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

Report of the Panel

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I. INTRODUCTION

A. COMPLAINT OF TURKEY

1.1 On 6 November 2000, Turkey requested consultations with Egypt pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("the DSU"), Article XXIII of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), and Article 17.3 of the Agreement on Implementation of Article VI of the GATT 1994 ("the Anti-Dumping

II. FACTUAL ASPECTS

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

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

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

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

B. EGYPT

3.2 Egypt requests the Panel (1)to find that Egypt's anti-dumping measures on imports of

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

B. REQUEST OF EGYPT

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

C.

VII. FINDINGS

A. INTRODUCTION

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

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

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

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

[5] *Ibid*, para.102.

[6] *Ibid*, para.104.

responsibility, and not that of the investigating authority, and cannot later be reversed by a WTO dispute settlement panel[7].

B. PRELIMINARY OBJECTIONS

7.4 Egypt raised three issues as preliminary objections, but did not request us to rule on these issues on a preliminary basis. Egypt's preliminary objections are (i) that Turkey has failed to present a *prima facie* case of a violation of the relevant Articles of GATT 1994 and of the AD Agreement, (ii) that Turkey is trying to lead us to conduct a

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

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

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

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

> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion,

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

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

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

7.16 Article 17.5(ii) provides:

> "The DSB shall, at the request of the complaining party, establish a panel to examine the matter based upon:
>
> (ii) the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member."

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

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

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

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

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

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

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

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

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

> "The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence *before the authorities*." (emphasis added)Furthermore, we agree with the statement by the panel in *US - Hot-Rolled Steel*[20], that:
>
> "The conclusion that we will not consider new evidence with respect to claims under the AD Agreement flows not only from Article 17.5(ii), but also from the fact that a panel is not to perform a *de novo* review of the issues considered and decided by the investigating authorities."

7.21 It is clear to us (and indeed, there is no disagreement on this point between the parties) that the evidence in question, which was proffered by Turkey in the dispute to challenge determinations made by the

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

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

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

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

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

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

Egypt contends that although Turkey claims in its Rebuttal Submission that we should not consider evidence that was not provided to interested parties during the course of the investigation, such as the report on *Other Causes of Injury*[40]

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

7.30

dumping margin and inventories. In its Rebuttal Submission[47], Egypt further states that "growth" (one of the factors alleged by Turkey not to have been addressed at all by the IA) was addressed by the information on "sales volume" and "market share", while "ability to raise capital" (another factor identified in Turkey's claim) is addressed by pre-tax profit as a percentage of shareholders' funds. Concerning the remaining factors alleged by Turkey not to have been considered at all, Egypt refers to the *Confidential Injury Analysis*, a submission containing Business Confidential Information which was provided to the Panel and to Turkey in accordance with the Supplemental Procedures Concerning Business Confidential Information that were adopted by the Panel.[48] According to Egypt, this *Analysis* forms part of the Final Determination in the rebar investigation, which must be distinguished from the Final Report. In particular, Egypt states that the *Confidential Injury Analysis* makes evident that the IA's analysis indeed covered "all of the factors listed in Article 3.4".[49]

7.35 Article 3.4 of the AD Agreement reads as follows:

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

7.36 In evaluating this claim, we take note of and agree with the findings of previous panels[50] and the Appellate Body[51] that *all* of the factors listed in Article 3.4 must be addressed in every investigation. Egypt does not argue to the contrary. Rather, the issue raised by this claim is the nature of the consideration performed, as reflected in the Essential Facts and Conclusions Report, in the Final Report, and in the *Confidential Injury Analysis*, taken collectively. Two questions are raised in this regard: first, as a threshold matter, whether the IA addressed each of the listed factors at all; and second, if so, whether the evidence provided by Egypt to the Panel establishes that the consideration of those factors substantively satisfies the requirements of Article 3.4.

7.37 Turning first to the threshold question, i.e., whether each factor is addressed in some way in at least one of these documents, we find in the affirmative. We take note of the references in the

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market share, the IA addressed "growth", as Egypt argues in its Rebuttal Submission.[54] We therefore do not consider further the factor "growth" in the context of this claim. Thus, the focus of this claim is whether the remaining factors identified by Turkey are reflected in the *Confidential Injury Analysis*, and if so, whether their treatment in that document is sufficient to satisfy the requirements of Article 3.4. Concerning the *Confidential Injury Analysis*, we are mindful of the findings of the Appellate Body in *Thailand – H-Beams* that confidential information relied upon by an IA, even if not shared with respondents, should be taken into account by a panel when assessing compliance with Article 3.4.[55].

7.38 Turning to its content, we note that the *Confidential Injury Analysis* contains data on, *inter alia*, cash flow, employment, wages, and productivity. Moreover, we accept, as argued by Egypt[56], that by addressing in the *Confidential Injury Analysis* pre-tax profit as a percentage of shareholders' funds for Alexandria National and Al Ezz, the IA addressed in that *Analysis* "ability to raise capital". Thus, taken together, the *Essential Facts and Conclusions Report*, the *Final Report*, and the *Confidential Injury Analysis* demonstrate that the IA addressed, at least in some way, all of the factors listed in Article 3.4.

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

> "The examination of the impact of the dumped imports on the domestic industry concerned shall include *2.691A, even i'sation" of all o* , concerned shall i

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

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

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

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

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

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

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

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

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

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

[61] Oxford English Dictionary Online: http://dictionary.oed.com.

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

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

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

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

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

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

7.47 In *U S – Hot-Rolled Steel*, the issue was whether the US investigating authority had violated Article 3.4 by failing to explicitly discuss, in its determination, certain factors for each year of the period of investigation. In that case, according to the panel, the authority had discussed each of the factors for the final two years of the three-year period of investigation, and only some of them for the first year of that period. The panel found that the determination explained the particular relevance of the second and third years of the period, and that the authority's failure to explicitly address each factor in its discussion of the first year of the period did not constitute a violation of Article 3.4[65]. That is, the panel found, *inter alia*, that each of the listed Article 3.4 factors was explicitly *discussed* in the authority's determination, and given the explanations provided in that determination for the particular emphasis on a part of the period of investigation, the *evaluation* of the facts was deemed adequate by the panel.

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

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

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

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

(e)

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

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

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

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

In our view, this means that in its evaluation of the state of the industry, an investigating authority must in every case include a price analysis of the type required by Articles 3.1 and 3.2. Turkey has raised no claim that the IA failed to conduct such an analysis in the rebar investigation. In addition, in our view, an investigating authority must consider generally the question of "factors affecting domestic prices". In this regard, we note that in the rebar investigation, the IA considered the potential price effects of imports from third countries[75], and noted as well that the market for rebar was price-driven, rather than technology- or specification-driven[76].

7.62 Turkey's argument that Article 3.4 requires a full "non-attribution" analysis appears to stem from its reading of the term "having a bearing on" as having to do exclusively with causation, (i.e., as meaning factors *having an effect on* the state of the industry). There is another meaning of this term which we find more pertinent in the overall context of Article 3.4, however. In particular, the term "having a bearing on" can mean *relevant to* or *having to do with* the state of the industry[77], and this meaning is consistent with the fact that many of the factors listed in Article 3.4 are descriptors or indicators *of* the state of the industry, rather than being factors *having an effect* thereon. For example, sales levels, profits, output, etc. are not in themselves *causes* of an industry's condition. They are, rather, among the factual indicators by which that condition can be judged and assessed as injured or not. Put another way, taken as a whole, these factors are more in the nature of *effects* than *causes*.

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[74] Article 3.2 of the AD Agreement.

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

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

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

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

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

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

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

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

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

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

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

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

7.69 Egypt responds[79] that contrary to Turkey's claim, the *Essential Facts and Conclusions Report* makes clear that the price comparison was made at the same level of trade (ex-factory for domestic goods, and ex-importer's store for the dumped imports). Egypt states that Turkey would prefer that the comparison be done at a different level of trade (delivered to the customer), but that there is no such legal requirement. Egypt further argues that such a comparison would ignore the fact that importers and exporters do not sell on a delivered basis. Thus, according to Egypt, the undercutting analysis was performed properly and on the basis of positive evidence, such that Egypt complied with Articles 3.1 and 3.2.

7.70 We understand the legal basis of Turkey's claim to be that, to satisfy the requirements of Article 3.2, a price undercutting analysis must be made on a delivered-to-the-customer basis, as it is

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

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

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

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

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

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

7.78 Turkey asserts, in particular, that the *Initiation Report* referred exclusively to threat of injury and undercutting196n

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

7.79 Egypt responds[85] that the IA presented in sufficient detail in the *Essential Facts and Conclusions Report* its findings and conclusions with respect to material injury, but that this is not the issue raised by this claim. Rather, according to Egypt, the issue is whether the IA was under an obligation to inform the Turkish respondents that it had changed the scope of the injury investigation from threat to present material injury during the course of the investigation. Egypt cites the panel report in *Guatemala – Cement II*

this is not in itself determinative. Indeed, it is logical, given that these factors have primarily to do with the likelihood of further increases in dumped imports, which is information in the hands of the foreign producers and exporters, that the requests for data on these factors would be directed to those foreign producers and exporters. By the same token, it is logical that requests for data on the Article 3.4 factors, information which is in the hands of the domestic industry, would be directed at the domestic producers, rather than the foreign producers and exporters.[91] The IA's *Final Report*

injury and threat.[98] These respondents implicitly confirmed their awareness of this fact in their 15 September 1999 submission on cost[99], in which they stated that "…[g]iven the clear fact that the Egyptian industry *is not materially injured* by Turkish exports, coupled with our earlier evidence concerning threat…we urge the ITPD to terminate these proceedings with a negative determination of *material injury or threat thereof*" (emphasis added). We note that this assertion that the industry was not materially injured was accompanied by no argumentation or evidence, however. Nor had these respondents made any attempt, upon receiving on 17 July 1999 explicit confirmation that the injury investigation covered present material injury as well as threat, to submit any such pertinent argumentation or evidence. We find significant that these respondents did not themselves take the initiative to try to protect their interests by requesting an opportunity to submit argumentation and evidence, or by simply presenting a submission, as they had done, apparently successfully, in respect of threat of material injury.[100] In short, we find no evidence that the respondents were "denied" the opportunity to present pertinent arguments on present material injury, nor that they ever attempted to

(ii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;

(iii) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and

(iv) inventories of the product being investigated.

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

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

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

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

7.100 To recall, Article 3.1 provides as follows:

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

7.101 Article 3.5 provides in relevant part as follows:

> "It must be demonstrated that the dumped imports are, through the effects of dumping, *as set forth in paragraphs 2*

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

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

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

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

7.108 The particular "known factors" identified by Turkey are the same as those identified in connection with its claim under Article 3.4[106]), namely:

(a) "The dramatic capacity expansion at the two major Egyptian rebar producers and its likely temporary effects on their cost structures";

(b) "The effects of the capacity expansions, which started production at the end of 1998, on competition between the Egyptian producers as they attempted to fill newly expanded order books";

(c) "Sharpening competition between Al Ezz and Alexandria National as Al Ezz sought to increase market share by capitalizing on its cost advantages over Alexandria National";

(d) "Falling prices for steel scrap, the primary raw material input at Al Ezz";

(e) "A sharp contraction in demand in January 1999, the very month in which prices for rebar fell";

(f) "The effect of comparably priced, fairly traded imports".

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

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

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[106] Section VII.C.1(b), *supra*.
[107] Para.7.50, *supra*.
[108] First Written Submission of Egypt, p.28.

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

7.111 This document was not given to Turkey during the course of the investigation[111], (although Egypt claims that it was in the Public File to which Turkey could have had access during that period), and Turkey states that it did request information from the Public File during the consultations that began this dispute, but was informed that as the investigation was closed, no further access to the Public File was possible.[112]

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

7.113 Turkey considers that the Panel should not rely on the public file document as evidence of the IA's consideration of certain other factors possibly causing injury. While Turkey acknowledges, in the light of the Appellate Body ruling in *Thailand – H-Beams* that Egypt can rely on evidence not referred to in the IA's published reports, it nevertheless maintains that Egypt can rely only on documents that were shared with or otherwise made available to the respondents[114]. It is not clear to us what distinction Turkey is making here, as our reading is that *Thailand – H-Beams* addresses and resolves both of these issues, to the effect that we can take into account the public file document.

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

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

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

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

[110] *Ibid*, p.1-4 and 6.

[111] Written Rebuttal Submission of Turkey, p.1.

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

[113] Exh. EGT-7.3, Section 12.

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

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

7.116 We start by considering whether, as a factual matter, Turkey is correct that the IA failed to examine the "other" factors identified by Turkey in this dispute. Turning to the first of these factors, capacity expansion, we note that both the IA's *Essential Facts and Conclusions Report*[115] and the *Final Report*[116] mention the fact of the industry's capacity expansion, although not its magnitude, and states that the industry did not reduce production to meet import competition, but rather reduced its prices to maintain capacity utilisation, and to try to cover its costs. The reports then conclude that there was "no effect" on capacity utilisation (i.e., that there was no change in capacity utilisation). Thus, it appears that the IA found the industry's capacity expansion to be a neutral factor in its injury and causation analysis. Moreover, we note that whilee a neindr.-0.0675 te 24idid not e acd the in0 TD /Fcityraiim

> which establishes the majority of the rebar costs – decreased so did the prices of rebars in the Egyptian market, as in most of other countries.
>
> The decline in domestic producers' profits and return on investment cannot be related to Turkish exports, either. *Other than the decrease of scrap prices*, this decline can only be associated with the new investments made by the Egyptian producer in the recent years, which ITPD mentioned in paragraph 4.3.2.4 of the Report."[120] (emphasis added)

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

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

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

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

7.122 Concerning the effects of intra-industry competition, Turkey's argument appears to be somewhat inconsistent, in that Turkey seems to be arguing both that the new capacity would have brought about cost increases at both domestic producers that would have increased their price competition with each other, and that Al Ezz was the lower-cost producer and thus was simply out-competing Alexandria National. While this factor does not seem to be explicitly referred to in the IA published reports, it is mentioned in the document identified as being from the Public F-12 0.8678e1, 2s, it is m decrease in scry3.3096 26 (and thes the firs new ceremplyvirtua de th di ofin che price of a -433.5 w (decr TD -0.1698 T

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

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

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

7.127 Turkey claims that because the period of investigation (POI) for dumping ended on 31 December 1998, and most of the injury found by the IA occurred in the first quarter of 1999, the IA failed to demonstrate that dumping and injury occurred at the same point in time such that there was a link between the imports that were specifically found to be dumped and the injury found, violating Articles 3.5 and 3.1.[126] 31

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

7.130 In addition, neither of the articles cited in this claim, nor any other provision of the AD

2. Claim under Article 17.6(i)

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

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

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

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

> "The only support for the Investigation Authority's supposition in this regard is the undisputed fact that Turkey's economy was experiencing high inflation during the period of investigation. However, hyperinflation in the economy as a whole certainly does not mean that each sector and product group is experiencing inflation at the same rate. This is particularly true of industries, like the Turkish rebar industry, that import most of their raw materials and where the raw material input is a commodity product subject to significant swings in price.
>
> …
>
> The Investigating Authority's findings that respondents' costs did not include the effects of inflation, which the Investigating Authority put at 5 % per month, were contrary to all of the facts on the record. For this reason, the Investigating Authority's determination of the fact was not "proper," nor was its evaluation of the facts "objective" and "unbiased" within the meaning of Article 17.6(i)."[133]

7.137 Egypt contends that Article 17.6(i) of the AD Agreement governs the standard of review to be applied by a panel when considering whether the Investigating Authority's establishment of the facts was proper and the evaluation unbiased and objective. Egypt further asserts that Article 17.6(i) does not govern the rights and obligations of Members under the AD Agreement. Egypt also contends that this claim was not cited in the Request for Establishment of a Panel[134] and as a consequence, this claim is not within the terms of reference of the Panel and must be rejected.[135]

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

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

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

[133] *Ibid*, p.31.

[134] WT/DS211/2, as amended.

[135] Second Written Submission of Egypt, p.14.

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

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

7.140 Turkey further argues that:

> "It is not clear, under the Agreement, that Turkey must allege violation of a separate substantive obligation under the Agreement in order to make this claim. Turkey believes there is a violation of the Agreement if, in reaching its final determination on any issue, the investigating authorities' establishment of the facts is improper or its evaluation of the facts fails to meet the test of objectivity and lack of bias.
>
> However, to the extent that the panel considers that it may only review a violation of Article 17.6(i) in the context of a separate substantive claim, we note that in Section II.Dy w ("It is not clear, under the Agreement, that Turkey must allege violation of a separate substantive obligation under the Agreement in order to make this claim. Turkey believes there is a violation of the Agreement if, in reaching its final determination on any issue, the investigating authorities' establishment of the facts is improper or its evaluation of the facts fails to meet the test of objectivity and lack of bias.
>
> However, to the extent that the panel considers that it may only review a violation of Article 17.6(i) in the context of a separate substantive claim, we note that in Section II.D

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

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

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

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

7.144 Egypt argues, first, that Turkey is requesting the Panel to perform a .

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

(a) Article 6.8 and Annex II

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

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

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

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

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

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

> "Because parties did not provide all the data required, the Investigating Authority decided to proceed with the investigation procedures and calculate margins of dumping in accordance with Article 6.8 of the Anti-dumping Agreement which provides that:
>
> [quotation of Article 6.8 omitted]
>
> Article 27 of the [Egyptian Anti-Dumping] Regulation provides that:

[144] Written Response, dated 7 December 2001, to Question 9 to Egypt of the

> 'In case of absence of the data required, failure to submit data within the time-limit or non-cooperation with the Investigating Authority, the Investigating Authority may proceed in the investigation procedures and come to conclusions according to the best information available …'
>
> And Article 35 of the Regulation states that:
>
> 'In cases where there is no sufficient data to determine the export price or the normal value, the Investigating Authority may determine them on the basis of the best information available'."[145]

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

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

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

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

7.154 It is clear that the provisions of Annex II that address what information can be used as facts available (which, along with the other provisions of Annex II, "shall be observed") have to do with ensuring the reliability of the information used by the investigating authority. This view may further be confirmed, as foreseen in Article 32 of the Vienna Convention on the Law of Treaties[149], by the negotiating history of Annex II. In particular, this Annex was originally developed by the Tokyo Round Committee on Anti-Dumping Practices, which adopted it on 8 May 1984 as a

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

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

[147] *Ibid*, para.82.

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

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

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable".

"Recommendation Concerning Best Information Available in Terms of Article 6:8".[150] During the

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

7.158 Annex II, paragraph 5 provides:

> "Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability."

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

7.160 We consider that in the present dispute, the determining factor in the IA's decision to resort to facts available, and thus the central aspect of Turkey's claim in respect of this decision, is the "verifiability", in the sense of paragraph 3, of the cost information submitted by the respondents, and note in this regard Turkey's objection to what it sees as the IA's conducting a "mail-order verification".[152]

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

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

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

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

(i) Colakoglu, Diler and Habas

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

7.167 On 10 May 1999 counsel for these three producers sent a fax to the IA regarding procedural issues, enquiring, *inter alia*, "[i]f there will be supplemental questions, when such questions would be issued".[157] 7.44 11.2gad Habas f BT su8 10D

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

7.168 The on-site verification of the information submitted by the three producers in response to the Manufacturer's Questionnaire was conducted in Turkey from 11 to 18 June 1999.[158] In the verification reports relating to these three producers, no discrepancies between the information submitted and the verified information were noted by the IA.[159] It is common cause that the verification was limited to export sales and domestic sales and that the reported data on cost of production were not verified.[160]

7.169 On 12 August 1999 the IA sent faxes to all five respondents, including Habas, Diler and

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

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

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

1. Basic Source Documents.

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

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

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

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

2. Accounting Practices

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

Provide a review of the accounting system using the basic books summary, chart of accounts, and the financial statements. Show how sales and expenses are posted to the various ledgers and statements (the vara writte, deiffstrted -12.ns e -0. which s

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

B. Reconcile the total value from the inventory ledgers for the months of [different

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

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

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

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

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

> "*1. Basic data:*" The IA requested Habas to provide the total monthly quantity of billets/rebars produced during the period of investigation.
>
> "*2. Materials:*" According to the IA no information was submitted for auxiliary materials used in the production process in attachment no 4 (to the 15 September response) and the IA requested a complete monthly list of all raw materials used to produce rebars and the percentage each represent of the finished product. The information requested was set out in an annex. According to the annex, the information to be submitted under the heading "materials used" was to be broken down into scrap, graphite, ferro alloys, electrodes etc, and "labour" into sub-headings "From scrap to billet" and "From billet to rebar" and the same with regard to "overhead". The other cost items requested were the same as in the format attached to the original Manufacturer's Questionnaire."

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

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

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

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

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

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

"*7. Interest expense:*" The

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

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

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

> "Although the Investigating Authority twice requested full costs of production for the entire POI, the company only provided costs for two selected months, and there is no

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

….

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

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

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

…

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

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

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

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

(ii) Icdas and IDC

7.196 As indicated in paragraph 7.170, *supra*, these two companies received basically the same letter, dated 19 August 1999, as Colakoglu,

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

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

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

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

> "On'e8f"39oAmTc 0.3938 Tw j 21 5.bas to submit certain

Item 1 should be submitted within 2 days."[185] [186]

7.207 IDC faxed information on interest expense to the IA on 25 September, the due date. When informed by the IA that the fax had not been received, IDC resent it on 29 September 1999.[187]

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

7.209 On 28 September 1999 the IA requested IDC to submit a list identifying separately interest expenses from interest income showing the difference between both interest expense and interest income per ton during 1998 on a monthly basis, with a note "[y]our effort will be appreciated if we receive the above-mentioned immediately". According to Turkey, IDC faxed the requested information to the IA on 29 September 1999.[189]

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

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

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

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

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

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

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[185] Exh. EGT–13-1-2.

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

[187] First Written Submission of Turkey, p.44.

[188] Exh. TUR-41.

[189] *Ibid.*

[190] Exh. TUR-15, para.3.2.6.1.

[191] Exh.TUR-27.

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

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

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

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

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

> "With its comments on the Essential Facts Report moor (Tj 31c 0.3025j 229.5 lefer in thcor (Tj 31c 0.3
> requested by the IA.

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

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

> "… [r]espondents' information on world scrap prices was expressed in annual terms (prices at the end of a year were lower than prices at the beginning of the year), it was not useful in determining price movements during the investigation period (calendar 1998). When the Department examined monthly domestic rebar and purchased scrap prices throughout the period (another respondent in this investigation submitted monthly scrap prices), a very different picture emerged. … The sharp decline, which respondents implied was sustained throughout the period, was in fact, limited to 3 out of 12 months of the investigation period, …. .
>
> Thus, the Department had a reasonable basis for its concern whether domestic costs fully reflected the high inflation."[196]

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

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

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

"As the panel can clearly see by a review of … the second page of EX-EGT-12, HMS1&2 scrap prices declined steeply between January 1998 ($114 – 116 per ton) and April 1998 ($96 - $97 per ton) and continued their decline into July 1998 (to $92 -$94 per ton). This is an overall decline of 19%, hardly evidence of scrap price

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

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

7.228 The parties also have divergent views concerning the general Turkish inflation rate during the POI. Throughout the process, the IA referred to an estimated inflation rate of 5 per cent per month in Turkey during that period,[207] which it said was derived from statistics sourced from the Turkish State Institute of Statistics.[208] In its comments on the *Essential Facts and Conclusions Report*, the Turkish Government objected to the use of an inflation rate of 5 per cent per month and submitted evidence (also from the Turkish State Institute of Statistics) showing that the inflation rate was less than 5 per cent per month during the POI.[209] The IA rejected the evidence and argument put forward by the Turkish Government, stating that: "[s]ince the referenced exhibit constitutes new, untimely information, the Department will not consider it in this investigation." Nevertheless, it should be noted that Turkey did not at the time and does not now contest the fact that the Turkish economy was "hyperinflationary" during the POI. Thus, there seems to be no disagreement between the parties that the actual monthly rate of inflation during the POI, whatever its exact level, was high. We thus see no basis on which to conclude, as contended by Turkey, that the factual evidence submitted by the Government of Turkey, even if it had been accepted, would have " to 9 3f2lthe

(i) Colakoglu, Diler and Habas

7.234 In reviewing the documentation submitted by Turkey as Exhibits TUR-34A, TUR-34B and TUR-34C, containing the full response of Diler, Colakoglu and Habas, respectively, to the IA's

Diler, and Colakoglu – did act to *the best* of their abilities in responding to the IA's requests for cost-related information in the rebar investigation. We recall that the Appellate Body stated that the phrase "to the best of its ability" suggests a *high* degree of cooperation by interested parties[222], and we agree.

7.244 Considering in more detail the concrete meaning of the phrase to the "best" of an interested party's ability, we note that the *Concise Oxford Dictionary* defines the expression "to the best of one's ability" as "to the *highest level* of one's *capacity* to do something"[223] (emphasis added). In similar vein, the *Shorter Oxford Dictionary* defines this phrase as "to the *furthest extent* of one's *ability*; so far as one can do". We note that in a legal context, the concept of "best endeavours", is often juxtaposed with the concept of "reasonable endeavours" in defining the degree of effort a party is expected to exert. In that context, "best endeavours" connotes efforts going beyond those that would be considered “reasonable” in the circumstances. We are of the opinion that the phrase the “best” of a ability7

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

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

(ii) Icdas and IDC

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

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

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

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

7.252 Moreover, looking at the evidence overall as submitted by Icdas and IDC, it is clear to us that these two producers responded quite comprehensively to the IA's 19 August 1999 request. It is also clear from the record that after receipt of these companies' responses, the IA on 23 September requested from each of them only two or three items of a minor nature, and identified no fundamental problems with, or deficiencies in, the information that they had submitted. These respondents

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

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

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

7.256 Annex II, paragraph 6 provides as follows:

> "If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations."

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

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

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

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

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

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

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

7.263 We note that, at least in respect of Habas, Diler and Colakoglu, the IA itself apparently considered that it had the obligation to explicitly indicate that the information submitted in response to the 19 August request was being rejected. In particular, the 23 September letters identify, as discussed above, a number of very serious inadequacies in the responses of these companies and contain long lists of missing items that would need to be submitted within two to five days. Given these companies' reactions to the 23 September letter, in their own letter of 28 September to the IA, it is evident that they were in no doubt that the IA intended to reject the cost information they had submitted. Nevertheless, the IA sent these three companies one final letter, dated 28 September 1999[231], informing them that they had not fully responded in respect of six items[232], and that therefore the IA "will use other data provided by your clients which were satisfactory, but will use facts available for the above-mentioned items". No similar communication was ever sent to IDC or Icdas.

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[229] *See* para.7.320, *infra.*

[230] We do not mean to imply here that an interested party can impose on an investigating authority an Annex II, paragraph 6 requirement simply by submitting new information *sua sponte*,c -0.1T

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

7.265 To summarize in respect of Icdas and IDC, we have found that the IA in the 19 August request not only informed these respondents of problems with their originally-submitted cost data, but informed them of what information would be needed for their costs to be verifiable. Thus, in the 19 August letter, the IA established the standard for verifiability of the respondents' cost data. Icdas and IDC responded in a timely manner, and as evidenced by the narrow scope of the 23 September follow-up requests that they received, their responses also were largely complete. Furthermore, they supplied the further information requested on 23 September within the deadlines set by the IA. Thus, the record evidence indicates that as of their responses to the 23 September requests, these two respondents had submitted all of the information that the IA itself had defined as what was necessary to render their cost information "verifiable". There is no indication whatsoever that the IA consideraa, tfoD -3 Tw (I
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respondents was not used. We therefore exercise judicial economy in respect of the claimed violations of Articles 2.2.1.1 and 2.2.2 in respect of all of the respondents.

7.269 Concerning its Article 2.4 claim in this context, Turkey argues that "[e]ven if there were some basis to conclude that respondents did not respond fully to the IA's 19 August or 23 September information requests, the respondents provided a full explanation of how their submitted costs and prices reflected inflation in Turkey and [ ] the IA's rejection of those well-founded reasons imposed an unreasonable burden of proof in violation of Article 2.4". As discussed in Section VII.E.2, *infra*, Article 2.4 has to do with the *comparison* of export price to normal value, and does not create a generally applicable rule as to burden of proof, and we thus find that Article 2.4 is not applicable to the IA's decision to resort to facts available. Furthermore, even if this provision were applicable, we have found elsewhere[233] that there is no basis in the evidence of record on which to conclude that the information requirements imposed by the IA in respect of costs were unreasonable. We therefore find that Turkey has not established that there is a violation of Article 2.4 under this claim.

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

7.270 Turkey argues that Article 6.1.1 requires that a party must be given 37 days to reply "after receiving a questionnaire used in an anti-dumping investigation[]" and that "due consideration" must then be given to any request for an extension of the original period for a response. According to Conc71ning its Article 2.4 claim in this context, Turkey argues that "[e]

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

_____

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

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

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

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

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

7.291 A further consideration concerning the "reasonableness" of the 23 September request is whether any of the other respondents received a longer period in which to respond to the letters they received from the IA on 23 September. Here the answer is "no"; all respondents were given the same amount of time to respond to those letters. The fact that more information was requested in the letter to Habas, Diler and Colakoglu than in the letters to the other two respondents, IDC and Icdas, is a reflection of the fact that, according to the record, the latter two companies' responses to the 19

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

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

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

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

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

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

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

[238] Exh.TUR-16, para.3.2.2.1.

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

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

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

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

7.303 In considering this claim, we note that the 5 per cent figure was derived from a secondary source, in fact the same secondary source as was proffered by the Government of Turkey during the investigation. Thus, the source of the information as such is not at issue. Given this, there was no need for the IA to check the validity of that source. Rather, the only issue is whether the 5 per cent TD5, in 9wever.

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

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

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

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

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

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

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

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

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[244] Written Response, dated 14 March 2002, to Question 4 to Turkey of the *Written Questions by the*

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

7.311 Turkey claims that the IA violated Annex II, paragraph 3 in calculating the amount of interest expense to use as facts available in constructing IDC's normal value. In particular, according to Turkey, the IA calculated the interest expense by dividing IDC's total interest expense by rebar production in April 1998. Turkey states that because IDC produces and sells on the market other products (namely billets), and because the April rebar production figures were abnormally low, the result was a distorted, very high, interest component, which overstated the constructed normal value. Turkey argues that the IA should have divided total interest cost by total sales during the period of investigation, based on the audited financial statement, instead of choosing the month with the highest interest cost and dividing that cost by that month's rebar production, which was abnormally low. According to Turkey, IDC's audited financial statement shows that its interest expense expressed as a percentage of the total cost of manufacturing would be much lower. Because the IA failed to use verifiable information (the interest expense as reflected in the audited financial statement), in Turkey's view, the IA violated Annex II, paragraph 3.[245]

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

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

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

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

E. OTHER CLAIMS RELATING TO THE DUMPING INVESTIGATION

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

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

[245] First Written Submission of Turkey, p.74-76 and Second Written Submission of Turkey, p.77-82.
[246] First Written Submission of Egypt, p.87-88.

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

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

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

> "As soon as possible after the initiation of the investigation the investigating authorities should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response."

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

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

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

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

7.323 Article 6.7 reads in relevant part as follows:

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

7.324 Annex I, paragraph 7 provides in relevant part:

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

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

7.325 Concerning the relationship of Annex I to Article 6.7, we come to the same conclusion as in respect of Annex II and Article 6.8.[247] In particular, we note Article 6.7's explicit cross-reference to Annex I: "[T]he procedures described in Annex I shall apply to investigations carried out in the territory of other Members". This language thus establishes that the specific parameters that must be respected in carrying out foreign verifications in compliance with Article 6.7 are found in Annex I. Thus, we must analyze the relevant provisions of Article 6.7 and Annex I together to determine if the requirement claimed by Turkey exists.

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

7.327 The relevant portion of Annex I, paragraph 7 deals with the *timing* of a foreign verification visit, *if* one is made (i.e., "after the response to the questionnaire has been received"). This provision thus cannot be construed as containing a requirement to conduct such a visit *per se.* We note that our reading of these provisions is consistent with the findings of the panel in *Argentina – Ceramic Tiles*, which stated that the AD Agreement contains no requirement to conduct foreign verifications, but

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

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

7.336 Moreover, even if the burden of proof requirement in Article 2.4 were considered to apply to requests for information for the establishment of normal value, and even if some of the information contained in the IA's 19 August request potentially could have been relevant to the fair comparison exercise that is the subject of Article 2.4, we do not find that Turkey has established that that request imposed an unreasonable burden of proof on the respondents. That is, we agree with Egypt that the factual basis for a claim of violation does not exist. In particular, we note that the request concerned the amplification or clarification of cost information provided or meant to have been provided in the questionnaire responses, and no respondent argued at the time that it received the 19 August request that it was unreasonably burdensome. Moreover, while all of the respondents requested (and

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

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

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

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

7.348 Egypt argues that the absence of an adjustment for credit expenses to the normal value is based on a permissible interpretation of the AD Agreement. In particular, Egypt notes, due allowances should be made for differences that affect price comparability, and with respect to terms and conditions of sale, in Egypt's view an allowance is normally warranted when normal value is based on actual domestic sales prices, as only then would the prices be affected by contractual conditions and terms of sales. By contrast, constructed normal value is based on cost of production, i.e., items wwt that al valu conb1daymen-12.75rhmade fcTj 0 -12. conf7e9s of ,rkey aimunities state5 normly waegoti for ca to the ly tbuye bn-12minie bnormairms to a common.75 TD -1578 Tgrgeni "a tEC pa pay

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

(a) Factual background

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

(i) Icdas

Questionnaire response

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

> "Payments of domestic sales of reinforcing bars are usually received at a later date then [sic] the date on the invoice. The duration between the date of invoice and the date of the receipt of the payment usually varies between 7 and 90 days.
>
> While deciding on the price, the date the customer will make the payment are taken into account and an additional charge is included in the price to offset the depreciation of Turkish Lira. (All sales in domestic market are made in Turkish Lira).
>
> Exact date receipt of payment can not be determined in the recording procedure of Icdas since the accounts receivable are followed by customer basis rather than invoice basis. Therefore we based our calculations on average number of days outstanding.
>
> For calculation of average number of days outstanding for the six months reported, we obtained the accounts receivable balance of and total sales to each customer on a monthly basis. Then we indexed these figures to the end of period of investigation i.e. to December 1998. (Republic of Turkey State Institute of Statistics Wholesale Price Indexes and calculated indexation figures to end of period of investigation are provided as Attachment 2.
>
> After indexation of these figures to the end of period of investigation we added up monthly indexed figures and finally by dividing the total indexed monthly accounts receivable to total indexed sales, we determined an average number of days outstanding for the reported period. For calculation of these figures please see Table 4.
>
> To get a unit interest expense by transaction basis, we used actual short term TL borrowing rate of Icdas. During the reported period Icdas used only one short term

Verification report

7.356

> "Other (credit) expenses: As explained in response to 4.3 which is credit expenses due to deferred payments in home market sales. IDC used the following equation to calculate home market credit expenses:
>
> $$\frac{\text{No. of days} \times \text{Interest Rate}}{360} \times (\text{Gross Invoice Value} - 1.5\% \text{ Discount})$$
>
> IDC calculated the weighted average number of days between invoice date and payment date for sales of rebar for each month. Based on the monthly calculations, IDC calculated the average number of days between invoice date and payment date during the investigation period. A worksheet summarizing the results of these calculations is attached in Exhibit B-1. Weighted-average short-term in the home market interest rate is shown in the worksheets attached to Exhibit B-1".[265]

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

Verification report

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

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

12 August letter

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

> "With regard to the cost of credit for normal values, the investigating authority decided not to adjust this cost for lack of reliable evidence concerning this adjustment."[269]

Response to the 12 August letter

7.364 Turkey states that on 13 August 1999,

IDC's 13 August fax to the IA, Turkey did not submit that fax to the Panel, either as an exhibit to that

expenses are 'period' costs, i.e., costs which vary greatly in particular months and therefore must be analyzed on an annual basis.

Interest expense is reported in a manner similar to G&A expense, i.e., on an annual basis, since it is also a period cost. Interest expenses is on a consolidated basis (Group interest expense, offset by Group interest income), as this is the practice in antidumping investigations, because of the fungibility of money."[272]

Verification report

7.368 The passage from the verification report on Diler contains the following passage concerning credit cost on home market sales:

"*Cost of Credit*
The company provided details of the credit period for the sales under review in Turkey. The team verified the difference between the date of sale and the date of payment from accounting records. Because the company has no short-term loan finance on its books the short-term loan interest rate from the Economist was taken as an independent source, and used for the applicable interest rate. The result of the calculation using this data gave the cost of credit for local sales. An adjustment for the cost of credit on local sales was made."[273]

12 August letter from the IA

7.369 In its 12 August 1999 letter to Diler, Habas and Colakoglu, the IA stated concerning credit cost:

"With regard to the cost of credit for normal values for the three companies (Habas, Diler and Colakoglu) the investigating authority decided not to adjust this cost for Habas and Colakoglu for lack of evidence concerning this adjustment. The purchase order provided by Diler as an evidence for credit period is unreliable."[274]

Response to 12 August letter

7.370 On 13 August 1999, counsel for the three respondents (Diler, Habas and Colakoglu) responded to the IA's 12 August letter.[275] Concerning the IA's indication that it was rejecting the claimed credit cost adjustment for each of the companies, these companies complained that such a rejection was unjustifiable given that the credit cost figures had been verified. In particular, they argued that the verification reports' indications that adjustments for credit costs had been made constituted legally binding findings of fact by the IA. They noted further that the stated reason for

7.371 There is no reference to the issue of a credit cost adjustment in any of the above-captioned documents. That is, once the cost and constructed value issue arose (as reflected in the 19 August request), there was no further mention of this issue, either by Diler or by the IA.

(iv) Colakoglu

Questionnaire response

7.372 The relevant portion of Colakoglu's questionnaire response reads as follows:

> "We add a field in which we calculate the net interest expense according to the formula:
>
> (T1-T2)/360 x INT x UNIT PRICE
>
> where T1 is the date of invoice, T2 is the date of receipt of payment, INT is the short term commercial interest rate in Turkey (equal to 80% per annum – see Exhibit 4 hereto), and UNIT PRICE is the unit price on the invoice. This field, then, is the unit imputed interest expense for the given line item in the database. Under typical antidumping practice, the imputed credit should be subtracted from unit price for purposes of making price-to-price comparisons between domestic price and export price (since both such prices have, or can have, imputed credit). However, imputed credit should *not* be subtracted from unit price in determining whether a sale is above cost, since there is not imputed credit component of cost of production, and both sides of the comparison should be viewed *in pari materia*."[277]

Verification report

7.373 The verification report concerning Colakoglu contains the following passage concerning credit cost:

> "*Cost of Credit*
> The verification rjustment in line ite Tj squal to 80%dur 0 -1ite seiod -3.-0.152sucAminl- TD -0.16

7.375 There is no reference to the issue of a credit cost adjustment in any of the above-captioned documents. That is, once the cost and constructed value issue arose (as reflected in the 19 August request), there was no further mention of this issue, either by Colakoglu or by the IA.

(v) Habas

Questionnaire response

7.376 The relevant portion of Habas' questionnaire response reads as follows:

> "We add a field for the interest component of the invoice price, since, as explained above, the interest component depends on the terms of payment and is a material part of the price.
>
> We add a field showing the number of days from invoice to payment (the time-period for imputed interest expense).
>
> We add a field in which we calculate the net interest expense (credit expense, column M) according to the formula:
>
> N/360 x INT x UNIT PRICE
>
> where N is the imputed credit period, INT is the short-term commercial interest rate in Turkey (80%), and UNIT PRICE is the unit price on the invoice. This field, then, is the unit imputed interest expense for the given line item in the database, and it should be subtracted from the domestic market selling price.
>
> We add a field for comparing price with cost of production, namely, column J. This is the invoice value without imputed credit. This is the appropriate figure to use for the cost test, since cost data are also exclusive of imputed credit."[279]

7.377 Habas' questionnaire also contains the following passage concerning selling, general and administrative expenses:

> "Selling expenses is the total indirect selling expenses incurred in the sale of rebar in November and December 1998, divided by the cost of goods sold for rebar for November and December 1998. We have subtracted directed selling expenses from total selling expenses, since the direct expenses (freight, handling charges and the like) are reported in Apps. 3B and 5 as adjustments to price. Keeping the direct expenses in the cost would result in a comparison of a selling-expense-included cost with a selling-expense-excluded price, which would be inappropriate.
>
> General and administrative expenses are the G&A of the Iron and Steel plant for the full year 1998, divided by total COGS for 1998. We report on this on an annual basis because G&A expenses are 'period' costs, i.e., costs which vary greatly in particular months and therefore must be analyzed on an annual basis.
>
> Interest expense is reported in a manner similar to G&A expense, i.e., on an annual basis, since it is also a period cost. Interest expense is on a consolidated basis (Group interest expense, offset by Group interest income)."[280]

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[279] Exh. TUR-42, p.18-19.
[280] Exh. TUR-42, p.26.

Verification report

7.378 The verification report for Habas contains the following passage concerning credit cost:

> "*Cost of Credit*
> The credit cost for the sales in Turkey during the period of export (Nov-Dec 1998) was verified from the company's records. The method of calculation using the formula, N/360 x interest rate x unit price, was accepted. As the company had no short-term borrowings, the short-term borrowing rate published in the *Economist* was accepted as the interest rate used. An adjustment for the cost of credit on local sales was made".[281]

12 August letter from the IA, and Response to the 12 August letter

7.379 The passages from the 12 August letter from the IA, and the response thereto, pertaining to Habas are as reflected, *supra*, in respect of Diler.

19 August request; 15 September response to the 19 August request; 23 September follow-up request from the IA; 28 September letter from the IA;

should apply regardless of whether normal value was determined based on price or based on constructed value.

7.383 Here we recall that the IA on 12 August informed the respondents that their claims of credit cost adjustment (to domestic selling prices) would be rejected essentially for lack of evidence, and we also recall that the three respondents who shared the same counsel (Diler, Colakoglu and Habas) protested this decision of the IA, insisting that their credit cost information had been verified, and that the IA was legally bound by the verification findings. We note as well Turkey's representation that Icdas and IDC also submitted written responses to the 12 August letters that they received from the IA in which they argued that a credit cost adjustment should be made to their domestic selling prices, as such an adjustment had been verified.

7.384 Considering further the credit cost information submitted by Diler, Colakoglu and Habas, we note the references to this issue in their original questionnaire responses concerning the cost of production information to be used for the below-cost sales test (which they refer to as the "cost test"). They indicated that there was no credit cost included, and that therefore cost of production should be compared with a domestic selling price unadjusted for credit expense, to ensure a correct comparison. In particular, Diler stated:

> "Imputed interest is excluded from price for purposes of the cost test because a company's financial statement and cost accounts *do not contain* any entry for imputed expenses, and so the sales price for cost test purposes should also be without imputed interest." (emphasis added)[282]

Colakoglu stated:

> "However, imputed credit should *not* be subtracted from unit price in determining whether a sale is above cost, since there is not imputed credit component of cost of production, and both sides of the comparison should be viewed *in pari materia.*" (underline emphasis added; italic emphasis in original)[283]

Habas stated:

> "We add a field for comparing price with cost of production, namely, column J. This is the invoice value without imputed credit. This is the appropriate figure to use for the cost test, since cost data are also *exclusive of* imputed credit." (emphasis added)[284]

7.385 The way in which the question of determining normal value in this case evolved had the potential to cause the IA to consider a number of important technical issues about the differences between the normal value assessed on the basis of domestic selling prices and the constructed normal values arrived at, and the need for any adjustment as between the constructed normal value and the export price. As it turned out, the consideration undertaken by the IA appears to have been limited to the context of credit cost adjustment to domestic selling prices, in which context the credit term information submitted by the respondents was rejected, because it was (in the view of the IA) insufficient and/or unreliable. The Turkish respondents objected to this in communications to the IA. No further consideration of the question of a credit cost adjustment after this point in time in the investigation appears in any document of record provided to the Panel, whether submitted by the respondents or created by the IA. The IA appears not to have considered whether an adjustment for credit cost should be made to the constructed normal values at all. In this dispute, the parties did not provide us with evidence of the consideration of that issue as it might relate to constructed normal

[282] Exh. TUR-42, p.12.
[283] *Ibid*, p.15.
[284] *Ibid*, p.18.

accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with production and sale of the product under consideration' ". Turkey claims in addition that the IA's failure to deduct short-term interest expense also violated Article 2.2.2, which provides that " 'amounts for administrative, selling and general costs … shall be based on actual data pertaining to the production and sales in the ordinary course of trade by the exporter or producer under investigation' ". According to Turkey, the respondents' financial statements were prepared in accordance with generally accepted accounting practices in Turkey, and these statements separate operating and non-operating income, classifying short-term interest income as operating income. Turkey argues that this classification means that this income is related to the companies' core operations involving production and sale of rebar. Furthermore, Turkey argues, short-term interest income is offset against interest expense and other expenses in arriving at the companies' net income,

7.392

"To the above costs the Investigating Authority added an amount for interest expense. The Investigating Authority did not offset this amount by interest revenue, as the Investigating Authority does not consider interest revenue as sufficiently related to production to be includable in the calculation of constructed value."[286]

Final Report

> Investigating Authority does not consider interest revenue as sufficiently related to production to be includable in the calculation of constructed value … ."[291]

IDC's comments on the *Essential Facts and Conclusions Report*

7.403 In its 15 October comments on the *Essential Facts and Conclusions Report*, IDC makes the following statement concerning the IA's treatment of IDC's interest expense and income[292]

Diler's Appendix 9A to its questionnaire response[295] contains a column for "Interest Expense (revenue)" which contains negative numbers (i.e., indicating net revenue) for all of the months for which data are provided.

> Indeed, we point out that Colakoglu, Diler and Habas have each submitted not only complete cost databases on a monthly basis – exceeding the requirements of the questionnaire – but they have also provided their financial statements and detailed analyses of their selling, general and administrative, and interest expenses to enable ITPD to evaluate each of these elements. See each company's Exhibit 2 of the questionnaire response, containing tables of financial statements and detailed SGA expense tables."[298]

23 September follow-up request from the IA

7.408 In its 23 September 1999 follow-up request to Diler's response to the 19 August request, the IA made the following request in respect of interest expense:

> "*7. Interest Expense:*
> Please, furnish a list identifying separately interest expenses from interest income."[299]

28 September letter from the IA

7.409 In its letter to Diler, Habas and Colakoglu dated 28 September, the IA indicated the following:

> "With reference to your fax messages of 15th and 28th September 1999, we note that you did not fully respond to the following items:
> …
> - Interest expense, and
> …"[300]

Essential Facts and Conclusions Report

7.410 At section 3.2.1.6, the *Essential Facts and Conclusions Report* states:

> "In addition, these respondents [Diler, Habas and Colakoglu] have asserted that the

7.412 In their joint comments on the *Essential Facts and Conclusions Report*[305],

7.416 The relevant passages concerning Colakoglu in the 15 September response to the 19 August request, the 23 September follow-up request from the IA, the 28 September letter from the IA, the *Essential Facts and Conclusions Report*, the 15 October comments on the *Essential Facts and Conclusions Report*, and the *Final Report*, are identical to those set forth above in respect of Diler.[309]

(v) Habas

Questionnaire response

7.417 Habas' questionnaire response contains the following text pertaining to interest expense in the section pertaining to cost of production:

> "Interest expense is reported in a manner similar to G&A expense, i.e., on an annual basis, since it is also a period cost. Interest expense is on a consolidated basis (Group interest expense, offset by Group interest income)."[310]

7.418 Habas's Appendix 9A contains a column entitled "Interest Expense", in which negative numbers are reported.

19 August request

7.419 The 19 August request sent to Habas contains the following passage pertaining to interest income and expense:

> "The costs reported included no finance cost, yet the income statement that Habas supplied indicated significant financing expenses. The costs reported include a deduction for 'interest expense', the Investigating Authority would need an explanation for this cost and why it is deducted from cost of production."[311]

23 September follow-up request

7.420 In its 23 September 1999 follow-up request to the Habas's response to the 19 August request, the IA made the following request concerning interest expense:

> "*Interest Expense:*
>
> Please furnish a list identifying separately interest expense from interest income."[312]

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

7.421 The relevant passages concerning Habas in the 15 September response to the 19 August request, the 23 September follow-up request from the IA, the 28 September letter from the IA; the *Essential Facts and Conclusions Report*, the 15 October comments on the *Essential Facts and Conclusions Report*, and the *Final Report*, are identical to those set forth above in respect of Diler.[313]

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[309] *See* paras.7.407, *et seq.*, *supra*.
[310] Exh. TUR-42, p.26.
[311] Exh. TUR-11.
[312] Exh. TUR-12.
[313] *See* paras.7.407, *et seq.*, *supra*.

(b) Assessment by the Panel

7.422 We recall that to resolve this claim, we must consider whether the evidence of record indicates that the short-term interest income is related to the production and sale of rebar in the Turkish home market. In this regard, we note that it was the respondents who initially advocated (at least implicitly) for an interest income offset, by reporting in their questionnaire responses on cost their net interest expense figures, which ranged from zero to negative numbers (the latter indicating net interest income). With two exceptions -- Diler and Habas -- the respondents simply reported the net figures without indicating how they were arrived at or what their components were. Diler and Habas, for their part, indicated that their reported interest figures were "consolidated" item reflecting "Group" interest expense offset by "Group" interest income (suggesting that it was broader than the companies or operations producing rebar), but did not offer further explanations or breakdowns.

notiall 7.423 Concerning [illegible] initiallH474), but 3income)hat it (thf) Tj

an interest income offset. Nor did the IA pose any specific questions to Icdas in this regard. While the IA noted briefly in the *Essential Facts and Conclusions Report* that no such offset was made in the constructed value calculation, Icdas made no comment on this point. We see, moreover, no evidence in the record otherwise that appears relevant to the existence of a relationship, if any, between interest income and the cost of producing and selling rebar. We note in this regard that when we asked Turkey to identify any such evidence, Turkey replied:

> "Specific information was not requested by the Investigating Authority on the nature of the interest income at issue. If the Investigating Authority had any doubt as to the validity of the offset in question, it was incumbent upon the Investigating Authority to request additional information. The Investigating Authority cannot justify the denial of an adjustment based on the failure to provide clarifications or supporting evidence that it itself did not seek. We note that the Investigating Authority never cited any evidence that the interest income was not related to production, nor has Egypt produced such evidence to the Panel".[317]

7.426 We note in this regard that three of the respondents simply refused to provide even a breakout of interest income from interest expense, when such a breakout was specifically requested by the IA. Then, in their comments on the *Essential Facts and Conclusions Report* they advanced an incorrect legal argument concerning the relationship-to-production test applied by the IA in deciding not to make an interest income offset, rather than trying to establish factually that their accounting records of the interest income reasonably reflected costs associated with the production and sale of rebar, and not some other aspect of the respondent's operations. The IA thus explicitly identified this issue during the course of the investigation, and provided the respondents with an opportunity to address it, which these companies chose to do in a certain way. The other respondent that commented on this aspect of the *Essential Facts and Conclusions Report* tried to *disprove* the relationship between interest *expense* and the cost of producing rebar, rather than trying to *prove* the existence of a relationship between interest *income* and cost of production. The fifth respondent made no comments or arguments at all on this issue at any point during the investigation (other than the somewhat ambiguous paragraph in its questionnaire response concerning "Interest Revenue"). In short, Turkey has not identified, and we have not found, evidence of record that would demonstrate any relationship of short-term interest income to the cost of producing rebar, nor any indication that any respondent attempted to submit such evidence or advance such an argument during the course of the investigation, in spite of the IA's providing them the opportunity to do so. We therefore find that Turkey has not established a *prima facie* case that the IA violated Article 2.2.1.1 or 2.2.2 in deciding not to make an interest income offset in calculating cost of production and constructed normal value.

F. CLAIM UNDER ARTICLE X:3 OF GATT 1994

7.427 Turkey claims a violation of Article X:3 of GATT 1994 in "connection with Egypt's refusal to schedule a meeting with the Turkish respondents to discuss the adequacy of their responses on September 15, 1999.[318] Turkey contends that this decision was "administrative" in nature and based directly on a substantive law or rule.[319]

7.428 Article X:3 of GATT 1994 provides:

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[317] Written Response, dated 14 March 2002, to Question 10 to Turkey of the *Written Questions by the Panel*, of 27 February 2002.

[318] First Written Submission of Turkey, Section IV.D.2.

[319] Written Response, dated 7 December 2001, to Question 2 to Turkey of *the Written Questions by the Panel*, of 28 November 2001.

> "(a) Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article."

7.429

(i) Article 6.1.1 of the AD Agreement, as the request for information at issue was not a "questionnaire" in the sense of this provision, and the minimum time-period provided for in Article 6.1.1 was therefore not applicable to this request for information;

(j) Article 6.2 of the AD Agreement, or paragraph 6 of Annex II thereto, with regard to the 19 August 1999 request for information, as Turkey has not established that the time-period allowed by the Egyptian Investigating Authority for submission of the requested information was unreasonable or, as a consequence, that the Egyptian Investigating Authority failed to provide the Turkish exporters with a full opportunity for the defence of their interests;

(k) Article 6.2 of the AD Agreement, or paragraph 6 of Annex II thereto, with regard to the 23 September 1999 request for information, as Turkey has not established that the time-period allowed by the Egyptian Investigating Authority for the submission of the requested information was unreasonable or, as a consequence, that the Egyptian Investigating Authority failed to provide the Turkish exporters with a full opportunity for the defence of their interests;

(l) Paragraph 3 of Annex II to the AD Agreement, as this provision does not apply to the selection of particular information as "facts available";

(m) Paragraph 7 of Annex II to the AD Agreement, as Turkey has not established that the Egyptian Investigating Authority failed to use "special circumspection" in estimating the prevailing inflation rate in Turkey, which was applied to the data reported by one respondent, at 5 per cent per month;

(n) Article 6.7 of the AD Agreement, paragraph 7 of Annex I thereto, and paragraphs 1 and 6 of Annex II thereto, as Turkey has not established that these provisions contain the obligations asserted by Turkey, i.e., Turkey has not established that it is mandatory for investigating authorities to conduct "on-the-spot" verification of information submitted, that investigating authorities are precluded from requesting additional information during the course of the investigation, that the rights of the Turkish exporters were seriously prejudiced, or that the actions of the Egyptian Investigating Authority impaired their "opportunity to provide further explanations";

(o) Article 2.4 of the AD Agreement, as Turkey has not established that the burden of proof requirement of that provision is applicable to the request for certain cost information by the Egyptian Investigating Authority in its letter of 19 August 1999, nor, even if that requirement were applicable, that the request imposed an unreasonable burden of proof on the Turkish respondents;

(p) Article 6.2 of the AD Agreement and paragraph 6 of Annex II thereto, as Turkey has not established that the Egyptian Investigating Authority denied requests of Turkish exporters for meetings;

(q) Article 2.4 of the AD Agreement, as Turkey has not made a *prima facie* case that the Egyptian Investigating Authority violated this provision in failing to make an adjustment to normal value for differences in terms of sale;

(r) Articles 2.2.1.1 and 2.2.2 of the AD Agreement, as Turkey has not made a *prima facie* case that the Egyptian Investigating Authority violated these provisions in deciding not to make an interest income offset in calculating cost of production and constructed normal value; and