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

(WT/DS513)

THIRD PARTY EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

January 8, 2018

EXECUTIVE SUMMARY OF THE U.S. THIRD PARTY WRITTEN SUBMISSION

I. CLAIMS REGARDING ARTICLE 4.4 AND ARTICLE 6.2 OF THE DSU

1. Morocco claims that Turkey breached Articles 4.4 and 6.2 of the DSU because it improperly expanded the scope of the dispute when: (1) Turkey added certain claims to its panel request that were not previously listed in the consultation request; and (2) Turkey added claims in its first written submission that were not contained in its panel request.

2. Articles 4.4 and 6.2 set out the requirements for a consultations request and a panel request, respectively, and contain different obligations with respect to the identification of the measures and the legal basis of the claims at issue. Article 4.4 requires "identification of the measures at issue" and "an indication of the legal basis for the complaint," while Article 6.2 requires that a complainant "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." The text of Articles 4.4 and 6.2 suggests that the claims set out in each of the consultation request and panel request may not be identical.

3. There may be some circumstances in which the legal claims are so different as between the panel and consultations requests that questions could be raised whether the dispute has been subject to consultations (DSU Article 4.7). Here, it could be relevant to the Panel's consideration that consultations had been requested pursuant to the AD Agreement and claims under Articles 3 and 6 had been raised in the consultations request.

4. With respect to Article 6.2, a deficient summary of the legal basis of the complaint means that a claim will not fall within a panel's terms of reference. Where an article in a covered agreement contains several distinct legal obligations, each capable of being breached, a cursory reference to such an article in a panel request does not reveal which one, or more, of those obligations is at issue. In that circumstance, a complaining party may not have provided the brief summary of the legal basis sufficient to present the problem clearly.

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

6. Therefore, the Panel should examine whether Turkey's consultation request is in accordance with Article 4.4 of the DSU, and whether Turkey's panel request is in accordance with Article 6.2 of the DSU.

II. CLAIMS REGARDING FOOTNOTE 9 OF ARTICLE 3 OF THE AD AGREEMENT

7. Turkey argues that the "establishment" of a domestic industry "alludes to an industry being brought into existence, rather than an already producing industry being stable or firm." For Turkey, "material retardation of the establishment of an industry" could also occur in circumstances "where there has been some production of the like product, but such production

has not reached a sufficient level to allow consideration of injury or threat of injury to an existing domestic industry."

8. Footnote 9 is appended to Article 3, and provides the definition of "injury." Specifically, footnote 9 defines injury to encompass three situations: (1) material injury to a domestic industry; (2) threat of material injury to a domestic industry; or (3) material retardation of the establishment of such an industry.

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

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

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

12. Read together, the ordinary meaning of the terms "material retardation of the establishment of … an industry" would suggest a [*material*] consequential or important [*retardation*] hindrance or delay of the accomplishment of the [*establishment*] bringing into being, or setting up on a secure basis, of an industry. This reading is consistent with the findings of the panel in *Mexico – Olive Oil*, which considered the issue in the context of Article 16.1 of the SCM Agreement.

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

III. CLAIMS REGARDING ARTICLES 3.1 AND 3.4 OF THE AD AGREEMENT

14. Turkey claims that the analysis of the MDCCE was inconsistent with Articles 3.1 and 3.4 of the AD Agreement because MDCCE failed to assess all the factors listed in Article 3.4.

15. Article 3.1 informs the obligations of Article 3.4. Article 3.1 of the AD Agreement sets forth two overarching obligations that apply to multiple aspects of an authority's injury determination. The first overarching obligation is that the injury determination be based on "positive evidence." The second obligation is that the injury determination involves an "objective examination" of the volume of the dumped imports, their price effects, and their impact on the domestic industry. Accordingly, any determinations or findings made in connection with Article 3.4 must be based on "positive evidence" and "involve an objective examination," as required by Article 3.1 of the AD Agreement.

16. Article 3.4 of the AD Agreement sets out an authority's obligation to ascertain the impact of dumped imports on the domestic industry. The United States observes that Article 3.4 imposes an obligation on the authority to conduct an "examination" of the impact of the dumped imports on the domestic industry. And the text of Article 3.4 expressly requires investigating authorities to examine the "impact" of subject imports on a domestic industry, and not just the state of the industry.

17. As recognized by Article 3.1 of the AD Agreement, subject imports can influence a domestic industry's performance through volume and price effects. Thus, to examine the impact of subject imports on a domestic industry, an authority would need to consider the relationship between subject imports – including subject import price undercutting, and the price depressing or suppressing effects of subject imports – and the domestic industry's performance during the period of investigation. The "examination" contemplated by Article 3.4 must be based on a "thorough evaluation of the state of the industry" and it must "contain a persuasive explanation as to how the evaluation of relevant factors led to the determination of injury."

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

IV. TURKEY'S CLAIMS REGARDING ARTICLES 6.5 AND 6.5.1 OF THE AD AGREEMENT

19. Turkey claims that MDCCE acted inconsistently with Articles 6.5 and 6.5.1 of the AD Agreement when: (1) it treated the break-even threshold as confidential and failed to "discuss" the "good cause" that warranted treating such information confidential; and (2) it did not require

the party to submit a non-confidential summary of the information, or to explain why such summary would not be possible.

20. Articles 6.5 and 6.5.1 balance the protection of confidential information with the right of parties to be given a full and fair opportunity to see relevant information and defend their interests. The United States considers that Article 6.5 requires that investigating authorities ensure the confidential treatment of information. Article 6.5.1 then balances the need to protect confidential information against the disclosure requirements of other Article 6 provisions by requiring that, if an investigating authority accepts confidential information, it shall require that confidential information is summarized in sufficient detail to permit a reasonable understanding of the substance of the information.

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

V. TURKEY'S CLAIMS REGARDING ARTICLE 6.8 AND ANNEX II OF THE AD AGREEMENT

22. Turkey claims that MDCCE breached Article 6.8 and paragraphs 1, 3, 5, 6, and 7 of Annex II of the AD Agreement by improperly resorting to facts available, rather than relying on the information provided pertaining to the exporters' sales information.

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

24. The provisions of Annex II of the AD Agreement are relevant to the proper interpretation of Article 6.8. Annex II has been interpreted to mean that "all the information provided by the parties, even if not ideal in all respects, should to the extent possible be used by the authorities and in case secondary source information is to be used, the authorities should do so with special circumspection." Moreover, Article 6.8 applies exclusively to interested parties from whom information is required by competent authorities, and both Article 6.8 and Annex II establish the expectation that competent authorities will use that information to the extent that it can be used. In this way, Annex II reflects that an investigating authority's ability to rely on facts potentially less favorable to the interests of a non-cooperating interested party is inherent in the authority's role in conducting an investigation in accordance with the AD Agreement, provided certain conditions are met.

25. In the United States' view, it may be appropriate for an investigating authority to fill gaps in the record, if the record otherwise contains usable data and is incomplete with respect to only a discrete category of information. Substitution with respect to all data from the non-cooperating party may be appropriate if, for instance, none of the reported data is reliable or usable because

the data contains pervasive and persistent deficiencies, or is unverifiable. This is a determination that will depend on the specific facts and circumstances of a case.

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

VI. TURKEY'S CLAIMS REGARDING ARTICLE 6.9 OF THE AD AGREEMENT

27. Turkey alleges that MDCCE acted inconsistently with Article 6.9 of the AD Agreement by failing to disclose all "essential facts," and with respect to the "essential facts" that were disclosed, by failing to provide "sufficient time" to the Turkish exporters to comment on the disclosures and defend their interests.

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

29. Thus, in considering whether the obligation in Article 6.9 has been breached, the analysis should turn on whether, under the specific facts of the dispute, the objective set out in Article 6.9 has been met. Specifically, whether interested parties were able to defend their interests.

VII. TURKEY'S REQUEST UNDER ARTICLE 19.1 OF THE DSU

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

31. Article 19.1 of the DSU provides that when a panel finds a measure to be inconsistent, it "shall" recommend that the Member bring the measure into conformity. A panel also has the authority, but not the obligation ("may"), to "suggest ways in which the Member could implement the recommendations."

32. Panels have seldom chosen to make suggestions to Members regarding their implementation of recommendations of the DSB. Under the DSU, a Member retains flexibility with respect to how that Member implements the DSB recommendations. To the extent the Panel finds that any challenged measure by Morocco is inconsistent with the AD Agreement,

however, the Panel must make the mandatory recommendation indicated in Article 19.1, *i.e.*, that the Member concerned bring its measure into conformity with the relevant covered agreement.

EXECUTIVE SUMMARY OF THE U.S. RESPONSES TO PANEL QUESTIONS TO THIRD PARTIES

33. Response to Question 1.1: With respect to the third form of injury, "material retardation of the establishment of such an industry," the text of footnote 9 of Article 3 links the "material retardation" finding to the "establishment" of a domestic industry. The ordinary meaning of the terms "material retardation of the establishment of … an industry" would suggest a [*material*] consequential or important [*retardation*] hindrance or delay of the accomplishment of the [*establishment*] bringing into being, or setting up on a secure basis, of an industry.

34. Response to Question 1.2: The text of footnote 9 of Article 3 links a "material retardation" finding with "establishment" of a domestic industry. Therefore, an investigating authority cannot make a material retardation finding without first ascertaining whether the industry is already established. However, the "establishment" of a domestic industry can occur either at the point an industry comes into being (for example, by commencing production), or at which it achieves stability.

35. Response to Question 1.3: Article 3.1 sets forth overarching obligations that apply to multiple aspects of an investigating authority's injury determinations. However, nothing in the text of Article 3.1 suggests that its obligations are only consequentially based on the breach of another provision of Article 3 because the term "shall" reflects a mandatory obligation. Thus, a panel may consider whether an investigating authority's determination was consistent with the obligations set forth under Article 3.1 independent of other provisions.

36. Response to Question 1.4: The United States agrees that the terms "such an industry" in footnote 9 of Article 3 are informed by Article 4.1 of the AD Agreement, which generally defines a "domestic industry" as referring to "the domestic producers as a whole of the like products or to those of them whose collective output of the products constitute a major proportion of the total domestic production of those products."

37. Article 2.6 of the AD Agreement then defines the term "like product" "to mean a product which is identical, i.e., alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration." Therefore, pursuant to Article 2.6, the "like product" is defined based on the "product under consideration."

38. In determining whether "such an industry" is established, an investigating authority may examine several or all of the following criteria: (1) when the domestic industry began production; (2) whether the production has been steady or start-and-stop; (3) the size of domestic production compared to the size of the domestic market as a whole; (4) whether the industry has reached a reasonable "break-even point"; and (5) whether the activities are truly a new industry or merely a new product line of an established industry.