on the state of the industry*” as required under Article 3.4 of the AD Agreement. Turkey’s claim is thus without foundation and therefore must be rejected by the Panel in this present dispute.

7. Turkey claims that “*the Panel should disregard evidence not shared with the respondents in assessing the consistency of the Egyptian anti-dumping investigation and findings with the Anti-Dumping Agreement*”.<sup>1</sup> In support of this claim Turkey refers to the decisions reached by the panels in *Korean Resins* and *Thailand – H Beams*. The Panel should note, however, that Turkey has failed to mention that the findings of the Panel in *Thailand – H Beams*, upon which Turkey relies, were reversed by the Appellate Body on appeal. Indeed, the Appellate Body in *Thailand – H Beams* stated that there is “nothing in Article 3.1 which limits an investigating authority to base an injury determination only upon non-confidential information” (emphasis added).<sup>2</sup> It follows that the findings of the Panel in *Korean Resins*, a pre-WTO claim brought under the GATT 1947, should be reviewed in this light.

## **B. TURKEY CONFUSES THE RELEVANT OBLIGATIONS OF ARTICLES 3.4 AND 3.5**

8. In Turkey’s First Written Submission in Section III.B.5 (page 9) and again in its Oral Presentation at the First meeting of the Panel in Section II.B (page 5), Turkey alleges that:

*“the Investigating Authority failed to examine all relevant economic factors and indices having a bearing on the state of the industry in violation of Article 3.4. Specifically, that the Investigating Authority failed to consider the adverse effects on domestic profitability and pricing produced by five factors.”* (emphasis added)

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<sup>1</sup> See page 7 of Turkey’s Oral Presentation at the First Meeting of the Panel.

<sup>2</sup> *Thailand – Anti-Dumping Duties on Angles Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* WT/DS122/R, Appellate Body Report WT/DS122/AB/R at para. 107, adopted 5 April 2001.

The five factors specifically referred to by Turkey are (a) capacity expansion of the domestic industry; (b) increased domestic competition; (c) falling prices for raw materials; (d) contraction in domestic demand; and (e) the effect of comparably priced, fairly traded imports.

9. It is clear that Turkey is alleging that Egypt improperly attributed the injury (i.e. falling prices and a decrease in profitability) to imports from Turkey. According to Turkey, the injury was “produced”, that is to say that it was caused, by factors other than the dumped imports, such as increased domestic capacity and domestic competition, a decline in the price of raw materials and domestic demand, and the effect of non-dumped imports. Accordingly, Egypt maintains that the issue is one of causation and attribution, in which the relevant provision is Article 3.5.

10. Attention should be called to the fact that nowhere in the Request for the Establishment of a Panel, nor in Turkey’s First Written Submission or in its Oral Presentation at the First Meeting of the Panel, has Turkey alleged that the Investigating Authority failed to investigate *‘factors affecting domestic prices’* under Article 3.4. Turkey should not be permitted, at this late stage, to modify its allegations of inconsistency. Should the Panel rule on this claim, Egypt submits that there is no prescribed method under the AD Agreement by which the Investigating Authority must consider *‘factors affecting domestic prices’*.

11. Thus, contrary to what Turkey alleges, an examination of *‘factors affecting domestic prices’* under Article 3.4 does not necessarily require that the Investigating Authority consider capacity expansion and its effects on intra-industry competition, falling prices of raw materials, contraction in demand and the effect of non-dumped imports. In any event, as demonstrated above, Egypt considers that an examination of domestic competition, contraction in demand and the effect of non-dumped imports are factors which may be relevant in the Investigating Authority’s examination of *‘any known factors other than the dumped imports’* under Article 3.5. As for the other alleged factors affecting domestic prices, the capacity expansion of the domestic industry was indeed examined by the Investigating Authority in addition to demand and the price of raw materials.

12. Turkey is of the opinion that it is *incumbent upon the Investigating Authority to secure certain kinds of information pursuant to Article 3.5 in order to determine whether or not there was a causal link between the dumped imports and injury*. Thus, according to Turkey, the Investigating Authority is under an obligation to develop “positive evidence” that:

- consumers purchased imported rebar from Turkey in place of rebar supplied by the domestic manufacturers for price reasons;
- specific sales were lost by the domestic industry to imports from Turkey;
- domestic manufacturers lowered their prices specifically in response to competing offers by suppliers of Turkish rebar;
- Turkey was considered by purchasers in Egypt as the price leader in the market.

13. Egypt would like to take this opportunity to clarify the obligations of the Investigating Authority with respect to its examination of *‘any known factors other than the dumped imports which at the same time are injuring the domestic industry’*. What is known to the Investigating Authority clearly includes factors presented to the Investigating Authority during the course of the investigation. We agree with the European Communities *‘that an interested party must make a prima facie case that a factor might be relevant in order for a factor to be known in the sense of Article 3.5’* (emphasis in the original).

14. Unlike Article 3.5 of the AD Agreement, the examination of causality under Article 4.2(b) of the Safeguards Agreement does not specifically direct the Investigating Authorities to examine *‘known factors’* other than the imports under investigation which might be injuring the domestic

industry. Moreover, interested parties are not as involved in the context of safeguard investigations and do not actively participate in the data collection exercise carried out by the Investigating Authority. Accordingly, in the context of a Safeguard investigation, the exercise of due diligence by a Member is all the more important in reaching a determination under Article 4.2(b). Finally, the Safeguard Agreement does not contain a similar provision to Article 17.5(ii) of the AD Agreement, which expressly limits the review of the Panel to the evidence that was *made available*, and thus made *known* to the Investigating Authority in conformity with the appropriate domestic procedures.

### C. SCOPE OF THE INVESTIGATION

15. Turkey claims that the additional evidence on causation that was presented in its First Written Submission was not presented by the Turkish respondents during the course of the investigation because the investigation was initially limited to a threat of material injury. However, in the Notice of Initiation with respect to the “*allegation of threat of injury*” (at paragraph 4), it is clearly stated that “[t]he applicant alleged and provided supporting evidence that the dumped imports have started to cause material injury to the domestic industry”. Accordingly, the Turkish respondents, assuming they read the Notice, could not have been unaware that the investigation would include an examination of present material injury. Moreover, attention to this fact was again pointed out by the Investigating Authority in a facsimile dated 17 July 1999 to David Simon, who acted as counsel for the Turkish respondents during the investigation (attached as EX-EGT-8).

16. In any event, contrary to that submitted by Turkey, it would not be “inequitable” for the current Panel to apply the decision in *Guatemala – Cement I*<sup>3</sup> to the facts of this case. The issue in *Guatemala – Cement II* is nearly identical to that in the current proceeding before the Panel. Indeed, it would be unreasonable to require an Investigating Authority to determine precisely the scope the injury examination at the beginning of the proceeding before it has even had a chance to review the evidence and to evaluate its findings.

## III. DUMPING

### A. CLAIMS NOT WITHIN THE PANEL’S TERMS OF REFERENCE

17. Turkey alleges that the Investigating Authority violated Paragraph 6 of Annex II of the AD Agreement by sending the letter of 19 August 1999 to the Turkish respondents<sup>4</sup>. Egypt submits that this claim is not within the Panel’s terms of reference. Indeed, in the Request for Establishment of a Panel, a violation of Paragraph 6 of Annex II was invoked solely with respect to the deadline granted to the respondents to reply to the letter of 19 August 1999. Conversely, Turkey did not claim in its Request for Establishment of a Panel that the sheer fact of sending the letter of 19 August 1999 constituted a violation of Paragraph 6 of Annex II. Accordingly, this claim must be rejected as it is not within the Panel’s terms of reference.

18. Turkey also alleges a violation of Article 17.6(i) of the AD Agreement in Section II.D. However, that provision 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. It does not govern the rights and obligations of Members under the AD Agreement. In any event, it was not cited in the Request for Establishment of a Panel. As a consequence, this claim is not within the terms of reference of the Panel and must be rejected.

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<sup>3</sup> *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico* WT/DS156/R, Report of the Panel, adopted 17 November 2000.

<sup>4</sup> See last sentence of Appendix TUR. II.A.

19. Turkey also contends that the Investigating Authority violated Paragraph 3 of Annex II and Article X:3 of GATT 1994 in its selection of facts as facts available. As noted by the Panel, those provisions were not cited in support of Claim 11 of the Request for Establishment of a Panel. Accordingly, the alleged violation of Paragraph 3 of Annex II and Article X:3 of GATT 1994 must be rejected as not being within the terms of reference of the Panel in the context of Claim 11.

B. FAILURE TO SUBMIT COSTS DATA FOR THE ENTIRE INVESTIGATION PERIOD

20. Turkey attempts to justify the failure of all respondents except IDC to submit costs data for the entire investigation period by referring to the practice of other jurisdictions. The practice of other jurisdictions is not at issue in this case nor should this practice have been considered by the respondents to determine the format in which they needed to submit their costs data in the Rebar investigation conducted by the Egyptian Investigating Authority. The Questionnaire sent to the respondents made it clear that data needed to be provided for the entire investigation period, and not for selected parts of such period.

C. REQUESTS FOR ADDITIONAL INFORMATION DID NOT CONSTITUTE A NEW QUESTIONNAIRE

21. Turkey suggested at the First Substantive Meeting and repeated in its replies to the Panel's Questions that the requests for additional information contained in the letter of 19 August 1999 constituted a new questionnaire because the letter contained a larger number of questions and raised more complex issues on costs than the initial Questionnaire. This is irrelevant. The original questionnaire requested the respondents to provide their costs of production for the entire investigation period. Four of the five respondents did not comply with that request. In fact, they provided costs data for a maximum period of four months. As thoroughly explained in Egypt's First Submission, the purpose of the letter of 19 August was therefore twofold:

- first, to provide an additional opportunity to the respondents to report their costs data for the entire investigation period;
- second, to seek to clarify whether and, if so, to what extent the respondents' costs data duly reflected the hyperinflation that Turkey was experiencing during the investigation period.

D. DATA SUBMITTED DID NOT REFLECT COSTS ASSOCIATED WITH PRODUCTION AND SALE

22. Turkey claims that the costs of production of the Turkish respondents were prepared in accordance with the generally accounting principles of Turkey and should therefore have been used by the Investigating Authority pursuant to Article 2.2.1.1 of the AD Agreement. In Egypt's view, it is clear that records that are not prepared in order to reflect hyperinflation cannot be considered to reflect the costs associated with the production and sale of the product under consideration, even though they would follow the generally accepted accounting principles of the exporting country.

23. Egypt considers that the fact that the respondents did not apply IAS 29 is not disputed by Turkey. Furthermore, Egypt disagrees with Turkey that the Panel could not consider the fact that IAS 29 was not followed by the respondents. Indeed, this fact is explicitly mentioned in the Auditors' notes to the Audited Accounts of the respondents, which were submitted to the Investigating Authority by the respondents themselves.

24. Turkey further alleges that there was no need to adjust raw material costs for hyperinflation since the prices of raw materials in USD were converted into Turkish Lira at the exchange rate of the day of purchase; however, the fact that Turkish respondents used the exchange rate of the date of

purchase of raw materials cannot cope with the effect of hyperinflation on the value of raw materials that are not immediately used in the production.

E. INTEREST INCOME WAS NOT RELATED TO PRODUCTION OR SALE

25. Turkey alleges in its reply to Question 16 that interest income on working capital is sufficiently related to production and sale of rebars because it is a fungible item that cannot be segregated to any particular business line and therefore benefits all production activities of the firm. It is precisely because this cost item is not associated to any business line that it must be excluded from the calculation of the cost of production of the product concerned.

F. THE LETTER OF 28 SEPTEMBER 1999

26. Turkey states that the Investigating Authority did not reply to the letter of 28 September 1999. This is factually wrong. A reply was sent on the same day to the legal counsel of the three Turkish respondents concerned informing them that the Investigating Authority would resort to facts available in view of the absence of reply on several issues (see EX-EGT-7.5). David Simon acknowledged receipt of this letter on the same day (see EX-EGT-9). The offer for a meeting in Cairo was subsequently addressed by the Investigating Authority in a letter of 5 October 1999 to David Simon (See EX-EGT-10). As a consequence, contrary to Turkey's erroneous allegations, the Turkish respondents were timely and appropriately informed of the legal consequences of their failure to submit the information requested in the letter of 23 September 1999.

## ANNEX 6-1

### SECOND ORAL STATEMENT OF EGYPT EXECUTIVE SUMMARY

#### I. PRELIMINARY REMARK

1. Turkey has not challenged Egypt's arguments from a legal standpoint. To the contrary, Turkey has treated its Rebuttal Submission as yet another opportunity to establish a *prima facie* case of the alleged inconsistencies and, even at this late stage, it is attempting to introduce new claims that were not included in the Request for the Establishment of a Panel.

2. Throughout the various stages of this proceeding, Turkey is attempting to persuade the Panel to correct the deficiencies of the Turkish respondents' participation in the rebar investigation. It was, however, the responsibility of the Turkish respondents to cooperate and to present all the requisite information and evidence pertinent to their defence during the investigation. The Panel cannot now correct that deficiency.

3. It has been noted that the majority of evidence upon which Turkey relies to substantiate its claims was not presented to the Investigating Authority during the course of the investigation. By introducing new information before the Panel, Turkey hopes to persuade the Panel that the Investigating Authority's establishment of the facts was not based on positive evidence. Moreover, Turkey has also exerted a considerable effort to reconstruct the facts that were before the Investigating Authority in an attempt to persuade the Panel that the Investigating Authority's establishment of the facts was improper and that its examination with respect thereto was biased and not objective. In essence, by introducing new evidence and reconstructing the facts, Turkey is in fact attempting to persuade the Panel to reconsider the Investigating Authority's determination in light of the existing evidence together with new facts; in other words, to conduct a de novo review of the Investigating Authority's determinations.

4. As previously noted, the obligations of the Panel under Article 17 of the AD Agreement are very clear in this respect: paragraph 6(i) directs the Panel to consider whether the authorities' establishment of the facts was proper in light of the facts that were made available as specified under paragraph 5(ii). Still, Turkey urges the Panel to ignore these provisions by taking "judicial notice" of facts that were not before the Investigating Authority during the course of the proceeding.

#### II. INJURY

5. Turkey has failed to demonstrate that the Investigating Authority's determination of injury under Article 3 of the Anti-Dumping Agreement was inconsistent with respect to Egypt's obligations thereunder. In particular, Turkey alleges that the Investigating Authority failed to examine the mandatory factors listed in Article 3.4. Turkey also alleges that the Investigating Authority failed to establish, by positive evidence, a causal link between the dumped imports and the injury to the domestic industry under Article 3.5.

##### A. THE EXAMINATION UNDER ARTICLE 3.4

6. It is apparent in the *Confidential Injury Analysis* that the Investigating Authority's final determination with respect to material injury was based on positive evidence and that it involved an objective examination of all the elements as required under Article 3, paragraphs 2 and 4 of the Anti-Dumping Agreement. A copy of the *Confidential Injury Analysis* was presented to Turkey, as requested

by the Panel. A non-confidential version of the *Analysis* would have been provided to the Turkish respondents had a request been made to review the public file during the course of the investigation. Indeed, the respondents must have been aware of the existence of the public file, as reference to its availability was specifically made in the *Notice of Initiation*, the *Essential Facts & Conclusions Report* and the *Final Report*.<sup>1</sup>

7. The very first time a request was made to review the public file was by the Turkish Government in a letter dated 12 July 2000 to the Investigating Authority. Egypt responded to that request at a meeting in Cairo on 6 August 2000. As the investigation had been closed for almost one year, access to the public file was accordingly denied. Nonetheless, Turkey alleges that the Panel should disregard evidence that was not previously made available to the Turkish respondents or to the Turkish Government.<sup>2</sup>

8. In view of the findings of the Appellate Body in *Thailand – H Beams*<sup>3</sup>, it is clear that the Panel cannot disregard the *Confidential Injury Analysis* simply because it was not shared with the respondents during the course of the investigation. In *Thailand – H Beams*, the Appellate Body confirmed that there is “*nothing in Article 3.1 which limits an investigating authority to base an injury determination only upon non-confidential information*”.<sup>4</sup> Accordingly, in its review of whether the Investigating Authority’s examination of the factors listed in Article 3.4 was complete, the Panel must consider the information contained in the *Confidential Injury Analysis*.

9. Turkey also claims in its Rebuttal that the Panel should disregard consideration of certain Article 3.4 factors mentioned in the working papers of the Investigating Authority when evaluating whether the *Final Report* contains findings or conclusions sufficient to satisfy the requirements of Article 12.2, with respect to each of the Article 3.4 factors.<sup>5</sup> Egypt wishes to stress that whether all of the Investigating Authority’s conclusions on material injury are reproduced in the *Final Report*, however, is not an issue that is before the Panel. A claim under Article 12.2 was not introduced in the Request for the Establishment of a Panel and accordingly, is not within the Panel’s Terms of Reference.

#### B. THE EXAMINATION UNDER ARTICLE 3.5

10. Turkey has raised a number of claims in connection with the Investigating Authority’s examination of the causal relationship under Article 3.5. In particular, Turkey alleges that the Investigating Authority failed to demonstrate that the dumped imports caused injury “*through the effects of dumping*” found and that the Investigating Authority failed to establish by positive evidence a causal link by not thoroughly investigating other potential causes of injury.

11. As previously submitted, the Investigating Authority’s investigation of injury was based on positive evidence and involved an objective examination of the volume of the dumped imports, both in absolute terms and relative to consumption, and the effect of those imports on prices in the domestic market. Indeed, the Investigating Authority found significant price undercutting resulting in price depression and suppression.

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<sup>1</sup> See Ex-EGT-7.3 (*Notice of Initiation*), Ex-TUR-15 (*Essential Facts & Conclusions Report*) and Ex-TUR-16 (*Final Report*).

<sup>2</sup> See the Rebuttal Submission of Turkey of 2 January 2002 at Claim II.A, page 1.

<sup>3</sup> *Thailand – Anti-Dumping Duties on Angles Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* WT/DS122/R, Appellate Body Report WT/DS122/AB/R, adopted 5 April 2001.

<sup>4</sup> *Id.*, at para. 107.

<sup>5</sup> See the Rebuttal Submission of Turkey of 2 January 2002 at Claim III.H, page 31.

12. Turkey, however, suggests that because the dumping occurred in 1998 and the injury in 1999, the Investigating Authority failed to show that the dumped imports caused injury to the domestic industry. As previously submitted, the Investigating Authority found that the injury in 1999 confirmed the effects of the dumping that took place in 1998. Moreover, it was demonstrated in our First Written Submission that the periods for data collection for both injury and dumping as established by the Investigating Authority are in line with the Recommendations of the Anti-Dumping Committee.

13. Turkey also claims that because the Investigating Authority allegedly failed to secure very “*specific*” positive evidence with regard to other potential causes of injury, Egypt failed to meet its obligations under Article 3.5. To this end, Turkey presents new evidence to the Panel that was not submitted to the Investigating Authority during the course of the investigation, which it alleges should have been taken into account. However, Article 3.5 only requires that the Investigating Authority examine known factors that are simultaneously injuring the domestic industry. Article 17.5(ii) of the Anti-Dumping Agreement expressly limits the review of the Panel to the evidence that was *made available*, and was thus *known* to the Investigating Authority. Article 3.5 does not require that the Investigating Authority secure, for example, information pertaining to consumers’ perceptions as to whether the dumped imports were price leaders in the market.

14. Turkey also places a great deal of emphasis in its Rebuttal Submission that the Investigating Authority did not separate and distinguish the injurious effects of these allegedly known factors that were contributing to the injury. Turkey in fact assumes that the injury was caused by a multitude of factors. However, the report on *Other Causes of Injury* demonstrates that the examination of the causal relationship included an inquiry into a number of other potential causes of injury. On the basis of this review, the Investigating Authority found that *there were no other causes of injury*. Accordingly, there was no need to separate and distinguish the injurious effects of factors other than the dumped imports that were simultaneously injuring the domestic industry.

15. Turkey has failed to demonstrate that the Investigating Authority’s examination of a causal relationship under Article 3.5 was inconsistent with Egypt’s obligations thereunder. In view of the evidence before the Investigating Authority, Turkey has failed to present a *prima facie* case that there were other known factors that were contributing to the injury. The report on *Other Causes of Injury* was available for review in the public file of the Investigation. The Turkish respondents therefore had the opportunity to review and to comment upon the report and to present refuting evidence. Egypt cannot be held accountable for the fact that the respondents did not avail themselves of that opportunity.

### III. DUMPING

#### A. THE USE OF FACTS AVAILABLE

16. With respect to the dumping determinations, the principal feature of this case is the fact that Turkish respondents offered very poor cooperation from the very beginning of the investigation onwards. The Anti-Dumping Agreement foresees and wisely provides for the circumstances in which an interested party refuses access to, or otherwise does not provide necessary information within a reasonable period or significantly impedes the investigation. In such instances, the Investigating Authority may resort to the use of “the facts available” as provided under Article 6.8.

17. It must be emphasised, however, that the use of facts available in the rebar investigation was not intended to be punitive. Egypt was not seeking to arrive at an outcome less favourable than would have been the case had the Turkish companies offered satisfactory cooperation. In that respect, Egypt disagrees with Turkey’s interpretation of the Appellate Body’s findings in *United States – Hot-Rolled*

*Steel from Japan*.<sup>6</sup> Turkey's understanding of the case is that the US Administration did not have the grounds to resort to the use of facts available. To the contrary, the use of facts available in the specific circumstances of the case was held to be permissible by the DSB.<sup>7</sup> What was found incompatible with the Anti-Dumping Agreement was the fact that the US Administration sought to reach an unfavourable determination through the deliberate selection of certain "adverse facts" available.<sup>8</sup>

B. CLAIMS THAT ARE NOT WITHIN THE PANEL'S TERMS OF REFERENCE

18. Turkey alleges that the Investigating Authority violated Paragraph 6 of Annex II of the Anti-Dumping Agreement by sending the letter of 19 August 1999 to the Turkish respondents.<sup>9</sup> In the Request for the Establishment of a Panel, however, a violation of Paragraph 6 of Annex II was invoked solely with respect to the deadline granted to the respondents to reply to the letter of 19 August 1999. Conversely, Turkey did not claim in its Request for Establishment of a Panel that the sheer fact of sending the letter of 19 August 1999 constituted a violation of Paragraph 6 of Annex II. Accordingly, this claim must be rejected.

19. Turkey also claims that the Investigating Authority violated Paragraph 3 of Annex II and Article X:3 of GATT 1994 in its selection of particular data as facts available.<sup>10</sup> As previously noted by the Panel, those provisions were not cited in Claim 11 of the Request for the Establishment of a Panel. Accordingly, the alleged violation of Paragraph 3 of Annex II and Article X:3 of GATT 1994 cannot be considered in this regard.

C. THE DUMPING DETERMINATIONS WERE IN COMPLIANCE WITH THE AD AGREEMENT

20. All the issues raised in Turkey's Rebuttal Submission consist essentially of a mere repetition of the arguments developed in Turkey's First Submission and other statements. They were all thoroughly addressed in Egypt's previous Submissions to the Panel, in particular:

- All respondents except IDC failed to submit costs data for the entire investigation period, despite the fact the Questionnaire sent to the respondents made clear that data needed to be provided for the entire investigation period;
- The requests for additional information contained in the Investigating Authority's letter of 19 August 1999 provided an additional opportunity to the respondents to report their costs data for the entire investigation period and to clarify whether and, if so, to what extent the respondents' costs data duly reflected hyperinflation;

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<sup>6</sup> *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* WT/DS184/R, Appellate Body Report WT/DS184/AB/R, adopted 23 August 2001.

<sup>7</sup> *Id.*, Report of the Panel at para. 7.69.

<sup>8</sup> *Id.*, at para. 7.70.

<sup>9</sup> See Response of Turkey to Questions of the Panel of 7 December 2001, Appendix TUR.II.A (last sentence).

<sup>10</sup> *Id.*, at Sections II.C and II.G.

- The respondents' records failed to reasonably reflect the costs associated with the production and sale of the product under consideration by not taking into account the hyperinflation of the Turkish economy;
- The 5 per cent monthly hyperinflation rate was determined on the basis of reliable data and was also used to adjust the costs of production of Habas;
- The computation of a weighted average cost of production for the entire investigation period was fully justified by the circumstances of the case and was in compliance with the AD Agreement.

## **ANNEX 6-2**

### **SECOND ORAL STATEMENT OF TURKEY EXECUTIVE SUMMARY**

#### **I. RESPONSE TO EGYPTIAN REBUTTAL BRIEF**

1. I would like to use this opportunity to address specifically the claims made by Egypt in its Rebuttal Brief and to make some comments on the information provided in the confidential injury analysis provided to us on 2 February 2002.

#### **A. FAILURE TO EXAMINE ALL OF THE ARTICLE 3.4 FACTORS**

2. Turkey has claimed that Egypt failed to examine all of the mandatory factors identified in Article 3.4 in its final determination. Specifically, Turkey has pointed out that the Essential Facts and Conclusions Report and the Final Report contain no discussion of productivity, actual or potential effects on cash flow, employment, wages, growth and ability to raise capital or investments. Turkey also noted that there is an insufficient examination and evaluation of capacity utilization or return on investment in the Final Report.

#### **B. CONFIDENTIAL EVIDENCE TO WHICH RESPONDENTS DID NOT HAVE ACCESS**

3. We agree with Egypt and withdraw our claim that Egypt may support its final determination only upon information placed in the public record. However, this does not relieve the Egyptian Authority of the requirement that it provide a meaningful analysis of all of the Article 3.4 factors in its Final Report. Nor does it mean that, in supporting its determination before this Panel, Egypt may rely on documents purportedly in the Public Record that were not shared with, or otherwise made available to, the Government of Turkey and the Turkish private respondents.

#### **C. ARTICLE 3.4 AND 3.5**

4. Egypt attempts to re-characterize all of Turkey's claims under Articles 3.4 and 3.5 as claims under Article 3.5 in an attempt to avoid Panel review of the Egyptian determination under Article 3.4. Articles 3.4 and 3.5 operate hand-in-hand. First, the Investigating Authority must identify what factors and indices are affecting the domestic industry under Article 3.4, including all relevant factors and indices having a bearing on domestic prices and profitability. Then, under Article 3.5, the Investigating Authority must ensure that it does not attribute effects of factors, other than imports, that are injuring the domestic industry to the dumped imports.

#### **D. FACTORS AFFECTING DOMESTIC PRICES**

5. Egypt claims that Turkey did not include a claim in its request for Panel review or in its First Written Submission that the Investigating Authority failed to examine "factors affecting domestic prices" under Article 3.4. This claim is incorrect. (See Turkey's request for Panel consideration at paragraph 3).

E. THE OBLIGATION TO CONSIDER ANY KNOWN FACTORS UNDER ARTICLE 3.5

6. With respect to the obligation in Article 3.5 Egypt argues that respondents must make *a prima facie* case that other factors are causing injury to the domestic industry before any obligation is imposed on the Investigating Authority to examine those factors.

7. We have extensively addressed this issue previously. (See, our reply to Panel Question Number 5 and Section III.C-D of our rebuttal brief).

F. THE SCOPE OF THE INJURY INVESTIGATION

8. Turkey has claimed that additional evidence on causation of present material injury was not submitted during the original investigation because respondents were led to believe that investigation was limited to threat of injury issues. In the only Notice of Initiation made available to the Turkish respondents during the course of the investigation (See TUR-1), it is stated that “the domestic industry alleges that the significant and continuing increase of dumped imports of rebars from Turkey in 1998 and the expected increase of imports . . . will threaten to cause material injury to the domestic industry. Aspects of threat of injury were detected in the second half of 1998”.

G. TURKEY HAS NOT INTRODUCED ANY NEW CLAIMS NOT WITHIN THE PANEL’S TERMS OF REFERENCE

9. Turkey claims that the Investigating Authority violated Annex II, paragraph 6 of the Anti-Dumping Agreement by waiting until after the verification to raise the cost issues identified in the August 19 letter. (See Response to Panel Question #1, at II.A.)

10. Egypt now asserts that this claim is not within the terms of reference for the Panel. This claim is incorrect. Turkey raised this issue in Claims 8 and 9.

11. Turkey has also alleged a violation of Article 17.6(i) of the AD Agreement. Egypt has claimed that this provision concerns the standard of review and does not govern the rights and obligations of the Members under the Agreement. Egypt has also asserted that this particular claim was not contained in Turkey’s request for the Panel.

12. Turkey disagrees on both points. As indicated in our Rebuttal Brief at pages 3-4, the Appellate Body specifically found in *Hot-Rolled Carbon Steel Products from Japan* that Article 17.6(i) imposes certain procedural obligations upon Investigating Authorities.

H. FAILURE TO SUBMIT COST DATA FOR THE ENTIRE INVESTIGATION PERIOD IN THE ORIGINAL RESPONSE

13. Egypt claims that there was no justification for Turkish respondents to submit cost data in their original responses that was limited to the months in which export sales and home market sales were reported. Contrary to Egypt’s claims, the original anti-dumping duty questionnaire did not clearly define the period over which costs should be reported. The questionnaire required the reporting of all sales to Egypt during the period of investigation, but it also directed respondents to limit their reporting of home market sales to those sales that were contemporaneous with sales that were made to Egypt. Since home market and Egyptian sales were reported only in a few months, it is only logical that costs of production should be reported for those months as well. This conclusion was particularly appropriate in the context of a hyperinflationary economy.

I. THE REQUESTS FOR ADDITIONAL INFORMATION DID CONSTITUTE A NEW QUESTIONNAIRE

14. Egypt claims that the 19 August 1999 letter did not constitute a new questionnaire. Regardless of whether or not monthly costs were requested in the original questionnaire, there were a substantial number of additional questions and demonstrations required in response to the 19 August 1999 letter that were in the nature of a questionnaire.

J. THE DATA SUBMITTED REFLECTED COSTS ASSOCIATED WITH THE PRODUCTION AND SALE OF THE PRODUCT CONCERNED

15. Egypt claims that because no company in Turkey applies IAS-29, it should be free to apply facts available. The fact that respondents did not apply IAS – 29 was never investigated by the Investigating Authority or mentioned in the Authority's Final Report. Second, if Egypt was unsatisfied with the costs generated by the respondents' internal accounting systems, even though organized in accordance with generally accepted accounting principles in Turkey, then it was incumbent upon Egypt to advise respondents how to revise their costs in order to meet Egypt's requirements.

K. REPLY TO MR. SIMON'S LETTER OF 28 SEPTEMBER 1999

16. Egypt claims that Habas, Diler and Colakoglu did not request an extension of time in which to respond to the 23 September 1999 supplemental questionnaire issued by the Investigating Authority. While it is true that there was no request for a specific period of additional time in which to respond to that questionnaire, counsel to Habas, Diler and Colakoglu noted, in his letter of 28 September 1999, that it would be impossible to respond to Egypt's request for additional information within the 2-5 day period allowed for a response by the Investigating Authority. This, in Turkey's view, constituted an implicit request for an extension of time.

II. THE "CONFIDENTIAL INJURY ANALYSIS" RECENTLY PROVIDED BY EGYPT SUBSTANTIATES MANY OF THE CLAIMS MADE BY TURKEY EARLIER IN THIS PROCEEDING

A. THERE WAS AN ENORMOUS CAPACITY EXPANSION DURING THE PERIOD OF INVESTIGATION

17. The "Confidential Injury Analysis" first supplied by Egypt to the Panel on 31 January 2002 establishes that there was a very large capacity expansion during the period of review. Between 1996 and 1998, domestic capacity to produce rebar increased by [[XX]] tons, or [[XX]] per cent. Between the end of 1998 and the first quarter of 1999, capacity increased by another [[XX]] tons, or [[XX]] per cent as compared to 1996.

B. AN INCREASE IN FINANCE EXPENSES ATTRIBUTABLE TO THE CAPACITY EXPANSION ADVERSELY AFFECTED PROFITABILITY

18. The Confidential Injury Analysis shows that [[XX]] decline in profitability in 1998 is attributable to an increase in finance costs per unit. Profits per ton declined from 1997 to 1998 by [[XX]] Egyptian lira per ton. Finance costs per unit increased in that year by [[XX]] Egyptian lira per ton. Had finance costs per unit not increased, industry profits would have increased in 1998.

C. IT APPEARS THAT THE CAPACITY EXPANSION HAD A TEMPORARY, ADVERSE EFFECT ON AL EZZ'S PROFITABILITY IN 1998

19. Al Ezz uses steel scrap as a raw material input for making rebar. Scrap accounts for 60-70 per cent of the cost of a finished rebar and steel scrap prices declined by 34 per cent during 1998. That should have translated into a 20-24 per cent decline in the cost of finished goods sold between the beginning and end of 1998. However, Al Ezz's cost of goods sold declined in 1998 by only [XX] per cent as compared to 1997. Accordingly, it appears that temporary disruptions caused by the capacity expansion acted to keep Al Ezz's costs higher than they would otherwise have been in 1998, adversely affecting the company's profitability.

D. [[XX]]

20. Al Ezz's expansion project came fully on stream at the end of 1998 its cost of goods sold [[XX]].

21. This [[XX]].

E. [[XX]]

22. [[XX]]

F. IMPORTS TOOK A DECLINING SHARE OF THE DOMESTIC MARKET IN 1999

23. The confidential injury analysis supports our claims in previous submissions that total import market share declined dramatically in the first quarter of 1999. Thus, total import market share declined from [[XX]] per cent of the market in 1998 to just [[XX]] per cent of the market in the first quarter of 1999, a decline of nearly [[XX]] per cent. The domestic industry also increased its market share, from [[XX]] per cent of the market in 1998 to [[XX]] per cent of the market in the first quarter of 1999. While Turkey took an increasing share of the market in 1999, it did so at the expense of other imports, including fairly traded imports from Saudi Arabia and Libya, it did not replace one ton of rebar formerly sold by the domestic industry, nor did it increase its market share at the expense of domestic market share.

G. THE INVESTIGATING AUTHORITY'S DETERMINATION OF PRICE UNDERCUTTING WAS FLAWED IN VIOLATION OF ARTICLE 3.1

24. It was not clear from the Final Report or the Essential Facts and Conclusions Report how the Investigating Authority made its determination of price undercutting – that is what prices were used and at what level of trade prices were compared. The Investigating Authority did not actually look at “prices” or make a proper comparison between prices charged for the same product. Prices for different rebar products when sold in the domestic market normally vary with the size and grade of the product sold.

**III. CORRECTIONS TO REBUTTAL BRIEF**

25. In Rebuttal Brief, footnote 55 on page 23 should make reference to our response to Panel Question # 4, rather than to Panel Question #16. Footnote 107 on page 42 should have been omitted. Footnote 106 should be read as appearing in the spot where footnote 107 is currently located.

#### **IV. CONCLUSION**

26. This statement must be read in combination with what we have said in our First Written Submission, responses to the Panel's questions, and Rebuttal Submission in order to appreciate our position on each of the issues.

27. For the reasons stated here, and in those prior submissions, we respectfully request the Panel to render a decision that the Egyptian Anti-Dumping investigation was not in accordance with the provisions of the Anti-Dumping Agreement that we have cited or with Article X:3 of the GATT.

## ANNEX 7-1

### CONCLUDING STATEMENT OF TURKEY AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

1. This Panel is reviewing an anti-dumping investigation by Egypt that took a very curious turn in the middle of the case, just after the first draft anti-dumping margins were calculated by the Investigating Authority. Up to that point in time, the Investigating Authority's informational demands and treatment of the respondents was very proper and correct. The Investigating Authority was satisfied with the content and coverage of the initial responses and it verified the price and sales responses at each of the respondents without discrepancy. Communications between the Investigating Authority and the respondents were quite cordial.

2. However, something happened in a short period of time after the tentative anti-dumping margins, ranging from zero to just over 4 per cent, were calculated by the Investigating Authority staff. Suddenly, the Investigating Authority began to adopt a very hostile attitude toward the Turkish respondents, sending threatening letters alleging various errors and omissions in the responses, even those aspects of the responses that had been fully verified without discrepancy, and announcing the Investigating Authority's intention to apply "facts available" if additional information and explanations were not provided within impossible deadlines. We submit that the Investigating Authority came under strong political pressure after the preliminary margins were calculated to come up with a margin that would prevent further imports of rebar from Turkey, and that this explains the subsequent series of events.

3. It explains why, four three weeks later, the Investigating Authority sent nearly identical letters to each of the five respondents alleging that they had misreported or not reported various price adjustments, when in fact, the Investigating Authority had already verified that those price adjustments were not included in the price or were reported under an expense with a different label. It explains why the Investigating Authority sought to heap a huge new and burdensome cost reporting requirement and self-verification requirement on the respondents and then initially provided only 13 days for a response. It explains why the Investigating Authority denied the respondents a reasonable extension of the original deadline for a response to the 19 August questionnaire. It explains why the Investigating Authority persisted in its conclusion that each and every respondent had failed to include inflation in its costs when the respondents had adequately explained why their costs did not rise with inflation. It explains why the Investigating Authority persisted in using an inaccurate inflation figure after having been shown authoritatively that costs did not rise by 5 per cent per month. It explains why the Investigating Authority applied "facts available" to IDC and Icdas notwithstanding the fact that it found those companies' responses to all questionnaires to be complete. It explains why, after securing what it considered to be an adequate pretext for the application of facts available, the Investigating Authority refused to grant respondents an opportunity for a hearing in Cairo to explain how their cost systems worked and why their costs did not increase by 5 per cent per month as the Investigating Authority had anticipated. And it explains the particular selection of facts available in each case – a selection that was plainly designed to secure the highest possible dumping margin for each company.

4. Turkey considers that this investigation was not carried out in an objective and unbiased manner and it urges the Panel to so find.

5. Egypt's injury investigation was also severely flawed. Egypt never gave the respondents adequate notice that the focus of its investigation had shifted from threat of injury to material injury.

Nor were any allegations or information concerning current material injury made available to respondents prior to their deadline to submit information and argument on the injury issues. Egypt failed to develop any “positive evidence” linking the dumped imports to the injury that it found to the domestic industry, which consisted solely of a loss of industry profitability and a price decline in the first quarter of 1998. Egypt’s conclusion that import prices were undercutting domestic prices was fundamentally flawed. It remains unclear whether the import price used by Egypt in its calculation was a price that was in direct competition with the prices being charged by the domestic industry; that is, whether the price selected for comparison was a price to a purchaser who had to make a choice between the domestic and imported product.

6. Moreover, it is clear now that Egypt never obtained any actual pricing data from the domestic industry. Rather, it compared the average revenue per unit for the industry as a whole for an entire year to average import prices for that year. This comparison fails to recognize that rebar is a commodity product and that prices change over time with changing raw material costs. Most of the Turkish material entered Egypt in the second half of 1998 when raw material costs were lower than they were during the first half of the year. Moreover, it fails to account for different prices being charged for different products. An accurate determination of price undercutting requires a comparison of prices in competition with each other for a product of the same dimensions and grade.

7. Egypt failed to investigate adequately and failed to separate and distinguish the effects of the very large capacity expansion that took place over the investigation period and, more particularly, during 1998 and the first quarter of 1999. As we showed yesterday, that capacity expansion certainly had negative effects on industry profitability in 1998 and 1999, yet those effects were never “separated and distinguished” from the effects of dumped imports in assessing industry profitability. Indeed, the increase in finance expenses per unit in 1998 explains the [[XX]] decline in industry profitability. If those finance expenses had remained at 1997 levels, industry profitability in the first quarter of 1999 would have been comparable to industry profitability in 1996, the first year of the investigation. And, it is clear that at Al Ezz, at least, manufacturing costs such as labour and probably depreciation were adversely affected by the expansion.

8. As we showed yesterday, there was a confluence of two events that had a dramatic effect on the domestic market at the same time. As confirmed by the “Confidential Injury Analysis”, [[XX]] tons of new capacity came on stream at the end of 1998. At the same time demand dropped in January 1999 by one-third as compared to the prior month. It is textbook economics that an increase in supply, all other things being equal, will cause a drop in the market price. This particular increase in supply was a very large one – it was a [[XX]] increase in total domestic supply as compared to the prior year. It is also textbook economics that a decline in demand will produce a decline in the marketplace. Yet the effects of neither of these two factors was fully examined or quantified by the Investigating Authority. Instead the entire decline in price and profitability experienced by the domestic industry was attributed to dumped imports, notwithstanding the fact that the market share of imports as a whole declined in the first quarter of 1999 by [[XX]] per cent. The failure to investigate fully the effects of these factors on domestic pricing and profitability violated Article 3.4 of the Agreement. The failure to separate and distinguish the effects of these other factors violated Article 3.5.

9. In sum, neither Egypt’s injury determination, nor its anti-dumping determination, was in compliance with the Anti-Dumping Agreement and we ask the Panel to so find.

10. I would like to take this opportunity to thank the Panel for all of its time and attention to this matter.

## ANNEX 7-2

### CLOSING STATEMENT OF EGYPT AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

1. We would like to conclude our presentation with the following comments on Turkey's oral presentation:

#### I. THE FINAL DETERMINATION

2. Turkey is confusing the *Confidential Injury Analysis*, which is a single set of documents, with the "*final determination*" of the Investigating Authority in the rebar investigation. For the record, we wish to stress that the "*final determination*" is not a document and has never been presented as such by Egypt. The "*final determination*" is rather the complete overview of all the findings (injury and dumping) of the Investigating Authority, including the information contained in the record of the rebar investigation (e.g. statistics, questionnaire responses, internal notes, memos and analysis, etc.). The *Confidential Injury Analysis*, on the other hand, comprises part of the set of findings which form part of the "*final determination*" of the Investigating Authority with respect to injury. The *Final Report* is a document that reflects the central points of these findings.

#### II. ARTICLE 3.4 AND ARTICLE 3.5

3. We notice that once again, Turkey is confused as to the respective objectives of Article 3.4 and Article 3.5. Turkey is attempting to extend the mandatory nature of the obligations of the Investigating Authority under Article 3.4 to the factors that may be relevant with respect to the examination of a causal relationship under Article 3.5. The questions before the Panel are simple:

- (a) Did the Investigating Authority examine all the factors under Article 3.4? We submit that the Investigating Authority did.
- (b) Did the Investigating Authority examine all the known factors that might have contributed to the injury? Again, we submit that the Investigating Authority did.

4. These two issues are separate. One given factor cannot be an indicator of injury and the cause thereof. Take the example of a pedestrian who is hit by a car. The injury is the broken leg and the cause of the injury is the car accident.

#### III. PRIMA FACIE EVIDENCE IN SUPPORT OF A CLAIM UNDER ARTICLE 3.5

5. An anti-dumping investigation is initiated at the request of a domestic industry, which must submit *prima facie* evidence of the allegations of injurious dumping. Likewise, Egypt considers that the other interested parties, including the exporting producers concerned, should play an active role in the rebuttal of the allegations made in the complaint. It is not sufficient to make unsubstantiated claims without providing any supporting evidence. There must be enough documentation to give an indication that the examination of any given cause of injury is warranted.

#### IV. THE NOTICE OF INITIATION

6. There is only one single *Notice of Initiation*, which is the one submitted to the Panel in Ex-EGT-7.3, together with a non-official English translation.

7. The *Notice of Initiation* should not be confused with the *Initiation Report* (see Ex-TUR-1), which is a document summarizing the complaint and recommending the initiation of the investigation. Since the *Initiation Report* was not published, a non-confidential version thereof was sent to the interested parties.

8. The *Notice of Initiation*, on the other hand, was published in the *Official Gazette*. Unfortunately, the non-official English translation submitted to the Panel as Ex-EGT-7.3 was mistakenly stamped “*confidential*” by a clerk of the Investigating Authority when compiling the documentation for the purposes of this DSB proceeding. The official Arabic version, however, which was also submitted to the Panel in Ex-EGT-7.3, is stamped “*public file*”.

## V. COSTS DATA FOR THE INVESTIGATION PERIOD

9. There is no inconsistency in requesting the costs of production data for the entire investigation period while requesting information on domestic sales for months during which export sales were made. Indeed, the Investigating Authority has a legitimate interest in making sure that no cost incurred during the relevant period was allocated to certain months only, thus distorting the true cost picture in any given month.

## VI. MANIPULATION OF THE FACTS

10. Turkey continues to set great store on capacity expansion as a cause of injury. By interpreting the data contained in the *Confidential Injury Analysis*, Turkey is again trying to extrapolate the facts in an attempt to present a different scenario than that which was before the Investigating Authority during the rebar investigation.

11. It is difficult to conceive that an increase in the production capacity, even of the magnitude suggested by Turkey, is likely to be a cause of injury if this capacity increase was not met by a corresponding reduction in capacity utilization. On the contrary, the *Confidential Injury Analysis* shows quite clearly that the capacity utilization increased between 1996 and 1998. Furthermore, the corresponding increase in the production volume did not translate into a disproportionate increase in inventory levels. Indeed, the ratio of inventory compared to production remained relatively stable between 1996 and 1999.

12. In order to address Turkey’s comments on this issue, Egypt wishes to stress that it is not suggesting that injury was not felt, among other factors, through increased inventory levels, but rather that the capacity expansion did not have an injurious effect on those inventory levels.

13. Likewise, the increase in finance costs should be examined not in absolute terms, but with reference to the evolution of production quantities. In this respect, it is necessary to evaluate the profitability on the basis of unit values, which is why a table on unit values was included in the *Confidential Injury Analysis*. Indeed, it makes no sense to compare absolute profit values between one year and another without taking into consideration variations in total turnover. Moreover, the finance costs did not affect the profit before interest expenses. As a matter of fact, the weighted average unit profit before interest expenses declined by over 30 per cent in 1999 (86) compared to 1998 (127). This simple comparison shows that the decline in the weighted average price had a direct impact on profitability.

14. Last but not least, Turkey appears to focus on the figures of Al Ezz in particular. Egypt wishes to stress that Al Ezz alone does not constitute the entire domestic industry.

## **VII. THE INVESTIGATING AUTHORITY DID NOT DISREGARD THE COSTS OF PRODUCTION OF THE RESPONDENTS**

15. Once again, Turkey alleges that the Investigating Authority “disregarded” the costs data submitted by the respondents. As explained on many occasions, this allegation is incorrect. All the costs data were taken on board by the Investigating Authority, where possible and were only adjusted in order to reflect the monthly hyperinflation rate of 5 per cent that the respondents failed to take into account in the computation of their costs data.

## **VIII. OBJECTION BY EGYPT TO THE ALLEGATIONS THAT THE INVESTIGATING AUTHORITY ACTED UNDER POLITICAL PRESSURE**

16. Turkey states that from the beginning, everything was going smoothly in the rebar investigation and that after the verification, the Investigating Authority suddenly became “*hostile*” to the Turkish respondents, allegedly as a result of political pressure.

17. For the record, **Egypt would like to state its very strong objection to the allegation that the Investigating Authority acted under political pressure.** To the contrary, as previously demonstrated, what occurred during the course of the investigation was that it became clear to the Investigating Authority that the costs data submitted by the Turkish respondents seemingly did not reflect the hyperinflation experienced by Turkey during the period under consideration. Quite naturally, as any other anti-dumping administration would have done in a similar situation, the Investigating Authority simply requested that the respondents supply additional information and an explanation as to how hyperinflation was taken into account in their costs data.

18. Thus, contrary to Turkey’s insinuations, there was no element of political pressure that influenced the Investigating Authority’s determinations in the Turkish rebar investigation.

## ANNEX 8-1

### RESPONSES OF TURKEY TO QUESTIONS POSED IN THE CONTEXT OF THE SECOND SUBSTANTIVE MEETING OF THE PANEL

#### QUESTIONS POSED BY THE PANEL TO TURKEY

**Q1. 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 reconciliations could be found and for each one explain exactly, in a step-by-step fashion, how the reconciliations were done?**

#### Reply

1. Turkey does not believe that it ever claimed that respondents submitted all of the information and documents requested by the Investigating Authority after the original questionnaire responses were filed. In fact, what Turkey has claimed is that it was impossible, or unreasonable to expect respondents, to provide all of the information requested within the deadlines imposed and that, in light of those deadlines, the respondents “acted to the best of their ability”. Restatement of Claims at Sections II.B and E.

2. Moreover, Turkey has not claimed that all of the reconciliations requested in the 19 August 1999 letter were provided by each respondent. It has claimed, with respect to Icdas and IDC, 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. The failure to notify Icdas and IDC of continuing deficiencies after receipt of their responses violated Annex II, paragraph 6 of the Anti-Dumping Agreement. Restatement of Claims, Section II.B.3.

3. That said, the respondents individually provided many, and in some cases all, of the reconciliations requested in the 19 August letter. Each respondent traced its materials, labour and overhead costs to internal invoices, books and ledgers, proving the accuracy of those costs. One of the respondents, IDC, provided a comprehensive trace of its extended reported costs through to its annual financial statement. Another, Colakoglu, provided a comprehensive trace for its reported costs in two months for which it had sales to Egypt, April and August, to its cost of goods sold and quarterly financial statements. A third respondent, Habas, provided records establishing that its extended costs reconcile to its annual cost of goods sold with only a minor difference. Diler and Icdas also reconciled their reported costs to internal books and records.

4. We review each respondents’ response to the 19 August 1999 questionnaire in turn below.

#### **1. Colakoglu**

5. The 19 August 1999 questionnaire (Question 4B) requested Colakoglu to reconcile its raw material inventory ledgers to its general ledger and financial statement. In Exhibit 9 to Colakoglu’s 15 September 1999 response (Exhibit TUR-34B), the company provided the raw material inventory ledger as at 31/12/98 and reconciled that ledger to its financial statement. The first page of the Exhibit is a reconciling item. The second page of the Exhibit is Colakoglu’s balance sheet at

31/12/98. The remainder of the Exhibit is Colakoglu's internal inventory movement record for each month of the POR and each type of inventory (first billet, then rebar, then scrap). The balance sheet shows that raw material inventory totaled [XX] thousand TL at 31/12/98. The last page of the Exhibit shows a raw material inventory total of [XX] thousand TL. The difference between these two figures is shown on the first page of the exhibit and is attributable to material purchased, but not yet imported.

6. Questions 4D, 5C and 6C of the 19 August 1999 questionnaire requested worksheets reconciling materials, labour and overhead costs that were submitted to the Investigating Authority for certain months to the company's audited financial statement. Colakoglu provided in its response, at Exhibit 4, a summary of its costs of production by month for the twelve months of 1998. As indicated in previous submissions to the Panel, Colakoglu, Habas and Diler submitted their billet costs as the raw material cost, since billet is the material that enters the rebar rolling mill. This information was submitted both in their original cost responses and in the 15 September 1999 response. (The Investigating Authority subsequently requested on 23 September 1999 that these respondents break down their billet costs into component raw material, labour and overhead costs, but provided only 2-5 days for the companies to do so. See Exhibit TUR-12.) Therefore, Colakoglu understood Question 4D as requiring it to reconcile the cost of billet to its internal books and records. This reconciliation, as well as the reconciliation of labour and overhead expenses, is provided in Exhibit 10 to Colakoglu's 15 September 1999 response. See Exhibit TUR-34B.

7. For example, for August 1998, Colakoglu reported a material cost of [XX] TL/ton, a labour cost of [XX] TL/MT, and a factory overhead expense of [XX] TL /ton. See Exhibit 4. The first page of Exhibit 10 is an internal document (Rolling Mill Production Cost List (TL)) prepared in the ordinary course of business that computes the monthly cost of production for rebar and provides a cost breakdown for the month of August (*Agustos*) 1999.

8. The total cost of direct material per ton of rebar in the month is shown as [XX] TL per ton. See line item 1510301 Total (*Toplami*), far right column (TL/ton). This is the same amount that Colakoglu reported in its response. It reflects the sum of scrap (1510301001), scrap loss (*hurda firesi*), electricity (1510301011), gas (1510301021), and other costs (1510301031 – 81). Labour cost, [XX] TL per ton, is shown on line 1510302001. This is also the same amount that Colakoglu reported in its response. Overhead is shown just below line 1510303. It also matches the amount reported in the response, after an adjustment to exclude packing costs (*ambalaj*), which are separately reported on the cost listings. The overhead includes depreciation (*amortisman*).

9. The total monthly cost of rebar production from this page, [XX] TL, is shown in the August trial balance on the next page opposite an item referencing total cost of rebar (*neverulu ve cubuk*). The difference between this amount and the total cost shown on the August trial balance four lines down is the value of scrap by-product produced (*haddehane* (2) *hurda*). Entries in the general ledger (*kebir defteri*) in August total the same amount. See Page 4 of Exhibit 10 (part of TUR-34B). The Subsidiary Ledger (on page 7) shows the derivation of August cost of goods sold as the beginning balance for finished goods inventory on 1 August 1998 (item 33), plus cost of goods manufactured in August (item 35 = total costs shown on page one; i.e., the costs that Colakoglu reconciled previously to its submission cost), less cost of finished goods remaining in inventory on 31 August 1998. The cost of goods sold for the month is [XX] TL. (Item 41). This matches the figure on page 9, cost of goods sold detail for August in the Subsidiary Ledger.

10. On page 11, marked Subsidiary Ledger - COGS Rebar, the cost of rebar goods sold in August is added to the cost of rebar goods sold for January–July and September to arrive at a cost for the first nine months of the year ([XX]). On page 13, marked September Trial Balance, this figure is shown being added to the cost of goods sold for other products to arrive at a nine-month cumulative cost of manufactured goods sold of [XX] TL. On page 14, this figure is shown on Colakoglu's cumulative income statement for the first nine months of the year as the cost of manufactured goods sold.

11. Thus, Colakoglu comprehensively tied its reported raw material cost, reported labour cost and reported overhead cost in August to its financial statement.

12. A demonstration for April 1998 is also provided. Although the first page of the April demonstration (Rolling Mill Production Cost List (TL) for April) is difficult to read because of the darkness of the copy, one can make out the total billet cost at line 1510301 Total as [XX] TL/ton, the amount reported for total raw material cost by Colakoglu on Exhibit 4. One can also make out a labour cost of [XX] TL/ton (line 1510302001) and an overhead cost, less packing, of [XX] TL/ton, the amounts reported. The total cost of manufacture of rebar on the page before deduction of scrap is [XX] TL. After the scrap deduction, the cost of manufacture is [XX] TL.

13. Colakoglu reconciles these figures to its trial balance, general ledger and monthly cost of goods sold on the following pages. Specifically, on the page marked Subsidiary Ledger, Colakoglu calculates its cost of goods sold in the month by adding beginning inventory to cost of manufacture in the month ([XX]) and deducting ending inventory to arrive at a total of [XX] TL. This figure is then shown being added on a Subsidiary Ledger to the cost of goods sold of rebar in other months for the first half of 1998 to a cumulative total of [XX] for the first six months. The cumulative total for rebar is then added on the next page to the cumulative totals for other products to arrive at a cumulative total cost of goods sold for all finished products of [XX]. This figure is shown on the next page, on Colakoglu's cumulative income statement for the first half of 1998, as cost of manufactured goods sold.

14. Thus, Colakoglu comprehensively tied its reported raw material costs, overhead expenses and labour costs in April to the cost of goods sold on its half-yearly financial statement as well.

15. Colakoglu was separately asked to reconcile its reported depreciation expenses. We note that it did so in reconciling its total reported costs, including overhead (which, in turn, included a separate element for depreciation expenses), to the cost of goods sold reported in its financial statement.

## **2. Habas**

16. Habas was also asked to provide a reconciliation of its raw material costs, labour costs and overhead costs to its internal books and financial statements.

17. In Exhibit 4 to its September 15, 1999 response (Exhibit TUR-34C), Habas provided monthly costs of production for 1998. Like Colakoglu, Habas reported its cost of billet as the raw material entering the rebar rolling mill. For December 1998, Habas reported a raw material cost of [XX] TL/ton, a direct labour cost of [XX] TL/ton and a factory overhead expense of [XX] TL/ton. See Exhibit 4 (attached to Exhibit TUR-34C).

18. On Exhibit 4, Habas grossed up its total material costs by multiplying the quantity produced by the reported raw material cost per unit in each month and then summing the costs for all of the months. Thus, the total cost of direct material in December is [XX] (TL/ton) \* [XX] (total tons produced) = [XX] TL (total material cost of manufacture in the month). The total material cost of manufacture for all months of 1998 is [XX] TL. See Exhibit 4. Page 11 of Exhibit 10 (marked page one on the page itself), reconciles this amount to the cumulative cost of billet incurred for the year. The item at the top of the page reports the total cost of billet (*kutuk*) for the year at [XX] TL. (Note that this cost relates to [XX] kg of billet. See same line under the heading *Aciklama*.) The difference between the TL amount shown on this line and the reported amount is shown on the bottom of the page and is accounted for by scrap that was recycled into the production process. The scrap cost is listed on the same report with the letter "b" beside it. It is normal to claim a byproduct credit for scrap produced that can be reused in production as long as the cost of that scrap is included in the new

production cost. Page 10 of Exhibit 10 (marked page 2) also shows the yearly cost of billet (*hammadé*).

19. Page 8 of the Exhibit (marked page 4) is a trial balance showing the booking of labour costs in December 1998, and the derivation of the per unit charge (dividing by total monthly production). Page 9 of the Exhibit (marked page 3) is a monthly trial balance showing the booking and derivation of the labour cost per unit reported in November 1998. There is a slight adjustment in the books, reflecting a year-end adjustment.

20. Page 4 of the Exhibit (marked page 8) shows total yearly overhead expenses in the rolling mill. These, with an adjustment for tolling charges, equal the extended total amount of overhead reported in Habas response for the twelve month period. *Compare* Exhibit 4. We note in this regard that factory overhead includes depreciation (*yili ayirlan amortisman*).

21. Habas also provided data that shows that its reported costs reconcile to its monthly and annual cost of goods sold:

Reported Raw material costs	27,584,102,609 <sup>1</sup>
Scrap Offset	214,338,288 <sup>2</sup>
Direct Labour	328,764,580 <sup>3</sup>
Overhead Expenses	1,241,196,036 <sup>4</sup>
Adjusting Entries for Overhead	<u>456,383,862<sup>5</sup></u>
Total Cost of Manufacture	29,368,401,513
Total Cost of Manufacture Per Subsidiary Ledger:	
	<u>29,608,110,717<sup>6</sup></u>
Difference	239,709,204
%	0.8%

22. Habas reconciled its cost of manufacture for rebar for the year, [XX], to its cost of goods sold for rebar for the year, [XX] on Exhibit 10, page 2. This figure was then reconciled to its overall cost of manufactured goods sold ([XX]) on page one of the Exhibit. *Compare* Exhibit 2, third page from the end, item D.1 (cost of goods manufactured [XX]) (difference of less than half of one per cent apparently due to auditor adjustments).<sup>7</sup>

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<sup>1</sup> See Exhibit 10, page 11. *Compare* Exhibit 4.

<sup>2</sup> See Exhibit 10, page 11.

<sup>3</sup> See Exhibit 4; Exhibit 10, page 8.

<sup>4</sup> See Exhibit 4; Exhibit 10, page 4.

<sup>5</sup> See Exhibit 10, pages 3-4.

<sup>6</sup> See Exhibit 10, page 2, second item.

<sup>7</sup> The difference between the amount shown on this income statement in Turkish and the audited statement appears to be due in large part to reclassifications between SG&A expenses and cost of goods sold, because the net profit is approximately the same.

23. Thus, Habas reconciled its total submission costs to its financial statements with a minor difference.

24. Habas was separately asked to reconcile its reported depreciation expenses to its financial expenses. It already did so, however, by reconciling its reported overhead expenses (which included depreciation expenses) and its total reported expenses to its annual cost of goods sold.

### 3. Diler

25. Diler was also requested to provide reconciliations of its monthly reported raw material, labour and overhead expenses to its internal books and records and financial statements.

26. Diler provided its monthly costs of production in Exhibit 4 to its 15 September 1999 response. See Exhibit TUR-34A. For December 1998, Diler reported a raw material cost of [XX] TL/ton, a labour cost of [XX] TL per ton and an overhead expense of [XX] TL/ton. See Exhibit 4. Diler has two affiliated companies that each produce rebar in Turkey, Yazici Demir Celik and Diler Demir Celik (described as Yazici or YDC and Diler or DDC). In Exhibit 10, page one, is a worksheet on which Diler showed how it weight-averaged the direct material, labour and scrap costs between these two companies. Subsequent pages and other Exhibits show how these costs reconcile to the companies' books and records.

27. Page 2 of the Exhibit is an internal cost calculation by Yazici in December (*Aralik*), prepared in the ordinary course of business. The costs on the left-hand side of the chart are total costs for all sections of the mill. *Malzeme* is materials, *Genel Uretim* is factory overhead, *Iscilik* is labour – as indicated on the Exhibit in English. The costs under *Celikhane* are costs in the electric arc furnace for steelmaking. The costs under *Haddehane* are for the rolling mill.

28. The total materials cost for all sections in the mill is [XX] TL for the month of December. This total cost is reconciled to the company's internal books on page 4 of the Exhibit (*Sark Cekislari* means withdrawal from inventory for consumption).

29. The total labour cost in the month is [XX] TL. See Exhibit 10, page 2. This cost is shown entering the company's trial balance subsidiary journal on page 12 of the Exhibit. The overhead cost is shown entering the trial balance subsidiary ledger on page 13 of the Exhibit. We note that this expense includes depreciation (*amortisman giderleri*).

30. *Haddehane* is the rolling mill. The total cost of billet (*kutuk*) consumed in production in the rolling mill December is shown as [XX] TL on page 2 of the Exhibit, the internal monthly cost calculation. This is the figure that appears under Material Cost opposite YDC (Yazici) on page one of the Exhibit where the weight-averaging occurs. Total production in the rolling mill (*Uretim Kg*) is shown as [XX] Kgs. Compare page one of the Exhibit. As shown on page one of the Exhibit, the raw material cost is equal to the billet entering production less recycled scrap. The total cost of recycled scrap is the sum of edges (*ucbas*) ([XX]) plus defective bar (*hadde bozu*) ([XX]), or [XX]. Compare pages one and two of the Exhibit.

31. Total labour cost in the rolling mill (*Iscili*) is [XX]. Total factory overhead (*malzeme plus genel yo*) is [XX] TL ([XX] in *malzeme* plus [XX] in *genel yo*). Compare page one of the Exhibit. We note in this regard that factory overhead includes depreciation.

32. Thus, Diler reconciled its total raw material costs, labour costs and factory overhead expenses to its trial balance for the month and showed the allocation of expenses between the different sections of the mill based on a record generated monthly in the ordinary course of business.

33. A similar demonstration is then provided for Diler.

#### 4. Icdas

34. Icdas was also asked to provide a reconciliation of its submitted materials, labour and overhead expenses to its internal books and records and financial statements.

35. Icdas presented its monthly costs in Attachments 2 and 11 (part 2) to its 15 September response. *See* Exhibit TUR-39. Attachment 2 reports the costs in dollars per ton on a monthly basis; Attachment 11, part two shows total costs in TL, the exchange rate for each month and the production quantity in the month. Icdas divided the total TL cost by the production quantity to arrive at a TL cost per ton and by the exchange rate to derive a cost per ton in US dollars. Thus, in January 1998, the total scrap cost was [XX] TL and total billet production was [XX] metric tons. The cost per ton was [XX] TL/ton. The exchange rate for the month is 212,830 TL/\$. Hence, the dollar cost of scrap is [XX] \$/ton. Compare Attachment 11, part two, page one with Attachment 11, part two, page two and Attachment 2, page 3.

36. Note that there are also two affiliated mills producing rebar at Icdas – Icdas Celik Enerji Tersane ve Ulasim San. and Demir Sanayi Demir ve Celik Ticaret ve Sanayi A.S., hence the separate cost charts for each. We shall refer to the first as Icdas and the second as Demir Sanayi.

37. Raw materials costs (all items marked with a single \* on Attachment 11, part two, page one) are reconciled to the company's books and records in Attachment 11, part one. Page one of this attachment shows the average cost of scrap in TL/Kg for each month. The figure shown for January, [XX] per kg, is the same figure derived above ([XX] per ton/1,000 kgs per ton). The pages following the first page of this attachment are used to reconcile the production quantities shown on the first page to company internal production control records. The circled figures are the monthly production amounts in kilograms.

38. The next page is a worksheet showing the monthly consumption of electrodes and the monthly consumption of ferroalloys, together with the average inventory value, for each month of 1998. The TL per ton amount reconciles to page one. The next set of pages are records kept in the ordinary course of business by the Inventory Control Department showing withdrawals of these items from inventory, quantity and value for each month of the period of investigation. The figures on these chart reconcile to the monthly summary described earlier and to the submission costs. A report on other materials and refractories follows.

39. Following that are documents referencing purchases of scrap. The page marked 1998/05/01 – 1998/05/31 Hurda Fiyat Ortalamasi is a document produced in the ordinary course of business showing the total quantity and value of different types of scrap purchased in May 1998, and the unit value of the purchases. Similar information is provided for other months of 1998. Note that the cost of scrap used by Icdas for May, [XX] TL per kilogram, exceeds the average cost of scrap purchased in the month, because the reported cost was based on the average inventory cost of scrap taken out of inventory to put into production in the month. The cost of scrap purchased in the month of May, in constant currency terms, was lower than the average value of scrap in inventory. This proves, as we have claimed throughout this proceeding, that use of a replacement cost would have produced a lower reported cost than use of the company's actual costing system.

40. Attachment 6 provides purchase documentation relating to Icdas' purchases of scrap during the period of investigation, including a material purchase contract in May for delivery in September–October showing scrap prices of \$[XX] per ton, several invoices showing the same price, a purchase contract in November for delivery in November showing a price of \$[XX] per ton, an invoice in the

same amount, a contract in October for delivery in November 1998 showing a price of \$[XX] per ton, a numerous other similar documents for scrap purchased in August through November.

41. Icdas reconciled its reported labour cost to its books and records in Attachment 8. The figures on pages two and three of that attachment reconcile to the total labour cost shown in the rolling mill for the months of February and March 1998. Compare Attachment 8, pages two and three with Attachment 11, part two, page two. These are the figures for Section 1 (rolling mill). There are also monthly pages for Section 2 (transport) and Section 3 (steelmaking). The figure for January for Section 1 ([XX]) and the figure for January for Section 3 ([XX]) seem to have been inadvertently switched. The sum of the figures for sections two and three in February reconcile to the total labour cost shown for the electric arc furnace on Attachment 11, part two, page two ([XX]) and the figures for January match two if those for Section 1 and Section 3 are switched.

42. Attachment 11, part two, page six, shows the monthly trial balance in January 1998 regarding financing expense (*kredi faizleri*). The amount shown, [XX] TL, reconciles to the item marked "A" on page one of that attachment. Copies of the trial balance for each month of 1998 are provided showing the booking of this expense. Financing revenue (marked "B") on page one of the attachment is shown on the succeeding pages (you must add item 642 and item 646). On the monthly trial balance page labelled "Other", the amounts incurred in January for electricity, natural gas in the electric arc furnace, oxygen, natural gas in the rolling mill, other overheads in the meltshop (Item marked A plus item marked B, plus item marked C, less items 5,6,7 = [XX]) and other overheads in the rolling mill (Item D less item 8 = [XX]) are shown as booked into the trial balance.

43. In Attachment 4, Icdas provided its inventory ledgers as at 31/12/98. Attachment 5 reconciles those inventory ledgers to the trial balance. Attachment 10 provides a complete listing of all sales in the domestic and export markets and reconciles those figures to Icdas' income statement.

## 5. IDC

44. IDC was also asked to reconcile its raw material costs, labour and overhead expenses to its internal books and records.

45. In Worksheet 2, attached to IDC's 9 September 1999 response, the company reconciled the costs it reported on a monthly basis to the annual cost of goods sold shown on its income statement.<sup>8</sup> The income statement provided as an attachment to IDC's original response (and one in Attachment 1 – see detailed income statement in English) shows a total cost of goods sold for 1998 of [XX] TL. That is the figure that appears at the bottom right-hand corner of Worksheet 2.

46. Worksheet two shows both the gross materials, labour and factory overhead costs of goods sold in each month and the unit costs, after division by the number of units sold. The total materials cost shown for January on Worksheet 2, [XX], divided by the total production of rebar, [XX], yields the reported materials cost of [XX] TL/ton. This is the amount that Icdas reported as its materials cost in its original response. Labour cost and manufacturing overheads per ton were similarly calculated. The sum of the raw materials, labour, and factory overhead shown in each month for the calendar year is [XX]. See Worksheet 2, far hand side bottom. This is the cost of goods sold for rebar during the year.

47. To this figure, some adjustments must be made to arrive at the cost of goods sold in the financial statement. First, the cost of products manufactured by IDC other than rebar is added. Also added is depreciation on the meltshop and the rolling mill, service costs, and the cost of commercial

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<sup>8</sup> This document will, we understand, be submitted as an Exhibit by Egypt in response to a Panel Question. Counsel for Turkey first obtained this document from the company on Monday, 11 March 2002.

goods purchased and resold. See Worksheet 2, far right. Worksheet 5 shows how depreciation expenses should be allocated to the product. Service costs, the costs of products other than rebar and the cost of commercial goods purchased and sold are not costs of production of the subject merchandise and so were appropriately excluded from the submitted costs. The cost of other products includes the cost of round bar that is not deformed.

48. Page 2 of Worksheet 2 shows the detailed trial balance at 31/12/98. The detailed trial balance confirms the amount of the reconciling items. Thus, it shows the total cost of service sales at item 62200, the total cost of other sales (spares) at item 62300, and the total cost of bar sales at line 62001 that were reported on Worksheet 2. The total cost of bar sales, [XX] TL (item 620), plus an adjusting item (item 621), is equal to the cost of rebar, the cost of other products and the cost of depreciation shown on Table 2. Thus, IDC showed that it incorporated all of the cost of goods sold in its income statement, with the exception of the adjusting items, in the costs of production that it reported to the Investigating Authority. And, as noted, other than depreciation, which was quantified and separately reported in IDC's 15 September 1999 response, none of the adjusting items should have been included in IDC's cost.

49. Worksheet 3 reconciles the reported labour cost to the books. It shows total labour cost consumed in the meltshop in January of [XX] TL and total labour consumed in the rolling mill of [XX] TL. The rebar labour cost per ton is [XX], calculated by dividing total labour cost by total production. This is the labour cost included in the cost of manufacture in the month. Since IDC reported the average labour cost in cost of goods sold, some adjustments were required.

50. The labour cost per ton of material in inventory was [XX] TL/ton. The labour cost per ton for product produced and sold in January, as calculated above ([XX] TL/ton), was averaged with labour cost per ton for product sold from inventory in the same month to arrive at a weighted average labour cost of goods sold of [XX] TL/ton. This amount, multiplied by the quantity sold in the month, yields the total labour cost in cost of goods sold for the month, [XX] TL. Compare Worksheet 2, page one. Similar worksheets are provided for December, August, September and October. The following pages are extracts from the detailed trial balance showing the booking of each of the detailed entries on the worksheets. For example, the first figure on the labour cost worksheet for January under item number 72101100, [XX] TL, is the first item on the detailed Trial Balance extract for January. Thus, for labour cost, IDC has traced from its detailed trial balance, through a worksheet, to the figures reported in the response, and from there to the cost of goods sold reported on the income statement.

51. Worksheet 4 is a similar exercise for manufacturing overhead expenses. It operates in just the same way.

52. Worksheet 5 shows calculation of the unit cost of depreciation. Since this is based on the year-end total depreciation amount, divided by total production, it is a fixed amount that should be added to the production cost in each month. The following pages reconcile the amounts on the worksheet to the subledger (*muavin defter*).

53. Worksheet 1 reconciles IDC's inventory movement records to the company's internal inventory records. There are separate charts for scrap, billet and rebar. The figures on the scrap inventory movement are tied to the stock records. Thus, the beginning balance for scrap on January 1, 1998, [XX] TL, is tied to the first figure on the page entitled *ILK MADDE VE MALZEME STOKLARI* (stock record). A similar reconciliation is provided for billet and rebar.

54. Attachment 4, part one, provides substantial documentation with respect to IDC's purchase invoices and payment ledgers for ferroalloys and scrap. For example, in the October scrap section, IDC has provided a payment ledger listing individual payments for scrap in October 1998. IDC has coded the ledger with numbers that relate the detail to the scrap invoices paid by the company in that

month. The first set of invoices are from domestic suppliers, and show the quantity (*miktari*), unit price (*fiyati*) and total invoice amount (*tutar*). The second set of invoices are related to imports and are all in English, showing prices denominated in dollars, ranging from \$[XX] per ton to \$[XX] per ton. Full documentation is provided for four months. Invoices and payment ledgers for other materials and factory overhead items are provided in Attachment 4, part two.

55. IDC provided a complete sales ledger in Attachment 6 and reconciled that sales ledger into its internal ledgers and financial statement in Attachment 7.

**Q2. Could Turkey comment on the legal basis of a claim of a violation of Article 17.6(i) by a Member, in light of the fact that Article 17.6(i) seemingly sets the standard of review which the Panel needs to follow when reviewing the measures in question in a dispute. That is, can a party to a dispute bring a legal claim of violation by an investigating authority of the provision? If so, what would be the legal basis for such a claim?**

Reply

56. This issue is addressed at pages 12-13 of Turkey's Oral Statement at the Second Substantive Session, 25 February 2002. We further elaborate on that response below.

57. As confirmed by the Appellate Body in *Hot-Rolled Carbon Steel Products from Japan*, Article 17.6(i) imposes an obligation upon investigating authorities with respect to their establishment and evaluation of the facts in an anti-dumping duty proceeding – their establishment of the facts in the context of an anti-dumping duty proceeding must be “proper” and their “evaluation” of the facts must be “unbiased and objective”.<sup>9</sup> In this case, Turkey claims that the investigating authorities “establishment of the facts” was improper and their “evaluation of the facts” was neither unbiased nor objective. 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.

58. 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.

**Q3. Turkey asserts that all Icdas' scrap cost data were “verified” (7 December 2001 response to questions posed by the Panel, Appendix at Section G, page 34). Could Turkey explain what is meant by the term “verified” as used in this context.**

Reply

59. Icdas verified its scrap costs in the sense that it provided invoices and other internal documentation establishing that the scrap costs it reported were based on actual purchases of scrap in

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<sup>9</sup> *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS 184/AB/R, 24 July 2001, paras. 55-56.

the month in question. This documentation was provided in Icdas' response to the 19 August 1999 letter-questionnaire. (See Response to Question # 1, above.)

**Q4. On page 58 of Turkey's First Written Submission it is asserted that Icdas requested "a hearing as soon as it had an opportunity to review the Essential Facts and Conclusions Report", Exhibit TUR-26 is cited as reference. However, it seems as if the referenced exhibit does not mention such a request. Could Turkey please clarify.**

Reply

60. It seems that Icdas did not, in fact, make such a request in its comments on the Essential Facts and Conclusions report. We apologize to the Panel for our error.

**Q5. In its 7 December 2001 response to the Panel's question 2.3, Turkey did not indicate whether it has dropped its allegations of violation of Articles 2.2.1.1, 2.2.2, and 6.8 in connection with its claim in paragraph 11 of the Request for Establishment of the Panel. Could Turkey please clarify whether these allegations are maintained.**

Reply

61. Turkey has not dropped its allegations of violation of Articles 2.2.1.1, 2.2.2 or 6.8 in connection with its claims in Paragraph 11 of the Request for Establishment of the Panel. These claims are set forth in our restatement of claims at Section II.F.2, II.F.3 and II.D. See Response of Turkey to the Questions Posed by the Panel, 7 December 2001 at Appendix – Restatement of Claims in Response to Question 1.

62. As we indicated previously, we would not object to a finding by the Panel that our claims in Section II.F.2 are rendered moot if the Panel considers that Egypt was unjustified in resorting to "facts available" and if the Panel then concluded that a re-determination was necessary. See *United States – Definitive Safeguards Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS 202/AB/R (February 4, 2001), para. 199.

63. Our claims in Section II.F.2 were intended to address and argue against any counter-argument by Egypt that its determination of normal value was correct, even if it was not justified in applying "facts available". To the extent that Egypt's position can be understood to make this counter-argument, we stand by our claim in Section II.F.2.

**Q6. Turkey argues that the Investigating Authority "declined" to adjust constructed normal value for credit costs. Turkey indicates that such an adjustment was requested by "respondents" during the course of the investigation. Could Turkey please indicate where in the record those requests and the relevant data can be found? How does Turkey interpret the reference in Article 2.4 to due allowance being made "on its merits" for differences which affect price comparability, both in the context of Article 2.4 itself, and in the context of the review by a panel pursuant to Article 17.6(i)?**

Reply

64. This claim was made in the initial responses and on the original sales listings. See Exhibit TUR - 42.<sup>10</sup>

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<sup>10</sup> See also Exhibit TUR-25 at 14-16 (Letter from Law Offices of David Simon, 13 August 1999, objecting to tentative decision not to adjust normal value for imputed credit costs).

65. We note further that the verification report for Icdas states:

"Cost of Credit

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

66. See Exhibit TUR-4 at 6. The "Cost of Credit" for each sale is shown on the second page of the dumping calculation attached to the verification report. See Exhibit TUR-4, ICDAS DUMPING CALCULATION (field Y).

67. A similar statement and calculation appears in the report for IDC (Exhibit TUR-5 at 4.3 "Adjustments to Normal Value" and dumping calculation, page 1, "Cost of Credit" ), Diler (Exhibit TUR-6 at 7 "Cost of Credit" and dumping calculation, page 2, "Cost of Credit"), Colakoglu (Exhibit TUR-7 at 6 and dumping calculation, page 2, "Cost of Credit"), and Habas (Exhibit TUR-8 at 7 "Cost of Credit" and dumping calculation page 4 "Cost of Credit"). Thus, in each case, the imputed credit cost calculations were verified as accurate by the Investigating Authority, including both the number of days from shipment to payment and the interest rate used to calculate the adjustment.

68. Turkey believes "on the merits" means, in this context, whether or not the facts supporting the claim are verified and whether an adjustment is necessary in order to achieve price comparability. The verification reports show that each of the underlying facts claimed by the respondents were verified, including the number of days the invoice was outstanding prior to payment and the applicable interest rate. Clearly, where there is a different payment term in the export and the domestic market, or where the interest rates applicable to sales in local currency and in foreign currency are different, as here, an adjustment must be made for different payment periods in order to ensure price comparability. Therefore, respondents are entitled to this adjustment both as a matter of the express obligation in the Anti-Dumping Agreement and on the facts of the case.

**Q7. In the Appendix to its 7 December 2001 responses to the Panel's questions, Turkey does not refer to a claim under Article 6.1 in the context of its dumping-related claims. Could Turkey please clarify whether this allegation is maintained. If so could Turkey please identify in its submissions and statements to the Panel its arguments in support of this allegation.**

#### Reply

69. Turkey cited Article 6.1 in Section II.B of its First Written Submission in support of its claims of violation of other provisions of the Agreement in connection with the request, late in the proceeding, for substantial new cost information. However, Turkey did not claim there, or in its Restatement of Claims, that this Article was specifically violated in that regard and it does not maintain such a claim.

70. We note, as did the European Union, that Turkey could have cited this provision in support of its claims in Section II. B.

**Q8. In the annexes to Exhs. TUR-34A-C, Turkey includes a series of tables preceded by a cover sheet entitled "[company] databases". Could Turkey please explain whether these tables were part of the 15 September submissions by Habas, Diler and Colakoglu. Could Turkey also please explain what these tables are, whether they form part of the record of the investigation, and what they are intended to show.**

Reply

71. These documents are the databases originally submitted in the response to the original foreign manufacturers' questionnaire (Total Sales of Steel Reinforcing Bars – Appendix 1; Sales in the Domestic Market – Appendix 2; Sales Price Structure – Appendix 3, and so forth), as revised on 11 June 1999 (see First Written Submission at II.A.9) and at verification. *Compare* Manufacturers Questionnaire, Exhibit TUR-3 at Appendices 1-9.<sup>11</sup> The revised databases were provided to the Egyptian verification team during the verification together with the explanatory boxes that appear on the charts to explain how the data fits together.

72. The file of documents submitted by the Turkish respondents to the IA, as forwarded to us by the Law Offices of David Simon, indicates that these documents were also attached to the companies' 15 September 1999 response. However, Mr. Simon has indicated to us that he has no specific recollection concerning this matter and so we were not able to independently confirm this fact. Nevertheless, Mr. Simon has confirmed that this data was submitted to the IA in exactly the same form as it appears in TUR-34 A-C during the verification.

**Q9. Did any of the Turkish respondents submit any documents to the Investigating Authority regarding how inflation is to be taken into account in accordance with Turkish generally accepted accounting principles? If so, did any such documents support the proposition that non-application of IAS 29 is in accordance with Turkish GAAP? Please explain, and indicate where in the record the relevant documents can be found. If not already submitted, please furnish copies of those documents.**

Reply

73. We note, first, that the Investigating Authority never addressed a question to respondents with respect to the non-application of IAS-29 and thus respondents never addressed this issue in their responses.

74. With respect to the more general issue, IDC explained in its response of 9 September 1999 (Exhibit TUR-29) that:

"Izmir Demir Celik Sanayi A.S. has agreed (*sic*) that Turkey is experiencing high inflation during the period of investigation, but disagree[s] with the statement of "The reported costs do not reflect inflation in effect." Because in our accounting system all costs are already indexed and further indexations to account for inflation is unnecessary (*sic*).

Material costs; these costs have not been indexed for inflation because they reflect the cost of procurement of materials used in production. Approximately 75% of the total

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<sup>11</sup> More specifically, in the case of Colakoglu, the first table (Appendix A) reports the value and volume of sales during the period of investigation. The second table (Appendix 2) is a listing of home market sales transactions made at the same time as, and of the same product and type as, the products sold in Egypt during the period of investigation, together with transaction specific prices and price adjustment information. The "Interest" column is the imputed credit cost adjustment. The third table (App. 3) is a listing of the domestic prices and price changes during the period of investigation for products also sold in Egypt. The fourth table (Appendix 3B) is the sales price structure in the domestic market. The fifth table (Appendix 4) is a listing of sales to Egypt during the period of investigation, together with price adjustment information. The sixth table (App. 5) is the sales price structure for export sales to Egypt. The seventh table (App. 9A) is respondent's costs of production for the domestic sales. The eighth table (App. 9A) is respondent's cost of production for sales in Egypt and the last table is the income statement.

cost of manufacturing of deformed steel bars is coming from the imported materials procurement and costs were converted from "foreign currency" to "Turkish lira" at the current exchange rate of the Turkish Central Bank, in which the inflation rate has been already taken into consideration.

Labour costs and overhead; these costs depend on production, not on sales. The increase in production results in a decrease in labour cost per ton, an increase in manufacturing overhead per ton. . .

SG&A expenses reported to you was based on the fixed expenses of total SG&A expenses. . . Therefore, the total yearly fixed SG&A expenses were divided by the total yearly export quantity and reported to you. There is no need for an inflation adjustment. Because the fixed portion of SG&A expenses had already covered the effect of the inflation, such as salary increases etc."

75. IDC is explaining here that the TL devalues against stable foreign currencies at approximately the rate of inflation in Turkey in order to maintain constant purchasing power parity between the currencies. The devaluations occur on a weekly and often daily basis. Therefore, a \$100 raw material cost in January will translate into 10,000 TL (at a rate of 100 TL/\$) and into 15,000 TL in December (at a rate of 150 TL/\$), reflecting an annual inflation/devaluation rate of 50 per cent. Furthermore, because labour costs are adjusted for inflation once per year, and the size of the labour force does not change with changes in the production quantity, labour cost is essentially a fixed cost and it already reflects inflation in the economy – certainly it reflects what is actually being paid out in wages and benefits on a monthly basis. SG&A expense was calculated by IDC on an annual basis (reflecting full inflation over the entire year) and divided by total quantity.

76. Icdas provided a similar explanation in its response to the 19 August 1999 letter. *See* Exhibit TUR-28 (discussion of materials, labour and overhead). Habas and Diler provided a similar explanation in their response of 15 September 1999. *See* Exhibit TUR-21.

77. Habas' audited financial statement notes that company maintains its books of account and prepares its statutory financial statement in accordance with accounting policies based on the Turkish Tax Laws and the Turkish Commercial Code. *See* Exhibit TUR-34C at note 2.1. Moreover, "transactions in foreign currencies during the year have been translated at rates ruling at the dates of the transactions." *Id.*, at note 2.7. Finally, the financial statement notes, under the rubric "Inflation Accounting".

"IAS 29, which deals with the effects of inflation in the financial statements has become applicable for the first time to financial statements covering the periods as from 1 January 1990. This standard requires financial statements prepared in accordance with IAS be stated in terms of the measuring unit current at the balance sheet data and corresponding figures for previous periods be restated in the same terms. \* \* \*

The Group has not reflected the results of this standard in the accompanying financial statements as restatement of financial statements in terms of the measuring unit current at the balance sheet date by applying a general price index is neither envisaged nor required by Turkish Commercial practice and tax legislation except for the revaluation of fixed assets referred to in note 2.4 above. As there is currently no consensus in Turkey on the application of IAS 29, the Management of the Group believes that the necessary restatement would be confusing and inappropriate at the present time until such consensus is reached in particular since it would prevent comparison with financial statements of other companies or groups in Turkey".

*Id.*, at note 2.10.

78. Colakoglu's financial statement is prepared in dollars. See EGT 7.6; TUR-34B at Appendix 1. As noted in the auditor's opinion letter: "[T] provisions of International Accounting Standard 29 – Financial Reporting in Hyperinflationary Economies ("IAS 29") . . . have not been applied since we believe that they are not applicable to financial statements reported in a stable currency. The effects of inflation on the financial statement have been dealt with by selecting the US\$ (a stable currency) as the reporting currency and recording TL denominated transactions and balances in US\$". See Exhibit TUR 34-B at Appendix 1, audit opinion letter, page 2.

**Q10 Concerning Turkey's claim that the interest income offset was related to production such that it ought to be accepted as an element in the cost of production of the subject goods, did any of the Turkish respondents explain to the Investigating Authority, in detail or otherwise, and/or furnish evidence to document, the exact nature of the income offset or offsets concerned, how they were generated, and their relationship to the production of the subject goods? If so, please indicate where in the record such submissions can be found, and furnish copies of the relevant documents.**

Reply

79. 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.

80. In Diler's original response (at 14), the company noted that "[i]nterest expense is reported on a consolidated basis (Group interest expense, offset by Group interest income) as is the practice in anti-dumping investigations, because of the fungibility of money". See Exhibit TUR-42. A separate field appears on its App. 9A – Cost (TL/MT) (Domestic Merchandise) for Interest Expense (Revenue). *Id.* This field is a negative reflecting net interest revenue. The audited financial statement for Diler (at note 21), attached as Exhibit 1 to TUR-34-A, indicates that most of the interest income for Diler was comprised of "Bank Interest (Repo and TL Accounts)" – all of which are short-term working capital accounts.

81. In the combined letter covering the responses of Colakoglu, Diler and Habas, dated 15 September 1999, it was explained:

"Regarding the issue of negative interest expenses, the fact is that interest income exceeded interest expense. Companies regularly invest their working capital in very short-term income instruments, such as overnight ("repo") loans, on which interest income can be as high as 120% per year".

See Exhibit TUR-34-A at 2.

Moreover,

"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 database submissions). From these income statements, as well as the worksheets embedded in the cost submissions (disapp 9A), it is apparent

that short-term interest income exceeded total interest expense. This is the reason that the respondents' interest expense for purposes of cost of production is a negative figure.

As for the 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 expenses".

*Id.*, at 7-8.

82. As in the case of Diler, for Colakoglu, the original response at App 9A – Cost of Production contained a field for short-term interest income as an offset to cost of production. *See* Exhibit TUR-42. Attachment 1 to the 15 September response is a financial statement audited by Pricewaterhouse Coopers. The income statement prepared by PriceWaterhouse Coopers shows net financial income for 1998. *See* Exhibit TUR-34B.

83. Habas' original response notes that "[i]nterest expense is on a consolidated basis (Group interest expense, offset by Group interest income)." App 9A – Cost (TL/MT) – Domestic Market shows a net negative interest expense; *i.e.*, that interest revenue exceeds interest income. *See* Exhibit TUR-42. This is confirmed by Habas' financial statement, audited by Grant Thornton. *See* Exhibit TUR-34-C, Attachment 1, at Income Statement. Habas' financial statement also shows that the company had [XX] billion TL in cash at banks at 31/12/98. *See id.* at note 3. Ordinarily, as indicated above, these funds would be in interest bearing deposits to avoid loss of value in a highly inflationary economy, accounting for the interest income.

84. In its original response in Appendix 9A – Factory Cost and Profit for Domestic Sales, IDC listed no amount under financing costs, meaning that it had no net financial expense after the application of interest income. *See* Exhibit TUR-42. The income statement attached to its 9 September 1999 response shows that interest revenues offset [XX] of the company's interest expenses.

**Q11. Could Turkey please provide the following documents:**

- **Annexes to Icdas 15 September 1999 submission (Exh. TUR-28);**
- **Responses of Icdas and IDC to the 23 September 1999 letters from the Investigating Authority.**

Reply

85. *See* Exhibits TUR-39, TUR-40, and TUR-41 attached to this response. Please note that Attachment 9 to Icdas' 15 September 1999 response is missing from our files. The Investigating Authority subsequently requested another copy of Attachment 9 on 23 September 1999 and it is our belief that it became separated from the file when a copy of the Attachment was made and sent to the Investigating Authority on 27 September 1999.

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**QUESTIONS POSED BY THE PANEL TO EGYPT – RESPONSES OF TURKEY**

86. Turkey would like to take this opportunity to comment on a few of the questions addressed to Egypt as well.

**Q2. In the Final Report at page 13, the IA refers to the scrap cost data provided by “another respondent” and describes the trends in those data. In Egypt’s oral response to this question at the 26 February 2002 meeting with the Panel, Egypt clarified that the “respondent” referred to was Alexandria National. Could Egypt please confirm this, and provide the scrap cost data referred to and copies of the supporting documents from which those data were drawn.**

Reply

87. Egypt gave a very surprising tentative answer to this question during the Second Substantive Meeting. It stated that Alexandria National was the source of the scrap data referenced in the Final Report as having been provided by “another respondent”. This response seems dubious in light of the context in which that statement was made in the Final Report.

88. First, as noted by Chairman Palecka, Alexandria National was not a “respondent” in this proceeding; it was an applicant or petitioner for anti-dumping relief. Everywhere else in the Final Report where the term “respondent” or “respondents” is used, that term refers to the Turkish producers and exporters. Thus, for example, in Section 1.5, the report states: “Review of the cost and sales data provided by the respondents raised significant questions regarding the accuracy of the data.” In Section 1.6.3, the report states: “The Investigating Authority disagrees with respondents regarding the requests for supplemental information”. When the domestic producers are referred to in the Final Report, they are invariably referred to by name or as “the domestic industry” or as the “Egyptian industry”. See Exhibit TUR-16.

89. The particular reference and surrounding text also suggests that the source of this scrap data was one of the Turkish respondents:

"Diler, Habas and Colakoglu claim that they “have proved in a number of different ways that the sharp decline in such world scrap prices gave the respondents’ constant currency declining costs, which in a hyperinflationary economy appear in local currency as steady costs even though the macroeconomy is hyperinflationary \* \* \*

Respondents then “tabulated the rebar pricing data from each respondents’ verified sales database, and the result showed a steep decline in Turkish rebar prices during 1998.” Thus, they claim, Turkey’s domestic rebar prices collapsed in 1998. They conclude that prices fell because scrap cost fell. \* \* \*

The Department disagrees for several reasons. First, since respondents’ information on world scrap prices was expressed in annual terms (prices at the end of the 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. For the first 7 months of the period, both were fairly constant and did not decline to any noticeable extent. For the next three months scrap prices declined sharply, and in the last 2 months, they began a noticeable recovery. 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, *despite a high inflation rate throughout the period*. Thus, the Department had a reasonable basis for its concern whether domestic costs fully reflected inflation".

Exhibit TUR-16 at 12-13 (emphasis added).

90. In this context, the term “domestic rebar and purchased scrap prices” clearly refers to domestic rebar prices in Turkey (as opposed to export prices to Egypt) and purchased scrap prices in Turkey. Turkey is the relevant market to examine in evaluating the accuracy of respondents’ cost information. It is very unlikely that this language would have been drafted as it was if rebar prices were based on prices in Turkey and the scrap prices were those in Egypt. The IA would then have had to explain this fact and that use of Egyptian scrap prices made sense in comparison to rebar prices submitted by the Turkish respondents. Moreover, the sentence – “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, *despite a high inflation rate throughout the period*” – makes sense only if the scrap prices were provided by a Turkish respondent – given the explicit reference to the high inflation rate in Turkey during the period.

91. In addition, it is not entirely clear why Alexandria National would have provided this information to the Investigating Authority. Ordinarily, cost data obtained from a domestic industry is not broken down to this level of detail because such information is not needed to analyze the question of whether the domestic industry has been materially injured by reason of imports. Moreover, the confidential injury analysis, submitted by Egypt, does not provide cost data at this level of detail.

92. Finally, in Panel Question #10, addressed to Egypt on 28 November 2001, the Panel requested that Egypt supply to the panel “[i]nformation on scrap steel prices on a monthly basis on which the final determination was based”. This was an obvious reference to page 12 of the Final Report. That Egypt took it as a reference to page 12 of the Final Report and not as a request for all scrap data upon which the final determination of normal value was based is evident in the fact that, in its response, Egypt provided scrap costs from only three of the five respondents – Icdas, IDC and Colakoglu. Colakoglu was one of the companies whose costs were specifically being questioned at page 12 of the Final Report and Icdas and IDC were the two other respondents whose costs were not being specifically questioned in that section of the report. By submitting this data, the Investigating Authority tacitly admitted that it was relying either on data submitted by Icdas or data submitted by IDC in questioning the declining scrap cost data submitted by Colakoglu, Habas and Diler. Certainly, all of the scrap costs provided in that exhibit were those of Turkish respondents.

93. We noted in our rebuttal brief that the data presented for Icdas supports the claims we have made challenging the factual findings in the Final Report and observing that the Investigating Authority seems to have been quite confused about the interplay of inflation, devaluation and costs reported in constant and nominal currencies. *See* Rebuttal Brief of Turkey at 68-69. Indeed, we initially made this claim in our First Written Submission. *See* First Submission of Turkey at I.IE.11. At no time prior to its response to this Panel question at the Second Substantive Session did Egypt take the position that Turkey was incorrect in concluding that the Final Report was referring to scrap data supplied by Icdas. It had an obvious opportunity to do so both in its Rebuttal Brief and in its response to the Panel’s First Set of Questions, but did not.

**Q4. Could Egypt please indicate exactly which inflation data contained in Exhibit EGT 7.7 it used as the basis for its conclusion that the average monthly inflation rate in Turkey was 5 per cent. In this regard, the Panel notes that the exhibit contains, *inter alia*, the same data from the Turkish State Institute of Statistics (submitted by the Turkish Government in its response of 15 October 1999 to the Essential Facts and Conclusions Report (Exhibit TUR-30)) on which the Turkish Government relied to indicate that the inflation rate was much lower during 1998.**

Reply

94. In its tentative response, Egypt states that it used a simple average of the wholesale price index and the consumer price index in 1998. We note that the wholesale price index rose by only 40.2 per cent in 1998, which, on a monthly basis, converts to an inflation rate of 3.4 per cent per

month. Moreover, in its letters of 19 August 1999, the Investigating Authority cited comparisons between costs in September, October and November (İcdas), August-December (Diler), April and August (Colakoglu), and November and December (Habas). *See* Exhibit TUR-11. However, the inflation rate was less than 3 per cent on average in those months.

95. The Consumer Price Index is irrelevant to the issue before the Investigating Authority. The Consumer Price Index refers to a market basket of goods purchased by individual consumers, not purchases of raw materials by large manufacturing enterprises. As claimed by the Government of Turkey in the Egyptian investigation, the relevant price index is the Wholesale Price Index.

**Q5. Egypt has requested the Panel to dismiss a number of Turkey's claims on the grounds that they are outside the Panel's terms of reference. In respect of each claim that Egypt has requested be dismissed, could Egypt please provide the two-part analysis referred to e.g. in *EC – Bed Linen*, i.e., the asserted lack of clarity in the Request for Establishment of the Panel, and evidence of any prejudice to Egypt's ability to defend its interests in this dispute due to such lack of clarity.**

Reply

96. Turkey notes that it would like the opportunity to respond to any claims made by Egypt in this regard. Turkey believes that its Request for Establishment of the Panel contained all of the claims that it has asserted before the Panel. *See, e.g.*, Response of Turkey to the Questions Posed by the Panel, 7 December 2001 at 1-2; Statement of Turkey at the Second Substantive Meeting at 12-14. Moreover, Egypt has had a more than adequate opportunity to respond to each of those claims and has in fact responded to each of the claims. Therefore, under the test enunciated in *EC-Bed Linens*, Egypt suffered no prejudice to its ability to defend its interests.

**Q8. Concerning İcdas, at page 6 of the Final Report, the IA stated that “İcdas ... provided incomplete data and most of the data submitted were not supported by evidence”. Further concerning İcdas, at page 22 of the Final Report, the IA stated that “[o]n 23 September 1999, the Department requested a missing document and several documents to be translated into English”. At page 23 of the Final Report, the IA stated, “[a]s for İcdas's claim that it ‘provided all the necessary information’ in response to the Department's 19 August 1999 request, and that the ‘remaining items are [*sic*] timely submitted’ in response to the Department's 23 September 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”. At page 29 of the Final Report, the IA stated that “as described above, İcdas did not provide sufficient information for the investigating authority to confirm the monthly specific costs of materials, labour, or overhead during the period of investigations, despite being requested to do so”. 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 İcdas on these points and indicate how, in light of those documents, the IA was satisfied that AD Article 6.8 could be applied.**

Reply

97. As indicated in response to Question #1 to Turkey, İcdas did provide this data. Specifically, İcdas provided a breakdown of its labour and overhead costs in the electric arc furnace and in the rolling mill in Attachment 11, part two, page two. It provided supporting documentation for its labour

costs in Attachment 8 and supporting documentation for its overhead expenses in Attachment II, part two. Its allocation methodology is obvious from the documents in Attachment II, part two – total costs incurred in the month in the electric arc furnace are divided by total production to arrive at a cost of billet and total production costs incurred in the month in the rolling mill are divided by total production of bar to arrive at a cost of bar processing through the rolling mill. These two costs are added to arrive at a total cost of manufacturing.

### **QUESTIONS POSED BY THE PANEL TO BOTH PARTIES**

**Q1. In paragraph 3 of the Request for Establishment of the Panel, four factors are specified by Turkey as being grounds for a breach of the cited Articles. However, in the submissions made by Turkey, it is arguable that other grounds are added. In the view of the parties, is it permissible:**

- (a) to use an inclusive expression when listing grounds for an alleged breach in request for establishment; and**
- (b) where a list of grounds is included in a request for establishment, to add another or other grounds in submissions:**
  - (i) where the list is said to be inclusive; and**
  - (ii) where the list is not said to be inclusive.**

### **Reply**

98. If Turkey identified all of its grounds for claiming a violation of the Agreement clearly in its Request for Establishment of the Panel, no issue of interpretation arises. Turkey maintains that all of the claims that it asserted in connection with Paragraph 3 are fairly raised in the language of Paragraph 3 itself.

99. In the alternative, it is Turkey's position that since the Articles of the Anti-Dumping Agreement alleged to be breached were clearly set forth in the Request for Establishment of the Panel, together with a general description of how those Articles were breached and a non-inclusive list of factors that were not evaluated or were not evaluated properly was provided, Egypt was on fair notice as to Turkey's claims. Moreover, all of those claims were set out in Turkey's First Written Submission such that Egypt suffered no prejudice to its position if there was any lack of clarity in the Request for Establishment of the Panel.

100. In paragraph 3 of the Request for Establishment of the Panel, Turkey alleged a violation of Articles 3.1, 3.4 and 3.5 of the Anti-Dumping Agreement because the Investigating Authorities "failed to take account of, and improperly attributed to Turkish imports, the effects of other factors that had a substantial adverse effect on the Egyptian industry and of other, neutral factors that caused prices to fall". The claim went on to state: "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 worldwide prices for steel scrap and a sudden contraction in domestic demand in January 1999 . . . ."

101. In its rebuttal brief, Turkey listed the following factors that had negative effects on industry profitability and domestic prices:

- Capacity expansions at the two major Egyptian rebar producers;
- The effects of the capacity expansion on the producer's costs of production;

The effects of the capacity expansion on the intra-industry competition;  
Increasing competition between Al Ezz and Alexandria National as Al Ezz sought to increase market share capitalizing on its cost advantages;  
Falling prices for steel scrap;  
Contraction in demand in January 1999, and  
The effect of comparably priced, fairly traded imports.

*See* Rebuttal Brief at 21. *See also* First Written Submission of Turkey at II.C. (items 1-2), II.D (items 3 - 6), II.E (item 7).

102. Items 1, 5, 6 and 7 are specifically referenced in paragraph 3 of the Request for Establishment of the Panel. Items 2 and 3 are subsumed in item 1 – they are the “adverse effect[s]” of the capacity expansion alleged in item 1 and in paragraph 3 of the Request for Establishment of the Panel. Turkey clearly alleged in its Request for Establishment of the Panel that the capacity expansion was having an adverse effect on the domestic industry or was a neutral factor causing prices to fall. Items 2 and 3 above merely specify how the capacity expansion had those effects.

103. Arguably, item 4 is subsumed in item 1 as well. [XX]

104. In any event, Turkey put Egypt on notice in paragraph 3 that it was alleging violations of Article 3.1, 3.4 and 3.5 due to the failure to take account of, and improper attribution to Turkish imports of the effects of other factors. Turkey also put Egypt on notice that the enumerated list of factors in that paragraph non-inclusive through use of the words “including, but not limited to”. Turkey then spelled out its claims in its First Written Submission and Egypt has had adequate opportunity to respond. Hence, even if the Request for Establishment of the Panel can be deemed to lack clarity, there has certainly been no prejudice to Egypt’s position.

**Q2. Could the parties please comment, in the light of Article 31 of the Vienna Convention on the Law of Treaties, on the meaning of the phrases:**

- (a) “special circumspection” in Annex II, paragraph 7; and
- (b) “to the best of its ability” in Annex II, paragraph 5.

Reply

105. Annex II, paragraph 7 provides: “if the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, . . . 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 information obtained from other interested parties during the course of the investigation.”

106. “Special circumspection” means, in this context, with extreme care to ensure the accuracy and pertinence of the data relied upon. Whenever it must rely on information from a secondary source as “facts available,” the Investigating Authority should endeavour to replicate, as closely as possible, the missing data and should check the data selected to verified data or other reliable public data. This provision also informs an investigating authority’s obligations when it uses data provided by respondents, but that data is other than the data that the respondents supplied as costs for the particular sale concerned. *See* Rebuttal Brief of Turkey at 77-79. When this step is taken, the Investigating Authorities must compare the data they have chosen to other verified or reliable data in the record and to published data in order to determine the pertinence and accuracy of the data. The Investigating

Authority failed in this obligation in several respects in the Egyptian rebar investigation. *See, e.g.*, Rebuttal Brief of Turkey at 80-82.

107. Egypt maintained, up to the convening of the commencement of the Second Substantive Session, that it relied solely on the information submitted by the Turkish respondents for its final determination and that, therefore, Article II, paragraph 7 was inapplicable. *See, e.g.*, Oral Presentation of Egypt, 27 November 2001, at 27. We note, however, that during the Second Substantive Session, Egypt claimed, for the first time, that it obtained scrap data from Alexandria National and that it relied upon that data in determining the normal value of respondents. Specifically, Egypt now claims that scrap data obtained from Alexandria National was compared to scrap data supplied by Colakoglu, Habas and Diler and, based on that comparison, it was concluded that the data submitted by Colakoglu, Habas and Diler was incorrect. We note, in this regard, that the Investigating Authority apparently did not follow the requirement of Annex II, paragraph 7 that data from this secondary source be used only with “special circumspection.” In particular, it evidently did not compare the data allegedly supplied by Alexandria National to public pricing information published in *American Metal Market* and *Metal Bulletin*, the two most widely read periodicals on the steel industry worldwide. If it had, it would have seen that the data allegedly provided by Alexandria National do not reflect the worldwide trend in scrap prices, while the scrap price data provided by Colakoglu, Habas and Diler did reflect those trends. *See* First Written Submission of Turkey at II.E.14-15 and TUR 13-14.

108. Regarding Annex II, paragraph 5, please see our response to joint question #4 below.

**Q3. Do you consider that the BCI submission of Egypt (*Confidential Injury Analysis*), by itself, constitutes an “evaluation” of the factors that it covers, in the sense of Article 3.4? Please cite any relevant legal authority and/or precedent.**

Reply

109. No, we do not. *See* Statement of Turkey at the Second Substantive Session, 1-3.

**Q4 Could the parties please comment, in the light of the Vienna Convention on the Law of Treaties, on the Appellate Body’s ruling in *United States – Hot-rolled Steel*, (at paragraph 101 and 102)<sup>12</sup> concerning Annex II, paragraphs 2 and 5.**

Reply

110. Annex II, paragraph 2 provides that the authorities may request that the response be put in a particular computer medium (e.g., computer tape). However, “[w]hen such a request is made, the authorities should consider the reasonable ability of the interested party to respond in the preferred medium or computer language, and should not request the company to use for its response a computer system other than that used by the firm”. Moreover, “The authorities should not maintain a request for a response in a particular medium or computer language . . . if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g., it would entail unreasonable additional cost and trouble”.

111. In *United States – Hot-Rolled Steel from Japan*, the Appellate Body drew on this language to conclude that

"investigating authorities [must] strike a balance between the effort they can expect interested parties to make in responding to questionnaires and the practical ability of

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<sup>12</sup> WT/DS184/AB/R.

those interested parties to comply fully with all demands made of them by the investigating authorities. We see this provision as another detailed expression of the principle of good faith, which is, at once, a general principle of law and a principal of general international law, that informs the provisions of the Anti-Dumping Agreement, as well as the covered agreements. This organic principle of good faith, in this particular context, restrains investigating authorities from imposing on exporters burdens which, in the circumstances, are not reasonable".<sup>13</sup>

112. Annex II, paragraph 5 provides that "[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".

113. Considering both of these provisions in combination, the Appellate Body in *United States – Hot-Rolled Steel from Japan* concluded:

"We, therefore, see paragraphs 2 and 5 of Annex II of the Anti-Dumping Agreement as reflecting a careful balance between the interests of investigating authorities and exporters. 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. At the same time, investigating authorities are not entitled to insist upon absolute standards or impose unreasonable burdens upon those exporters".<sup>14</sup>

114. Turkey agrees with all of these observations. In the Egyptian rebar investigation, the investigating authorities imposed an unreasonable burden on the exporters by requesting all of the new cost information identified in the 19 August 1999 questionnaire, and then insisting upon a "mail order" verification of all of that data and, in addition the cost and pricing data submitted in the original responses too. As discussed elsewhere, this was an impossible task, requiring the review, collation, translation and synthesis of thousands of pages of company books and records. If the investigating authorities desired a verification of the data in question, they should have scheduled a second "cost" verification in Turkey. There was sufficient time, given administrative deadlines, to do so.<sup>15</sup>

115. Moreover, the investigating authorities, according to the interpretation of their rationale offered by Egypt to the Panel in this proceeding, imposed an absolute standard or unreasonable burden on respondents by insisting that their cost data was useless because the companies' cost of

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<sup>13</sup> *United States – Imposition of Definitive Anti-Dumping Measures on Hot-Rolled Steel Products from Japan*, WT/DS 184/AB/R, July 24, 2001, para. 101.

<sup>14</sup> *Id.* at para. 102.

<sup>15</sup> As noted in our Rebuttal Brief, Egyptian law imposes a 12-month deadline for completion of anti-dumping investigations, with the possibility of a six month extension in certain circumstances. Rebuttal Brief of Turkey at note 152 and related text. Thus, in August 1999, the Investigating Authority still had at least five months in which to complete its investigation, and could have sought an extension of its investigation for another six months if necessary.

inventory was not indexed to inflation – a practice that is not common in Turkey and that was certainly not followed by the companies in their internal book-keeping systems. Annex II, paragraph 2 and Article 2.2.1.1 suggest that the Investigating Authority should accept costs drawn from the companies' own computerized accounting systems. At a minimum, as a matter of "good faith," it was incumbent upon the Investigating Authority, if it felt that the companies' internal book-keeping systems required modification, to advise the respondents how their costs should be modified, and in doing so, not to impose an unreasonable burden upon the respondents.

## ANNEX 8-2

### RESPONSES OF EGYPT TO QUESTIONS POSED IN THE CONTEXT OF THE SECOND SUBSTANTIVE MEETING OF THE PANEL

#### QUESTIONS POSED BY THE PANEL TO EGYPT

**Q1. In paragraph 3.2.2.1 of the Final Report, the Investigating Authority states with reference to the methodology used to calculate the normal value of Habas that "[t]herefore, as facts available for 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 for each month". It is not exactly clear to the Panel how this was done. Could Egypt please explain in detail how the calculations were done.**

#### Reply

1. Habas reported cost data for only two months of 1998. The Investigating Authority took the highest monthly value found for each cost element (except interest) and added 5 per cent monthly to account for inflation. This was done as follows. The Investigating Authority used the raw materials, labour and overhead expenses from the month of November 1998. Those costs were adjusted by the monthly inflation rate of 5 per cent according to the following formula.

(a) Adjustment for inflation rate of November 1998

Submitted Costs of November 1998 X 1.05

(b) Adjustment for inflation rate of December 1998

Adjusted costs in (a) X 1.05

2. The interest expenses were calculated as a percentage of costs of goods sold on the basis of the data submitted by Habas. The result (5 per cent) was applied to the costs as adjusted above.

3. Lastly, a reasonable amount for profit of 5.5 per cent was added. This margin was based on the profit achieved by Habas as shown in the income statement submitted by the company.

4. We attach the costs data submitted by Habas in EX-EGT-11.1 and the normal value constructed by the Investigating Authority as explained above in EX-EGT-11.2.

**Q2. In the Final Report at page 13, the IA refers to the scrap cost data provided by "another respondent" and describes the trends in those data. In Egypt's oral response to this question at the 26 February 2002 meeting with the Panel, Egypt clarified that the "respondent" referred to was Alexandria National. Could Egypt please confirm this, and provide the scrap cost data referred to and copies of the supporting documents from which those data were drawn.**

#### Reply

5. The other “*respondent*” from whom the Investigating Authority obtained information on scrap costs is Alexandria National Steel, one of the complainant respondents. The data submitted by this “respondent” is attached in EX-EGT-12.

**Q3. The Panel notes the comments made in Annexes 1 to Exhibit TUR-34A, B and C, respectively, by the auditors of the three companies to the effect that there is no consensus in Turkey on the use of IAS 29 and that it seems to be only of value when a comparison is to be made with a previous period (which would not be the case with a POI of one year only). In the light of these comments, could Egypt please explain the relevance of IAS 29 in this dispute.**

Reply

6. The absence of consensus in Turkey on the application of IAS 29 is irrelevant to the current issue.

7. Indeed, as explained in previous submissions, it is not sufficient that costs data be prepared in accordance with the generally accepted accounting principles of the exporting country in order for such data to be used by the Investigating Authority without adjustment. In addition, the records must reasonably reflect the costs associated with the production and sale of the product under consideration. In this respect, Egypt considers that the non-application of IAS 29 can seriously distort the accuracy and reliability of cost records of companies operating in an hyperinflationary economy since such records will underestimate the actual costs incurred by the company in producing and selling the product concerned.

8. Furthermore, IAS 29 is not only of value for comparison with previous years but also for the restatement of values of the reporting year.

9. IAS 29 is summarized as follows<sup>1</sup>:

“- Hyperinflation is indicated if cumulative inflation over three years is 100 per cent or more (among other factors).

- In such a circumstance, financial statements should be presented in a measuring unit that is current at the balance sheet date.

- Comparative amounts for prior periods are also restated into the measuring unit at the current balance sheet date.

- Any gain or loss on the net monetary position arising from the restatement of amounts into the measuring unit current at the balance sheet date should be included in net income and separately disclosed.”

10. While it is correct that IAS 29 seeks to readjust the corresponding amounts of previous periods to reflect hyperinflation when comparing these amounts to the current balance sheet as pointed out in Question 3, the summary of IAS 29 also specifically refers to the effects of hyperinflation on the profit/loss accounts of the reporting year. Accounts that are not restated in accordance with IAS 29 will therefore not reflect the full costs of production during the reporting period.

11. Furthermore, contrary to what Turkey stated in point J of its Oral Statement of 25 February 2002, Egypt did not conclude that the costs of production did not reflect hyperinflation

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<sup>1</sup> Source: International Accounting Standard Board

simply because IAS 29 was not applied. The non-application of IAS 29 constitutes only one indication that the reported costs data may not have reflected hyperinflation. However, the Investigating Authority was careful not to rely exclusively on this factor. Indeed, it also relied on the information received from the respondents that the costs were not adjusted to reflect hyperinflation of which the Panel received a copy (audited accounts, admissions by the respondents themselves). This was specifically acknowledged by Turkey in its rebuttal.

**Q4. Could Egypt please indicate exactly which inflation data contained in Exhibit EGT 7.7 it used as the basis for its conclusion that the average monthly inflation rate in Turkey was 5 per cent. In this regard, the Panel notes that the exhibit contains, *inter alia*, the same data from the Turkish State Institute of Statistics (submitted by the Turkish Government in its response of 15 October 1999 to the Essential Facts and Conclusions Report (Exhibit TUR-30)) on which the Turkish Government relied to indicate that the inflation rate was much lower during 1998.**

Reply

12. Egypt used the average yearly inflation rate for wholesale (54.3 per cent) and for retail (69.7 per cent) expressed on a monthly basis and rounded to 5 per cent. The details of the calculations are as follows:

- $54.3/12 = 4.5\%$
- $69.7/12 = 5.8\%$
- $(4.5 + 5.8)/2 = 5.1\%$ , rounded to 5%.

Those data are contained in the *document 1(b) TURKEY UPDATE* in EX-EGT-7.7.

13. In response to Question 2 submitted by Turkey, Egypt wishes to confirm that the above inflation rates relate to the calendar year 1998.

**Q5. For each respondent company, please identify the communication or communications that in Egypt's view informed that respondent that its evidence was not being accepted, and giving it an opportunity to provide further explanations within a reasonable period, as referred to in Annex II, paragraph 6.**

Reply

14. The communications by which the respondents were informed that their costs data were not accepted and giving them an opportunity to provide further explanations are as follows:

- (1) Letters of 19 August 1999 to all respondents

15. On 19 August 1999, the Investigating Authority sent all respondents a letter informing them that it had reasons to believe that the reported costs of production were unreliable and insufficient for the purposes of the dumping investigation and provided an initial period of 13 days to provide clarification and additional data. The deadline was later extended by 14 days. The responses received from the respondents were incomplete.

- (2) Letters of 23 September 1999 to all respondents

16. On 23 September 1999, after review of the responses to the letter of 19 August 1999, the Investigating Authority sent a second letter to all respondents offering them another opportunity to

clarify the matters raised in the letters of 19 August 1999. The Investigating Authority granted a deadline of two to five days.

17. Since Habas, Diler and Colakoglu informed the Investigating Authority that they would not supply the information requested in the letter of 23 September 1999, the Investigating Authority informed these respondents that it would use facts available by letter of 28 September 1999 to counsel to the said respondents.

18. As to Icdas and IDC, the information submitted did not show that the costs data duly reflected hyperinflation and, therefore, could not be used as submitted for the determination of the normal value. In consequence, the Investigating Authority had to resort to facts available in order to compensate for the unreliability of the submitted costs data.

19. The reasons for the use of partial facts available were given in the *Essential Facts & Conclusions Report* and the *Final Report*.

20. For the Panel's reference, a copy of the above-mentioned communications to the respondents is attached in EX-EGT-13.

**Q6. Egypt has requested the Panel to dismiss a number of Turkey's claims on the grounds that they are outside the Panel's terms of reference. In respect of each claim that Egypt has requested be dismissed, could Egypt please provide the two-part analysis referred to e.g. in *EC – Bed Linen*, i.e., the asserted lack of clarity in the Request for Establishment of the Panel, and evidence of any prejudice to Egypt's ability to defend its interests in this dispute due to such lack of clarity.**

#### Reply

21. In view of the reasoning of the Panel in *EC – Bed Linen* and the Appellate Body in *Korea – Dairy Safeguards*, Egypt requests that the following claims be dismissed:

(a) Claims under Article 3.4 as regards “*factors affecting domestic prices*”

22. Throughout its various submissions, Turkey presents the same arguments in relation to Article 3, paragraphs 4 and 5 and even goes so far as to allege a violation under Article 3.4 or Article 3.5<sup>2</sup> as regards the Investigating Authority's examination of “*factors affecting domestic prices*”. Turkey's claims in relation to these two provisions as stated in the Panel Request at Claim 3 or 4 were not in any way clarified in Turkey's First Written Submission. Nor were these claims clarified at the First Meeting of the Panel on 27 November 2001. Indeed, it will be recalled that the very first question of the Panel, dated 28 November 2001, was that Turkey set out in summary format its legal argumentation in support of each of its claims, including those relating to the Investigating Authority's examination of injury under Article 3. Moreover, when requested by the Panel to clarify its position on this issue at the First Meeting of the Panel on 27 November 2001, Turkey stated that it was presenting a claim solely under Article 3.4. The following day, on 28 November 2001, Turkey modified that response and stated that it was presenting a claim under both Articles 3.4 and 3.5.

23. In applying the approach of the Appellate Body in *Korea – Dairy Safeguards* to the particular facts of this case, Egypt submits that the Panel must look further into the nature of the particular provision at issue – i.e. where the Articles listed establish not one single distinct obligation, but rather multiple obligations. Articles 3.4 and 3.5 establish multiple obligations. If any violation with respect thereunder is not presented with sufficient clarity in the Panel Request, (1) the burden on the

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<sup>2</sup> See for example the Rebuttal Submission of Turkey of 2 January 2002 at Claim III.C, page 15.

respondent becomes too onerous; and (2) both the Panel and the respondent are at risk of being misled as to which claims are in fact being asserted against the respondent.

24. Article 6.2 of the DSU requires at the very least, that the claims, although not the arguments, must be presented with sufficient clarity in the Panel Request. This was not done in the present case before the Panel. Because it was unclear as to which provision under Article 3 Turkey was presenting its argumentation with respect to “*factors affecting domestic prices*”, Egypt was prejudiced as regards the preparation its defense with respect to those particular factors.

(b) Paragraph 6 of Annex II

25. In the Request for Establishment of a Panel, a violation of Paragraph 6 of Annex II was invoked with respect to the deadline granted to the respondents to reply to the letter of 19 August 1999. In its Restatement of Claims, Turkey additionally claimed that the sheer fact of sending the letter of 19 August 1999 constituted a violation of Paragraph 6 of Annex II. However, as the Panel will have noted, Turkey fails to explain its reasoning underlying the claim that the simple fact of sending a letter constitutes by itself a violation of Paragraph 6 of Annex II.

26. Yet, such an explanation was particularly called for in this case.

27. Indeed, it will be recalled that Paragraph 6 of Annex II imposes upon the Investigating Authority the obligation to inform a responding party of the reasons why information submitted by such party is not accepted and to grant that party an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. Since the purpose of the letter of 19 August 1999 was precisely to inform the respondents of the reasons why some of their data were not accepted and to provide them with an opportunity to supply additional information and clarification, the claim of violation presented by Turkey in its Restatement of claims is quite perplexing and should have been given special consideration by Turkey.

28. As a result of the absence of any explanation of the claim presented by Turkey with respect to Paragraph 6 of Annex II, Egypt’s ability to defend its interests in this context was severely prejudiced and, in fact, simply denied.

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

29. Turkey alleged that the Investigating Authority violated Paragraph 3 of Annex II and Article X:3 of GATT 1994 in its selection of facts as facts available. As noted by the Panel, those provisions were not cited in support of Claim 11 of the Request for Establishment of a Panel addressing the selection of facts available.

30. For the reasons set out below, Egypt submits that the alleged violation of Paragraph 3 of Annex II and Article X:3 of GATT 1994 must be rejected as not being within the Terms of Reference of the Panel in the context of Claim 11.

(i) Paragraph 3 of Annex II

31. As regards the alleged violation of Paragraph 3 of Annex II, Turkey failed to identify the obligations contained in that provision that the Investigating Authority would have violated in its selection of “facts available”, therefore preventing Egypt from presenting a meaningful defence. As already noted in Egypt’s First Written Submission<sup>3</sup>, Paragraph 3 of Annex II concerns the circumstances in which the data submitted by respondents must be accepted or can be rejected. This

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<sup>3</sup> Section IV.B.8.b.i)

provision, however, does not address the *selection* of facts available once it has been decided to reject the data submitted by the respondents. The reference to Paragraph 3 of Annex II in this latter context was definitely odd. Accordingly, Egypt would have expected Turkey to be particularly careful and thorough in explaining the legal basis for its claim that the Investigating Authority violated this provision by its selection of facts available. However, although invited to elaborate on this claim by the Panel, Turkey merely restated that the Investigating Authority's selection of facts available was inconsistent with Paragraph 3 of Annex II without any further detail.

32. In those circumstances, Egypt submits that its rights of defence were severely prejudiced with respect to the alleged violation of Paragraph 3 of Annex II since Turkey never explained the legal basis for the alleged violation.

(ii) *Article X:3 of GATT 1994*

33. The allegations of a violation of Article X:3 of GATT 1994 were equally vague and unsubstantiated. Thus, at page 30 of its Restatement of Claims, Turkey alleges that

“The denial of respondents’ requests for meetings at which they could explain how their responses to the Investigating Authority’s request for information were complete and accurate and show that their responses could be tied to their books and records was abusive, discriminatory and unfair to respondents in violation of Article X:3 of the GATT. The calculation of an interest charge for IDC that overstated IDC’s interest expenses as a per cent of costs of goods sold manufactured by a factor of eight was also abusive and discriminatory in violation of Article X:3.” (emphasis added)

34. Besides the fact that the language of Article X:3 does not seem to contain the obligations of non-discrimination and unfairness that Turkey considers were violated, it must be stressed that Turkey failed at any point during the proceeding to explain the elements of “abusiveness”, “discrimination” and “unfairness” which allegedly would characterize the decisions to refuse a meeting and the calculation of interest expenses. In other words, Turkey has made unsubstantiated and legally-ill allegations of violation to which therefore it is virtually impossible to respond in any meaningful way.

(d) Failure to refer to the relevant treaty article in the Panel Request

35. According to the Panel in EC – Bed Linen, a “[f]ailure to even mention in the request for the establishment the treaty Article alleged to have been violated in our view constitutes failure to state a claim at all”<sup>4</sup>. It follows that the following claims must be dismissed.

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

36. Turkey claims that the Panel should disregard consideration of certain Article 3.4 factors mentioned in the working papers of the Investigating Authority when evaluating whether the *Final Report* contains findings or conclusions sufficient to satisfy the requirements of Article 12.2, with respect to each of the Article 3.4 factors.

37. Again, Egypt wishes to stress that whether all of the Investigating Authority’s conclusions on material injury are reproduced in the *Final Report* is not an issue that is before the Panel. A claim under Article 12.2 was not introduced in the Request for the Establishment of a Panel and

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<sup>4</sup> WT/DS141/R at para. 6.15.

accordingly, is not within the Panel's Terms of Reference. As a result, Egypt did not prepare any defense in this regard.

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

38. In its Rebuttal Submission, Turkey claims that the Panel 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*. In support of this contention, Turkey refers to Article 6.4 of the Anti-Dumping Agreement.

39. Apart from the fact that a violation of Article 6.4 was not alleged in the Request for the Establishment of a Panel and accordingly, is not within the Panel's Terms of Reference, it is indeed ironic that Turkey should ask the Panel to dismiss evidence that was not provided to the Turkish respondents, while at the same time claim that the Panel should accept evidence that was not provided to the Investigating Authority during the course of the investigation. This is even more unreasonable in view of the fact that the Turkish respondents did not, at any time during the course of the investigation, request that the Investigating Authority provide non-confidential information to interested parties through its public file system.

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

40. Turkey alleges a violation of Article 17.6(i) of the AD Agreement. However, that provision 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. It does not govern the rights and obligations of Members under the AD Agreement. In any event, it was not cited in the Request for Establishment of a Panel. As a consequence, this claim is not within the Terms of Reference of the Panel and must be rejected.

**Q7. At page 6 of the Final Report, the IA stated that "IDC ... provided incomplete data and most of the data submitted were not supported by evidence". At page 29 of the Final Report, the IA stated in respect of IDC that "[f]or materials, labour and overhead, ... the company did not adequately demonstrate or support its claim that inflation was included...". At para. 3 of page 2 of Egypt's Rebuttal, it is said that it was clear that the records of the respondents were not prepared in order to reflect hyperinflation. However, in TUR-29, IDC submits that "inflation had been taken into account by the procurement price mechanism automatically" (in relation to materials). In your Oral Presentation dated 25 February 2002, it is said that "it cannot be contested that the costs data of the respondents was not adjusted to reflect hyperinflation". It is also said that ample evidence was submitted to establish that, and reference is made to EX-EGT-7.6. There is no document relating to IDC in that Exhibit. Could Egypt please identify how, and on the basis of what specific information in the record, the investigating authority arrived at its above-cited opinions and conclusions about hyperinflation in relation to IDC? Please furnish the documents relied upon by Egypt in reaching these conclusions.**

Reply

41. In EX-EGT-7.6, Egypt submitted a copy of the Auditors' notes to the Financial Statements in which IAS 29 was specifically discussed. Conversely, as explained in Egypt's First Written Submission, the Audited Accounts of IDC seemingly did not contain any indication that the financial statements had been prepared in accordance with the provisions of IAS 29, or were otherwise adjusted

to reflect inflation.<sup>5</sup> It should be noted that Turkey admitted on several occasions that no company applies IAS 29.

42. However, the fact that the costs data of IDC were not duly adjusted for inflation is apparent from other documents submitted by Egypt to the Panel.

43. Egypt wishes to refer to the documents attached in EX-EGT-7.9. This exhibit contains a copy of the reply of IDC to the Investigating Authority's questions on cost and sales data. In its response, IDC acknowledges that it makes "*no adjustments for inflation in [its] accounting practice*". The "*procurement price mechanism*" for materials mentioned by IDC in point 4 of its reply and reproduced in the Panel's question refers only to the fact that IDC converts the prices of imported materials at the exchange rate "*on the day which the materials were imported*". As explained on many occasions, this is irrelevant since it cannot cope with the effect of hyperinflation on the value of raw materials that are not immediately used in the production. Indeed, as from the moment the value of the raw materials is converted into Turkish Lira, e.g. at the date of purchase, this value is "frozen" and will not be adjusted for inflation during any subsequent months until the raw materials concerned are used.

44. As regards the other costs items, IDC either failed to provide any explanation on whether hyperinflation was taken into account (labour and overhead) or supplied unconvincing and unsubstantiated explanations (depreciation expenses).

45. Accordingly, the Investigating Authority legitimately came to the conclusion that IDC did not demonstrate that the above-captioned cost items adequately reflected hyperinflation.

**Q8. Concerning Icdas, at page 6 of the Final Report, the IA stated that 'Icdas ... provided incomplete data and most of the data submitted were not supported by evidence'. Further concerning Icdas, at page 22 of the Final Report, the IA stated that "[o]n 23 September 1999, the Department requested a missing document and several documents to be translated into English". At page 23 of the Final Report, the IA stated, "[a]s for Icdas's claim that it 'provided all the necessary information' in response to the Department's 19 August 1999 request, and that the 'remaining items are [sic] timely submitted' in response to the Department's 23 September 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". At page 29 of the Final Report, the IA stated that "as described above, Icdas did not provide sufficient information for the investigating authority to confirm the monthly specific costs of materials, labour, or overhead during the period of investigation, despite being requested to do so". 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.**

#### Reply

46. The documents and explanations regarding Icdas's costs data were requested in the Investigating Authority's letters to Icdas of 19 August 1999 and 23 September 1999, respectively.

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<sup>5</sup> See IV-B.6.b)

47. The main purpose of the questions was to give Icdas an opportunity to explain whether, contrary to what the submitted data appeared to reveal, such data duly reflected the hyperinflation experienced by Turkey during the investigation period.

48. The main questions raised in the letter of 19 August 1999 as well as the responses and documentation submitted by Icdas can be described as follows:

(a) 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 ICDAS’s accounting records.”

49. Icdas did not provide the inventory ledgers on a monthly basis as requested, but only at year-end 1998 arguing that monthly inventory ledgers are not prepared within the ordinary course of trade.

50. Icdas furthermore stated that inventory is not adjusted “*with regard to the inflation*”.

“B. Reconcile the total value from the inventory ledgers for the months of January, September, October, November and December, to ICDAS’ general ledger and financial statement.”

51. No monthly reconciliation of inventory values was provided. Icdas only supplied a reconciliation of the year-end stock values to the inventory ledger. It was therefore impossible for the Investigating Authority to reconcile the monthly cost of production to the company’s records.

52. Furthermore, no reconciliation to the Financial Statements was provided.

“C. Provide a copy of all raw material purchase orders placed during the months of January, September, October, November, and December 1998. Provide a copy of the appropriate pages from the payments ledger showing payment for those purchases.”

53. Icdas provided copies of purchase contracts and invoices together with copies of listings which were presented as “payment documentation” for the purchase invoices.

54. However, the listings were not translated into English and Icdas failed to explain how the payment of the submitted purchase invoices could be verified on the basis of the listings.

55. Lastly, no data was submitted for December 1998, as requested.

“D. [Provide] a worksheet reconciling the materials costs that you submitted in your summary to the Investigating Authority to the company’s audited financial statement”

56. Icdas provided a table showing the monthly production volumes of billet and rebar as well as the monthly unit value in Turkish Lira of scrap, electrodes, ferro-alloys, other materials and refractories. Were appended to this table copies of unidentified documents.

57. If some of the figures reported in the table could be found in the appended documents such as the production figures of billet, Icdas failed to give any description of the submitted documents and,

more importantly, Icdas did not supply any explanation on how these documents should be read and interpreted by the Investigating Authority. As a result, it was impossible for the Investigating Authority to perform any kind of verification of the data submitted.

58. Furthermore, no reconciliation to the Financial Statements was provided.

(b) Labour

“A. Explain whether any adjustments have been made in ICDAS’ accounting records to recognize the inflation that occurred during this time”

59. Icdas replied that wages and salaries were allegedly adjusted for inflation on an annual basis and stated that, with respect to the investigation period (January–December 1998), the adjustment was performed in January 1998.

60. Besides the fact that Icdas did not provide any detail on the adjustment concerned, it should be noted that an adjustment in January evidently cannot account for the hyperinflation occurring in any subsequent month until the end of the year.

61. Accordingly, the allegation that labour costs data for the investigation period were adjusted for inflation could not be accepted.

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

62. The explanation was provided as requested.

“C. Reconcile the labour costs reported for January, September, October, November and December 1998 to the general ledger and to the financial statement, and provide supporting documents, including bank statements for those months”

63. The reconciliation of labour costs was not submitted in Icdas’ response of 15 September 1999. Accordingly, the Investigating Authority requested by letter of 23 September 1999 that such reconciliation be submitted within five working days.

64. The documents received in response to the letter of 23 September 1999 were presented in the same format as the so-called reconciliation of material costs. Thus, Icdas presented a table showing total monthly labour costs and attached copies of extracts from an unidentified ledger. No data was provided for December 1998.

65. Once again, Icdas failed to provide any narrative explanation on how these documents should be used in order to reconcile the submitted data.

66. Furthermore, Icdas only provided copies of the relevant ledger but failed to provide a reconciliation to the financial statements, as requested.

67. Lastly, Icdas failed to submit the requested supporting documents, such as bank statements.

(c) Overhead

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

68. Icdas failed to explain whether any adjustments for inflation were made to the overhead expenses.

“B. 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 January through December, 1998”

69. Instead of supplying monthly depreciation expenses as requested, Icdas supplied one single amount for the full calendar year 1998 and allocated this amount equally to each month of the investigation period.

“C. Specifically explain whether your recorded depreciation expenses take into account inflation that occurred during this time”

70. The explanation provided by Icdas was minimal. Indeed, Icdas limited its response to the general statement that “depreciation expenses are calculated over the revalued rates of the fixed assets according to the revaluation rate which is determined annually by the Ministry of Finance according to the inflation rate”. Icdas failed however to give any detail on this alleged revaluation. In particular, Icdas did not indicate whether this revaluation was performed at the end of the year or at the beginning of the year, as for labour costs (see above). As a consequence, the Investigating Authority could not accept the claim.

(d) Conclusions

71. As demonstrated above, the minimal explanations and insufficient documentary evidence submitted by Icdas in response to the Investigating Authority’s letters of 19 August 1999 and 23 September 1999 could not allow the Investigating Authority to verify the accuracy of the costs data submitted by Icdas. In fact, far from presenting a reconciliation of its costs data as requested, Icdas simply submitted copies of voluminous raw documents without any walk-through instructions which would have allowed the Investigating Authority to perform a meaningful verification of the costs data.

72. Furthermore, Icdas’s responses did not contradict but in fact confirmed that its costs data did not reflect the hyperinflation experienced by Turkey in 1998. Icdas’s allegations to the contrary can only be considered as disingenuous or, at best, erroneous.

73. As a consequence, Egypt submits that the Investigating Authority was entitled to use partial facts available with respect to Icdas pursuant to Article 6.8 of the AD Agreement in order to arrive at meaningful determinations.

**Q9. In Egypt's 7 December 2001 response to Question 5 from the Panel, Egypt highlighted how, in its opinion, the *Confidential Injury Analysis* demonstrates that the injury analysis was thorough and covered all factors listed in Article 3.4. Could Egypt please indicate where the analysis of each factor is reflected in the Essential Facts and Conclusions and/or Final Reports.**

Reply

74. The Panel has asked Egypt to indicate “where” in the *Essential Facts & Conclusions Report* and the *Final Report* the analysis of each factor listed under Article 3.4 is reflected. We would like to refer the Panel to the table provided in Question 5 of Egypt’s 7 December 2001 response to the Panel, which has been reproduced for ease of reference below:

Economic Factor/Indices	EFCR	FR
Sales	Section 2.4.1 Section 4.3.1 Section 4.5.2 Section 4.5.4	Section 2.4.1 Section 4.3.1 Section 4.6.2 Section 4.6.4
Profits	Section 4.3.5 Section 4.5.2 Section 4.5.4	Section 4.3.5 Section 4.6.2 Section 4.6.4
Output	Section 2.4.2 Section 4.3.2	Section 2.4.2 Section 4.3.2
Market Share	Section 2.4.1 Section 4.3.4 Section 4.5.4	Section 2.4.1 Section 4.3.4 Section 4.6.4
Return on investments	Section 4.3.7 Section 4.5.2	Section 4.3.7 Section 4.6.2
Capacity utilization	Section 4.3.6	Section 4.3.6
Prices	Section 4.2.1.2 Section 4.2.2.1 Section 4.5.1 Section 4.5.2 Section 4.5.3 Section 4.5.4	Section 4.2.1.2 Section 4.2.2.1 Section 4.6.1 Section 4.6.2 Section 4.6.3 Section 4.6.4
Dumping margin	Section 3.3	Section 3.3 Section 4.4 Section 4.6.2
Inventories	Section 4.3.3 Section 4.5.2	Section 4.3.3 Section 4.6.2

EFCR = Essential Facts & Conclusions Report  
FR = Final Report

75. It may be the case that the Panel considers that the *Confidential Injury Analysis* is not fully reflected in the *Essential Facts & Conclusions Report* and/or the *Final Report*. However, we repeat that whether all of the Investigating Authority's conclusions on material injury are reproduced in these reports is not an issue that is before the Panel. A claim under Article 12.2 was not introduced in the Request for the Establishment of a Panel and accordingly, is not within the Panel's Terms of Reference.

76. What is relevant, however, is whether the Investigating Authority's examination under Article 3.4 was complete. Accordingly, we wish to direct the Panel's attention Question 3 of the "Questions to Both Parties" below.

**Q10. In respect of each of the five respondents (Habas, Diler, Colakoglu, Icdas and IDC), the Investigating Authority stated in the Final Report that "[t]he Investigating Authority did not offset this interest expense 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". Where in the record can the basis for this conclusion be found in respect of each of these companies? That is, what information and considerations were relied upon in the Investigating Authority's analysis on this point for each?**

Reply

77. The determination that interest revenue was not found to be sufficiently related to production was based on the treatment of this income as a non-operating income by the auditors of the companies concerned and/or on the extraordinary nature of this income in comparison to previous years.

(a) Icdas

78. First, the interest income was reported after the calculation of the operating profit or loss and could therefore not be considered as related to production or sales activities. Second, it was apparent from the amount of interest income of 1998 that such interest income could not reasonably be related to production or sales activities. Indeed, according to the "Detailed Statement of Income" of Icdas, the amount of interest income for 1998 was as high as 1,022,244 million Turkish Lira for a total turnover of 80,561,205 million Turkish Lira and a total cost of sales of 74,529,114 million Turkish Lira. By contrast, in 1997, interest income amounted to only 13,728 million Lira while the total turnover and costs of sales amounted to 44,072,138 million and 38,722,381 million Turkish Lira, respectively.

79. The above figures show beyond any doubt that the amount of interest income in 1998 is in no way related to production or sale activities but represents rather an extraordinary income. Should the interest income be related to production or sale, then the ratio between interest income on the one hand and turnover/cost of sales on the other hand would not vary so significantly from one year to the next.

(b) Habas

80. The interest income of Habas was reported as a non-operating income in the company's Income Statement and, accordingly, was considered by the Investigating Authority as not being sufficiently related to production or sale activities.

(c) Colakoglu

81. The interest income of Colakoglu was also reported as a non-operating income in the Income Statement (i.e. it was reported after the calculation of the operating profit or losses of the company). Furthermore, the absence of any relationship to production and sale was underlined by the fact that the interest income in 1998 was almost 6 times higher than in 1997 while, in the same period of time, gross sales had increased by approximately 50 per cent only.

(d) Diler

82. The interest income of Diler was reported as a non-operating income in the Income Statement of the company (i.e. it was reported after the calculation of the operational profit or losses of the company). Accordingly, such income was not considered to be sufficiently related to production activities.

(e) IDC

83. The interest income of IDC was reported as a non-operating income in the Income Statement of the company (i.e. it was reported after the calculation of the operating profit or losses of the company). Accordingly, such income was not considered to be sufficiently related to production activities.

84. In view of the foregoing considerations, Egypt submits that the Investigating Authority was entitled to reject interest income from the calculation of the construction normal value since the evidence on the record indicated that such income was not sufficiently related to production activities. It should be noted that no respondent provided any evidence to the contrary.

85. As explained in Egypt's First Written Submission and subsequent submissions, the Investigating Authority's actions in this regard are in line with the practice of other major jurisdictions such as the European Communities and the USA.

**Q11. Could Egypt please provide a copy of the following documents:**

- **letter dated 26 August 1999 from the Investigating Authority to all of the respondents granting the 14-day extension for responses to the letters of 19 August 1999 (the granting of the extension is referred to at page 35 of the First Written Submission of Turkey);**
- **letter dated 23 September 1999 from the Investigating Authority to Icdas;**
- **Annexes to IDC's 9 September 1999 submission (Exh TUR-29)**

Reply

- (a) Letter dated 26 August 1999 to all respondents
- Icdas: EX-EGT-14.1
  - IDC: EX-EGT-14.2
  - Counsel to Diler, Colakoglu and Habas: EX-EGT-14.3
- (b) Letter dated 23 September 1999 from the Investigating Authority to Icdas
- EX-EGT-13.2.2
- (c) Annexes to IDC's 9 September 1999 submissions
- EX-EGT-15

**QUESTIONS POSED BY THE PANEL TO BOTH PARTIES**

**Q1. In paragraph 3 of the Request for Establishment of the Panel, four factors are specified by Turkey as being grounds for a breach of the cited Articles. However, in the submissions made by Turkey, it is arguable that other grounds are added. In the view of the parties, is it permissible:**

- (a) **to use an inclusive expression when listing grounds for an alleged breach in a request for establishment; and**
- (b) **where a list of grounds is included in a request for establishment, to add another or other grounds in submissions:**

- (i) **where the list is said to be inclusive; and**
- (ii) **where the list is not said to be inclusive?**

Reply

(a) Egypt considers that, while it is permissible to use an inclusive expression when listing grounds for an alleged breach in a request for the establishment of a panel, the list of factors contained therein should be as exhaustive as possible. The DSU does not impose any time limits as to when the request for establishment of a panel must be submitted once consultations are formally initiated. Accordingly, the complainant has ample opportunity to identify the specific measure at issue and the relevant legal basis of the complaint.

(b.i) Where the list of grounds is said to be inclusive, Egypt considers that it is permissible to add additional grounds in submissions on the condition that the legal basis of those grounds is clearly identified in connection with each treaty article in the request for the establishment of a panel. Moreover, the complainant must be able to explain why these grounds were not included in the panel request if the information on which the grounds are based is not new to the complainant. Lastly, the respondent must be granted adequate opportunity in which to prepare a defence.

(b.ii) Where the list of grounds is not said to be inclusive, Egypt considers that it is not permissible to add additional grounds in submissions, unless new facts come to light during the course of the proceeding that were not previously available to the complainant. In this latter situation, Egypt considers that it is permissible to add other grounds to a non-inclusive list, provided that the complainant can demonstrate that these grounds are relevant to the legal basis of its claim and that the respondent is granted adequate opportunity in which to prepare a defence.

**Q2. Could the parties please comment, in the light of Article 31 of the Vienna Convention on the Law of Treaties, on the meaning of the phrases:**

- (a) **"special circumspection" in Annex II, paragraph 7; and**
- (b) **"to the best of its ability" in Annex II, paragraph 5.**

Reply

86. Egypt considers that the following interpretations are in accordance with the ordinary meaning to be given to the terms of the provisions in their context and in light of their object and purpose under the AD Agreement.

- (a) The meaning of "special circumspection"

87. As a preliminary remark, it should be noted that Annex II, paragraph 7 contemplates circumstances in which the Investigating Authority must use information from a *secondary* source, as opposed to information obtained from the respondents concerned. Accordingly, as explained in Egypt's First Written Submission, this provision does not apply to the rebar investigation since all dumping findings were made on the basis of the data submitted by the respondents, with the sole exception of the hyperinflation rate which was based on official statistics and the data on scrap prices which were obtained from another respondent that furnished supporting evidence (see reply to Question 2 to Egypt).

88. In Egypt's view, the use of the terms "*special circumspection*" indicates that the Investigating Authority should resort to information from secondary sources *only* to the extent strictly necessary to

fill the gaps in the information obtained from the respondents concerned, i.e. from the primary source. The terms also indicate that the Investigating Authority should carefully check the information used as facts available with other information that the Investigating Authority has at its disposal from other sources. In the rebar investigation, the only information coming from a secondary source was the monthly hyperinflation rate of 5 per cent. As explained previously (see, e.g., Egypt's reply to Question 4), this rate was calculated on the basis of the average yearly inflation rate for wholesale and for retail reported by the State Institute of Statistics of the Republic of Turkey.

(b) The meaning of "to the best of its ability"

89. Egypt considers that the terms "*to the best of its ability*" in Annex II, paragraph 5, qualifies the level of cooperation that an Investigating Authority may legitimately expect from respondents in an anti-dumping investigation. In particular, the word "best" indicates that the level of cooperation must be very high.

90. Thus, Egypt considers that respondents are expected to provide within a reasonable period of time all information required by the Investigating Authority which is at the immediate disposal of the respondents concerned or can be obtained by them without undue difficulty.

91. Thus, a respondent cannot be considered to have acted "*to the best of its ability*" if it does not submit copies of its own records and meaningful explanations on how these records were prepared. On the other hand, Egypt recognizes that a respondent may encounter more difficulties in complying with an Investigating Authority's request if the data requested by the Investigating Authority have to be obtained from a source upon which the respondent has no or little control. In such case, the Investigating Authority should take into account the specific circumstances of the respondents, without prejudice, however, to its right to resort to "fact available" if meaningful data are not obtained from the respondents in order to reach accurate determinations. The fact that some respondents provide all the documents requested while others do not is already an indication that, all other things being equal, the failing respondents do not act to the best of their ability.

92. In the rebar investigation, the requests for additional information and explanations exclusively concerned the respondents' own records and data. Accordingly, the Investigating Authority was entitled to expect full and complete answers to its questions. Failure to submit full and complete answers indicates that the respondents concerned did not act to the *best of their ability* within the meaning of Annex II, paragraph 5.

**Q3. Do you consider that the BCI submission of Egypt (*Confidential Injury Analysis*), by itself, constitutes an "evaluation" of the factors that it covers, in the sense of Article 3.4? Please cite any relevant legal authority and/or precedent.**

Reply

93. Egypt considers that the *Confidential Injury Analysis* demonstrates that the injury analysis was thorough and covered all the factors listed in Article 3.4. The *Confidential Injury Analysis* is the set of findings upon which the Investigating Authority based its final determination of injury, the central points of which are reflected in the *Final Report*.

94. It is clear from the *Confidential Injury Analysis* that a substantial amount of data was requested and collected for the Article 3.4 factors listed therein. The data was compiled individually for each domestic producer and for the entire domestic industry. Each factor was analysed separately for each individual domestic producer and for the entire domestic industry and set in a table format so as to enable the Investigating Authority to compare the trends and review the situation of the domestic industry as a whole from 1996 to Q1 1999. The Investigating Authority was therefore able to

examine the data in context, and assess its internal evolution and *vis-à-vis* the other factors examined. Accordingly, the Investigating Authority was able to determine which of the factors had a bearing on the state of the industry. The *Confidential Injury Analysis* therefore constitutes an evaluation of the factors that it covers in the sense of Article 3.4.

95. Egypt submits that this approach is consistent with the findings of the Panel in *United States – Hot-Rolled Steel from Japan*.<sup>6</sup> In that case, the Investigating Authority analysed all relevant economic factors having a bearing on the state of the industry on the basis of data covering a three-year period and discussed the trends at various instances in its *Final Report*<sup>7</sup>, which is similar to the approach adopted by the Egyptian Investigating Authority in the rebar investigation.

96. In *United States – Hot-Rolled Steel*, the question before the Panel was whether the Investigating Authority failed to sufficiently evaluate certain factors by failing to discuss and to compare particular data over a specified period.<sup>8</sup> Similarly, in the present dispute before this Panel, Turkey alleges that the Investigating Authority failed to take into account certain trends in the data and it is on this basis that Turkey concludes that the examination of the IA was not based on positive evidence. However, as noted by the Panel in *United States – Hot-Rolled Steel*, a proper evaluation is dynamic in nature and takes into account changes in the market that determine the current state of the industry – the fact that the Investigating Authority did not explicitly address certain trends should not undermine the adequacy of its evaluation with respect thereto.<sup>9</sup> Accordingly, the evaluation was upheld by the Panel.

97. Moreover, the Panel in *United States – Hot-Rolled Steel* made very clear that it is indeed “another question whether the evaluation and the conclusion with regard to these factors is supported by the facts”.<sup>10</sup> What is important in this respect is to keep in mind that the Panel is bound in its analysis by the standard of review set forth in Article 17.6 of the AD Agreement.<sup>11</sup>

**Q4. Could the parties please comment, in the light of the Vienna Convention on the Law of Treaties, on the Appellate Body's ruling in *United States – Hot-rolled Steel*, (at paragraphs 101 and 102)<sup>12</sup> concerning Annex II, paragraphs 2 and 5.**

#### Reply

98. The Appellate Body's ruling in *United States - Hot-rolled Steel* concerning Annex II, paragraphs 2 and 5 was reached in the context of the US Administration's decision to apply “*adverse*” facts available to one of the Japanese respondents, namely KSC, on the grounds that KSC had not sufficiently cooperated with the US Administration in the course of the domestic investigation. The issue before the DSB was whether the quality of cooperation offered by KSC during the investigation entitled the US Administration to seek to arrive at unfavourable results.

99. The questions that the DSB needed to examine were twofold: (1) the meaning of the term “*cooperation*” and (2) the efforts that an Investigating Authority may legitimately expect from respondents in the course of an investigation.

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<sup>6</sup> WT/DS184/4, at para. 7.232.

<sup>7</sup> *Id.*, at paras. 7.226 – 7.227.

<sup>8</sup> *Id.*, at paras. 7.228 – 7.231.

<sup>9</sup> *Id.*, at para. 7.234.

<sup>10</sup> *Id.*, at para. 7.235.

<sup>11</sup> *Id.*

<sup>12</sup> WT/DS184/AB/R.

100. Thus, the Appellate Body noted that “cooperation is a process, involving joint effort, whereby parties work together towards a common goal. In that respect, we note that parties may very well “cooperate” to a high degree, even though the requested information is, ultimately, not obtained”.<sup>13</sup>

101. Examining the level of cooperation expected from respondents, the Appellate Body noted that the provisions of Annex II, paragraph 5 “*suggest[s] to us that the level of cooperation required of interested parties is a high one – interested parties must act to the “best” of their abilities*”<sup>14</sup>, although an Investigating Authority should not impose an “*unreasonable extra burden*” upon the respondents. On this basis the Appellate Body concluded that “[paragraph 2 of Annex II] *requires investigating authorities to strike a balance between the effort that they can expect interested parties to make in responding to questionnaires, and the practical ability of those interested parties to comply fully with all demands made of them by the investigating authorities*”. *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. At the same time, however, the investigating authorities are not entitled to insist upon absolute standards or impose unreasonable burdens upon those exporters*”.<sup>15</sup>

102. Applying the above principles to the case at hand, the Appellate Body upheld the Panel’s findings that KSC had acted to the best of its ability in trying to obtain the data requested by the US Administration and that, therefore, the Investigating Authority was not entitled, when resorting to facts available, to seek to reach intentionally an adverse outcome.

103. The exact scope of the above ruling must be understood well. Contrary to Turkey’s interpretation, it was not held in *United States – Hot-rolled Steel* that the use of facts available is not warranted when a company acts to the best of its ability. To the contrary, the Appellate Body specifically stated that cooperation does not necessarily result in obtaining the information requested. In such case, as held by the Panel, the use of facts available is fully justified. Thus, the Panel stated that “[i]t is undisputed in this case that KSC did not provide the requested information regarding resale prices and further manufacturing costs with respect to its sales through its affiliate CSI. Thus, it appears that USDOC was justified in deciding to apply facts available with respect to the information not provided by KSC concerning CSI’s further manufacturing costs, as this necessary information was not provided within a reasonable period.”(emphasis added).<sup>16</sup>

104. Conversely, according to the DSB, the use of “*unfavourable*” facts available is only permissible when the respondent fails in its duty to cooperate within the meaning of the AD Agreement.

105. In conclusion, *United States – Hot-rolled Steel* confirms that the use of facts available is legitimate also in case of full cooperation by the respondents if the information provided is not sufficient to reach meaningful findings.

## **QUESTIONS POSED BY TURKEY TO EGYPT**

**Q1. Egypt claims that the “another respondent” who submitted scrap costs that were reviewed by the Investigating Authority as mentioned in the Final Report was Alexandria**

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<sup>13</sup> WT/DS184/AB/R, at para. 99.

<sup>14</sup> *Id.*, at para. 100 – emphasis added.

<sup>15</sup> *Id.*, at paras. 101-102.

<sup>16</sup> WT/DS184/R, at para. 7.69.

**National. We understand, however, that Alexandria National uses the direct reduction iron (DRI) method of steelmaking, which uses iron pellets as the raw material, and that Alexandria National does not use an electric arc furnace (EAF) to melt steel scrap. Please comment on whether this understanding is correct and, if so, what is the nature and relevance of the scrap price data submitted by Alexandria National?**

Reply

106. Contrary to Turkey's understanding, Alexandria National Steel uses both the DRI method for steelmaking and the electric arc furnace method for melting scrap.

**Q2. Please identify the period over which the inflation figures supplied in your oral response to Panel Question Number 4 were calculated.**

107. The period over which the inflation figures were calculated is the calendar year 1998.

## ANNEX 8-3

### RESPONSE OF EGYPT TO FOLLOW-UP QUESTIONS POSED BY THE PANEL, AND COMMENTS BY TURKEY ON EGYPT'S RESPONSE

#### B. RESPONSE OF EGYPT TO PANEL'S FOLLOW-UP QUESTIONS

##### Question 1

**Could Egypt please explain the context in which Alexandria National provided the scrap price data in its fax to the IA dated 15 September 1999 (Exhibit EGT-12). In particular, was this information provided in response to a request from the IA? If so, please furnish a copy of that request. If not, please explain Alexandria National's having provided the information.**

##### Response

2. The scrap prices data in Exh. EGT-12 were provided by Alexandria National further to a request made by the Investigating Authority upon receipt of the claim by Turkish respondents that scrap prices would have collapsed throughout the investigation period. In order to verify the veracity of this factual claim, the Investigating Authority asked the Egyptian industry to supply information on the evolution of scrap prices on a monthly basis for 1998. This request was made by telephone.

##### Question 2

**Could Egypt please provide the calculations showing exactly how each of the monthly scrap prices for 1998, shown in the first page of EGT-12, were derived from the "source reference" in the second page of EGT-12, and could Egypt explain why the methodology employed was chosen.**

##### Response

3. The prices indicated on the first page of Exh. EGT-12 were computed by Alexandria National, and not by the Investigating Authority. This matter is, in any case, irrelevant. Indeed, the Investigating Authority's assessment of the evolution of scrap prices was based on the "source reference" in the second page of Exh. EGT-12, and not on the prices mentioned on the cover page of Alexandria National. The evidence submitted by Alexandria National revealed that the Turkish respondents' claim that scrap prices would have collapsed throughout the investigation period was factually wrong. 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 of the investigation period. In other words, the "sharp decline" was in fact limited to three out of twelve months.

4. Incidentally, Egypt wishes to stress that the Investigating Authority's assessment of the evolution of scrap prices during the investigation period on the basis of the information provided by Alexandria National is in line with the trends showed in the documents submitted by Turkey in Exh. TUR-13 and Exh. TUR-14. Indeed, those documents, which were submitted for the first time by Turkey in the course of the current dispute, show that the scrap prices were relatively stable during the first seven months of 1998, and then, collapsed for a period of approximately three months.

5. Lastly, it is important to note that, contrary to Turkey's contentions, the scrap prices submitted by Alexandria National were *not* used to calculate the normal value of the Turkish respondents. This information was used for the *sole* purpose of verifying the accuracy of the claim made by the Turkish respondents regarding the decrease of scrap prices during the investigation period. Conversely, the material costs used for the calculation of the normal value of the Turkish respondents were based *exclusively* on the costs data submitted by each respective respondent.

6. Egypt considers that the Investigating Authority's actions are in full compliance with the WTO Anti-Dumping Agreement and, in particular, with paragraph 7 of Annex II thereof.

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### C. COMMENTS OF TURKEY ON EGYPT'S RESPONSE TO CERTAIN QUESTIONS POSED BY THE PANEL

1. Egypt states in its April 5, 2002 response to a panel question that the scrap data it used for its final determination appears on page two of EX-EGT-12. Egypt then states that this data on the "evolution of scrap prices during the investigation period . . . is in line with the trends showed in the documents submitted by Turkey in EX-TUR-13 and EX-TUR-14." We agree that the scrap prices on page two of EX-EGT-12 are in line with the data in EX-TUR-13 and EX-TUR-14. In fact, the prices shown on the Egyptian Exhibit in question for HMS 1&2 scrap are precisely the same as the scrap prices provided in EX-TUR-14 – as they should be since they are both from the same source, *Metal Bulletin*.<sup>1</sup>

2. Where we disagree is with Egypt's statement that "those documents" – a reference to EX-TUR-13 and EX-TUR-14 – "show that the scrap prices were relatively stable in the first seven months of 1998 and, then collapsed for a period of approximately three months." As the panel can plainly see by a review of EX-TUR-13 and EX-TUR-14, as well as the second page of EX-EGT-12, HMS 1&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.<sup>2</sup> Certainly, these data, which Egypt now acknowledges the IA had before it when it rendered its Final Determination, do not support the factual finding in the Final Report that "[f]or the first seven months of the period," scrap prices "were fairly constant and did not decline to any noticeable extent." Final Report at 12. That finding is patently incorrect. Moreover, the data on these charts do not support the conclusion that the sharp decline in scrap prices was limited to three months out of the twelve month period. While there was an additional decline between July and October of some \$35 per ton, or an additional 30% as compared to January, contrary to the impression given in the Final Report, the decline during the latter three-month period was only 3/5 of the total decline between January and October. There certainly were significant declines that took place earlier in the year.

3. The significance of these declines must be examined in terms of the issue being considered by the Investigating Authority (IA). The IA was specifically responding to a claim by respondents that the decline in stable currency scrap prices offset the effects of the inflation and devaluation in the Turkish

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<sup>1</sup> Since EX-TUR-14 is merely a graphical representation of the data that Egypt acknowledges was presented to the IA during the original investigation, the Panel should not disregard EX-TUR-14 for the reasons that Egypt set forth earlier in this proceeding. Specifically, the Panel is not barred from considering this data under Article 17.5(b) of the Agreement.

<sup>2</sup> 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. Note that the decline in August to October is not that much greater, in percentage terms, than the decline that took place earlier in the year.

economy such that their costs in Turkish lira were not increasing with the inflation rate. In this context, a decline in constant currency costs of 19-20% for the first seven months of the period of investigation is very significant indeed, and it directly undermines the IA's finding that scrap costs should have increased by 5% per month over this period. In addition, as we pointed out earlier, most sales of rebar to Egypt took place in the second half of 2001 when the scrap price declines had their most significant impact on rebar costs of production. During this period, scrap prices were up to 44% below January 1998 levels, or by more than the intervening inflation rate.

4. Finally, we never claimed, as Egypt contends, that the scrap price data purportedly submitted by Alexandria National was used by the IA to calculate respondents' cost of production. We acknowledged that the IA used respondents' data; however, we claimed that that data was based, in at least some instances, on scrap costs in January for comparison with selling prices in the second half of 2001, when scrap prices were demonstrably much lower.

## ANNEX 9

### THIRD PARTY ORAL STATEMENT OF CHILE

1. Thank you Mr. Chairman and members of the Panel.
2. We appreciate your giving us the opportunity to express our views in this dispute. As we stated in our letter on 1 November, we did not present any written submission but we wanted to reserve our rights to raise some points during this hearing.
3. Chile has no commercial interest in this case but strong systemic concerns, resulting from the alarming increase in the use of anti-dumping measures among WTO members. Especially when these measures are applied in an arbitrary way that, in our view, give grounds to the conclusion that the final intention is to keep out imports and protect uncompetitive local industries.
4. The way some national laws and practices interpret and apply the provisions of Article VI of GATT 94 and the Anti-Dumping Agreement clearly go beyond the true meaning, scope, spirit and text of those multilateral provisions. These rules provide for remedy in exceptional cases when real and effective injury occurs and when the specific conditions laid down in the AD Agreement are fulfilled.
5. Therefore, it is the duty of Panels to confirm - by rejecting unfounded interpretations and practices - the principles of transparency and fairness on which the WTO Agreements are based. Guaranteeing that the multilaterally agreed principles and rules will be fully respected and, in particular, that the disciplines of the AD Agreement will be strictly observed.
6. Thank you.

## ANNEX 10-1

### THIRD PARTY WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

#### I. INTRODUCTION

1. The European Communities welcomes this opportunity to present its views in the proceeding brought by Turkey concerning the consistency with Article X of the General Agreement on Tariffs and Trade (hereafter “GATT 1994”), and with Articles 2, 3, 6 and Annexes I and II of the Agreement on Implementation of Article VI of the GATT (hereafter the “Anti-Dumping Agreement”) of the definitive anti-dumping duties imposed by Egypt on Steel Rebar originating in Turkey.

2. The European Communities has decided to intervene as third party in this case because of its systemic interest in the correct interpretation of the Anti-Dumping Agreement. Many of the issues in dispute relate to questions of fact on which the European Communities is not in a position to comment. Accordingly, the European Communities will limit its submission to a number of issues of legal interpretation which are of particular interest to the European Communities. Indeed, given that some of the underlying factual situations remain unclear, the European Communities remains at the Panel’s disposition should it be interested in the views of the European Communities on issues which emerge at a later stage and which have not been addressed in the present submission.

3. The European Communities shall set out below a number of comments on three aspects of the dispute brought before the Panel. In turn, the European Communities will examine 1) the range of evidence which the Panel is entitled to examine; 2) issues relating to the determination of injury and causal link, and 3) issues relating to the determination of dumping.

#### II. THE RANGE OF EVIDENCE WHICH THE PANEL IS ENTITLED TO EXAMINE

4. Egypt has argued that Turkey has placed evidence before the Panel which was not placed before the investigating authority. The European Communities understand that while the specific evidence before the Panel was not brought to the attention of the investigating authority, the underlying arguments on causal link were made before the investigating authority. Turkey argues that Egypt failed to prove, on the basis of positive evidence, the existence of a causal link between dumping and injury.<sup>1</sup> Egypt considers that the Panel should regard as inadmissible all evidence submitted to it which was not made available to the Investigating Authority. Egypt bases this argument on Article 17.6(i) of the Agreement and on requirements of “due process”.<sup>2</sup>

5. However, Article 17.6(i) does not direct a Panel to consider inadmissible any evidence which was not before the investigating authority. Rather it directs the Panel to “verify whether the authorities establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective”. As the Appellate Body has pointed out:

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<sup>1</sup> Turkey – First Written Submission, 27 September 2001, page 6 *et seq.*

<sup>2</sup> Egypt – First Written Submission, 24 October 2001, page 28.

*[Article 17.6(i)], at the same time, in effect defines when investigating authorities can be considered to have acted inconsistently with the Anti-Dumping Agreement in the course of their “establishment” and “evaluation” of the relevant facts.<sup>3</sup>*

6. It may thus be the case that a panel could be asked whether the exclusion of certain evidence from a domestic procedure was consistent with an investigating authority's obligation to establish the facts in a “proper” manner. In such an event a panel may be confronted with evidence which was not before the investigating authority, and may need to take such evidence into consideration to examine whether the investigating authority has “properly” established the facts.

7. Article 17.5(ii) is also relevant in this regard. If it is alleged that an investigating authority did not examine a particular issue, through excluding it from the domestic procedure, then the record of “the facts made available in conformity with appropriate domestic procedure” will shed light on the investigating authority's examination of this issue.

8. However, as already noted, the European Communities understands that Turkey is not alleging that Egypt improperly excluded evidence from the domestic record. Rather, Turkey alleges that by failing to base itself on “positive evidence” in conformity with Article 3.1 Egypt did not properly establish the facts or did not make an unbiased and objective evaluation of those facts. In such an event, Article 17(5)(ii) directs a Panel to consider facts made available in conformity with the appropriate domestic procedures. In so doing the Panel should look to see whether facts made available were not taken into consideration and also whether all appropriate steps have been taken to establish the necessary facts.

### **III. THE DETERMINATION OF INJURY AND CAUSAL LINK**

#### **A. ARTICLE 3.5 OF THE AGREEMENT**

9. Egypt points out that the list of factors to be examined in the last sentence of Article 3.5 is an illustrative rather than mandatory list. This conclusion has also been reached by the Panel in *US-Hot Rolled Steel*.<sup>4</sup> The European Communities does not disagree with this interpretation, but notes that Article 3.5 imposes an obligation on the investigating authority to “examine any known factors other than the dumped imports which at the same time are injuring the domestic industry”. The list in the final sentence suggests a number of factors which may be relevant in conducting this examination. It is, however, of crucial importance to determine what is understood by “known factors”. The European Communities considers, in the first place, that such factors would be those brought to the attention of the investigating authority by the interested parties in the domestic procedure. However, there may be circumstances where an interested party can raise other factors but cannot itself prove conclusively that other factors are causing injury. In such circumstances, the European Communities would consider that such factors would be “known” to the investigating authority in the sense of Article 3.5, and should therefore be examined. Indeed, the Appellate Body, when considering Article 4(2)(a) of the Agreement on Safeguards (which also deals with the investigation of causal link) has stated:

*[the central role played by interested parties in the investigation] does not mean that the competent authorities may limit their evaluation of “all relevant factors”, under*

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<sup>3</sup> Appellate Body Report, , United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/AB/R, adopted 23 August 2001, para. 56.

<sup>4</sup> Panel report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001, as modified by the Appellate Body Report, WT/DS184/AB/R, para. 7.247

*Article 4(2)(a) of the Agreement on Safeguards, to the factors which the interested parties have raised as relevant. The competent authorities must, in every case, carry out a full investigation to enable them to conduct a proper evaluation of all of the relevant factors expressly mentioned in Article 4(2)(a) of the Agreement on Safeguards. Moreover, Article 4(2)(a) requires the competent authorities – and not the interested parties – to evaluate fully the relevance, if any, of “other factors”. If the competent authorities consider that a particular “other factor” may be relevant to the situation of the domestic industry, under Article 4(2)(a), their duties of investigation and evaluation preclude them from remaining passive in the face of possible shortcomings in the evidence submitted, and views expressed, by the interested parties. In such cases, where the competent authorities do not have sufficient information before them to evaluate the possible relevance of such an “other factor”, they must investigate fully that “other factor”, so that they can fulfil their obligations of evaluation under Article 4(2)(a).<sup>5</sup> (emphasis in original)*

10. Thus, the European Communities consider that where the investigating authority knows of the existence of other factors which may be causing injury it is under an obligation to fully investigate any such factor. It cannot fail to react in the face of limitations on the information presented to it by interested parties, where it has the means to investigate further.

#### B. DETERMINATION OF THE INVESTIGATION PERIOD FOR DUMPING AND INJURY

11. Turkey has argued that the period of the injury determination must coincide with the period of the dumping determination.<sup>6</sup> The European Communities does not understand Turkey as suggesting that the two periods of investigation should be the same length. The requirements set down in the Anti-Dumping Agreement on injury assessment logically require that the injury investigation period include a substantial period preceding the investigation period for dumping, in order to allow an evaluation of the trends affecting the domestic industry over a number of years. The European Communities rather understands Turkey as suggesting that a difference in the periods of investigation may lead to injury being found where there is no causal link to dumping, and that such a situation would be inconsistent with the Anti-Dumping Agreement.

12. The European Communities notes first of all that the Anti-Dumping Agreement does not establish any particular period of investigation, either for dumping or for injury. In any particular case, various factual considerations may require a particular investigation period. On the other hand, there can be no doubt that the Agreement sets in place an overarching substantive obligation; *viz.* that anti-dumping duties can only be imposed where a causal link between dumped imports and injury has been established, in accordance with Articles 3.1 and 3.5. It is noted that the Panel in *EC -Bed Linen* found that the injury assessment should be made for all imports originating in a country from which it has been determined that dumping has occurred and that it was not necessary to assess the injurious impact of only those individual imports which had been found to be dumped.<sup>7</sup>

13. Thus, as a matter of substance, in order to prove a causal link, it is likely that the period of investigation for injury must be broadly contemporaneous with the period of investigation for

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<sup>5</sup> Appellate Body Report, United States – Definitive Safeguard Measures on Import of Wheat Gluten from the European Communities (“United States – Wheat Gluten Safeguards”), WT/DS166/AB/R, adopted 19 January 2001, para. 55

<sup>6</sup> Turkey – First Written Submission, page 24.

<sup>7</sup> Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-type Bedlinen from India* (“*European Communities – Bedlinen*”), WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body Report, WT/DS141/AB/R, para. 6.132 to 6.142.

dumping, and will, in most cases be considerably longer.<sup>8</sup> As the injurious effects of dumping may only be apparent some time after the dumping itself has taken place it would be an unwarranted limitation on the investigatory powers of a domestic authority to prevent the period of investigation for injury lasting longer than that for dumping. In any event, irrespective of the length and the extent of overlap of the periods of investigation, it would be inconsistent with Articles 3.1 and 3.3 were a Member to impose anti-dumping duties had it not found, in the respective investigation periods, evidence of dumping, injury and a causal link.

#### IV. THE DETERMINATION OF DUMPING

##### A. APPLICABLE TIME-LIMITS FOR REQUESTS FOR FURTHER INFORMATION

14. Turkey argues that Egypt's requests for further information after the on-the-spot verification were in violation of Turkey's rights under Articles 6.1, 6.1.1 of the Anti-Dumping Agreement and Annex II, paragraphs 1 and 6 thereof.<sup>9</sup> Turkey argues, in particular, that the time limits granted for responses to requests for further information did not allow the exporters "ample opportunity" to present all evidence, in conformity with Article 6.1 and that Egypt had not specified in detail the information it required as it should have done under paragraph 1 of Annex II. Turkey also argues that Egypt should have applied the time limit set down in Article 6.1.1 to its requests for further information.

15. The European Communities takes issue with Turkey's suggestion that the deadlines set down in Article 6.1.1 should apply to requests for further information. Such a suggestion would inhibit the ability of Members to conduct an in-depth investigation consistent with the requirements set out in Article 6.6 and within the time limits for the conduct of investigations set out in Article 5.10.

16. Turkey's suggestion is, moreover, not supported in law. Article 6.1.1 refers to "questionnaires used in an anti-dumping investigation". From its context, it is apparent that this refers to questionnaires issued at the initiation of an investigation. Thus, Article 6.1.3 refers to the obligation to send to known exporters the written application for an investigation. Furthermore, paragraph 7 of Annex I refers to "the questionnaire" in the singular ("*[i]t should be carried out after the response to the questionnaire has been received*").

17. Indeed, the Anti-Dumping Agreement makes several references to the possibility to obtain "further information" without imposing an express time limit on such a request. For instance, Article 6.7 provides that on-the-spot verifications may be used to "obtain further details". Article 6.6 requires authorities to satisfy themselves as to the accuracy of information supplied, clearly implying that further questions may be posed. Additionally, in a slightly different context, paragraph 6 of Annex II requires an authority to inform an interested party of the reasons for rejecting information and obliges it to give a "a reasonable period" for such a party to provide explanations. If the party succeeds in providing further satisfactory information, it may be taken account of in any determination. This is thus an opportunity for further information to be provided where the time limit of Article 6.1.1 is not applicable. The European Communities note that the Panel in *Guatemala –*

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<sup>8</sup> It is noted that the Committee on Anti-Dumping Practices recommended that the investigation period for injury "should include the entirety of the period of data collection for the dumping investigation". This recommendation has been considered to be non-binding. See Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Portland Cement from Mexico* ("*Guatemala – Cement II*"), WT/DS156/R, adopted 17 November 2000, para. 8.266 and footnote 868 thereof, and Panel report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, ("*United States – Hot Rolled Steel*") WT/DS184/R, adopted 23 August 2001, as modified by the Appellate Body Report, WT/DS184/AB/R, para. 7.226, footnote 152.

<sup>9</sup> Turkey – First Written Submission – page 56.

*Cement II* concluded that there were no applicable time-limits for the presentation of evidence or arguments other than that contained in Article 6.1.1 for the questionnaire response.<sup>10</sup>

18. In conclusion, while the European Communities believe that the reasonableness of any time limits imposed on requests for further information should be examined under Article 6.1, the European Communities cannot see the justification, as a matter of law or practice, in applying the time limit of Article 6.1.1 to requests for further information.

#### B. DEDUCTION OF SHORT-TERM INTEREST INCOME FROM INTEREST EXPENSES

19. Turkey considers that Egypt's failure to deduct short-term interest income from interest expenses in calculating normal value is in violation of Article 2.2.1, 2.2.1.1 and 2.2.2 of the Agreement.<sup>11</sup> Egypt claims that this was done because the interest earnings did not bear a sufficiently close relationship to the cost of production.<sup>12</sup>

20. The European Communities considers that it follows from Articles 2.2.1.1 and 2.2.2 of the Agreement that short-term interest income can only be deducted from interest expenses where such income, as a matter of fact, can be linked to the sale or production of the product concerned. Thus, the Panel's attention is drawn to the requirement in Article 2.2.1.1 that costs are to be based on records which "reasonably reflect the costs associated with production and sale of the product under consideration". In addition, Article 2.2.2 states that amounts for the calculation of administrative, selling and general costs shall be "based on actual data pertaining to production and sales in the ordinary course of trade". From this, the European Communities in its practice has concluded that interest income can only be deducted from interest expenses where it has a relationship to the production or sale of the product concerned. It is consequently a matter of fact, to be determined by the investigating authority, whether the interest income in question is sufficiently closely related to the production or sale of the product concerned.

#### C. ADJUSTMENTS FOR CREDIT COSTS TO NORMAL VALUE

21. Turkey has argued that there is a violation of Article 2.4 of the Agreement since Egypt did not make an adjustment to normal value for credit costs while doing so for the export price.<sup>13</sup> Egypt considers that since the normal value was constructed a possible adjustment for credit costs need not be considered because, according to Article 2.4 due allowance should only be made for differences affecting price comparability.<sup>14</sup> According to Egypt, as the normal value has been constructed on the basis of cost of production it cannot be influenced by conditions and terms of sale.

22. The practice of the European Communities is to grant adjustments for credit costs to both normal value and export prices where they are justified also in the event that normal value has been constructed. The reason for this is that the constructed normal value will typically include an element for costs relating to the granting of credit terms. Thus, Article 2.2 of the Agreement provides that constructed normal value should be based on the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits. Article 2.2.2 provides three possible means of calculating administrative selling and general cost and profits should it be necessary to construct normal value. These costs used to construct normal value may also include

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<sup>10</sup> *Guatemala – Cement II op cit.* para. 8.118 - 8.120. Note that this Panel deals with the issue of the submission of evidence and argument in the period between the imposition of provisional measures and the imposition of definitive measures.

<sup>11</sup> Turkey – First Written Submission – page 77.

<sup>12</sup> Egypt – First Written Submission – page 89.

<sup>13</sup> Turkey – First Written Submission – page 78.

<sup>14</sup> Turkey – First Written Submission – page 89.

credit costs. Thus, if an adjustment were to be made for credit costs on the actual amounts used under Article 2.2.2 as a basis to calculate constructed normal value, the European Communities considers that an adjustment should be permitted to constructed normal value. The European Communities also notes, by analogy, that the fourth sentence of Article 2.4 explicitly refers to the possibility of granting allowances for costs where the export price has been considered to be unreliable and has to be constructed.

## **V. CONCLUSION**

23. In conclusion, the European Communities considers:

- That the admissibility of evidence which was not before the investigating authority should not be determined on the basis of Article 17.6(i);
- That an investigating authority is under an obligation to fully investigate the existence of other known factors which may be causing injury, even in the absence of short-comings in the evidence submitted;
- That the investigation period for injury and dumping need not be identical, but should permit the establishment, on the basis of positive evidence, of a causal link between dumped imports and injury suffered by the domestic industry;
- That the Anti-Dumping Agreement does not impose deadlines on the submission of responses to requests for further information from investigating authorities, but that any deadlines set must respect Article 6.1 of the Anti-Dumping Agreement;
- That interest income can only be deducted from interest expenses when it is sufficiently closely linked to production or sales of the product concerned; and,
- Credit costs may be deducted from constructed normal value where factually justified.

## ANNEX 10-2

### THIRD PARTY ORAL STATEMENT OF THE EUROPEAN COMMUNITIES

#### I. INTRODUCTION

1. Mr. Chairman, distinguished members of the Panel, on behalf of the European Communities, let me express first our appreciation for the opportunity to submit our views in this dispute.

2. As was noted in our written third party submission, many of the issues before you in this dispute relate to detailed questions of fact which the European Communities is not in a position to comment upon. As such this intervention will concentrate on some of the systemic issues which the European Communities raised in its written third party submission. Our comments will therefore focus on:

- First, the interpretation of Article 3.5 of the Anti-Dumping Agreement;
- Second, the relationship between the investigation period for dumping and injury;
- Third, the time limits applicable to requests for further information in the course of an investigation;
- Fourth, the treatment of interest income in calculating interest expenses; and,
- Finally, adjustments for credit costs to constructed normal value.

#### II. INTERPRETATION OF ARTICLE 3.5 OF THE AGREEMENT

3. The parties to the dispute have disagreed over whether the Egyptian investigating authority carried out an analysis of the existence of a causal link which conformed with Article 3.5 of the Anti-Dumping Agreement. In particular, Egypt has argued that the list of factors to be examined in the last sentence of Article 3.5 is an illustrative rather than mandatory list. The European Communities agrees that Article 3.5 sets out a non-mandatory list, both on the basis of the language of Article 3.5 when compared to Article 3.4, and on the basis of the conclusion of the Panel in *US-Hot Rolled Steel*.<sup>1</sup>

4. Japan has argued, in its written third party submission, that Article 3.5 requires a detailed examination of other factors injuring the domestic injury and a rigorous segregation of those factors from the effects of dumping.<sup>2</sup> The European Communities would agree that a detailed examination must take place. However, the initial focus of Article 3.5 in this respect, and the preliminary issue before this panel, is whether other factors which are to be examined are "known factors". In *Thailand – H Beams* the Panel considered:

"We consider that other "known" factors would include those causal factors that are clearly raised before the investigating authorities by interested parties in the course of an AD investigation. We are of the view that there is no express requirement in

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<sup>1</sup> Panel report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001, as modified by the Appellate Body Report, WT/DS184/AB/R, para. 7.247

<sup>2</sup> Third party Written Submission of Japan, 1 November 2001, para. 27.

Article 3.5 AD that investigating authorities seek out and examine in each case on their own initiative the effects of all possible factors other than imports that may be causing injury to the domestic industry under investigation".<sup>3</sup>

5. This statement suggests that the onus lies on the interested parties to raise factors which may be relevant to the causal link before the investigating authorities. It would seem logical that in raising other relevant issues, the interested parties must provide some *prima facie* evidence or argument that a particular factor may be relevant and merits detailed examination by the investigating authority. Otherwise, an interested party would simply list the factors set out in Article 3.5 and an investigating authority would be obliged to fully investigate such factors, hence circumventing the deliberate choice of language of Article 3.5 illustrated in the use of the term "any known factors", by transforming the list of factors into mandatory factors to be examined.

6. Thus, the European Communities considers that the Panel should first examine whether the Turkish exporters made a *prima facie* case in the domestic investigation that a particular factor might be a cause of the injury suffered by the Egyptian industry. Should this be the case, then the Panel should examine whether the examination made of such factors meets the standards set out in, *inter alia*, Article 3.1 and Article 17.6(i). The relevance of Article 17.6(i) has recently been explained by the Appellate Body in *US – Hot Rolled Steel*:

"[Article 17.6(i)], at the same time, in effect defines when investigating authorities can be considered to have acted inconsistently with the Anti-Dumping Agreement in the course of their "establishment" and "evaluation" of the relevant facts".<sup>4</sup>

7. In conclusion, the Panel should determine first, whether the factors which Turkey alleges should have led the investigating authority to conclude that imports were not responsible for injury were known to the investigating authority, and second, whether the examination of such factors meets the criteria set down by Article 3.1 and Article 17.6(i) of the Agreement.

### **III. RELATIONSHIP BETWEEN THE INVESTIGATION PERIOD FOR DUMPING AND INJURY**

8. Turkey has argued that the period of the injury determination must coincide with the period of the dumping determination.<sup>5</sup> The European Communities understands Turkey as suggesting that a difference in the periods of investigation may lead to injury being found where there is no causal link to dumping, and that such a situation would be inconsistent with the Anti-Dumping Agreement.

9. The European Communities agrees that an investigating authority must always be able to show that dumped imports are the cause of injury to the domestic industry. This does not require, however, that the investigation periods for dumping and injury must end at the same time. In practice, in the case of investigations carried out by the European Communities, investigation periods for dumping and injury do however end at the same time.

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<sup>3</sup> Panel 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/R, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS122/AB/R, para. 7.273. The European Communities does not understand Turkey as suggesting the existence of factors which the investigating authority should have known about independent of the domestic investigation.

<sup>4</sup> Appellate Body Report, , United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/AB/R, adopted 23 August 2001, para. 56.

<sup>5</sup> Turkey – First Written Submission. page 24.

10. The European Communities has already noted in its written submission that the Anti-Dumping Agreement does not establish any particular period of investigation, either for dumping or for injury. According to the recommendation adopted by the Committee on Anti-Dumping Practices (G/ADP/6) the injury investigation period "should include the entirety of the period of data collection for the dumping investigation". The end-points of both the investigation period for dumping and injury will therefore have to be quite close to each other.

11. In any event, it would be inconsistent with Articles 3.1 and 3.3 if a Member imposed anti-dumping duties without having found, in the respective investigation periods, evidence of dumping, injury and a causal link between the two. It will be for the Panel to evaluate whether such a causal link exists on the basis of the facts before it. To do so, the Panel is not required to make any findings as to the respective lengths of injury and dumping investigation periods.

#### IV. APPLICABLE TIME-LIMITS FOR REQUESTS FOR FURTHER INFORMATION

12. The European Communities shares the pre-occupations of the United States with respect to the notion, put forward by Turkey, that the time-limit set down in Article 6.1.1 should apply to requests for further information made after the submission of the initial questionnaire.<sup>6</sup> Such a suggestion is without basis in the Agreement and would inhibit the ability of Members to conduct an in-depth investigation consistent with the requirements set out in Article 6.6 and within the time limits for the conduct of investigations set out in Article 5.10.

13. Article 6.1.1 refers to "questionnaires used in an anti-dumping investigation". From its context, it is apparent that this refers to questionnaires issued at the initiation of an investigation. As the European Communities have already pointed out, paragraph 7 of Annex I refers to "the questionnaire" in the singular ("*it should be carried out after the response to the questionnaire has been received*").

14. Several provisions allow investigating authorities to request further information without referring to a specific deadline. For instance, Article 6.7 provides that on-the-spot verifications may be used to "obtain further details". Article 6.6 requires authorities to satisfy themselves as to the accuracy of information supplied, clearly implying that further questions may be posed. Paragraph 6 of Annex II requires an authority to inform an interested party of the reasons for rejecting information and obliges it to give a "a reasonable period" for such a party to provide explanations.

15. The European Communities moreover note that the Panel in *Guatemala – Cement II* concluded that there were no applicable time-limits for the presentation of evidence or arguments other than that contained in Article 6.1.1 for the questionnaire response<sup>7</sup>.

16. In conclusion, while the European Communities believe that the reasonableness of any time limits imposed on requests for further information should be examined under Article 6.1, the European Communities cannot see the justification, as a matter of law or practice, in applying the time limit of Article 6.1.1 to requests for further information.

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<sup>6</sup> Third party Submission of the United States, 1 November 2001, part IV, page 9.

<sup>7</sup> Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Portland Cement from Mexico* ("*Guatemala – Cement II*"), WT/DS156/R, adopted 17 November 2000, para. 8.118 - 8.120. Note that this Panel deals with the issue of the submission of evidence and argument in the period between the imposition of provisional measures and the imposition of definitive measures.

## **V. DEDUCTION OF SHORT-TERM INTEREST INCOME FROM INTEREST EXPENSES**

17. The parties are also in dispute as to the legality of Egypt's decision not to deduct short-term interest income from interest expenses in calculating normal value. Turkey argues that this is in violation of Article 2.2.1, 2.2.1.1 and 2.2.2 of the Agreement while Egypt claims that this is possible because the interest earnings did not bear a sufficiently close relationship to the cost of production.<sup>8</sup>

18. The European Communities broadly agrees with Egypt's position as a matter of law. It follows from Articles 2.2.1.1 and 2.2.2 of the Agreement that short-term interest income can only be deducted from interest expenses where such income, as a matter of fact, can be linked to the sale or production of the product concerned. Article 2.2.1.1 requires that costs are to be based on records which "reasonably reflect the costs associated with production and sale of the product under consideration". In addition, Article 2.2.2 states that amounts for the calculation of administrative, selling and general costs shall be "based on actual data pertaining to production and sales in the ordinary course of trade". The European Communities interpret this as meaning that interest income can only be deducted from interest expenses where it bears a sufficiently close relationship to the production or sale of the product concerned. It is consequently a matter of fact, to be determined by the investigating authority, and subject to review by the Panel in accordance with Article 17.6(i), whether the interest income in question is sufficiently closely related to the production or sale of the product concerned.

## **VII. ADJUSTMENTS TO CONSTRUCTED NORMAL VALUE FOR CREDIT COSTS**

19. Turkey has argued that there is a violation of Article 2.4 of the Agreement since Egypt did not make an adjustment to normal value for credit costs while doing so for the export price.<sup>9</sup> Egypt considers that since the normal value was constructed a possible adjustment for credit costs need not be considered because, according to Article 2.4, due allowance should only be made for differences affecting price comparability.<sup>10</sup> According to Egypt, as the normal value has been constructed on the basis of cost of production it cannot be influenced by conditions and terms of sale.

20. The European Communities typically grants adjustments for credit costs to both normal value and export prices where justified. This also applies to the case where normal value has been constructed. This interpretation is based on the fact that the constructed normal value will typically include an element for costs relating to the granting of credit terms. Article 2.2 of the Agreement provides that constructed normal value should be based on the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits. Article 2.2.2 provides three possible means of calculating administrative selling and general cost and profits should it be necessary to construct normal value. These costs used to construct normal value may thus also include credit costs. Therefore, if an adjustment were to be made for credit costs on the actual amounts used under Article 2.2.2 as a basis to calculate constructed normal value, the European Communities considers that an adjustment should be permitted to constructed normal value. The European Communities also notes, by analogy, that the fourth sentence of Article 2.4 explicitly refers to the possibility of granting allowances for costs where the export price has been considered to be unreliable and has to be constructed.

## **VII. CONCLUSION**

21. In conclusion, the European Communities asks the Panel to find:

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<sup>8</sup> Egypt – First Written Submission – page 89.

<sup>9</sup> Turkey – First Written Submission – page 78.

<sup>10</sup> Turkey – First Written Submission – page 89.

- First, that under Article 3.5 it must first establish whether other factors were known to the investigating authorities, and then review whether the examination of the investigating authority was consistent with the requirements of Article 3.1 and Article 17.6(i);
- Second, that the Agreement does not prescribe a specific investigation period for either injury or dumping. However, any periods chosen must permit the establishment, on the basis of positive evidence, of a causal link between dumped imports and injury suffered by the domestic industry;
- Third, that the Anti-Dumping Agreement does not impose explicit deadlines on requests for further information, but that any deadlines set must respect Article 6.1 of the Anti-Dumping Agreement;
- Fourth, that interest income can only be deducted from interest expenses when it is sufficiently closely linked to production or sales of the product concerned; and,
- Finally, that credit costs may be deducted from constructed normal value where factually justified.

22. Thank you for your attention.

## ANNEX 10-3

### THIRD PARTY RESPONSES TO QUESTIONS FROM THE PANEL OF THE EUROPEAN COMMUNITIES

**Q1. What role does the EC foresee for an investigating authority in an anti-dumping investigation establishing the existence of "other known factors" of Article 3.5 and what is the legal basis for the EC's position?**

#### Reply

1. The European Communities considers that the Anti-Dumping Agreement regulates the role of an investigating authority principally in Article 17.6(i) and, for injury and causal link determinations, in Article 3.1. Article 17.6(i) requires that the establishment of the facts be proper and the evaluation of such facts unbiased and objective. Article 3.1 requires that a determination of causal link shall be based on positive evidence and involve an objective examination.

2. Article 3.5 requires the investigating authority to "examine any known factors". It obliges an investigating authority to determine whether another known factors are causing injury and not to attribute injury caused by any such factor to dumped imports. This raises the threshold issue of whether a factor is "known" to the investigating authority and then a secondary issue of whether the investigating authority has examined it in accordance with Articles 3.1 and 17.6(i). Evidently, a factor must be "known" to an investigating authority where it is raised in the domestic procedure. However, it cannot be the case that an interested party must simply make an unsubstantiated claim. Were this sufficient for a factor to be "known" to the investigating authority, then the non-mandatory nature of the list in the final sentence of Article 3.5 could easily be circumvented by an interested party simply listing those factors. From this, the European Community deduces that an interested party must make a *prima facie* case that a factor might be relevant in order for a factor to be "known" in the sense of Article 3.5, thus engaging an analysis under Article 3.1 and 17.6(i).

3. The European Communities has not touched upon, and it does not seem to be an issue in this dispute, whether an investigating authority might be deemed to "know" of the existence of other factors possibly relevant for Article 3.5 when they have not been raised before it by an interested party.<sup>1</sup>

**Q2. In the EC's view, is there a different obligation on an investigating authority in an anti-dumping investigation with regard to establishing "other known factors" in terms of Article 3.5 of the AD Agreement, compared with the establishment of "all relevant factors" in terms of Article 4(2)b of the Safeguards Agreement, and if so, what are the different obligations and the legal bases for these obligations?**

#### Reply

4. Article 4(2)(b) of the Safeguards Agreement, which concerns the establishment of a causal link, uses neither the term "all known factors" (which is found in Article 4(2)(a)) nor "other known factors" (as in Article 3.5 of the Anti-Dumping Agreement). Article 4(2)(b) is indeed silent with

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<sup>1</sup> See, Panel 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/R, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS122/AB/R, para. 7.273

respect to the issue of what are the other factors referred to in its second sentence. The reference to “all relevant factors” in Article 4(2)(a) of the Safeguards Agreement can be seen as a parallel to “all relevant economic factors ..” in Article 3.4 of the Anti-Dumping Agreement (and, like Article 3.4, prescribes the action to be undertaken by the investigating authority).

5. When comparing Article 3.5 of the Anti-Dumping Agreement and Article 4(2)(b) of the Safeguard’s Agreement several differences can be noted. The first two sentences of Article 3.5, like the first sentence of Article 4(2)(b), set out the requirement for the existence of a causal link. However, Article 3.5 provides examples of other factors which may be causing injury, unlike Article 4(2)(b) (the language on non-attribution is similar). Moreover, there is no list in Article 4(2)(b) comparable to the non-mandatory list of factors in Article 3.5. It can also be noted that the qualifier “known” is not used in Article 4(2)(b). Thus, the European Communities considers that while the underlying general obligation is similar *viz.* to examine other factors which might be causing injury and not to attribute such injury to dumped or increased imports, Article 3.5 provides an illustrative list of other factors which are possibly relevant and it also qualifies the nature of other factors to be examined (“known”), while Article 4(2)(b) is silent thereupon.

6. For the avoidance of confusion, the European Communities reference to the Appellate Body report in *United States – Wheat Gluten* in its written submission was intended to illustrate by analogy the fact-finding obligations incumbent upon an investigating authority when a factor is “known” to it under Article 3.5, in the event that an interested party is not in a position to conclusively prove the effect of such a factor.

**Q3. Regarding your argument at paragraph 5 of the EC's written submission, that Article 17.6(i) does not direct a panel to consider inadmissible any evidence that was not before the investigating authority, what is the significance of the provision of Article 17.5(ii), that a panel "shall examine the matter based upon ... the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member" (emphasis added)?**

Reply

7. The European Communities commented upon this issue because Egypt had argued that certain evidence was inadmissible on the basis of Article 17.6(i), an argument clearly not borne out by the text of this article. Article 17.6(i) does not control the admissibility of evidence before a panel. It articulates a standard of review for matters of fact, and hence also imposes certain obligations on an investigating authority.<sup>2</sup> Thus a Panel cannot find evidence inadmissible on the basis of Article 17.6(i). Article 17.5(ii), on the other hand, is the only provision of the Anti-Dumping Agreement which regulates the status of evidence on which a Panel should base its examination. Thus, as the Panel’s question suggests, Article 17.5(ii) is of significance in this respect. Indeed, the European Communities pointed out the relevance of Article 17.5(ii) in para. 7 of its written submission.<sup>3</sup>

8. In so doing, the European Communities raised the hypothetical situation of evidence which a Member claimed was improperly excluded from an investigation and pointed out that it may be the case that such evidence should not be excluded from a panel’s examination since the domestic record

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<sup>2</sup> Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, para. 56.

<sup>3</sup> See, Panel report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001, as modified by the Appellate Body Report, WT/DS184/AB/R, para. 7.6, in which the Panel refused to consider evidence which had not been submitted in the domestic procedures.

would shed light on the treatment of such evidence. Thus, the absence of the evidence on the record might be of relevance to the sufficiency and objectiveness of an investigating authority's investigation. However, since this issue is not before the Panel, the European Communities will not develop this argument further.<sup>4</sup>

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<sup>4</sup> See, *ibid.*, para.7.8, where the Panel also reserved its position on whether evidence improperly excluded could be considered by a panel.

## ANNEX 11-1

### THIRD PARTY WRITTEN SUBMISSION OF JAPAN

#### **.I. THE INVESTIGATING AUTHORITY HAS FAILED TO COMPLY WITH THE PROCEDURAL REQUIREMENTS FOR ANTI-DUMPING INVESTIGATIONS**

1. It appears that Egypt conducted its anti-dumping investigation of Steel Rebar from Turkey in a manner that is not consistent with the Agreement on Implementation of Article VI of GATT 1947 (the “Agreement”). The Agreement specifies procedural requirements for the conduct of anti-dumping investigations. These requirements serve “the fundamental underlying principle that anti-dumping investigations should be fair”.<sup>1</sup>

2. In this case, Turkey has made certain compelling arguments that the Investigating Authority failed to comply with the minimum procedural requirements of the Agreement. Indeed, extensive and significant irregularities in Egypt’s investigation procedures call into question the fairness of the investigation as a whole.

#### A. THE INVESTIGATING AUTHORITY DID NOT PROVIDE RESPONDENTS A “REASONABLE TIME” TO ANSWER ITS QUESTIONS UNDER THE CIRCUMSTANCES

3. Turkey claims that, after the Investigating Authority received and verified the respondents’ answers to its questions, the Investigating Authority asked the respondents to answer many additional questions. Turkey further claims that the Investigating Authority required the respondents to provide extensive supporting documentation and to translate all those documents into English. These requests were made immediately after Turkey had suffered a devastating earthquake, indeed, at a time when key personnel of the respondents were absent from work to search for relatives and assist relief efforts. Yet, even in those trying circumstances, the Investigating Authority did not afford the respondents a reasonable time to respond. In fact, the Investigating Authority repeatedly set short deadlines – in one case as little as two days.

4. These deadlines are inconsistent with several provisions of the Agreement, including:

- Article 6.1 which requires, “All interested parties in an anti-dumping investigation shall be given . . . ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.”
- Article 6.2, whose *first sentence*, requires, “Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defense of their interests.”
- Article 6.13 which requires, “The authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable.”

5. These provisions make clear that Investigating Authorities must afford a reasonable period of time to respondents to answer questions presented. They also make clear, moreover, that Investigating Authorities have a duty to provide additional time when circumstances warrant. In that regard, the Appellate Body recently emphasized that Investigating Authorities must set deadlines “in a

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<sup>1</sup> *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, para. 6.181.

manner that allows for account to be taken of the particular circumstances of each case”.<sup>2</sup> Among the factors that “investigating authorities should consider” are “the nature and quantity of the information submitted” and “the difficulties encountered by an investigated exporter in obtaining the information”.<sup>3</sup> Turkey claims that several important factors warranted additional time in this case, including the number of documents requested, the requirement for translating these documents into English, and the after-effects of the tragic earthquake. After setting short initial deadlines, the Investigating Authority erred in these circumstances by refusing to grant an extension for “cause shown” and by failing to assist the respondents with their “difficulties”.

6. Egypt tries to justify its short deadlines as being “more than adequate”.<sup>4</sup> It argues that the time allowed is “somewhat longer than the normal time period granted by other jurisdictions in similar circumstances”, *i.e.* the standard response time for supplemental questionnaires.<sup>5</sup> This argument shows that the Investigating Authority set the deadline without taking into account the difficulties that the Turkish respondents would face in the particular circumstances of this case. The conduct of the Investigating Authority is therefore inconsistent with Article 6 of the Agreement.

B. THE INVESTIGATING AUTHORITY DID NOT PROVIDE THE RESPONDENTS AN ADEQUATE OPPORTUNITY TO EXPLAIN THEIR QUESTIONNAIRE RESPONSES

7. As mentioned, the supplemental questionnaires at issue were sent after the Investigating Authority had verified the respondents’ answers to the initial questionnaires through an on-site examination under Article 6.7 of the Agreement. The Investigating Authority requested the respondents to provide extensive supporting documentation – translated into English – so that the Investigating Authority could attempt to verify the answers. Turkey has shown, and Egypt has conceded, that the Investigating Authority chose not to hold a second on-site examination to verify the respondents’ answers to the new questionnaires.<sup>6</sup> Respondents then offered to meet the Investigating Authority in Cairo, but that offer was not accepted.<sup>7</sup> When the Investigating Authority had questions about the respondents’ answers and documents, apparently for lack of the routine explanations and dialogue that take place at on-site examinations, it rejected the information submitted and used “facts available”.

8. The Investigating Authority’s approach to verification is inconsistent with the procedural requirements of the Agreement in at least four respects.<sup>8</sup>

9. First, the Agreement establishes that questionnaires and supplemental questionnaires ordinarily should precede verification.<sup>9</sup> This is not to say that Investigating Authorities are precluded from ever issuing supplemental questionnaires after verification. But if the Investigating Authority considers that substantial new information is needed after verification, then it is incumbent on the

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<sup>2</sup> *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, para. 85 (discussing the factors affecting whether information is submitted within a “reasonable time” even though it is submitted after a deadline set by the Investigating Authority).

<sup>3</sup> *Id.*

<sup>4</sup> First Written Submission of Egypt (WT/DS211) (“Egypt Submission”), page 55 (“a time period of 13 days was, in Egypt’s view, more than reasonable”).

<sup>5</sup> *Id.* at 55 n.26 (citing standard EC practice for requesting additional information in ordinary circumstances).

<sup>6</sup> See Egypt Submission, page 57.

<sup>7</sup> See Egypt Submission, page 72.

<sup>8</sup> The use of “facts available” is discussed in Part II *infra*.

<sup>9</sup> “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. . . .” Agreement, Annex I, para. 7. “Enquiries or questions put by the authorities . . . should, whenever possible, be answered before the visit is made.” *Id.*, para. 8.

Investigating Authority to obtain such information in a manner that ensures the fundamental fairness of the proceeding. At a minimum, the Investigating Authority must afford the respondent adequate time to respond to the new questions and adequate opportunity to explain its new responses.

10. Second, the Agreement expressly authorizes on-site verifications; it does not provide for any other type of verification.<sup>10</sup> There are sound reasons for preferring on-site verifications over other possible procedures – such as what Turkey calls “mail order verification” – because they reduce the burdens on the respondent and allow the respondent a full opportunity to explain its documents to the verifiers. Therefore, if an Investigating Authority chooses not to conduct an on-site verification, it should accept any timely information submitted by the respondents.<sup>11</sup>

11. Third, the Agreement recognizes the value of face-to-face meetings, providing respondents the right to meet the Investigating Authorities on request.<sup>12</sup> Turkey has shown, and Egypt conceded, that the Investigating Authority chose not to meet with the respondents. Respondents should have been given such opportunity.

12. Finally, the Agreement prohibits Investigating Authorities from imposing “an unreasonable burden of proof” on respondents.<sup>13</sup> It is clearly unreasonable to require that respondents anticipate every possible question the Investigating Authority might have about a document, and answer each such question in writing. A respondent should only have to answer questions in accordance with its own cost and sales records and data; a respondent should not be required to make any additional adjustments, such as the alleged hyperinflation adjustment, which it would not be required to make in accordance with the GAAP (Generally Accepted Accounting Principle). Further, a respondent should have the opportunity to explain its answers orally to the Investigating Authority’s satisfaction.

13. By requiring the respondents to defend by mail their responses to the post-verification questionnaires without giving an opportunity to explain their responses in person, the Investigating Authority violated Article 6 of the Agreement.

## **II. THE INVESTIGATING AUTHORITY IMPROPERLY USED “FACTS AVAILABLE”**

14. As mentioned, when the Investigating Authority determined that it could not verify the accuracy of certain questionnaire responses by examining the supporting documents mailed by the respondents, it rejected those responses and used “facts available” to calculate the normal value of respondents’ rebar. The decision to use “facts available” and the choice of the “facts” to use are both inconsistent with the Agreement. This improper resort to “facts available” inexorably led to errors in calculation of the normal value and therefore to a failure to make a “fair comparison . . . between the export price and the normal value,” as required by Article 2.4.

### **A. THE INVESTIGATING AUTHORITY SHOULD NOT HAVE USED “FACTS AVAILABLE” IN THE CIRCUMSTANCES OF THIS CASE**

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<sup>10</sup> Agreement, art. 6.7 (“the authorities *may* carry out investigations”) (emphasis added).

<sup>11</sup> “All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, [and] which is supplied in a timely fashion, . . . should be taken into account when determinations are made.” Agreement, Annex II, para. 3.

<sup>12</sup> “Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. . . . Interested parties shall also have the right, on justification, to present other information orally.” Agreement, art. 6.2.

<sup>13</sup> Agreement, art. 2.4.

15. Article 6.8 of the Agreement authorizes Investigating Authorities to use “facts available” only where a party (1) “refuses access to, or otherwise does not provide, necessary information within a reasonable period”, or (2) “significantly impedes the investigation”. Annex II then elaborates on the circumstances in which an Investigating Authority may use “facts available,” as follows:

"1. . . . . The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.

. . . . .

3. All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, [and] which is supplied in a timely fashion, . . . should be taken into account when determinations are made. . . .

. . . . .

5. 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.

6. 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. . . . . [I]f an interested party does not cooperate and this relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate."

16. The Appellate Body recently had occasion to explain these provisions. It concluded that an Investigating Authority cannot reject information provided within a “reasonable time” by a respondent that “cooperate[s]” and “act[s] to the best of its ability”.<sup>14</sup> The Appellate Body expressly noted that a respondent’s mere inability to provide all the information requested by an Investigating Authority does not, by itself, warrant use of “facts available”. Rather, a respondent may “cooperate” “to the best of its ability” and still not be able to answer every single question posed by the authorities.<sup>15</sup> Accordingly, an Investigating Authority cannot simply make demands of respondents and then use “facts available” whenever a respondent fails to completely satisfy those demands. Instead, “cooperation” is “a two-way process involving joint effort” by the Investigating Authority and the respondent.<sup>16</sup> In imposing requirements for respondents, therefore, Investigating Authorities must:

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<sup>14</sup> *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, paras. 99-100.

<sup>15</sup> “[P]arties may very well ‘cooperate’ to a very 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.” *Id.* at 99.

<sup>16</sup> *Id.* at 104 (citing Agreement, art. 6.13).

"strike a balance between the effort that they can expect interested parties to make in responding to questionnaires, and the practical ability of those interested parties to comply fully with all demands made of them by the investigating authorities. We see this provision as another detailed expression of the principle of good faith, which is, at once a general principle of law and a principle of general international law, that informs the provisions of the *Anti-Dumping Agreement*, as well as the other covered agreements. This organic principle of good faith, in this particular context, restrains investigating authorities from imposing on exporters burdens which, in the circumstances, are not reasonable".<sup>17</sup>

17. In this case, the Investigating Authority failed to "strike a balance" between its demands on the respondents and their "practical ability" to comply – especially taking into account the short time afforded the respondents to reply<sup>18</sup> and the dire circumstances then prevailing in Turkey. Turkey claims that the respondents "cooperated" consistently with the Investigating Authority throughout the investigation, and that they "acted to the best of their ability" even after the earthquake. In these circumstances, the decision to reject the information provided by respondents in favour of "facts available" was inconsistent with Article 6.8 and Annex II of the Agreement. If the Investigating Authority concluded that it needed further information to verify the respondents' answers, then it should have specified its concerns and given the respondents an opportunity to address those concerns through either an on-site examination under Article 6.7 or a meeting under Article 6.2.<sup>19</sup>

18. Finally, it appears that the Investigating Authority decided to reject respondents' answers based not on contrary facts, but on a conflict between the answers and the Investigating Authority's own assumptions. The Investigating Authority assumed that the respondents' costs for steel scrap – the main input for rebar – should have increased during the investigation period due to Turkish hyperinflation at that time. The Investigating Authority rejected respondents' data on their steel scrap costs, based on its finding that the reported costs decreased during the investigation period notwithstanding inflation in the economy as a whole. It may be the case, however, that the cost of a raw material declines even during a hyperinflationary period in the overall economy due to material-specific factors. When a conflict arose between the Investigating Authority's assumption and the actual data, the Investigating Authority should have discarded its own assumption – and not the respondents' data.

B. THE INVESTIGATING AUTHORITY SHOULD NOT HAVE USED, AS "FACTS AVAILABLE," AN INFLATION RATE AT ODDS WITH OFFICIAL INFLATION DATA

19. Turkey claims that, even if this were an appropriate case in which to use "facts available", the facts used by the Investigating Authority do not comport with the Agreement's requirements. Annex II, Paragraph 7 requires Investigating Authorities to use "special circumspection" when resorting to "facts available".<sup>20</sup> In particular, "the authorities should, where practicable, check the information from other independent sources at their disposal. . . ."<sup>21</sup>

20. The Investigating Authority did not exercise "special circumspection" in the facts that it chose to use. For example, as Egypt has conceded, the Investigating Authority selected 5 per cent as the monthly inflation rate in Turkey during the investigation period.<sup>22</sup> Egypt, however, did not identify

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<sup>17</sup> *Id.* at 101.

<sup>18</sup> See Part I.A *supra*. See also Egypt Submission, page 56 (conceding that Egypt provided only two to five days to respond to its September 23 questionnaire).

<sup>19</sup> Annex II, para. 6.

<sup>20</sup> Agreement, Annex II, para. 7

<sup>21</sup> *Id.*

<sup>22</sup> Egypt Submission, pages 58, 84.

the source of this figure even in its submission in this proceeding, while Turkey claims that the figure does not comport with official inflation data. Turkey called the official data to the Investigating Authority's attention during the investigation, but the Investigating Authority compounded its error by rejecting the Turkish Government's comments as untimely.<sup>23</sup> In this case, it would have been "practicable" for the Investigating Authority to "check" the inflation rate it proposed to use against "independent sources," such as the official publications on Turkey's inflation rates, but the Investigating Authority simply failed to do so. It therefore violated Annex II, Paragraph 7 of the Agreement.

C. THE IMPROPER USE OF "FACTS AVAILABLE" DISTORTED THE CALCULATION OF THE DUMPING MARGINS

21. Article 2.4, *first sentence*, of the Agreement requires, "A fair comparison shall be made between the export price and the normal value." A fair comparison cannot be made, however, when the export price or the normal value is calculated improperly. Turkey claims that Investigating Authority's improper resort to "facts available" led to the calculation of a higher normal value than otherwise would have been found. Such an improper calculation in turn prevents a fair comparison of export price to normal value, and leads to the determination of inflated dumping margins and the imposition of excessive anti-dumping measures.

**III. THE INJURY INVESTIGATION DOES NOT COMPORT WITH THE AGREEMENT**

22. The Investigating Authority Failed To Notify the Respondents of the Information Required for the Injury Investigation Turkey claims that the Investigating Authority stated in its Initiation Report that the investigation concerned an allegation of *threat* of injury (and not of present injury). Likewise, the questionnaires concerned threat of injury. The respondents accordingly focused their responses and arguments on issues pertaining to threat of injury. Ultimately, however, the Investigating Authority found present injury (and not a threat of injury). Egypt concedes that it changed the basis of its injury investigation from threat of injury to actual injury without informing the respondents.<sup>24</sup>

23. The Agreement does not permit Investigating Authorities to act in this manner. Under Article 6, Respondents must be "given notice of the information which the authorities require".<sup>25</sup> They also must be given "ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question"<sup>26</sup> and a "full opportunity for the defence of their interests".<sup>27</sup>

24. The basic fairness of an investigation is called into question if the Investigating Authority invites evidence and argument on one issue and then bases its ruling on a different issue. A determination of threat of injury must be based on one legal standard, while a determination of actual injury must be based on a different legal standard. To account for the prospective nature of a threat analysis, and to avoid determinations based "merely on allegation, conjecture or remote possibility,"

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<sup>23</sup> Article 6.9 of the Agreement provides: "The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests." Where an Investigating Authority informs the parties late in an investigation that it has selected a 5 per cent inflation rate as one of the essential facts forming the basis for its decision, the parties (including the respondents' government) must be allowed to "defend their interests" by submitting data that establishes a different inflation rate.

<sup>24</sup> Egypt Submission, pages 10-11.

<sup>25</sup> Agreement, art. 6.1.

<sup>26</sup> *Id.*

<sup>27</sup> Agreement, art. 6.2.

Article 3.7 of the Agreement requires that a determination of threat of injury must be based on a “conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur”. Actual injury investigations, by contrast, are not prospective in nature and thus do not require consideration of such forward-looking factors. In light of these significant differences between threat cases and actual injury cases, a respondent cannot present the relevant evidence and defend its interests under Articles 6.1 and 6.2 without knowledge of the issue in question.

25. Should an Investigating Authority consider it necessary to change the basis for its injury investigation after receiving responses to its initial questionnaire, then it has a duty to notify the respondent of the change and afford the respondent a full opportunity to address the new issues. Absent such notice and opportunity, the Investigating Authority here violated Article 6 of the Agreement.

B. THE INJURY ANALYSIS DID NOT CONSIDER ALL THE FACTORS AND ISSUES REQUIRED BY ARTICLE 3 OF THE AGREEMENT

26. Under Article 3 of the Agreement, an Investigating Authority must consider in its injury analysis for an anti-dumping investigation “any known factors other than dumped imports which at the same time are injuring the domestic industry”. It must not attribute to the dumped imports any injury caused by any other factor.<sup>28</sup>

27. The Appellate Body recently addressed the “non-attribution” requirement of Article 3.5. It held that Investigating Authorities must “examine *all* known factors other than imports. . .”.<sup>29</sup> Then they “must ensure” that they do not attribute to dumped imports any injury due to other factors.<sup>30</sup> To satisfy that obligation, they must “separat[e] and distinguish[] the injurious effects of the other factors from the injurious effects of the dumped imports”.<sup>31</sup> The Appellate Body highlighted the importance of this requirement in the WTO regime:

"[I]n the absence of such separation and distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury which, under the *Anti-Dumping Agreement*, justifies the imposition of anti-dumping duties".<sup>32</sup>

It is clear, therefore, that Article 3.5 requires both a detailed examination of other factors injuring the domestic industry, and a rigorous segregation of the effects of those factors from the effects of dumping. Only then can an Investigating Authority legitimately conclude that dumped imports are *causing* injury to the domestic industry.

28. Turkey claims that the Investigating Authority failed to conduct a sufficiently rigorous examination and segregation of the effects of several factors other than dumped imports on the Egyptian rebar industry. The critical factors include production capacity within Egypt, competition among Egyptian producers, contracted demand, input costs, and non-dumped imports.

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<sup>28</sup> *Id.*

<sup>29</sup> *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, para. 222 (emphasis in original; internal punctuation omitted).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at para. 223.

<sup>32</sup> *Id.*

29. In response, Egypt argues that “there were no other causes of injury sufficient to break the causal link between the dumped imports and the injury to the domestic industry”.<sup>33</sup> Egypt, however, does not claim that it examined the other possible causes of injury and concluded that none of them contributed to the injury. Rather, Egypt simply considers that no other single factor has a stronger causal link to injury to the domestic industry than the dumped imports. That approach misplaces the causation standard. Under Article 3 of the Agreement, as explained by the Appellate Body, Investigating Authorities have the burden to separate and distinguish the effects of other factors from the effects of dumped imports. In the end, therefore, Egypt does not address the “non-attribution” allegations in this case.

30. As the effects of other factors were not adequately described and segregated from the effects of the Turkish imports, the Investigating Authority has not met the “non-attribution” obligation of Article 3.5.

#### **IV. CONCLUSION**

31. Due to the substantive and procedural errors discussed above, the Panel should conclude that the anti-dumping investigation was conducted in a manner that breached the Agreement. These violations led to the imposition of improper and excessive anti-dumping measures on Turkish rebar. The Panel, accordingly, should recommend that Egypt bring its anti-dumping measures into conformity with the Agreement.

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<sup>33</sup> Egypt Submission, pages 7, 24.

## ANNEX 11-2

### THIRD PARTY ORAL RESPONSES OF JAPAN TO QUESTIONS FROM THE PANEL

1. The Government of Japan respectfully submits the following answers to the questions presented at the First Meeting of the Panel.

**Q1. Japan argues that the deadlines imposed by the investigating authority were inconsistent with AD article 6.13. Given that Turkey has made no claim under this provision, what is its legal relevance to this case?**

#### Reply

2. Article 31 of the Vienna Convention of the Law of Treaties, which has been recognized to provide rules of construction for the WTO Agreements,<sup>1</sup> provides that the terms of a treaty shall be interpreted “in their context and in the light of [the treaty’s] object and purpose”. Article 31 further defines the “context” of a treaty to include its “text, including its preamble and annexes”. The Appellate Body has accordingly recognized that the entire text of the WTO Agreements is relevant to the construction of any part thereof.<sup>2</sup> More particularly, the Appellate Body has also held that the context for one paragraph of one article of one WTO Agreement includes another paragraph of that same article.<sup>3</sup>

3. In the present dispute, Turkey claims that Egypt has acted in violation of Articles 6.1 and 6.2 of the WTO Agreement on Implementation of Article VI of GATT 1994 (the “Anti-Dumping Agreement”). Article 6.1 requires in part that an Investigating Authority must provide respondents with “ample opportunity” to submit written evidence. Likewise, Article 6.2 requires in part that an Investigating Authority must provide respondents with “a full opportunity for the defence of their interests”.

4. The meaning of the terms “ample opportunity” and “full opportunity” in Articles 6.1 and 6.2 must be understood in their “context.” Article 6.13 forms part of that context. Specifically, Article 6.13 provides:

"The authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable."

5. Construing Articles 6.1 and 6.2 in this context, Japan considers that a failure by an Investigating Authority to take due account of difficulties experienced by a respondent and to provide

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<sup>1</sup> See, e.g., *Dispute Settlement Understanding*, Art. 3.2; *United States – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body, WT/DS2/AB/R, AB-1996-1, page 17.

<sup>2</sup> See *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, Report of the Appellate Body, WT/DS98/AB/R, para. 81 (“Article II:2 of the *WTO Agreement* expressly manifests the intention of the Uruguay Round negotiators that the provisions of the *WTO Agreement* and the Multilateral Trade Agreements included in its Annexes 1, 2 and 3 must be read as a whole.”).

<sup>3</sup> See *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, AB-1998-3, page 52 (In considering the context of Article 5.1(b), “We look first to the rest of Article 5.1. . . . Paragraph 5 of Article 5 is also part of the context of Article 5.1(b).”).

practicable assistance to the respondent should inform the Panel's decision whether the respondent was afforded the "ample opportunity" and the "full opportunity" mandated by Articles 6.1 and 6.2.

6. In this regard, it is noteworthy that the Appellate Body has relied on Article 6.13 when analyzing the reasonableness of the deadlines in another case; the allegation there, as here, arose under another paragraph of Article 6 and not under paragraph 13 itself.<sup>4</sup> This Appellate Body decision further supports that evaluation of claims under any part of Article 6 should take place in context, including Article 6.13.

**Q2. Japan argues at paragraph 11 of its written submission that parties have the right to meet investigating authorities upon request. The provision cited by Japan in this connection, Article 6.2, states that this right exists "on justification". Please comment.**

Reply

7. The second sentence of Article 6.2 provides a right to meet "on request". Specifically, the first two sentences provide:

"Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities *shall, on request*, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered". (emphasis added).

8. The inclusion of the word "shall" makes clear that this provision obliges an Investigating Authority to grant requests to meet. Parties in anti-dumping investigations thus have the right to meet the Investigating Authority upon request.

9. The last sentence of Article 6.2 provides a separate right to present oral evidence "on justification." Specifically, this sentence provides:

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

10. The use of the phrase "shall also have the right" makes clear that this right to present oral evidence is in addition to the aforementioned right to meet. The fact that the latter right is conditioned on "justification" in no way affects the automatic nature of the right to meet. The "justification" language in the last sentence therefore should not be read into the right to meet.

**Q3 How does Japan interpret Article 2.4, in this context?**

Reply

11. Article 2.4 is a key provision of the Anti-Dumping Agreement, establishing several crucial rules concerning the calculation of dumping margins. In this context, Japan has commented on two aspects of Article 2.4:

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<sup>4</sup> See *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, AB-2001-2, pages 39-41. Japan raised a "conditional appeal" under Article 6.13, but the condition was not satisfied and the Appellate Body did not reach that claim. *Id.* at 81.

- *First*, the first sentence of Article 2.4 requires, “A fair comparison shall be made between the export price and the normal value.” Japan has submitted that the necessary comparison cannot be made fairly if either the export price or the normal value is calculated improperly.<sup>5</sup>
- *Second*, the last sentence of Article 2.4 requires that the Investigating Authorities must tell the parties to an anti-dumping investigation “what information is necessary to ensure a fair comparison” and “shall not impose an unreasonable burden of proof” on those parties. Japan has submitted that this sentence forbids an Investigating Authority from requiring that respondents anticipate every possible question the Investigating Authority might have about a document and answer each such question in writing.<sup>6</sup>

12. Egypt claims that Article 2.4 does not apply here, asserting that it is “strictly limited” to determining “allowances” for price comparisons.<sup>7</sup> But that claim is incorrect. *First*, it has no basis in the text of the Article. Indeed, it is inconsistent with the text, which requires a “fair comparison” in the first sentence (without the limitation suggested by Egypt) and which expressly refers back to that “fair comparison” in the last sentence when addressing the burden of proof. *Second*, the claim is also inconsistent with the Appellate Body’s view of Article 2.4. The Appellate Body held that the “fair comparison” requirement of Article 2.4 is a “general obligation” that goes beyond the Article’s “specific obligations” (such as determining “allowances”).<sup>8</sup> It further emphasized that the “fair comparison” requirement applies to all aspects of dumping calculations: “This is a general obligation that, in our view, informs all of Article 2. . . .”<sup>9</sup> In the end, therefore, the obligation to conduct a “fair comparison” and the ban against “an unreasonable burden of proof” run throughout the proceeding.

13. Finally, Japan also notes the US view that, “To the extent a comparison has been made in accordance with the [specific] rules of Article 2.4, a fair comparison is established.”<sup>10</sup> This view is inconsistent with the Appellate Body’s holding discussed above. It also, moreover, fails to take account of a key difference between Article 2.4 of the Anti-Dumping Agreement and its predecessor in Article 2:6 of the Tokyo Round Anti-Dumping Code (the “Code”). In Article 2:6 of the Code, the “fair comparison” language was limited to an introductory phrase leading into the Article’s specific provisions concerning the price comparison: “In order to effect a fair comparison. . . .” That wording

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<sup>5</sup> See *Japan’s Submission*, para. 21.

<sup>6</sup> See *Japan’s Submission*, para. 12.

<sup>7</sup> See *Egypt’s Submission*, page 67.

<sup>8</sup> See *Bed Linen*, *supra* note 4, page 16. That holding is crucial to the Appellate Body’s conclusion that a price comparison that uses “zeroing” violates the “fair comparison” requirement of Article 2.4, because the rules on “allowances” are not implicated by the practice of “zeroing.”

<sup>9</sup> See *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, AB-2000-13, page 18.

<sup>10</sup> See *US Submission*, para. 8.

“made clear that if the requirements of that Article were met, any comparison thus undertaken was deemed to be ‘fair.’”<sup>11</sup> The current language in Article 2.4 is not so limited. Article 2.4 today begins with a sentence requiring a “fair comparison” separate and apart from the specific provisions in the following sentences. This free-standing sentence establishes requirements independent of the other aspects of Article 2.4. The US view would improperly render the first sentence of Article 2.4 “inutile”.<sup>12</sup>

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<sup>11</sup> See *European Communities — Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, Report of the Panel, ADP/137, adopted on 30 October 1995, para. 492.

<sup>12</sup> See *Reformulated Gasoline*, *supra* note 1, at page 22 (“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.”).

## ANNEX 12-1

### THIRD PARTY WRITTEN SUBMISSION OF THE UNITED STATES

#### I. INTRODUCTION

1. The United States makes this third party submission to provide the Panel with its view of the proper legal interpretation of the provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the “AD Agreement”) under which this dispute arises. In particular, the United States will address the following issues: (1) the proper understanding of the first sentence of Article 2.4; (2) the proper understanding of Annex I of the AD Agreement; (3) the proper understanding of Article 6.1.1; and (4) the lack of clarity with respect to the Agreement provisions alleged to have been breached. The United States recognizes that many of the issues raised in this dispute are strictly factual. The United States takes no view as to whether, under the facts of this case, the measure at issue is consistent with the Agreement.

#### II. EGYPT'S CALCULATION OF THE COST OF PRODUCTION AND THE CONSTRUCTED NORMAL VALUE DOES NOT IMPLICATE ARTICLE 2.4

2. Turkey has alleged that, in calculating cost of production and the constructed normal value, Egypt did not act in compliance with Articles 2.2.1.1, 2.2.2, and the first sentence of Article 2.4.<sup>1</sup> The United States takes no position with respect to Turkey’s claim under Articles 2.2.1.1 and 2.2.2. Article 2.4, however, does not address the calculation of cost of production and the constructed normal value. Turkey’s limited argument on this point takes the first sentence of that article entirely out of context. Because detailed rules for making the calculations at issue are set forth in Articles 2.2.1, 2.2.1.1 and 2.2.2, in the view of the United States, the Panel must resolve the issue before it by reference to the specific rules negotiated to address those issues.

3. Articles 2.2.1, 2.2.1.1 and 2.2.2 relate to the proper establishment of normal value, by permitting the elimination of sales below cost from normal value under certain circumstances, and by providing for the use of constructed normal value as the basis for normal value under certain circumstances. Turkey has made its arguments under those provisions and Egypt has made its replies.<sup>2</sup>

4. However, Turkey has also asserted an argument under the first sentence of Article 2.4. Although the basis of Turkey’s argument is somewhat unclear, in the view of the United States Article 2.4, and in particular the first sentence, is wholly inapposite to the issue Turkey has put before the Panel. Moreover, it is wholly unnecessary for the Panel to address this issue, as the dispute can be resolved by applying the specific rules of Articles 2.2.1.1 and 2.2.2, which Turkey alleges to have been breached.

5. Article 2.4 addresses the comparisons and adjustments Members must make after identifying the proper basis for normal value and export price and prior to calculating the margins of dumping. Article 2.4 provides, in its entirety:

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<sup>1</sup> *First Submission of the Government of the Republic of Turkey*, (“*Turkey First Submission*”), section IV-G, para. 4 and section IV-H, para. 1 (pp. 69-70). As discussed further below, it is unclear whether Turkey has actually asserted a breach of Article 2.4 in section IV-H of its brief (p. 70).

<sup>2</sup> *First Written Submission of Egypt* (25 October 2001) (“*Egypt First Submission*”), section IV.7 (pp. 79-82).

"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. In the cases referred to in paragraph 3 of Article 2, 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 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".

6. Turkey's arguments in this regard relate to the *identification* of normal value under Article 2.2, 2.2.1, 2.2.1.1 and 2.2.2, and not to its subsequent *comparison* with export price under Article 2.4. As can be seen from the language of this provision quoted above, Article 2.4 presupposes that export price and normal value have already been identified. Specifically, under Article 2.4, once the basis for normal value and export price have been established, the administering authority is required to select the proper sales for comparison (sales at the same level of trade and as nearly as possible the same time), and make appropriate adjustments to those sales (due allowances for differences which affect price comparability). In this way, the Agreement establishes a fair comparison.

7. Thus, the United States does not agree that an improper calculation of cost of production or constructed normal value can constitute a breach of the first sentence of Article 2.4. The language of Article 2.4, which relates solely to the comparison, should not be taken out of context and applied to other issues related to calculation of dumping margins. Article 31 of the *Vienna Convention on the Law of Treaties* requires that a treaty be interpreted in accordance with "the ordinary meaning to be given to the terms of the treaty in their context" (emphasis supplied).<sup>3</sup> The Panel should not adopt Turkey's proposed approach to the Agreement of taking the general language of the first sentence of Article 2.4 out of context in order to override the detailed rules negotiated in Articles 2.2, 2.2.1, 2.2.1.1 and 2.2.2.

8. Moreover, the fair comparison language simply does not apply outside of the context in which it is contained: the rules for making comparisons under the remainder of Article 2.4. The language of the first sentence of Article 2.4, which provides for a fair comparison, must be read in the context of the second sentence which defines how "this comparison" is to be made. To the extent a comparison has been made in accordance with the rules of Article 2.4, a fair comparison is established.<sup>4</sup> Claims that do not relate to obligations under Article 2.4 cannot constitute breaches of the first sentence of Article 2.4.

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<sup>3</sup> The rules reflected in the *Vienna Convention on the Law of Treaties* have attained the status of customary rules of international law. See, *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, p. 23; *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, p. 12; *Australia - Subsidies Provided to Producers and Exporters of Automotive Leather (WT/DS126) - Recourse to Article 21.5 of the DSU by the United States*, WT/DS126/RW, 14 January 2000, para. 6.25.

<sup>4</sup> Further support for this reading of Article 2.4 is found in the first sentence of Article 2.4.2 which refers to "the provisions governing fair comparison in paragraph 4." This clause clarifies that the entirety of Article 2.4, and not just the first sentence, constitutes the provisions which "govern fair comparison".

9. In addressing the issues of calculation of cost of production and constructed normal value, the Panel should limit its analysis to whether Turkey has established a breach of Articles 2.2.1.1 and 2.2.2. To the extent the Panel is required to address arguments under Article 2.4, the Panel should find that Turkey has failed to satisfy its burden of proof.

### **III. ARTICLE 6.7 AND ANNEX I DO NOT REQUIRE VERIFICATION, NOR DO THEY PROHIBIT COLLECTION OF INFORMATION AFTER VERIFICATION**

10. Turkey has argued that certain procedures relating to verification<sup>5</sup> followed by Egypt in the subject anti-dumping investigation were inconsistent, *inter alia*, with Article 6.7 and Annex I of the AD Agreement.<sup>6</sup> Specifically, at several points in its argument Turkey complains that Egypt refused an offer of a second verification, and collected a substantial amount of information after verification.<sup>7</sup> As stated previously, the United States takes no position on the factual issues in this case, nor on whether the facts raised by these issues may establish a claim under another provision of the Agreement, such as Article 6.2. However, the United States wishes to make clear its views on verification and collection of information after verification.

#### **A. THE AGREEMENT DOES NOT PROHIBIT COLLECTION OF INFORMATION AFTER VERIFICATION**

11. First, collection of information after verification is not *per se* prohibited by the Agreement. Although the facts are somewhat unclear at this stage in the dispute, according to Turkey, after the respondents made their initial submissions, and after Egypt conducted verification, Egypt requested additional information. In a nutshell, Turkey asserts that the information requested was so substantial, and the request was made so late in the proceeding, that respondents were severely prejudiced. Thus, Turkey has raised a factual issue relating to the exporters' opportunity to present evidence and defend their interests, which may best be analyzed under the obligations of Article 6, and on which the United States takes no position.

12. In the course of its arguments, however, Turkey also asserts that "it is not contemplated in the structure of the Agreement that new information will be sought after verification. Such action should be taken only in exceptional circumstances".<sup>8</sup> In fact, the Agreement does not prohibit gathering information after verification, and the "exceptional circumstances" standard advanced by Turkey appears nowhere in the Agreement.

13. As a preliminary matter, verification is an entirely optional procedure. Article 6.7 states that authorities may conduct verification, but does not require that they do so. The Panel must keep this fact in mind when addressing Turkey's arguments. Given that verification is not required, it would be absurd to interpret the Agreement to prohibit collection of information after an event which may never take place.

14. This being said, the only provision of the Agreement arguably dealing with collection of information after verification is Annex I, paragraph 7, which states in pertinent part:

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<sup>5</sup> Turkey and Egypt have both repeatedly used the term "verification" to refer to the on-the-spot investigations referred to in Article 6.7 and Annex I. Because so many Members use the term "verification" to refer to these investigations, and to avoid confusion, the United States will continue to use this term in this submission.

<sup>6</sup> *Turkey First Submission*, section IV-B (pp. 52-55).

<sup>7</sup> *Id.*, paras. 5 and 6 (p. 53).

<sup>8</sup> *Id.*, para. 4 (p. 53).

"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".

15. The United States observes that the language of this provision is not mandatory. As such, there is no basis for Turkey's assertion that, barring "exceptional circumstances", investigating authorities are restricted in their ability to seek information after verification. While some Members may limit collection of information after verification out of concern that such information will not be subject to the check on completeness and accuracy which verification provides, there is nothing in the Agreement which restricts the ability to solicit and accept information at that time.

16. Moreover, Annex I, paragraph 7, is limited on its face to responses to "questionnaires". This limitation is important because not every request for clarification or follow-up question constitutes a "questionnaire". Rather, the Agreement distinguishes between initial "questionnaires," under Article 6.1.1, and supplemental requests for "further explanation" under Annex II, paragraph 6. After the initial request for information under Article 6.1.1 the authorities may identify areas where the response appears to be incomplete or confusing. Rather than rejecting the response, authorities are required, under Annex II, paragraph 6, to present supplemental requests for clarification and other follow-up questions. Because such supplemental requests for further explanation may occur throughout the investigation, Annex I, paragraph 7, must be limited to the initial "questionnaire". It may be for this reason that Turkey emphasizes its view that the information solicited after verification was so extensive that it amounted to a new questionnaire.<sup>9</sup>

17. Additionally, interpretation of Annex I, paragraph 7, to apply to all information requests, rather than merely "questionnaires" could result in the absurd situation that conduct of verification, the purpose of which is to clarify the issues, would cut off the authority's ability to seek further clarification. Such a rule would work either to discourage authorities from conducting verification or to limit authorities' ability to solicit clarifications. Either situation could result in determinations based upon unclear information, and greater reliance on the facts available under Article 6.8.

18. Finally, this provision must be read in light of its object and purpose. A careful reading of Annex I reveals two purposes: 1) ensuring that authorities obtain permission before conducting a verification; and 2) ensuring that interested parties and governments are notified of what they need to do to prepare for verification, and that they are given sufficient time to prepare.<sup>10</sup> Thus, paragraph 7 is not aimed at preventing authorities from gathering information after verification; rather, it is aimed at preventing them from conducting verification before the party has even had an opportunity to

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<sup>9</sup> See, e.g. *Turkey First Submission*, at Section IV-C, para. 2 (p. 56). Egypt disputes this assertion. *Egypt First Submission*, section IV.A.7 (pp. 51-55).

<sup>10</sup> This understanding of the purpose of Annex I is reinforced by its history. The United States notes that Annex I began life as, and indeed remains virtually unchanged from, a recommendation adopted in November, 1983 by the Committee on Antidumping Practices under the GATT Antidumping Code. *Recommendation Concerning Procedures for an On-the-Spot Investigation*, adopted 15 November 1983, GATT Doc. ADP/18, reprinted in GATT, *BISD* 30<sup>th</sup> Supp., p. 28 (March 1984). This document begins with the following recitation of the problems which had caused Signatories to develop specific recommendations:

The Committee is aware that some difficulties have arisen in this area which have been caused mainly by the failure of the investigating authorities to advise the exporting firms of the proposed date of the visit and the purpose of the investigation. It should be borne in mind that the firms will require time to prepare for the visit. There have also been instances where the authorities of the exporting country have not been specifically informed of the proposed visit.

analyze the initial questionnaire and provide its response. The fact that an authority realizes after verification that it needs further explanation does not mean that the verification took place too early. Indeed, as a full understanding of the information is necessary for an accurate determination of whether dumping measures are warranted, authorities should not be discouraged from asking follow-up questions, provided that they observe the requirements of Articles 6.1 and 6.2.

B. WHERE AUTHORITIES COLLECT INFORMATION AFTER VERIFICATION, MEMBERS DO NOT HAVE AN OBLIGATION TO PROVIDE A SECOND VERIFICATION

19. Turkey also alleges that Egypt declined Turkey's offer to permit an additional verification of the information collected after the initial verification.<sup>11</sup> Not being familiar with the facts of this case, the United States takes no position as to whether Turkey can establish a breach of Article 6.2 in light of any such refusal. The United States would like only to make clear that collection of information after verification does not obligate a member to conduct a second verification. Nor does it require a Member to make other arrangements for an oral explanation of the information submitted.

20. As noted above, Article 6.7 does not require an authority to conduct verification at all. Article 6.7 states that authorities *may* carry out verifications in the territory of other members provided that the appropriate procedures are followed. It follows that interested parties in anti-dumping proceedings do not have a right to verification. Moreover, even where verification is conducted, Article 6.7 does not require verification of every piece of information submitted. Indeed, such a requirement would make verification extraordinarily burdensome to all involved. Rather, as the express purpose of Article 6.7 is to "verify" information, and to "obtain further details", authorities must be free to focus on those portions of the response which appear to raise issues of accuracy or clarity. Thus, the Agreement gives to authorities the latitude to determine whether to verify any information submitted, including information solicited after verification.

21. Further, while verification permits the authority to "obtain further detail", in light of the fact that verification is optional, the possibility of verification does not relieve interested parties of the obligation, in their written submissions, to explain clearly the information provided. Ultimately, it is the interested parties, and not the authority, who are in possession of the necessary information and, as that information relates to their own business, are in the best position to explain it. Moreover, Article 6 makes clear that, while opportunities for oral presentations are necessary, the primary means of providing evidence in a dumping investigation is in writing. For example, while Article 6.2 gives interested parties certain rights to present information orally, Article 6.3 prohibits authorities from taking such information into account unless it is subsequently reproduced in writing and made available to other interested parties. The emphasis in the Agreement on written evidence is not only important for the investigating authority, it is vital for the other interested parties to permit them to understand the case and to defend their interests. Thus, the Panel should be wary of reading the Agreement in a way which would place heavy reliance on oral presentations rather than on written submissions.

22. More importantly for purposes of dispute resolution, to the extent the written submissions of fact by the exporters were unclear on their face, and could not be understood except through a subsequent oral explanation, evaluation of the facts is particularly difficult. The Panel must take such lack of clarity into account in weighing whether establishment of the facts was proper and their evaluation unbiased and objective under Article 17.6(i).<sup>12</sup>

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<sup>11</sup> *Turkey First Submission*, section IV-D (pp. 58-59).

<sup>12</sup> See, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, Panel Report, WT/DS/179/R, adopted 1 February, 2001 ("*United States – Stainless Steel*"), para. 6.26 - 6.31 (where unclear facts before the authority pointed to two possible conclusions, panel

#### IV. THE TIME LIMIT CONTAINED IN THE FIRST SENTENCE OF ARTICLE 6.1.1 DOES NOT APPLY TO ALL REQUESTS FOR INFORMATION

23. Turkey asserts that in its request for information after the verification, Egypt did not provide the full 30 days, plus 7 days for mailing, as required for questionnaires by Article 6.1.1, and footnote 15.<sup>13</sup> While not taking any position on the factual dispute, the United States would like to reiterate that not every request for information constitutes a “questionnaire” for which a 37-day response period must be provided. Indeed, Turkey makes a point of alleging that Egypt’s request for information was not a mere supplemental question, but rather “amounted to an entirely new cost questionnaire”.<sup>14</sup>

24. The Agreement distinguishes between the deadlines for questionnaires, and the deadlines for supplemental requests for further explanation. Article 6.1.1 requires authorities to allow 30 days (plus 7 for mailing) for responses to “questionnaires”. By contrast, Annex II, paragraph 6 addresses subsequent requests for further explanation. That provision requires only that, with respect to such requests, authorities provide a “reasonable period” for response, “due account being taken of the time limits of the investigation”.

25. This distinction is an important one for the Panel to recognize. If authorities were required to grant 37 days to respond to every request for information, they would be severely constrained in the ability to seek clarification. This would disadvantage all parties and result in less accurate determinations of dumping. Such a rule would also greatly increase the likelihood that authorities would have to take the full 18 months allowed by Article 5.10, and could even result in an increase in breaches of that provision.<sup>15</sup> For this reason, the deadline for requests for “further explanation” is flexible; it gives the authority the discretion to establish a deadline to reflect: 1) the amount of further explanation being requested; and 2) the time-limits of the investigation.

26. Moreover, where the supplemental request under Annex II, paragraph 6, amounts to a second opportunity to provide information that has already been requested, in assessing the “reasonableness” of the deadline, the Panel must bear in mind that the respondent has already had at least 37 days to respond, and has not done so adequately.

27. This is not to say that there are no limits on the deadlines which authorities may set for responding to requests for information other than questionnaires. Such deadlines must be “reasonable” under Annex II, paragraph 6. Further, the overall procedure may be reviewed by a Panel for consistency with Articles 6.1 and 6.2.<sup>16</sup>

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limited its factual analysis to the issue of whether an unbiased and objective authority *could* properly have made the determination at issue).

<sup>13</sup> The United States notes that, although Turkey makes arguments about Article 6.1.1 of the Agreement in section VI-C of its First Submission (pp. 56-58), it only asserts a breach of Articles 6.1, 6.2 and Annex II, paragraph 6. It is unclear whether this is a typographical error, or whether Turkey is actually asserting a claim under Article 6.1 rather than Article 6.1.1.

<sup>14</sup> *Turkey First Submission*, Section IV-C, para. 2 (p. 56). As noted above, Egypt disputes this assertion. *Egypt First Submission*, section IV.A.7 (pp. 51-55).

<sup>15</sup> For this reason, Annex II, paragraph 6, states that the deadline for providing “further explanation” must be set with due account being taken of the time-limit of the investigation.

<sup>16</sup> Turkey also alleges that its requests for extension of the time to respond to Egypt's supplemental request for information was denied, and addresses the second sentence of Article 6.1.1 which states, “[d]ue consideration should be given to any request for an extension of the thirty day period and, upon cause shown, such an extension should be granted whenever practicable.” *Turkey First Submission*, Section IV-C, paras. 3 and 4 (pp. 56-57). In this regard, the United States emphasizes only that the second sentence of Article 6.1.1 simply does not impose a specific obligation upon authorities to grant extensions

**V. PARTIES MUST SPECIFY IN THEIR SUBMISSIONS THE PROVISIONS OF THE AGREEMENT WHICH THEY BELIEVE TO HAVE BEEN BREACHED**

28. As a final matter, the United States would like to underscore the importance that complainants state clearly the provisions of the Agreement they contend have been breached. For example, although section IV-H of Turkey's First Submission (pp. 69-70) refers to Article 2.4 and paragraph 7 of Annex II, Turkey does not clearly assert that either of those provisions has been breached. Similarly, section IV-I (p. 72) does not assert that any particular provision has been breached.

29. Without such clarity it is difficult for the Panel and for other parties to address the arguments. Third parties face a particular problem when the specific claims are not clear in the first submissions, because they may not have the opportunity to participate later in the dispute when the issues are clarified. Finally, given that the AD Agreement represents a series of carefully negotiated and delineated obligations, whether a Member has breached an obligation can only be reviewed in relationship to the text of specific provisions of the Agreement.<sup>17</sup>

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<sup>17</sup> Turkey cites individual members' comments to the Committee on Anti-Dumping Practices during the Article 18.5 review process. See *Turkey First Submission*, footnote 107 (p.55). These comments represent solely the views of an individual Member, and are not appropriate authoritative guidance for the Panel.

## ANNEX 12-2

### THIRD PARTY ORAL STATEMENT OF THE UNITED STATES

#### I. INTRODUCTION

1. Thank you, Mr. Chairman, and members of the Panel. It is our sincere pleasure to appear before you today to present the views of the United States in this proceeding. The purpose of this oral statement is to highlight certain aspects of our written statement, particularly in light of issues raised by other third parties, and briefly to present our views on certain other issues.

2. As we stated in our written submission, not being a party to the underlying administrative proceedings, the United States' familiarity with the facts of this case is necessarily limited to the assertions made in the submissions of the parties. Thus, the United States limits its arguments to issues of legal interpretation.

#### II. CONSIDERATION OF EXTRA-RECORD EVIDENCE

3. As a preliminary matter, we would like to highlight a dispute over certain documents cited in Turkey's brief. In its submission, Egypt has argued that the documents in question were not presented to the investigating authority in the underlying proceeding, and thus should not be considered by the Panel.

4. The Anti-Dumping Agreement, as illuminated by past panel and Appellate Body reports, is clear on this point: information not presented to the investigating authority is not relevant to a panel's consideration of whether a Member has acted in accordance with the standard set forth in Article 17.6(i). That provision establishes the standard to be applied in the Panel's "assessment of the facts of the matter". The chapeau of Article 17.6 makes clear that the "matter" covered by that Article is the same as the "matter" addressed in Article 17.5.

5. Article 17.5, in turn, establishes that, in examining a matter presented to a Panel, the facts upon which its examination must be based are those which were presented to the investigating authority. Thus, Article 17.6(i) can only be understood by reference to Article 17.5(ii). As explained by the Appellate Body in *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-alloy Steel and H-beams from Poland*:

"Article 17.6(i) must be read in conjunction with Article 17.5(ii) of the Anti-Dumping Agreement, which requires that a panel must examine the matter based upon the 'facts' made available to the investigating authorities in accordance with appropriate domestic procedures".<sup>1</sup>

6. The issue of the range of evidence which the Panel is entitled to examine has been addressed in prior disputes. For example, the Panel in *Mexico – Anti-Dumping Investigation of High Fructose*

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<sup>1</sup> Appellate Body Report on *Thailand – Anti-dumping Duties on Angles, Shapes and Sections of Iron or Non-alloy Steel and H-beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, para. 17.

*Corn Syrup (HFCS) from the United States*<sup>2</sup> summed up this range of relevant evidence under Article 17.5(ii):

"Mindful of the standard of review and Article 17.5(ii), we note that we may consider in our examination of this issue only what was actually available to the investigating authority at the time of the initiation in evaluating the consistency of the initiation with Article 5.3, and must consider whether SECOFI's establishment of the facts was proper and its evaluation of those facts was unbiased and objective".

7. Similarly, the panel in *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*<sup>3</sup> stated:

"It seems clear to us that, under this provision, 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. . .

That Article 17.5(ii) and the DSU provisions are complementary does not diminish the importance of Article 17.5(ii) in guiding our decisions in this regard. It is a specific provision directing a panel's decision as to what evidence it will consider in examining a claim under the AD Agreement. Moreover, it effectuates the general principle that panels reviewing the determinations of investigating authorities in anti-dumping cases are not to engage in *de novo* review".

8. Thus, Article 17.5(ii) is fully applicable, and the Panel should disregard information which was not presented to the Egyptian authorities.

9. Finally, the EC imagines a situation in which information was improperly rejected by the authority, and argues that the Panel may be required to review the information itself in that situation. While the United States does not necessarily agree with this assertion, we note that the EC admits that improper rejection of the information Turkey has presented is not an issue in this case, and thus the Panel need not address this issue.

### III. INJURY ISSUES

10. The United States will now turn to the injury issues arising in this dispute. The United States will address the following subjects: (1) the obligation to examine the impact of the dumped imports under Article 3.4, (2) the obligation to examine price undercutting under Article 3.2, (3) the examination of causal link between imports and injury under Article 3.5, and (4) the determination of the period of investigation for injury analysis.

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<sup>2</sup> Panel Report on *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, adopted 24 February 2000, para. 7.105.

<sup>3</sup> Panel Report on *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001, para. 7.6.

A. THE REQUIREMENTS OF ARTICLE 3.4 TO CONSIDER ALL RELEVANT ECONOMIC FACTORS SHOULD NOT BE CONFUSED WITH THE SEPARATE OBLIGATION CONTAINED IN ARTICLE 3.5 OF THE AGREEMENT

11. Turning first to the obligation under Article 3.4, Turkey argues that the Egyptian authorities failed properly to consider the factors listed in Articles 3.4 and 3.5 of the Anti-Dumping Agreement.<sup>4</sup> The United States agrees that an investigating authority must evaluate the critical factors listed in *Article 3.4* (or other relevant economic factors, not listed) in its consideration of the impact of dumped imports on the domestic industry, so that it may be discerned how imports affect, *inter alia*, the industry's sales, prices, its share of total domestic production, its profitability, financial performance, or the overall condition of the industry. Without such an analysis, the investigating authority would fail to comply with Article 3.4 of the Anti-Dumping Agreement. This issue is well settled by now, having been addressed by panels in the *High Fructose Corn Syrup* and *Bed Linens* disputes and by the Appellate Body.

12. The United States disagrees, however, with Turkey's assertion that investigating authorities are required to identify specific lost sales. In evaluating Article 3.4 factors, the investigating authority is required by the Anti-Dumping Agreement to examine any actual and potential decline in sales, but the authority is not required to investigate whether specific sales were lost by the domestic industry to unfairly traded imports. While there may be certain types of investigations involving large capital goods or custom-made goods ordered under contract in which the loss of a single sale or a few specific sales could prove indicative of injury, there is nothing in Article 3.4 of the Agreement that specifically obligates a Member to investigate specific lost sales in determining the impact of dumped imports on the domestic industry.

B. THE DETERMINATION OF PRICE UNDERCUTTING UNDER ARTICLE 3.2 NEED NOT ALWAYS BE MADE ON A DELIVERED-PRICE BASIS

13. Turning to the issue of price undercutting under Article 3.2, the United States agrees that injury determinations under Article 3 must be based on positive evidence and must involve an objective examination of not simply the volume of dumped imports but also the effect of those imports on prices in the domestic market. Article 3.2 provides that, in determining the effect of dumped imports on prices, the investigating authorities shall consider whether there has been 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. Turkey argues (at 3 and 20-21) that by not ensuring that the comparison of domestic and imported prices was conducted on a comparable, delivered basis, the Egyptian authority's finding of price undercutting was based on a flawed price comparison. However, there is no legal requirement under the Anti-Dumping Agreement that an authority make its price comparison only on a delivered price basis. In fact, in many instances sales are made on an FOB basis and converting them to a delivered basis is both unnecessary to obtain comparable prices and potentially distorting to commercial realities.

C. THE ARTICLE 3.5 OBLIGATION

14. With respect to Turkey's argument about Article 3.5, it appears that none of the parties dispute that the Anti-Dumping Agreement does not prescribe a specific methodology to be used by Members to establish the requisite causal link between subject imports and the injury suffered by a domestic industry. The Appellate Body confirmed in *Hot-rolled Steel* that Article 3.5 leaves open to Members the means employed to fulfill the non-attribution requirement.

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<sup>4</sup> First Written Submission of Turkey at 3 and 8-19.

15. Although the United States agrees with Turkey's assertion that consideration of the Article 3.4 factors is mandatory, we do not agree with the implication that consideration of the factors listed in Article 3.5 is also mandatory. By failing to differentiate between the analysis required under Articles 3.4 and 3.5, Turkey has left the erroneous impression that the factors referenced in paragraph 5 of Article 3 must be examined and considered in every determination. The plain language of that provision makes clear that is not the case.

16. Although Article 3.5 directs Members to "examine any known factors other than the dumped imports which at the same time are injuring the domestic industry . . .", the nature of this obligation is different from the requirement in Article 3.4 that all relevant economic factors be examined. In particular, Article 3.5 states that the authorities' demonstration of the causal relationship between dumped imports and injury shall be based on an examination of all relevant evidence before them. The specific factors that are listed in Article 3.5 are not mandatory, but simply illustrate the type of factors which may be examined by the investigating authority. Article 3.5 specifically refers to causal factors which "*may be relevant*" in this respect.<sup>5</sup> Moreover, the scope of an investigating authority's obligation under Article 3.5 extends only to "known" factors.

17. More fundamentally, Article 3.5 does not require investigating authorities to demonstrate that there are no other factors also causing the domestic industry's injury or to investigate any factors other than those which are known to the investigating authority. Accordingly, a complainant does not satisfy its *prima facie* case requirement simply by suggesting that there *may* be other unidentified factors contributing to the injury.

#### D. THE PERIODS OF INVESTIGATION FOR DUMPING AND INJURY ANALYSES

18. With respect to the proper period(s) of investigation for determining dumping and injury, the Anti-Dumping Agreement does not prescribe any specific time period(s) for the purpose of data collection. In light of the requirement in Article 3.5 that it "be demonstrated that the dumped imports are, through the effects of dumping . . . causing injury", the United States submits that both the dumping and injury components of the investigations must be contemporaneous such that an investigating authority can substantiate the requisite causal link, or lack thereof, between the allegedly dumped imports and any alleged injury, or threat of injury. This is not to state, however, that the two periods must be exactly the same. In fact, the injury investigation may reasonably include a substantial period of time either prior to or subsequent to (or both prior to and subsequent to) the dumping investigation, and be of sufficient length to allow investigating authorities to examine various industry and import trends.

#### IV. THE DUMPING DETERMINATION

19. The United States would now like to address certain of the legal issues presented to the Panel in connection with Egypt's determination of dumping. As stated, the United States will confine its comments to issues of legal interpretation and procedure.

20. First, as mentioned in our submission, in reviewing the amount of time to respond to a request for further information made after the initial questionnaire, the deadlines established in Article 6.1.1 are simply not relevant. Such supplemental requests for information are not "questionnaires" within the meaning of that term as used in Article 6.1.1. As the EC points out in its submission, several provisions of the Agreement provide for requests for information other than questionnaires. Most

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<sup>5</sup> Panel and Appellate Body Reports on *Thailand -- Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, WT/DS122/AB/R, adopted 5 April 2001).

importantly, where an investigating authority does not believe evidence or information is acceptable, it must request further explanation, and provide a “reasonable” period to respond to such request, “due account being taken of the time-limits of the investigation”.

21. However, while the United States does not believe that the time limit established in Article 6.1.1 is relevant to subsequent requests for information, we agree with Japan that the Panel may review the period to ensure that the party has had “ample opportunity” to present its evidence, as required by Article 6.1, and has had a full opportunity for defense of its interests, as required by Article 6.2. However, the Panel must bear in mind, in determining whether the investigating authority has acted reasonably, that the needs and circumstances of the responding party are not the only relevant consideration. Authorities must weigh those needs and circumstances against the deadlines for investigations established in Article 5.10, and the time needed by the investigating authority to make an accurate, well-reasoned and well-explained analysis.

22. The United States would also like to clarify one point about collection of information after the verification – not only is collection of further information after verification permitted under the agreement, the right of investigating authorities to do so is also highly desirable as it fosters more accurate determinations. To the extent authorities realize that they need clarification on some point after verification is conducted, it is in the interest of accuracy that they be permitted to request such clarification, provided that they establish a reasonable deadline.

23. Paragraph 7 of Annex I in no way limits the authority of Members to collect further information after verification. As noted in our written submission, that provision applies only to questionnaires, and not to supplemental requests for information. That provision is aimed against the abusive practice of conducting an on-the-spot investigation of a respondent’s business practices before the respondent has even been informed of the information required, and before it has had an opportunity to formulate its response. Thus, paragraph 7 relates to the timing of verifications, rather than the timing of requests for information.

24. In this regard, the United States would also like to point out the potential for confusion in the way some parties have used the term “verification”. Turkey has objected to what it terms “mail order” verification by Egypt. Japan has picked up this term, and argued that because on-the-spot verifications are provided for, any other type of “verification” is prohibited. This mis-use of the term “verification” could be highly misleading. Verification is not required under Article 6.7. Rather, on-the-spot verification may be conducted by the investigating Member if it perceives some benefit from doing so, and the exporting Member permits it. Responding parties do not have a right to rely on a verification being conducted in order to provide necessary information. Whether a verification is conducted or not does not alter the obligation of responding parties to provide requested information and support the claims they make. Requests for such support are not “verification”.

25. The anti-dumping investigation process is a demanding process, both for the investigating authority, and for the responding party. Making the required determinations, while meeting the obligation to ensure accuracy under Article 6.6 and at the same time meeting the deadlines under Article 5.10, requires a large amount of information in a short amount of time. In determining whether an investigation has been conducted in accordance with the Agreement, the Panel must bear in mind one important fact: the necessary information is in the possession of the responding party. Although investigating authorities must provide a full opportunity for interested parties to defend their interests, ultimately there is a burden on responding parties. The quality of the determination is directly related to the extent to which responding parties have been promptly forthcoming. Insistence that those parties provide requested information should not be dismissed as “mail order” verification. There is nothing improper about asking responding parties to provide documentary evidence to establish the accuracy of claims they have made. Indeed, the Agreement requires it.

26. The United States appreciates this opportunity to address the Panel on these points, and would welcome any questions.

## ANNEX 12-3

### THIRD PARTY RESPONSES OF THE UNITED STATES TO QUESTIONS FROM THE PANEL

**Q1. What role does the US foresee for an investigating authority in an anti-dumping investigation establishing the existence of “other known factors” under Article 3.5, and what is the legal basis for its position?**

#### Reply

1. Article 3.5 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (“Anti-Dumping Agreement”) directs Members to “examine any *known* factors other than the dumped imports which at the same time are injuring the domestic industry. . .”. The use of the word “known” is significant as it is not used anywhere else in the text of Article 3 to describe factors relevant either to injury or causation. In fact, the inclusion of the term “known” in Article 3.5 is one of the principal changes regarding causation made between the text of the Tokyo Round Anti-Dumping Agreement and the WTO Anti-Dumping Agreement. Its use exclusively in connection with factors other than dumped imports that may be causing injury unmistakably distinguishes the investigative authorities’ responsibilities associated with such factors from the other factors referenced in Article 3. The ordinary meaning of the term “known” makes clear that the investigating authorities’ responsibility in this regard extends only to the examination of factors of which the investigating authorities possess knowledge or with which they are made familiar or become acquainted.<sup>1</sup>

2. There is no textual requirement, express or implied, that the investigating authorities affirmatively seek out information about other possible alternative factors that are not “known” to them that may be causing injury. Thus, factors will be known to the investigating authorities by virtue of any relevant information already in their possession in the applicable record or by reason of information provided by the participants in the investigation. In this connection, we agree with the European Communities’ observation<sup>2</sup> regarding the pertinence of the findings by the Panel in *Thailand - H Beams* that

“We consider that other “known” factors would include those causal factors that are clearly raised before the investigating authorities by interested parties in the course of an investigation. We are of the view that there is no express requirement in Article 3.5 that investigating authorities seek out and examine in each case on their own initiative the effects of all possible factors other than imports that may be causing injury to the domestic industry under investigation”.<sup>3</sup>

3. The factors identified in the last sentence of Article 3.5, moreover, are merely illustrative of the factors that, if known to the investigating authorities, are to be examined in ensuring that no injury caused by factors other than subject imports is attributed to such imports. That this list is illustrative only is indicated by the introductory language, which states that the factors *may* be relevant. Therefore, the factors set forth in Article 3.5 do not constitute a mandatory list of matters that the

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<sup>1</sup> The Shorter Oxford English Dictionary, 1993 ed.

<sup>2</sup> Third party Oral Statement of the European Communities, 27 November 2001, para. 4.

<sup>3</sup> Panel Report in *Thailand - Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS/122/R, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS122/AB/R, para. 7.273.

investigating authorities must in each investigation examine. Investigating authorities may rely on interested parties to bring relevant “known” factors to the authorities’ attention.

**Q2. Is there a different obligation borne by an investigating authority in an anti-dumping investigation with regard to establishing “other known factors” in terms of Article 3.5 of the Anti-Dumping Agreement, compared with the establishment of “all relevant factors” in terms of Article 4.2(b) of the Safeguards Agreement and, if so, what are the different obligations and the legal bases for these obligations?**

Reply

4. The United States submits that quite different investigative obligations are established by the text of the Anti-Dumping Agreement and the Safeguards Agreement, as befits the distinct objectives of those agreements, the particular rights and obligations contained, respectively, in them, and the significant textual differences in the language of the two Agreements. By virtue of the use of the term “known factors” in Article 3.5 of the Anti-Dumping Agreement investigating authorities have no obligation under Article 3.5 to seek out causes of injury other than dumped imports. Given, in particular the absence of the same term “known factors” from the text of Article 4.2 of the Safeguards Agreement, that Article is not useful to inform the nature of the responsibilities of the investigating authorities under the Anti-Dumping Agreement, the pertinent issue before this Panel.

5. Further, the Safeguards Agreement’s specific reference to a competent authority’s consideration of “all relevant factors” of an objective and quantifiable nature having a bearing on the situation of that industry appears in Article 4.2(a), which concerns the determination of serious injury, rather than in Article 4.2(b), which concerns causation. The provision in the Anti-Dumping Agreement most directly comparable to, but not identical with, Article 4.2(a) of the Safeguards Agreement, is not Article 3.5, but Article 3.4.

**Q3 The US view seems to be that the reference in Article 17.5(ii) to facts “made available” during an investigation means facts “presented” to the Investigating Authority. In the US view, by whom, how and when would such information be presented?**

Reply

6. In the view of the United States, Article 17.5(ii) limits the review of the panel to facts that were presented to the investigating authority, either through submission by some person, as discussed below, or through its own investigative activities. The reference to facts “made available” is significant in that it eliminates from consideration facts which, although theoretically “available,” were not actually presented to the authority.

7. The Panel’s question is answered in a general way by the language of Article 17.5(ii) itself, which states that, even if facts were “made available,” they are only relevant to the Panel’s consideration if they were made available “in conformity with appropriate domestic procedures”. This phrase reserves to each member the authority to determine by whom, how and when information may be presented during an investigation.

8. This is not to say that such authority is unfettered. For example, although domestic procedures may specify who has a right to present information, such procedure must meet the requirement of Article 6.11 which defines interested parties as including:

- (i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product;

- (ii) the government of the exporting country; and
- (iii) a producer of the like product in the importing country or a trade and business association a majority of the members of which produce the like product in the importing country.

9. Similarly, Article 6.12 requires investigating authorities to permit industrial users and representative consumer organizations to provide information which is relevant to the investigation regarding dumping, injury and causality.

10. Although the question of *who* may provide information is subject to fairly clear guidelines, the question of *when* is more vague under the Agreement. Members have the authority to establish deadlines. One clear limit on that authority, however, is the requirement under Article 6.1.1 that authorities allow at least 37 days for questionnaire responses. Deadlines for submission of information may also be reviewed for consistency with Article 6.1, to ensure that interested parties have been provided ample opportunity to present in writing all evidence which they consider relevant. Finally, to the extent the investigating authority does not intend to accept information submitted, under Annex II, paragraph 6 authorities must provide a “reasonable period, due account being taken of the time limits of the investigation”, for parties to provide further explanations. However, Article 6.14 counters these limitations on deadlines by making clear that a member is free to proceed expeditiously. This concept is reinforced by the relatively short deadlines of Article 5.10.

11. Finally, on the question of how information is to be provided, the Agreement is largely silent. Information must be provided in writing, or otherwise reduced to a form which can be seen under Article 6.4. There must be an opportunity for a hearing under Article 6.2. Additionally, a party who has provided confidential information must furnish a non-confidential summary. Apart from those requirements, the authority is free to establish appropriate procedures for parties to submit information.

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12. The United States would also like to take this opportunity briefly to present its views on one of the questions presented to Japan.

### Questions to Japan

#### **Q3 How does Japan interpret Article 2.4, in its context?**

##### Reply

13. It is the view of the United States that the first sentence of Article 2.4 cannot be divorced from the context of the remainder of Article 2.4. While the first sentence of Article 2.4 establishes the requirement to make a “fair comparison”, the remainder of Article 2.4 *defines* how “this comparison” is made.

14. The predecessor to Article 2.4, Article 2.6 of the Antidumping Code, also defined what was required “[i]n order to effect a fair comparison” (emphasis added). The “in order to effect” language of this provision was ambiguous. One possible reading of this language was that the fair comparison was not required, but if a Member wished to make one, it should do so as instructed in Article 2.6. Thus, all of Article 2.6 could have been read as non-mandatory. In other words, Article 2.6 clearly mandated *how* to make a fair comparison, but the fair comparison itself was not clearly mandated.

15. That ambiguity was eliminated in the current Agreement by adding the first sentence of Article 2.4, which makes explicit the requirement to make a fair comparison. However, the remainder of Article 2.4, like its predecessor, defines the comparison. Thus, Article 2.4 of the current Agreement is clearly mandatory – it requires members to make the fair comparison, and instructs them how to do it. This interpretation of Article 2.4 is also consistent with its drafting history. In what is known as the “Dunkel Draft”, Article 2.4 read:

“A fair comparison shall be made between the export price and the normal value.  
*The two prices shall be compared* at the same level of trade. . . .” (Emphasis added).

16. Arguably, that formulation was ambiguous as to whether the requirement to make a fair comparison was free standing. In the final draft, however, the language was amended to read:

“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. . . .” (Emphasis added).

17. Substitution of the phrase “this comparison” establishes a reference back to the subject of the prior sentence, *i.e.*, a fair comparison, which is what is being defined.

18. Further support for this reading of Article 2.4 is found in the first sentence of Article 2.4.2 which refers to “the provisions governing fair comparison in paragraph 4”. The plural term “provisions,” as well as the reference to “paragraph 4,” rather than “the first sentence of paragraph 4”, make clear that this clause refers to the entirety of Article 2.4. Further, this clause clarifies that the entirety of Article 2.4, and not just the first sentence, constitutes the provisions which “govern fair comparison”.

19. In light of the object and purpose of the AD Agreement, there is no basis for an interpretation of Article 2.4 that divorces the obligation in Article 2.4 to make a fair comparison from the allowances required to establish price comparability. In accordance with Article 2.1, a dumping analysis is based on a comparison of prices for sales in the export market to prices for sales in the home market. By requiring due allowance for all factors affecting price comparability, Article 2.4 assures that the prices used to establish dumping in Article 2.1 are “comparable,” *i.e.* a comparison of such prices is fair. There is simply no logic in asserting that even where transactions in the two markets are rendered comparable in all respects affecting price, comparing them in a dumping analysis could be unfair.<sup>4</sup> The concept of fairness and the concept of comparability are inseparable.

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<sup>4</sup> Similarly, holding the requirement of a fair comparison separate from the requirement of comparability implies that a comparison of two prices which are not comparable could be fair, clearly an absurd result.

## ANNEX 13

### SUPPLEMENTAL WORKING PROCEDURES OF THE PANEL CONCERNING CERTAIN BUSINESS CONFIDENTIAL INFORMATION

1. Egypt shall submit to the Panel six copies and to Turkey one copy of the *Confidential Injury Analysis*, as referred to in its written response to Question 5 of the Panel, dated 7 December 2001.
  2. Egypt shall mark the cover and/or first page of the document containing business confidential information, and each page containing such information to indicate the presence of such information. Specifically, the information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains business confidential information on pages xxxxxx", and each page of the document shall contain the same notice at the top of the page.
  3. As required by Article 18.2 of the DSU, Turkey shall treat as confidential the information in the *Confidential Injury Analysis* that has been designated as business confidential under these procedures; i.e., Turkey shall not disclose the information contained therein without the formal authorization of Egypt. Turkey shall have the responsibility for all members of its delegation, which, for the purposes of these supplemental procedures only, shall not include any employee of any private entity that was an interested party in the anti-dumping investigation. In particular, no member of Turkey's delegation shall disclose to any person outside the delegation any information designated as business confidential under these procedures, and any such information must only be used for the purposes of submissions and argumentation in this dispute and for no other purpose.
  4. Any party referring in its written submissions or oral statements to any information that has been designated as business confidential under these procedures, shall clearly identify all such information in those submissions and statements. All such written submissions shall be marked as described in paragraph 2, above. A non-confidential version, clearly marked as such, of any written submission containing business confidential information shall be submitted to the Panel simultaneously with the confidential version. In the case of an oral statement containing business confidential information, a written non-confidential version shall be submitted within a day after the statement has been made. Non-confidential versions shall be redacted in such a manner as to convey a reasonable understanding of the substance of the business confidential information deleted therefrom.
  5. The Panel engages not to disclose, in its report, or in any other way, any information designated as business confidential under these procedures. The Panel may, however, make statements of conclusion drawn from such information.
  6. Submissions containing information designated as business confidential under these procedures will, however, be included in the record forwarded to the Appellate Body in the event of any appeal of the Panel's Report.
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