



**MOROCCO - DEFINITIVE ANTI-DUMPING MEASURES
ON SCHOOL EXERCISE BOOKS FROM TUNISIA**

FINAL REPORT OF THE PANEL

Addendum

*BCI redacted, as indicated [[***]]*

This addendum contains Annexes A to C to the Report of the Panel to be found in document WT/DS578/R.

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ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 8 May 2020

General

1. (1) In this proceeding, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). In addition, the following Working Procedures apply.

(2) The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

Confidentiality

2. (1) The deliberations of the Panel and the documents submitted to it shall be kept confidential. Members shall treat as confidential information that is submitted to the Panel which the submitting Member has designated as confidential.

(2) In accordance with the DSU, nothing in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.

(3) If a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. A party shall strive to submit a non-confidential summary to any Member requesting it as soon as possible and within 10 days of receipt of the request to the extent possible.

(4) Upon request, the Panel may adopt appropriate additional working procedures for the treatment of business confidential information after consultation with the parties.

Submissions

3. (1) Before the first substantive meeting of the Panel with the parties, each party shall transmit a written submission in which it presents the facts of the case and its arguments in accordance with the timetable adopted by the Panel.

(2) Each party shall also submit to the Panel, prior to its second substantive meeting, a written rebuttal, in accordance with the timetable adopted by the Panel.

(3) Each third party that chooses to make a written submission before the first substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.

(4) The Panel may invite the parties or third parties to make additional submissions during the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

Preliminary rulings

4. (1) If Morocco considers that the Panel should make a ruling before the issuance of the Report that certain measures or claims in the panel request or the complainant's first written submission are not properly before the Panel, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.

- a. Morocco shall submit any such request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. Tunisia shall submit its response to the request before the first substantive meeting of the Panel, at within a reasonable time to be determined by the Panel in light of the request.
 - b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request before, during or after the first substantive meeting, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Report to the parties.
 - c. If the Panel finds it appropriate to issue a preliminary ruling before the issuance of its Report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Report.
 - d. Any request for such a preliminary ruling by Morocco before the first meeting, and any subsequent submissions of the parties in relation thereto before the first meeting, shall be served on all third parties. The Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately. Any preliminary ruling issued by the Panel before the first substantive meeting on whether certain measures or claims are properly before the Panel shall be shared with all third parties.
- (2) This procedure is without prejudice to the parties' right to request other types of preliminary or procedural rulings during the proceeding, and to the procedures that the Panel may follow with respect to such requests.

Evidence

5. (1) Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except evidence necessary for purposes of rebuttal, or evidence necessary for answers to questions or comments on answers provided by the other party. Additional exceptions may be granted upon a showing of good cause.

(2) If any new evidence has been admitted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.
6. (1) If the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the submission. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.

(2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or the meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by an explanation of the grounds for the objection and an alternative translation.
7. (1) To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by Tunisia should be numbered TUN-1, TUN-2, etc. Exhibits submitted by Morocco should be numbered MAR-1, MAR-2, etc. If the last exhibit in connection with the first submission was numbered MAR-5, the first exhibit in connection with the next submission thus would be numbered MAR-6.

(2) Each party shall provide an updated list of exhibits (in Word or Excel format) together with each of its submissions, oral statements, and responses to questions.

(3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

- (4) If a party includes a hyperlink to the content of a website in a submission, and intends that the cited content form part of the official record, the cited content of the website shall be provided in the form of an exhibit indicating the date on which it was viewed.

Editorial Guide

8. In order to facilitate the work of the Panel, each party and third party is invited, to the extent possible, to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions (electronic copy provided).

Questions

9. The Panel may pose questions to the parties and third parties at any time, including:
- a. Before any meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally during the meeting. The Panel may ask different or additional questions at the meeting.
 - b. The Panel may put questions to the parties and third parties orally during a meeting, and in writing following the meeting, as provided for in paragraphs 15 and 21 below.

Substantive meetings

10. The Panel shall meet in closed session.
11. The parties shall be present at the meetings only when invited by the Panel to appear before it.
12. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.
- (2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.
13. Each party shall provide to the Panel the list of members of its delegation no later than 5.00 p.m. (Geneva time) three working days before the first day of each meeting with the Panel.
14. A request for interpretation by any party should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.
15. The first substantive meeting of the Panel with the parties shall be conducted as follows:
- a. The Panel shall invite Tunisia to make an opening statement to present its case first. Subsequently, the Panel shall invite Morocco to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. If interpretation is needed, each party shall provide additional copies for the interpreters before taking the floor.
 - b. Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the duration of its opening statement to not more than 45 minutes. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least 10 days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to the other party.
 - c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other party questions.
 - d. The Panel may subsequently pose questions to the parties.

- e. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Tunisia presenting its statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its closing statement, if available.
- f. Following the meeting:
 - i. Each party shall submit a final written version of its opening statement no later than 5.00 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.
 - ii. Each party shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.
 - iii. The Panel shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.
 - iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the time-frame established by the Panel before the end of the meeting.

16. The second substantial meeting between the Panel and the parties shall be conducted in the same manner as the first one, the only difference being that Morocco shall have the possibility of making its oral statement first. The party having made its preliminary statement first shall make its final statement first.

17. If the substantive meetings cannot be held in-person on the scheduled date in Geneva due to the health crisis caused by COVID-19, the Panel may, depending on the circumstances, decide to change the timetable and the working procedures after consulting the parties.

Third party session

18. Each third party may present its views orally during a session of the substantive meeting with the parties set aside for that purpose.

19. Each third party shall inform the Panel if it intends to make an oral statement at the third party session and shall provide to the Panel the list of members of its delegation no later than 5.00 p.m. (Geneva time) three working days before the first day of each meeting with the Panel.

20. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

21. A request for interpretation by any third party should be made to the Panel as early as possible, preferably upon receiving the working procedures and timetable for the proceeding, to allow sufficient time to ensure availability of interpreters.

22. The third-party session shall be conducted as follows:

- a. All parties and third parties may be present during the entirety of this session.
- b. The Panel shall first hear the oral statements of the third parties, who shall speak in alphabetical order. Each third party making an oral statement at the third-party session

shall provide the Panel and other participants with a provisional written version of its statement before it takes the floor. If interpretation of a third party's oral statement is needed, that third party shall provide additional copies for the interpreters before taking the floor.

- c. Each third party should limit the duration of its statement to 15 minutes, and avoid repetition of the arguments already in its submission. If a third party considers that it requires more time for its statement, it should inform the Panel and the parties at least 10 days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to all third parties for their statements.
- d. After the third parties have made their statements, the parties shall be given the opportunity to pose questions to any third party for clarification on any matter raised in that third party's submission or statement.
- e. The Panel may subsequently pose questions to any third party.
- f. Following the third-party session:
 - i. Each third party shall submit the final written version of its oral statement, no later than 5.00 p.m. (Geneva time) on the first working day following the meeting.
 - ii. Each party may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.
 - iii. The Panel may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.
 - iv. Each third party wishing to do so shall respond in writing to written questions from the Panel or a party, within a timeframe established by the Panel before the end of the meeting.

Descriptive part and executive summaries

23. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

24. Each party shall submit one integrated executive summary. This shall summarize the facts and arguments as presented by the party to the Panel in the party's written submissions, oral statements, and may also include a summary of its responses to questions and comments thereon following the substantive meetings. The deadline for submitting such an integrated summary shall be indicated in the timetable adopted by the Panel.

25. The integrated executive summary shall be limited to no more than 30 pages.

26. The Panel may request the parties and third parties to provide executive summaries of facts and arguments presented in any other submissions to the Panel for which a deadline may not be specified in the timetable.

27. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and oral statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions. The executive summary to be provided by each third party shall not exceed six pages. If a third-party submission and/or oral statement does not exceed six pages in total, this may serve as the executive summary of that third party's arguments unless said third party expresses the wish that the

submission and/or oral statement does not serve as the executive summary, in which case it shall submit a separate executive summary.

Interim review

28. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

29. Each party may submit written comments on the other party's written request for review. Such written comments shall be limited to commenting on the other party's written request for review and shall be submitted in accordance with the timetable adopted by the Panel.

Interim and Final Report

30. The interim report, as well as the final report before its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

31. The following procedures regarding service of documents apply to all documents submitted by parties and third parties during the proceeding:

- a. Each party and third party shall submit all documents to the Panel by submitting them with the DS Registry (office No. 2047).
- b. Each party and third party shall submit 2 paper copies of its submissions and 2 paper copies of its Exhibits to the Panel by 5.00 p.m. (Geneva time) on the due dates established by the Panel. The DS Registrar shall stamp the documents with the date and time of submission. The paper version submitted to the DS Registry shall constitute the official version for the purposes of submission deadlines and the record of the dispute. If any exhibit is in a format that is impractical to submit as a paper copy, then the party may submit such an exhibit in electronic format to the DS Registrar (by email or on a CD-ROM, DVD or USB key). In such a case, the cover page of the exhibit shall indicate that it is available in electronic format only.
- c. Each party and third party shall also submit all documents in paper copies to the Panel via the Disputes On-line Registry Application (DORA), the WTO online registry (<https://dora.wto.org>) before 5:00 p.m. on the same day. If the parties or third parties have any questions or technical difficulties relating to the online registry, they are invited to consult the Help Section of the DORA User Guide or contact the DS Registry (DSRegistry@wto.org).
- d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve any submissions in advance of the first substantive meeting with the Panel directly on the third parties. Each third party shall serve any document submitted to the Panel directly on the parties and on all other third parties. A party or third party may serve its documents on another party or third party by email only or other electronic format acceptable to the recipient, unless the recipient party or third party has previously requested a paper copy at least five working days prior to the due date for said submission. Each party and third party shall confirm, in writing, that copies have been served on the parties and third parties, as appropriate, at the time it provides each document to the Panel. Each party and third party shall serve copies on the other party (and third parties if appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel.
- e. As a general rule, all communications from the Panel to the parties and third parties will be via email. In addition to transmitting them to the parties by email, the Panel shall provide the parties with a paper copy of the Interim Report and the Final Report.

Correction of clerical errors in submissions

32. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected, and should be made promptly following the filing of the submission in question.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Adopted on 28 May 2020

1. For the purposes of these proceedings, business confidential information (BCI) is defined as any information designated as such by a party submitting the information to the Panel. The parties shall only designate as BCI information that is not available in the public domain, the release of which would cause serious harm to the interests of the originator(s) of the information. BCI may include information that was previously treated as confidential by Morocco's Ministry of Industry, Investment, Trade and the Digital Economy in the course of the anti-dumping proceedings at issue.
2. No person shall have access to BCI except a member of the Panel, a WTO Secretariat staff member assisting the Panel, an employee of a party or third party, and an outside advisor to a party or third party for the purposes of this dispute. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export or import of the products that were the subject of the proceedings at issue, or an officer or employee of an association of such enterprises.
3. A person having access to BCI shall treat it as confidential, i.e., shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each party or third party shall have responsibility in this regard for its employees as well as any outside advisors used for the purposes of this dispute. Any information obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose.[^] All documents and electronic storage media containing BCI shall be stored in such a manner as to prevent unauthorized access to such information.
4. When a party or third party submits BCI in a written submission, it shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains Business Confidential Information", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page. For all BCI disclosed in the form of, or as part of, an exhibit, the exhibit shall also be marked to indicate that it contains BCI by putting "BCI" next to the exhibit number (e.g. Exhibit TUN-1 (BCI)).
5. For all BCI submitted electronically, the file name shall include the terms "Business Confidential Information" or "BCI". In addition, where applicable, the term "Business Confidential Information" shall be written clearly on the label affixed to the storage media.
6. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 4.
7. Where a party or third party submits a document containing BCI to the Panel, the other party or third parties, when referring to that BCI in its documents, including written submissions, and written copies of their oral statements, shall clearly identify all such information in those documents. All such documents shall be marked as described in paragraph 4.

8. If a party considers that information submitted by the other party or a third party should have been designated as BCI and objects to such submission without BCI designation, it shall promptly bring this objection to the attention of the Panel and the other party or third party, together with the reasons for the objection. Similarly, if a party considers that the other party or a third party submitted information designated as BCI information which should not be so designated, it shall promptly bring this objection to the attention of the Panel and the other party or third party, together with the reasons for the objection. The Panel shall decide whether information subject to an objection will be treated as BCI for the purposes of these proceedings on the basis of the criteria set out in paragraph 1.

9. The Panel will not disclose BCI, in its report or in any other way, to unauthorized persons to have access to BCI. The Panel may, however, make statements of conclusion drawn from that information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any information that the party has designated as BCI.

10. Submissions, exhibits and other documents or recordings containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

ANNEX A-3

PRELIMINARY RULING OF THE PANEL

14 September 2020

1 INTRODUCTION

1.1. On 19 June 2020, Morocco submitted a preliminary ruling request to the Panel, arguing that certain claims made in Tunisia's first written submission do not appear in its request for the establishment of a panel or are too vague. Morocco requests the Panel to make a preliminary ruling that the submission of these claims is not in accordance with Article 6:2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereafter "the DSU") and were therefore not properly before the Panel's jurisdiction.

2 MAIN ARGUMENTS OF THE PARTIES

2.1. In its preliminary ruling request, Morocco argues that:

- a. The "claims" relating to (i) the distribution cost¹, (ii) the exclusion from the calculation of the profit margin of certain costs and expenses that are not part of the product price², and (iii) the mathematical formulas used to calculate the margin of dumping³, are "missing" from the request for the establishment of a panel.
- b. The "claim" relating to the exclusion of domestic sales in Tunisia is referred to in the panel request, but the legal basis is different to that given in Tunisia's first written submission.⁴
- c. The wording of the claim under Articles 3.1 et 3.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), concerning the analysis of sales price depression and of price suppression, made in the panel request is too vague.⁵

2.2. Morocco contends that its rights of defence are affected by Tunisia's non-compliance with the provisions of Article 6:2 of the DSU.⁶

2.3. Moreover, Morocco asks the Panel to exclude from its jurisdiction certain "claims" that Tunisia appears to have dropped from its first written submission or that would have no chance of being upheld⁷:

- a. The "claims" that Tunisia appears to have dropped are (i) the violation of Article 5.8 of the Anti-Dumping Agreement set out in paragraph B.1 of the panel request; (ii) the violation of Article 6.8 of the Anti-Dumping Agreement and paragraphs 3, 5, 6 and 7 of Annex II set out in paragraph B.4 of the panel request; (iii) the violation of Article 2.2.1.1 of the Anti-Dumping Agreement set out in paragraph B.5 of the panel request; (iv) the violation of Articles 3.1 and 3.2 of the Anti-Dumping Agreement set out in paragraph B.7.a of the panel request (concerning the analysis of the volume of imports, in absolute terms); and (v) the claim made in paragraph B.11 of the panel request.⁸

¹ Tunisia's first written submission, section 5.3; and Morocco's preliminary ruling request, section B.1.

² Tunisia's first written submission, section 5.2.3; and Morocco's preliminary ruling request, section B.3.

³ Tunisia's first written submission, section 5.4; and Morocco's preliminary ruling request, section B.4.

⁴ Morocco's preliminary ruling request, section B.2.

⁵ Morocco's preliminary ruling request, section B.5; and Tunisia's request for the establishment of a panel, WT/DS578/2 (Request for the establishment of a panel by Tunisia), para. B.7.c.

⁶ Morocco's preliminary ruling request, para. 6.

⁷ Morocco's preliminary ruling request, para. 9 and sections III.A and III.B.

⁸ Morocco's preliminary ruling request, para. 47.

- b. The claims that, according to Morocco, have no chance of being upheld are those criticizing the fact that "the [Ministry of Industry, Trade, Investment and the Digital Economy (MIICEN)] failed to objectively consider the volume of imports in relative terms", as required under Articles 3.1 and 3.2 of the Anti-Dumping Agreement.⁹

2.4. Meanwhile, Tunisia asks the Panel to reject Morocco's preliminary ruling request pursuant to Article 6:2 of the DSU and not to issue a preliminary ruling on Morocco's request concerning claims that "had no chance of being upheld". Tunisia hopes that the Panel will address those claims at the same time as other substantive issues.¹⁰

2.5. Lastly, Tunisia confirms that it has dropped claims that were not expanded on in its first written submission, with the exception of the claim under Article 5.8 of the Anti-Dumping Agreement.¹¹

3 ANALYSIS BY THE PANEL

3.1. In this section, we will, first of all, recall the relevant provisions of the DSU that apply to requests for the establishment of a panel. Next, we will examine Morocco's request according to which certain claims made by Tunisia in its first written submission are "missing" from the request for the establishment of a panel. We will then determine whether the legal basis of the "claim" relating to the exclusion of domestic sales, as set forth in the panel request, is different to that given in Tunisia's first written submission. Lastly, we will consider whether the wording of the complaint about the analysis of price depression and of price suppression is too vague and, for that reason, does not meet the requirements of Article 6:2 of the DSU.

3.1 Relevant provisions of the DSU

3.2. Article 6:2 of the DSU provides that:

The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

3.3. Furthermore, pursuant to Article 7 of the DSU, the Panel's terms of reference, and thus the scope of its jurisdiction, are governed by the request for the establishment of a panel. The panel request also serves the rights of defence, as it notifies the responding party of the case against it and allows it to prepare its response. As the Appellate Body recalled in *US - Carbon Steel*:

The requirements of precision in the request for the establishment of a panel flow from the two essential purposes of the terms of reference. First, the terms of reference define the scope of the dispute. Secondly, the terms of reference, and the request for the establishment of a panel on which they are based, serve the due process objective of notifying the parties and third parties of the nature of a complainant's case. When faced with an issue relating to the scope of its terms of reference, a panel must scrutinize carefully the request for establishment of a panel "to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU".¹²

3.4. It is well established that the adequacy of the panel request must be assessed on a case-by-case basis, depending on the merits of each case, having considered the panel request as a whole.¹³ However:

Defects in the request for the establishment of a panel cannot be "cured" in the subsequent submissions of the parties during the panel proceedings. Nevertheless, in

⁹ Morocco's preliminary ruling request, para. 50.

¹⁰ Tunisia's reply to Morocco's preliminary ruling request, para. 8.3.

¹¹ Tunisia's reply to Morocco's request for a preliminary ruling, footnote on page 1.

¹² Appellate Body Report, *US - Carbon Steel*, para. 126 (fns omitted)

¹³ Appellate Body Report, *US - Carbon Steel*, para. 127 (referring to Appellate Body Report, *Korea - Dairy*, paras. 124-127).

considering the sufficiency of a panel request, submissions and statements made during the course of the panel proceedings, in particular the first written submission of the complaining party, may be consulted in order to confirm the meaning of the words used in the panel request and as part of the assessment of whether the ability of the respondent to defend itself was prejudiced.¹⁴

3.5. Article 6.2 imposes two obligations on the complaining party regarding the formulation of its claims in the panel request. The request shall (i) identify "the specific measures at issue" and (ii) provide "a brief summary of the legal basis of the complaint sufficient to present the problem clearly". Moreover, "while the summary of the legal basis may be 'brief', the degree of brevity that is permissible under Article 6.2 is a function of its clarity in presenting the problem".¹⁵ In particular, the complaining party must "plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed".¹⁶

3.6. The Appellate Body has clarified the meaning of this obligation on several occasions:

[W]hat is sufficient to "plainly connect" the measure with the provision of the covered agreements claimed to have been infringed will also depend on the circumstances of each case. Such circumstances may include the nature of the measure at issue and the manner in which it is described in the panel request, as well as the nature of the provision of the covered agreements alleged to have been breached. In addition, a panel request need only provide the "legal basis of the complaint", that is, the *claims* underlying this complaint and not the *arguments* in support thereof.¹⁷

3.7. Thus, if a complainant includes certain *arguments* in its panel request, "these arguments should not be interpreted to narrow the scope of the measures or the claims".¹⁸

3.2 Whether the "claims" relating to (i) the distribution cost, (ii) the exclusion from the calculation of the profit margin of certain costs and expenses that are not part of the product price, and (iii) the mathematical formulas used to calculate the margin of dumping, are "missing" from the request for the establishment of a panel.

3.2.1 Summary of parties' arguments

3.2.1.1 Morocco

3.8. Morocco asks the Panel to rule that the three "claims missing" from the panel request do not comply with Article 6.2 of the DSU.¹⁹

3.9. Morocco notes that Tunisia's first written submission contains a section 5.3 which states that "the MIICEN acted inconsistently with Articles 2.1 and 2.2 of the Anti-Dumping Agreement by including the 'distribution cost' in the reconstructed normal value of most of the types of SOTEFI exercise books".²⁰ However, Morocco asserts that this claim is not included in the panel request.

3.10. Morocco also contends that Tunisia's first written submission includes, in section 5.2.3, a claim of inconsistency with Articles 2.1, 2.2 and 2.2.2 of the Anti-Dumping Agreement on the grounds that, when calculating the profit margin, the investigating authority did not exclude administrative

¹⁴ Appellate Body Report, *US - Carbon Steel*, para. 127.

¹⁵ Appellate Body Report, *Korea - Pneumatic valves (Japan)*, para. 5.6.

¹⁶ Appellate Body Report, *Korea - Pneumatic valves (Japan)*, para. 5.6.

¹⁷ Appellate Body Report, *Korea - Pneumatic valves (Japan)*, para. 5.6. (fns omitted; emphasis in the original)

¹⁸ Appellate Body Report, *EC - Selected Customs Matters*, para. 153. In *Korea - Pneumatic valves (Japan)*, the Appellate Body recalled the difference between claims and arguments: "claims [pertain] to a specific provision of a covered agreement, that is, an allegation that 'the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision'". Meanwhile, "arguments" are "statements put forth by a complaining party 'to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision'". (Appellate Body Report, *Korea - Pneumatic valves (Japan)*, para. 5.31)

¹⁹ Morocco's preliminary ruling request, sections B.1, B.3 and B.4

²⁰ Morocco's preliminary ruling request, para. 11.

costs and certain expenses that are not part of the product price. Again, Morocco asserts that this claim is not included in the panel request.²¹

3.11. Moreover, Morocco contends that Tunisia's first written submission includes (in section 5.4) a claim under Article 2.4 of the Anti-Dumping Agreement that was not made in the panel request. This claim concerns the "mathematical formulas used by MIICEN to calculate the margin of dumping".²²

3.2.1.2 Tunisia

3.12. Tunisia responds that these "claims" are in fact "arguments" made in support of claims brought in the panel request. Thus, according to Tunisia the two relevant claims are:

- a. The fact that the investigating authority "committed errors leading to the calculation of an artificially high normal value", in a manner that was incompatible with Articles 2.1, 2.2, 2.2.1.1 and 2.2.2 of the Anti-Dumping Agreement. Tunisia explains that this claim does appear in the panel request (in paragraph B.5) and that it was submitted in accordance with the provisions of Article 6:2 of the DSU.²³
- b. The fact that Morocco has infringed Article 2.4 of the Anti-Dumping Agreement and Article VI:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994) because "the investigating authority failed to make a fair comparison between the normal value and the export price". Tunisia explains that this claim does appear in the panel request (in paragraph B.6) and that it was submitted in accordance with the provisions of Article 6:2 of the DSU.²⁴

3.13. According to Tunisia, paragraph B.5 of the panel request is in conformity with the provisions of Article 6:2 of the DSU because it identifies (i) the specific measures at issue (the calculation of the reconstructed normal value)²⁵, and (ii) the legal basis of the claim (Articles 2.1, 2.2 and 2.2.2 of the Anti-Dumping Agreement). Furthermore, Tunisia maintains that paragraph B.5 of the panel request explains the "precise connection" between the specific measure at issue and the legal basis for the complaint (the fact that Morocco committed errors leading to the calculation of an artificially high normal value).²⁶

3.14. Tunisia adds that Morocco is confusing the *claim* set forth in the panel request and the *arguments* in support of this claim, including the issue of the distribution cost and the failure to exclude administrative costs and certain expenses.²⁷ Tunisia clarifies that paragraph B.5 contains a claim that the investigating authority "committed errors leading to the calculation of an artificially high normal value" and that its first written submission sets out three errors committed by Morocco. Tunisia contends that "the argument regarding the failure to exclude administrative costs and certain expenses from the profit margin serves to demonstrate that the profit margin used to calculate the constructed normal value was inflated".²⁸ It also asserts that "the argument concerning the inclusion of the distribution cost in the normal value calculation shows that MIICEN constructed an artificially high normal value".²⁹ Tunisia maintains that there is no obligation under the DSU requiring a complainant to include its *arguments* in its panel request.³⁰

3.15. With regard to the allegedly "missing" claim concerning the mathematical formulas, Tunisia replies that the claim under Article 2.4 of the Anti-Dumping Agreement is made in paragraph B.6 of the panel request.³¹ According to Tunisia, this paragraph contains: (i) the claim itself (the failure to make a fair comparison between the normal value and the export price, in contravention of Article VI:1 of GATT); and (ii) an argument in support of that claim (not making allowance for the physical

²¹ Morocco's preliminary ruling request, para. 29.

²² Morocco's preliminary ruling request, section 4.

²³ Tunisia's reply to Morocco's preliminary ruling request, section 3.

²⁴ Tunisia's reply to Morocco's preliminary ruling request, section 5.

²⁵ Tunisia's reply to Morocco's preliminary ruling request, paragraph 3.11.

²⁶ Tunisia's reply to Morocco's preliminary ruling request, paragraph 3.20.

²⁷ Tunisia's reply to Morocco's preliminary ruling request, paragraph 3.22.

²⁸ Tunisia's reply to Morocco's preliminary ruling request, paragraph 3.25.

²⁹ Tunisia's reply to Morocco's preliminary ruling request, paragraph 3.25.

³⁰ Tunisia's reply to Morocco's preliminary ruling request, paragraph 3.26.

³¹ Tunisia's reply to Morocco's preliminary ruling request, para. 5.1.

characteristics).³² Therefore, what Morocco contends is a "claim" regarding the mathematical formulas is actually an argument in support of the claim made in paragraph B.6 of the panel request.³³

3.16. Lastly, Tunisia considers that paragraph B.6 of its panel request would be compliant with the DSU insofar as it sets forth (i) the specific measure at issue (the failure to make a fair comparison); (ii) the claim's legal basis (Article 2.4 of the Anti-Dumping Agreement and Article VI:1 of GATT), which covers not only the question of adjustments, but also the calculation of the margins of dumping; and (iii) the explicit link between the measure and the obligation in question (the fact that Morocco would have infringed Article 2.4 by not making a fair comparison between the normal value and the export price).³⁴

3.2.2 Summary of the arguments of the third parties

3.17. In its comments on the preliminary ruling request, Canada supports Tunisia's position, stating that³⁵:

[T]his "claim", concerning the exclusion from the calculation of the profit margin of certain costs and expenses that are not part of the product price, is in fact an argument in support of the claim made in paragraph B.5 of the panel request, namely that the investigating authority committed errors leading to the calculation of an artificially high normal value. That Tunisia chose to submit, in the panel request, a potential argument in support of this claim does not in any way limit the scope of the claim or Tunisia's ability to submit further arguments in support of this claim.

3.18. Similarly, the European Union submits that:

[I]n its panel request, Tunisia does not simply list the provisions that it claims have been violated, but also indicates "why", in particular by referring to "errors leading to the calculation of an artificially high normal value". While the nature of these errors has not been specified in all instances, this does not appear to be required under Article 6.2 of the DSU. As far as the European Union is concerned, the description of the nature of the errors at issue seems, *a priori*, to provide a level of detail that goes beyond setting out the claim underpinning the complaint, and to fall within the category of arguments rather than claims.³⁶

3.19. With regard to the distinction between claims and arguments that do not necessarily have to be set forth in a panel request, Japan and the European Union draw the Panel's attention to the clarifications provided by the Appellate Body in *Korea - Pneumatic valves (Japan)*.³⁷

3.2.3 Evaluation by the Panel

3.20. We recall that Morocco does not ask us to rule on whether the claims, set forth in paragraphs B.5 and B.6 of the panel request, are made in accordance with Article 6:2 of the DSU. Morocco's request is limited to asking the Panel to rule that new claims are presented in the first written submission, which is not conformity with Article 6.2, and that these claims therefore fall outside the Panel's terms of reference.³⁸

³² Tunisia's reply to Morocco's preliminary ruling request, paras. 5.6 and 5.7.

³³ Tunisia's reply to Morocco's preliminary ruling request, paras. 5.19-5.22.

³⁴ Tunisia's reply to Morocco's preliminary ruling request, paras. 5.6, 5.10 and 5.18.

³⁵ Comments of Canada on Morocco's preliminary ruling request, para. 10. (fns omitted)

³⁶ Comments of the European Union on Morocco's preliminary ruling request, para. 9.

³⁷ Comments of Canada on Morocco's preliminary ruling request, para. 8; Comments of Japan on Morocco's preliminary ruling request, para. 2; and Comments of the European Union on Morocco's preliminary ruling request, para. 8.

³⁸ We note that Morocco states at the beginning of its request that "at least two claims in Tunisia's panel request fail to comply with the provisions of Article 6.2 of the DSU which require a brief summary of the legal basis of the complaint sufficient to present the problem clearly". (Morocco's preliminary ruling request, para. 2.) However, the two claims in question are not specified and section B of Morocco's request refers to five separate claims submitted by Tunisia. Meanwhile, Tunisia maintains that the "Panel could also consider, even in the absence of a specific challenge by Morocco, whether the claim set forth in paragraph B.5 of the panel

3.21. The disagreement between the parties relates to the content of the panel request, and specifically whether certain claims set forth by Tunisia are "missing" therefrom. To answer this question, we will now examine the text of the panel request in the light of Tunisia's first written submission.

3.22. We note that the request for the establishment of a panel comprises (in addition to the introduction and the panel request itself) two parts entitled "the measure at issue" and "legal basis for the complaint", respectively.

3.23. The "measure at issue" is "the definitive anti-dumping measure imposed on imports of school exercise books from Tunisia". The request also states that it "covers the anti-dumping duties, as well as all the documents forming part of the investigation record that led to the imposition of the measure at issue".³⁹ The reading of this section of the panel request therefore leaves no doubt as to the nature of the measure at issue.

3.24. With respect to the "legal basis for the complaint", Tunisia sets out 12 complaints against the measure at issue. Each complaint is set forth in a paragraph citing the relevant articles of the Anti-Dumping Agreement and of GATT 1994 and explaining the legal issue in a clause beginning with "because ...". It appears to us, therefore, that each of these 12 paragraphs contains a separate claim⁴⁰ and that the claims pertinent to Morocco's **preliminary ruling** request are those set forth in paragraphs B.5 and B.6 of the panel request.

3.25. Having identified the measure at issue and the claims set out in Tunisia's panel request, we will analyse whether the complaints that Morocco presents as new claims (i.e. that cannot be linked to claims set forth in paragraphs B.5 and B.6) are actually "missing" or whether, as argued by Tunisia, they are made in support of those claims, in which case they do not necessarily have to be included in the panel request.

3.26. We first consider whether the complaints relating to the distribution cost and the exclusion of administrative costs and certain expenses that are not part of the product price are new claims.

3.2.3.1 Complaints relating to distribution cost and the exclusion of administrative costs and certain expenses that are not part of the product price

3.27. Morocco considers that "the text [of paragraph B.5] clearly has nothing to do ... with the disputed inclusion of the 'distribution cost' in the calculation of the reconstructed normal value" nor with "the exclusion from the calculation of the profit margin of administrative costs and certain expenses that are not part of the product price".⁴¹ Accordingly, Morocco considers that these two new "claims" are not within the Panel's terms of reference.

3.28. We recall that the text of paragraph B.5, in which Tunisia claims that the measure at issue infringes Morocco's obligations, and specifically:

Articles 2.1, 2.2, 2.2.1.1 and 2.2.2 of the Anti-Dumping Agreement and Article VI:1 of GATT 1994, because the investigating authority committed errors leading to the calculation of an artificially high normal value. In particular, but not limited to the fact that, when reconstructing the normal value, the authority failed to take into account all the sales made in Tunisia for the calculation of the profit margin.

3.29. We are not convinced by Morocco's contention that this paragraph has "nothing to do" with the claims concerning the distribution cost and the exclusion of administrative costs and certain expenses that are not part of the product price. We recall that in order to clarify the meaning of the terms used in the panel request, the Panel may consult the text of the complaining party's first written submission.⁴² Thus, sections 5.2.3 and 5.3 of Tunisia's first written submission are part of

request satisfies the conditions of Article 6.2 of the DSU". (Reply to Morocco's preliminary ruling request, para. 3.39).

³⁹ Tunisia's panel request, p. 1.

⁴⁰ The claim under Articles 3.1 and 3.2 of the Anti-Dumping Agreement in paragraph B.7 of Tunisia's panel request is divided into several subparagraphs numbered (a) to (c).

⁴¹ Morocco's preliminary ruling request, paras. 19 and 31.

⁴² Appellate Body Report, *US - Carbon Steel*, para. 127

section 5 on "claims relating to the determination of dumping". The introduction to section 5 states that Tunisia "presents two claims". The first claim is worded as follows:

Firstly, MIICEN incorrectly calculated the profit margin of Tunisian exporters when constructing the normal value, which is inconsistent with Articles 2.1, 2.2 and 2.2.2 of the Anti-Dumping Agreement. In fact, MIICEN incorrectly included in the profit margin, in addition to ordinary profits, administrative costs, as well as certain expenses that are not part of the ex-factory price... Moreover, MIICEN excluded valid sales in the Tunisian market from the calculation of the profit margin. Furthermore, MIICEN acted in a manner inconsistent with Articles 2.1 and 2.2 by incorrectly including the distribution cost in the reconstructed normal value for most of the types of SOTEFI exercise books.⁴³

3.30. This paragraph therefore relates to the conformity of the normal value constructed by the investigating authority with Articles 2.1, 2.2 and 2.2.2.⁴⁴

3.31. Section 5.2 of Tunisia's first written submission addresses the calculation of an incorrect profit margin and Tunisia sets forth "two arguments" in support of this claim:

Firstly, MIICEN calculated the profit margin incorrectly by failing to exclude from the calculation of the profit margin administrative costs and certain expenses that are not part of the product price. Secondly, MIICEN excluded, wrongly, the sales of numbered and watermarked exercise books from the profit margin used for the constructed normal value.⁴⁵

3.32. Lastly, section 5.3 addresses the inclusion of the "distribution cost" in the reconstructed normal value of most of the SOTEFI models. The conclusion of this section states that:

MIICEN acted inconsistently with Article 2.2 of the Anti-Dumping Agreement by including in the construction of the normal value of certain types of SOTEFI exercise books the "distribution cost", covering the cost of domestic transport, port charges and shipping costs, even though these costs and expenses are not part of an appropriate normal value, as provided for in Article 2.2. In addition, MIICEN acted in a manner inconsistent with Article 2.1 of the Anti-Dumping Agreement by calculating an inflated margin of dumping as a result of the incorrectly calculated normal value.⁴⁶

3.33. Comparing the panel request and Tunisia's first written submission therefore confirms that the *claim* at issue is that set forth in paragraph B.5 of the panel request (errors in the establishment of the normal value in contravention of Articles 2.1, 2.2 and 2.2.2). This claim is divided into several subsections, including in particular *the inclusion of the distribution cost* in the normal value and *the inclusion in the profit margin*, in addition to the ordinary profits, of administrative costs, as well as certain expenses that are not part of the ex-factory price.

3.34. Therefore, we do not share Morocco's view that "the text [of paragraph B.5] clearly has nothing to do ... with the disputed inclusion of the 'distribution cost' in the calculation of the reconstructed normal value" nor with "the exclusion from the calculation of the profit margin of administrative costs and certain expenses that are not part of the product price". On the contrary, Tunisia's first written submission shows that these two complaints are arguments that support the claim set forth in the panel request.

3.35. In light of the foregoing, we find that Morocco has failed to demonstrate that the complaints concerning the distribution cost and the exclusion of administrative costs and certain expenses from the calculation of the profit margin are "claims" missing from the panel request.

⁴³ Tunisia's first written submission, para. 5.2.

⁴⁴ See also Tunisia's first written submission, para. 519.

⁴⁵ Tunisia's first written submission, para. 5.19.

⁴⁶ Tunisia's first written submission, para. 5.87.

3.2.3.2 Complaint relating to the mathematical formula for calculating the margin of dumping

3.36. We now turn to Morocco's contention that the complaint relating to the mathematical formula for calculating the margin of dumping is a new claim that is not within the Panel's terms of reference.

3.37. We note that Tunisia's panel request does include, in paragraph B.6, a claim under Article 2.4 of the Anti-Dumping Agreement that Morocco breached its obligation:

Article 2.4 of the Anti-Dumping Agreement and Article VI:1 of GATT 1994, because the investigating authority failed to make a fair comparison between the normal value and the export price, by not making allowance, in particular, for all the physical characteristics affecting price comparability that were cited by the exporters;

3.38. Tunisia states that its first written submission sets forth "two arguments" in support of the claim that "MIICEN acted in a manner inconsistent with the obligation under Article 2.4 of the Anti-Dumping Agreement to make a 'fair comparison' between the normal value and the export price".⁴⁷

3.39. The first argument relates to the choice of the numerator and denominator of the formula used to calculate the margin of dumping. The second argument concerns the rejection by MIICEN of a request for adjustment based on a characteristic affecting price comparability (the use of licences). It is therefore clear from reading these documents that, according to Tunisia, the complaint concerning the mathematical formulas for calculating the margin of dumping is an argument in support of the claim made in the panel request.

3.40. Tunisia recalls⁴⁸ that the obligation under Article 2.4 of the Anti-Dumping Agreement to make a fair comparison between the normal value and the export price relates not only to the question of adjustments, but also to the issue of the margin of dumping calculation. Thus, Article 2.4.2 determines the methods for establishing the margins of dumping "[s]ubject to the provisions governing *fair comparison in paragraph 4*".⁴⁹ Similarly, other panels and the Appellate Body have confirmed that the obligation to make a "fair comparison" is applicable to the calculation of margins of dumping.⁵⁰ Contrary to Morocco's assertion⁵¹, there is therefore no doubt that an argument concerning the calculation of the margin of dumping could support a claim of violation of Article 2.4 of the Anti-Dumping Agreement.

3.41. We understand that the first part of paragraph B.6 of the panel request contains a claim ("Article 2.4 of the Anti-Dumping Agreement and Article VI:1 of GATT 1994, because the investigating authority failed to make a fair comparison between the normal value and the export price"). The second part of the sentence ("by not making allowance, in particular, for all the physical characteristics ...") serves, in our view, to explain how the investigating authority violated the relevant obligations and, therefore, constitutes an argument rather than an integral part of the claim. We consider that the fact that Tunisia included one argument (out of two) in its panel request cannot have the effect of restricting the scope of the claim set forth in paragraph B.6. Furthermore, Article 6:2 of the DSU does not require Tunisia to include in its request the second argument concerning the mathematical formulas used to calculate the margin of dumping.

⁴⁷ Tunisia's first written submission, para. 5.88.

⁴⁸ Tunisia's reply to Morocco's preliminary ruling request, paras. 5.13 and 5.14.

⁴⁹ Emphasis added.

⁵⁰ For example, the Panel in *US - Zeroing (EC)* found that "the obligation to make a fair comparison is not limited to the issue of how to ensure price comparability by selecting comparable transactions or making appropriate adjustments but also applies to the issue of the calculation of margins of dumping within the meaning of Article 2.4.2 of the Anti-Dumping Agreement". (Report of the Panel, *US - Zeroing (EC)*, para. 7.258). The Appellate Body upheld the panel's finding. (Appellate Body Report, *US - Zeroing (EC)*, para. 146).

⁵¹ Morocco's preliminary ruling request, para. 38.

3.42. In light of the foregoing, and bearing in mind what Morocco asked of us in its preliminary ruling request⁵², we conclude that Morocco has not demonstrated that the complaint relating to the mathematical formulas is a "claim" missing from the panel request.

3.3 Whether the legal basis of the "claim" relating to the exclusion of domestic sales, as set forth in the panel request, is different to that given in Tunisia's first written submission

3.3.1 Summary of parties' arguments

3.43. Morocco submits that there is an inconsistency between the panel request and Tunisia's first written submission, because the latter (under section 5.2.4) refers to Articles 2.1, 2.2 and 2.2.2 of the Anti-Dumping Agreement, whereas the request refers (in paragraph B.3) to Articles 2.1, 2.2 and 2.2.1. According to Morocco, the claim under Article 2.2.2 of the Anti-Dumping Agreement is "missing entirely from the panel request".⁵³

3.44. Tunisia responds that the issue of the exclusion of sales of numbered or watermarked exercise books is "an argument" that "serves to support the claim" set forth in paragraph B.5 of the panel request, "that MIICEN acted in a manner inconsistent with Articles 2.1, 2.2 and 2.2.2 of the Anti-Dumping Agreement".⁵⁴ Tunisia maintains that the issue of excluding certain types of exercise books by the investigating authority is explicitly referred to in paragraph B.5 of the panel request.

3.3.2 Evaluation by the Panel

3.45. We begin by noting that the issue of excluding domestic sales in Tunisia is explicitly included in the description of the "first claim" under Articles 2.1, 2.2 and 2.2.2, in section 5 of Tunisia's first written submission ("in addition, MIICEN excluded valid sales in the Tunisian market from the calculation of the profit margin").⁵⁵

3.46. We further note that the issue of domestic sales in Tunisia is referred to explicitly in paragraph B.5 of the panel request, in support of the claim set forth in that paragraph that "the investigating authority committed errors leading to the calculation of an artificially high normal value".

3.47. Since paragraph B.5 refers to Article 2.2.2 of the Anti-Dumping Agreement among other provisions, it follows that, contrary to Morocco's assertions, Tunisia's first written submission does refer to the same legal basis as the panel request.

3.48. In light of the foregoing, we find that Morocco has not demonstrated that the complaint concerning the exclusion of domestic sales in Tunisia is a "claim" missing from the panel request or that it is based on a legal provision that is not cited in the panel request.

3.4 Whether the wording of Tunisia's claims concerning the analysis of sales price depression and price suppression is too vague

3.4.1 Summary of parties' arguments

3.49. Morocco contends that the claims set forth in the panel request relating to the investigating authority's determination of injury are worded using "catch-all terms" that do not meet the criteria of Article 6:2 of the DSU.⁵⁶

3.50. Morocco refers to paragraph B.7 of the panel request and specifically paragraph B.7.c⁵⁷, which alleges a violation of "Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles VI:1 and VI:6(a) of GATT 1994 because, among other things":

⁵² Morocco asks the Panel to rule that "the claims relating to the mathematical formulas used by Morocco to calculate the margin of dumping [in violation of] Article 2.4 are missing from the panel request". (Morocco's preliminary ruling request, section II.4) (emphasis added).

⁵³ Morocco's preliminary ruling request, para. 24.

⁵⁴ Tunisia's reply to Morocco's preliminary ruling request, paras. 3.37 and 3.40.

⁵⁵ Tunisia's first written submission, para. 5.2.

⁵⁶ Morocco's preliminary ruling request, para. 46.

⁵⁷ Morocco's preliminary ruling request, para. 41.

[T]he analysis regarding sales price depression and price suppression is not based on positive evidence and does not involve an objective examination.

3.51. In particular, Morocco considers that the panel request should have specified "why and how" the analysis at issue is not based on "positive evidence" and does not involve "an objective examination".⁵⁸

3.52. Tunisia responds that its panel request does comply with the provisions of Article 6:2 of the DSU, insofar as it sets forth (a) the specific measure at issue (the anti-dumping measure at issue based on the MIICEN analyses of sales price depression and price suppression); (b) the legal basis of the complaint (Articles 3.1 and 3.2 of the Anti-Dumping Agreement); and (c) an explicit link between the challenged measure and the alleged violation (paragraphs 7.a-7.c).⁵⁹ Tunisia considers that requiring a complaining party to explain in its panel request "why and how" the measure at issue violates the cited obligation would be "contrary to Article 6.2 of the DSU". Tunisia asserts that:

Insofar as the complaining party identifies the relevant aspect of the measure, specifies the obligation (distinct and well delineated) and explicitly establishes the link between the two, the claim shall meet the legal standard of Article 6.2 of the DSU.⁶⁰

3.4.2 Summary of the arguments of the third parties

3.53. The United States addresses Morocco's assertion that Tunisia should have explained "how and why" the measure at issue is inconsistent with Morocco's obligations. In this regard, the United States maintains that neither of the terms "why" and "how" appears in Article 6.2 and considers that Morocco's request should be examined in the light of the explicit requirement in Article 6.2, namely that the complaining party shall provide in the request for the establishment of a panel a "brief summary of the legal basis of the complaint sufficient to present the problem clearly".⁶¹ The United States adds that Article 6.2 does not require the complaining party to present its arguments in the panel request and that, according to the provisions of Appendix 3 of the DSU, the complaining party should instead present its arguments in its written submissions.⁶²

3.4.3 Evaluation by the Panel

3.54. Article 6.2 requires that the request for the establishment of a panel "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". We understand that in this case, Morocco specifically denounces the lack of an "explicit link" between the measure at issue and the alleged violation. We therefore examine whether paragraph B.7.c of the panel request satisfies the requirements of Article 6.2.

3.55. We note that this paragraph of the panel request refers to both Articles 3.1 and 3.2 of the Anti-Dumping Agreement (as well as Articles VI:1 and VI:6(a) of GATT 1994) and thus identifies the provisions of the covered agreements alleged to have been breached. Articles 3.1 and 3.2 of the Anti-Dumping Agreement together establish a distinct, well-delineated obligation that determinations of the effect of the dumped imports on the price of a like product of the importing Member shall be based on positive evidence and involve an objective examination.

3.56. Furthermore, Tunisia's claim states that it relates specifically to the section of the measure at issue concerning the analysis of price depression and of price suppression. With regard to the explicit link between the relevant provisions and the measure at issue, it is our view that Tunisia has clearly presented how the measure at issue is inconsistent with Articles 3.1 and 3.2 by explaining that the analysis relating to sales price depression and price suppression is not based on positive evidence and did not involve an objective examination.⁶³

⁵⁸ Morocco's preliminary ruling request, para. 42.

⁵⁹ Tunisia's reply to Morocco's preliminary ruling request, paras. 6.6-6.10.

⁶⁰ Tunisia's reply to Morocco's request for preliminary ruling, para. 2.16.

⁶¹ Comments of the United States on Morocco's preliminary ruling request, paras. 4-6 and 10.

⁶² Comments of the United States on Morocco's preliminary ruling request, para. 6 (referring to para. 4 of Appendix 3 of the DSU).

⁶³ We note that the Appellate Body in *Korea - Pneumatic valves (Japan)* followed a similar approach with respect to Japan's claim based on Articles 3.1 and 3.2 of the Anti-Dumping Agreement. The relevant section of

3.57. We understand that by denouncing the failure to explain "how and why", Morocco is criticizing Tunisia for not setting out in sufficient detail its specific allegations regarding the analysis of price depression and of price suppression in the panel request. However, in our view, demanding this level of detail would go beyond that required by Article 6.2. In this connection, the Appellate Body has specified that "the reference to the phrase 'how or why' in certain past disputes does not indicate a standard different from the requirement that a panel request include a 'brief summary of the legal basis ... sufficient to present the problem clearly' within the meaning of Article 6.2 of the DSU".⁶⁴

3.58. It therefore follows that, contrary to Morocco's assertion, paragraph B.7.c of Tunisia's panel request contains "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" within the meaning of Article 6.2 of the DSU. In light of the foregoing, we reject Morocco's request on this point and confirm that the claim at issue falls within the Panel's terms of reference.

3.5 Morocco's requests concerning claims that have been "dropped" and "have no chance of being upheld"

3.59. We recall that Morocco asks the Panel to exclude from its jurisdiction certain claims that Tunisia appears to have dropped from its first written submission.⁶⁵ In this regard, we note Tunisia's confirmation that it has dropped the claims that were not expanded on in its first written submission, with the exception of the claim under Article 5.8 of the Anti-Dumping Agreement, set forth in section 8 and paragraph 9.1.(h) of Tunisia's first written submission.⁶⁶

3.60. Morocco also asks the Panel to exclude from its jurisdiction Tunisia's claim that MIICEN acted in a manner inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing "to objectively consider the volume of imports in relative terms" because that claim had no chance of being upheld.⁶⁷ Tunisia responds that this request by Morocco encapsulates the essence of Tunisia's case and it would therefore be "inappropriate for such a substantive matter to be the subject of a preliminary determination".⁶⁸ We consider that the issue of whether the examination of the volume of imports in relative terms undertaken by MIICEN may be inconsistent with the obligation set forth in Articles 3.1 and 3.2 of the Anti-Dumping Agreement is a matter that should be examined in conjunction with other substantive issues raised in this dispute.⁶⁹ Accordingly, the Panel reserves its answer and will address to the points raised by Morocco in its final report.

4 CONCLUSION

4.1. For the reasons set out in this preliminary ruling, we find that:

- a. Tunisia's complaints relating to (i) the distribution cost, (ii) the exclusion from the calculation of the profit margin of certain costs and expenses that are not part of the ex-factory product price, and (iii) the exclusion of certain domestic sales, are not "claims

Japan's panel request argued that Korea's measure imposing the anti-dumping duties on pneumatic valves from Japan was inconsistent with Korea's obligations under "[a]rticles 3.1 and 3.2 of the [Anti-Dumping] Agreement because Korea's analysis of a significant increase of the imports under investigation did not involve an objective examination based on positive evidence". The Appellate Body found that this argument met the criteria of Article 6:2 of the DSU. (Appellate Body Report, *Korea - Pneumatic valves (Japan)*, paras. 5.65-5.79).

⁶⁴ Appellate Body Report, *Korea - Pneumatic valves (Japan)*, para. 5.12.

⁶⁵ Morocco's preliminary ruling request, paras. 9(a), 47-49.

⁶⁶ Tunisia's reply to Morocco's request for a preliminary ruling, footnote on page 1.

⁶⁷ Morocco's preliminary ruling request, paras. 9 (b) and 50-53.

⁶⁸ Tunisia's reply to Morocco's preliminary ruling request, para. 8.3. Similarly, Canada submits that "the Panel's preliminary rejection of a claim otherwise included in the panel request and that is the subject of arguments in Tunisia's first written submission would be contrary to Article 11 of the DSU. Therefore, this claim should not be the subject of a preliminary ruling by the Panel as requested by Morocco". (Comments of Canada on Morocco's preliminary ruling request, para. 15). Japan and the European Union are also in favour of such an approach. (Comments of Japan on Morocco's preliminary ruling request, para. 6; and Comments of the European Union on Morocco's preliminary ruling request, para. 13).

⁶⁹ Similarly, the Appellate Body observed in *Australia - Apples* that "the question of whether the measures identified in the panel request can violate, or cause the violation of, the obligation in Annex C(1)(a) and Article 8 is a substantive issue to be addressed and resolved on the merits". The Appellate Body therefore criticized the fact that the panel chose to stop its analysis at the jurisdictional stage. (Appellate Body Report, *Australia - Apples*, para. 425).

missing" from Tunisia's panel request and are therefore not presented in violation of Article 6.2 of the DSU.

- b. Tunisia's complaint relating to the mathematical formulas used to calculate the margin of dumping is not a "claim missing" from Tunisia's panel request and is therefore not presented in violation of Article 6.2 of the DSU.
- c. Subparagraph (c) of the claim set forth in paragraph B.7 of Tunisia's panel request does comply with the requirements of Article 6.2 of the DSU, and thus falls within a Panel's terms of reference.

ANNEX A-4

INTERIM REVIEW

1 INTRODUCTION

1.1. This annex to the Panel Report sets out our responses to the requests and comments made by the parties during the interim review stage, as provided for under Article 15.3 of the DSU.

1.2. With regard to certain requests, we were guided by the consideration that the descriptions of the parties' arguments in our Report are not intended to reflect the entirety of the parties' arguments. Rather, they focus on the principal points we considered relevant to the resolution of this dispute. In this respect, we recall that "a panel ha[s] the discretion to address only those arguments it deems necessary to resolve a particular claim".¹ We further note that the executive summaries of the arguments of the parties are set out in Annexes B1 and B2. Those summaries have been prepared by the parties themselves and therefore have provided the parties with the full opportunity to reflect their arguments as they see fit.

1.3. Furthermore, consistent with the approach of previous panels, we consider it to be inappropriate for the parties to re-argue, at the interim review stage, arguments already put before a panel.²

1.4. Where appropriate, we have modified aspects of the Report in the light of the parties' requests and comments. Due to changes as a result of our review, the numbering of the paragraphs and footnotes in the Final Report has changed from the Interim Report. The text below refers to the numbers in the Interim Report, with the numbers in the Final Report in parentheses, if different, for ease of reference.

1.5. In addition to the modifications specified below, we have also corrected a number of typographical errors throughout the Report.

2 MOROCCO'S SPECIFIC REQUESTS FOR REVIEW

2.1. Morocco has not submitted any request for review of the Interim Report.

3 TUNISIA'S SPECIFIC REQUESTS FOR REVIEW

3.1 Paragraphs 7.58, 7.85, 7.106 and 7.183

3.1. Tunisia first requests that we modify our conclusions in paragraphs 7.58, 7.85, 7.106 and 7.183, according to which Tunisia failed to establish what Morocco's obligations are under Article 2.1 of the Anti-Dumping Agreement, or how those obligations have been violated as a result of the errors committed by MIICEN when establishing a reasonable amount for profit, when establishing normal value and in the mathematical formula used to calculate the margin of dumping. Tunisia considers that its responses to Panel questions Nos. 1.26 and 1.29 explain the specific obligation under Article 2.1 and why MIICEN did not have a "valid factual basis" to find that the exercise books should be considered as being dumped.³ "Alternatively", Tunisia requests that we apply "the principle of judicial economy" to its claim under Article 2.1.⁴

3.2. For its part, Morocco requests that we do not modify our reasoning with regard to Tunisia's claims under Article 2.1 nor our Report.⁵

3.3. Tunisia's argument, as we understand it, is therefore that an authority that committed an error when establishing normal value or when calculating the margin of dumping does not have a "valid factual basis" to find that a product "is to be considered as being dumped" within the meaning of

¹ Appellate Body Reports, *EC - Poultry*, para. 135; *US - COOL*, para. 414.

² Panel Reports, *EU - Fatty Alcohols (Indonesia)*, para. 6.5; *Japan - DRAMs (Korea)*, para. 6.2; *US - Poultry (China)*, para. 6.32; and *India - Agricultural Products*, para. 6.5.

³ Tunisia's request for interim review, para. 2.2.

⁴ Tunisia's request for interim review, para. 2.3.

⁵ Morocco's comments on Tunisia's request for interim review, para. 16.

Article 2.1. From this perspective, a panel finding a violation of another provision of Article 2 of the Anti-Dumping Agreement could also find a "consequential" violation of Article 2.1.

3.4. We recall that Article 2.1 reads as follows:

For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

3.5. This provision sets out positively when a product is to be considered as being dumped: when its export price is less than its normal value. The use of the verb "*devoir*" in the first sentence of Article 2.1 in the French text of the Anti-Dumping Agreement is not sufficient, in our opinion, to establish an obligation on a Member.⁶ Explaining, in its responses to the Panel's questions, that "Article 2.1 contains the general requirement for the calculation of the margin of dumping"⁷ and "that a product 'is to be considered as being dumped' when its normal value is higher than its export price"⁸, Tunisia sets out a definition but fails to establish what Morocco's obligation was under Article 2.1 in this case, nor how that obligation was violated by Morocco. For that reason, we reject Tunisia's request that paragraphs 7.58, 7.85, 7.106 and 7.183 be amended.

3.2 Paragraphs 7.121-7.125, 7.128, 7.129 and 8.1.c.i.

3.6. Tunisia then requests that we clarify in our Final Report that its argument regarding the impact of licenses on price comparability does not concern SOTEFI's possible request for an adjustment, but rather the typology established by MIICEN to classify the exercise books by model. In that regard, Tunisia would like the Report to indicate that SOTEFI "responded to all MIICEN's requests relating to the *classification of the exported product*".⁹

3.7. In particular, Tunisia asks that we include in our Report a reference to MIICEN's written request sent to Tunisian producers/exporters on 4 May 2018, seeking to clarify with which type of cover ("varnished or not, laminated, cardboard, under licence, etc.") the exercise books were sold in the domestic market and for export to Morocco. The purpose of MIICEN's request was a possible revision of the classification used "by adding cover criteria".¹⁰

3.8. Morocco considers that Tunisia's comments constitute an attempt to relitigate arguments already discussed and resolved by the Panel. Morocco therefore asks us to reject Tunisia's request.¹¹

3.9. In order to accurately reflect all of the requests sent by MIICEN to the exporters, we have decided to include a reference to MIICEN's written request in paragraph 7.120 of our Report, which now reads as follows:

c. Lastly, on 4 May 2018, MIICEN requested SOTEFI to revise "the classification used" for domestic sales and for sales to Morocco "by adding cover criteria (varnished or not, laminated, cardboard, under licence, etc.)".^[168]

¹⁶⁸ Email dated 4 May 2018 (Exhibit TUN-72).

3.10. However, we do not see any reason to amend paragraph 7.121, which specifically describes SOTEFI's response to that request, in the form of revised spreadsheets distinguishing which exercise books were sold under licence and which exercise books were sold without a licence. Nevertheless, for our findings to respond to Tunisia's specific argument on price comparability, we have amended the last sentence of paragraph 7.124, which also refers to those spreadsheets by indicating:

⁶ In fact, the verb "*devoir*" ("must") is not used in the English and Spanish versions of the text.

⁷ Tunisia's response to Panel question No. 2.9, para. 68.

⁸ Tunisia's response to Panel question No. 1.26, para. 23.

⁹ Tunisia's request for interim review, para. 2.5. (emphasis original)

¹⁰ Email dated 4 May 2018 (Exhibit TUN-72).

¹¹ Morocco's comments on Tunisia's request for interim review, para. 17.

Similarly, the revised electronic spreadsheet submitted to MIICEN by SOTEFI does refer to which exercise book models are sold under licence, but does not **demonstrate how that difference affected price comparability**.¹²

3.11. We also do not consider it relevant to indicate, as Tunisia requests, that SOTEFI "responded to all MIICEN's requests relating to the *classification of the exported product*".¹³ As we stated in our Report, "we are not convinced that how an authority decides to make allowances for differences affecting price comparability (by developing a typology of different models or by making adjustments) changes the burden of proof falling on the authority and the interested parties, respectively".¹⁴ The authority only has "to make allowance" for a possible difference if it is demonstrated that this difference exists and that it affects price comparability. In this case, the information requested by MIICEN was reasonable and relevant both to demonstrating the difference that existed between the exercise books under licence and the exercise books sold without a licence, and to demonstrating how this difference affects price comparability (actual expenditure, market value of the adjustment and corresponding references in the company's accounts).

3.12. For this reason, we decline Tunisia's request to revise paragraph 7.124 of our Report. We also decide to uphold our conclusion, reflected in paragraph 7.126 of our Report, according to which "SOTEFI never provided the information requested by MIICEN and therefore failed to 'demonstrate' that licences affected price comparability within the meaning of Article 2.4 of the Anti-Dumping Agreement".¹⁵ To clarify our conclusion with regard to that claim by Tunisia, we have amended paragraph 8.1.c. of our Report as follows:

Article 2.4 of the Anti-Dumping Agreement, because MIICEN did not accept to make allowance for licences as a difference affecting price comparability.

3.3 Section 7.3.2

3.13. With regard to the claim under Articles 3.1 and 3.2 of the Anti-Dumping Agreement concerning the examination of the volume of Tunisian imports of exercise books compared to domestic production and to domestic consumption, Tunisia notes that the Panel resorted to judicial economy.¹⁶ Tunisia requests us either to find that the underlying facts of this claim are not contested by the parties, or to make the necessary factual findings that could help the Appellate Body to complete the legal analysis should it disagree with our decision.¹⁷

3.14. Morocco objects to Tunisia's request and asks us to not modify our Report on this point.¹⁸

3.15. We note that Tunisia is not contesting our decision to apply judicial economy to that claim.¹⁹ We consider that MIICEN's report on the definitive determination contains the relevant facts and data underpinning its consideration of the volume of Tunisian imports in relative terms. In our opinion, the additional factual findings requested by Tunisia are therefore not necessary to rule on this claim. That being said, we have added in footnote 344 (345) a clarification regarding the data on which MIICEN based its analysis.

3.4 Paragraph 7.253

3.16. Tunisia considers that paragraph 7.253 reflects its position but does not mention its specific arguments nor Morocco's position on those arguments. Tunisia requests us to amend this paragraph by including a summary of Tunisia's arguments and Morocco's position.²⁰ Morocco requests that we do not amend this paragraph because the parties' arguments are adequately reflected in the executive summaries prepared by the parties and because, according to

¹² Footnote omitted.

¹³ Tunisia's request for interim review, para. 2.5. (emphasis original)

¹⁴ Paragraph 7.128 of the Interim Report.

¹⁵ Footnote omitted.

¹⁶ Tunisia's request for interim review, para. 2.14.

¹⁷ Tunisia's request for interim review, paras. 2.15 and 2.16.

¹⁸ Morocco's comments on Tunisia's request for interim review, paras. 26 and 27.

¹⁹ Tunisia's request for interim review, paras. 2.14-2.16.

²⁰ Tunisia's request for interim review, para. 2.17.

Morocco, it would not be appropriate to include a summary of Morocco's arguments at Tunisia's request.²¹

3.17. We consider that this paragraph summarizes Tunisia's position succinctly, while footnotes 334 to 336 refer to the paragraphs of the parties' written submissions that contain their specific arguments. For that reason, we do not consider the amendments suggested by Tunisia to be necessary.

3.5 Paragraph 7.308

3.18. Tunisia notes that we have not addressed its argument that MIICEN disregarded the fact that many injury factors evolved positively.²² Without contesting that approach, Tunisia requests us to make the necessary factual findings that could help the Appellate Body to review that argument in the event of an appeal. In particular, Tunisia requests us to find that "production, productive capacity, employment, wages, domestic sales, market share and investments evolved positively".²³

3.19. We note that data on the domestic industry's productive capacity, staff assigned to exercise book production, productivity, wages and investments are not disputed by the parties. We therefore do not see any reason to analyse these factors' trends.

3.20. With regard to developments in the domestic industry's production, domestic sales and market share, paragraphs 7.272 and 7.283 of the Report reflect the relevant data considered by MIICEN.

3.6 Paragraphs 7.333 and 7.334

3.21. Tunisia argues that the investigation record contains information demonstrating that Imprimerie Moderne sold exercise books in the Moroccan market and therefore competed with the domestic industry.²⁴ Tunisia requests us to amend the sentences "because the record does not demonstrate whether this producer sold its exercise books in the Moroccan market or in export markets" (paragraph 7.333) and "the investigation record does not indicate where Imprimerie Moderne sold its exercise books" (paragraph 7.334) by taking into account the evidence that shows that Imprimerie Moderne made its sales in the Moroccan market.²⁵ Should these changes affect the reasoning and final finding on the non-attribution analysis under Article 3.5 of the Anti-Dumping Agreement, Tunisia requests us to make the necessary amendments.²⁶

3.22. Tunisia draws our attention to three elements in the record that, in its view, demonstrate that Imprimerie Moderne was a competitor in the Moroccan market. We shall examine each of these elements in turn.

3.23. First, Tunisia explains that, in their petition, the applicants accepted the fact that Imprimerie Moderne was a competitor in the Moroccan market²⁷:

It should be noted that the entry of a new producer of exercise books into the Moroccan market in 2015 is also unlikely to have caused any injury to the domestic industry, since that injury existed well before that new producer started its activities.

Consequently, no domestic competition among producers can break the causal link between dumped imports of the product under consideration from Tunisia and the injury suffered by the domestic industry.²⁸

3.24. Second, Tunisia recalls MIICEN's finding that Imprimerie Moderne was an importer of exercise books for a number of years before resuming production of exercise books in 2015. Tunisia deduces

²¹ Morocco's comments on Tunisia's request for interim review, para. 9.

²² Tunisia's request for interim review, para. 2.18.

²³ Tunisia's request for interim review, para. 2.19.

²⁴ Tunisia's request for interim review, paras. 2.22-2.25.

²⁵ Tunisia's request for interim review, para. 2.26.

²⁶ Tunisia's request for interim review, para. 2.26.

²⁷ Tunisia's request for interim review, paras. 2.22 and 2.23 (referring to Petition, (Exhibit MAR-9) paras. 141 and 142).

²⁸ Petition (Exhibit MAR-9), paras. 141 and 142.

from this that, prior to 2015, Imprimerie Moderne's business was selling exercise books at the national level.²⁹ Lastly, Tunisia notes that the exporters brought to MIICEN's attention the fact that Imprimerie Moderne "successfully offer[ed] new brands (e.g. Bleu Marine) and [had] expanded their production and sales".³⁰ According to Tunisia, this information confirms "the presence of Imprimerie Moderne in the Moroccan market as a competitor". Consequently, MIICEN should have considered the effects of competition from Imprimerie Moderne on the domestic industry.³¹

3.25. We have noted in paragraph 7.328 of our Report that the investigating authority is only required to investigate a potential injury factor if it has evidence suggesting that a factor *is injuring* the domestic industry. Subsequently, we concluded in paragraph 7.337 that, on the basis of elements contained in the record, an objective authority would not have found that competition from Imprimerie Moderne was injuring the domestic industry.

3.26. In our view, neither the assertions of the applicants and exporters cited by Tunisia, nor MIICEN's finding that Tunisia brought to our attention demonstrate, on the basis of evidence, what proportion of Imprimerie Moderne's sales of exercise books were made in the Moroccan market. More importantly, the elements raised by Tunisia do not indicate that Imprimerie Moderne's sales *were injuring* the domestic branch and are, therefore, not such as to oblige the investigating authority to consider this factor under Article 3.5. Consequently, we do not consider it necessary to change our reasoning or our conclusions relating to this claim. Nevertheless, bearing in mind Tunisia's request, we have made changes to paragraphs 7.333 and 7.334, explaining that the record does not demonstrate what proportion of Imprimerie Moderne's sales were made in the Moroccan market and how its sales affected the domestic industry.

3.7 Paragraph 7.335

3.27. Tunisia requests us to amend paragraph 7.335 which states that "the investigation record does not provide information on the price levels of the exercise books offered by Imprimerie Moderne allowing for an assessment of whether this producer could have exerted pressure on domestic industry prices".³² According to Tunisia, Exhibit TUN-30, contains the value of Imprimerie Moderne's output, allowing MIICEN to assess whether Imprimerie Moderne exerted pressure on domestic industry prices.³³ Thus, Tunisia requests us (i) to reflect this information on the value of Imprimerie Moderne's products; and, if applicable, (ii) to amend our reasoning and our conclusion with regard to the existence of data on the "value" of this producer's overall and per-unit (tonne) production.³⁴

3.28. For the sake of completeness, we accept Tunisia's first request and reflect the information on the value of Imprimerie Moderne's output in footnote 465 (466) of the Report.

3.29. However, the information contained in Exhibit TUN-30 does not change our reasoning in paragraph 7.335. Tunisia itself explains that the data in that exhibit may relate to either the exercise books' estimated price per tonne, or to their value "at cost".³⁵ Tunisia has therefore not established that these data reflected the price levels proposed by Imprimerie Moderne. Accordingly, we see no reason to amend paragraph 7.335.

3.30. Tunisia argues that, to the extent that these data represent the value of Imprimerie Moderne's exercise books "at cost", MIICEN could have checked whether Imprimerie Moderne's cost of production was lower or higher than the domestic industry's cost of production and assessed whether this producer exerted pressure on domestic industry prices.³⁶ This argument by Tunisia assumes that MIICEN was required to investigate the effects of competition from Imprimerie Moderne on the domestic industry. However, we have indicated that the investigating authority should examine an injury factor if it had evidence suggesting that this factor *was injuring* the domestic industry. We do

²⁹ Tunisia's request for interim review, para. 2.24 (referring to the report on the definitive determination (Exhibit MAR-CONF-3 (BCI)), para. 77).

³⁰ Tunisia's request for interim review, para. 2.24 (citing the Tunisian exporters' comments on the investigation (27 February 2018) (Exhibit TUN-29), p. 10).

³¹ Tunisia's request for interim review, para. 2.25.

³² Footnote omitted.

³³ Tunisia's request for interim review, paras. 2.27-2.29 (referring to Excel File listing the petitioners (Exhibit TUN-30 (BCI))).

³⁴ Tunisia's request for interim review, para. 2.30.

³⁵ Tunisia's request for interim review, para. 2.29.

³⁶ Tunisia's request for interim review, para. 2.29.

not have the confidential version of Exhibit TUN-30. With respect to the data in the non-confidential version of Exhibit TUN-30, in our view, they would not have led an objective and unbiased authority to conclude that Imprimerie Moderne was exerting pressure on domestic industry prices. Thus, in view of the elements before us, we are not convinced that MIICEN should have investigated the effects of competition from Imprimerie Moderne and, more specifically, compared its cost of production with that of other producers. For these reasons, we decline Tunisia's request to amend our reasoning and our conclusion with regard to the existence of data on the "value" of this producer's overall and per-unit (tonne) production.

3.8 Paragraphs 7.355, 7.360 and 8.1.c.iii. and paragraphs 7.378, 7.379 and 7.386

3.31. In the light of the Panel's findings on the measure's consistency with Article 5.3 of the Anti-Dumping Agreement, Tunisia requests that we do not make findings under Articles 5.2 and 5.8, because such findings are not necessary for the resolution of the dispute. For the same reason, Tunisia requests us to delete the last sentence of paragraph 7.378 from our Report and paragraphs 7.379 and 7.386 in their entirety.³⁷

3.32. Morocco asks us to decline Tunisia's request for judicial economy in relation to Article 5.2, insofar as it was Tunisia itself that requested the Panel to find a violation of Morocco's obligations under that article.³⁸

3.33. We do not share Tunisia's view that our findings in paragraphs 7.355 and 7.360 are not necessary to resolve the dispute. We recall that Tunisia itself requested us, principally, to conclude that Morocco had violated Articles 5.2, 5.3 and 5.8 of the Anti-Dumping Agreement.³⁹ On the other hand, we consider, in the light of the parties' arguments, that it is necessary to explain how we interpret the relationship among those three provisions, in order to reach our conclusion of violation of Article 5.3. For this reason, we do not consider that these passages of our Report constitute *obiter dicta*, i.e. an observation that, although it appears in our decision, is not necessary for the resolution of the dispute.

3.34. Lastly, contrary to Tunisia's assertion, we consider that paragraphs 7.378, 7.379 and 7.386 of our Report respond directly to an argument made by Tunisia regarding the "representativeness" of evidence contained in the complaint, and that the paragraphs are useful for understanding the Panel's conclusion on the alleged violation of Article 5.3 of the Anti-Dumping Agreement. We therefore consider that they should be included in the Final Report and we therefore decline Tunisia's request in this regard.

3.9 Paragraph 7.391

3.35. Tunisia requests us to expand on the first sentence of paragraph 7.391 in order to better reflect its argument and to indicate in our Report whether we consider that the fact that "similar trade practices are taking place in the same region - despite the lack of information in the initiation petition on the similarities or differences between the markets concerned in the same region - is a sufficient factual basis to establish the adequacy of the evidence".⁴⁰ Morocco requests that we do not amend this paragraph because the parties' arguments are adequately reflected in the executive summaries prepared by the parties and annexed to the Report.⁴¹

3.36. We accept Tunisia's request to develop our description of its argument and we reflect this addition in the first sentence of paragraph 7.390, which now reads as follows:

7.390. In that regard, Tunisia considers that the information substantiating the proposed normal value adjustments "does not pertain to the source or the export market, i.e. Tunisia" and that "no explanation is offered as to why these margins 'are similar' to those that could be obtained in Tunisia" **and, in particular, "why the market conditions in Morocco with respect to that profit margin could have**

³⁷ Tunisia's request for interim review, paras. 2.31 and 2.32.

³⁸ Morocco's comments on Tunisia's request for interim review, paras. 34 and 35.

³⁹ Tunisia's response to Panel question No. 6.22, para. 175.

⁴⁰ Tunisia's request for interim review, para. 2.34.

⁴¹ Morocco's comments on Tunisia's request for interim review, para. 8.

been representative or a reasonable indicator of distribution margins in Tunisia".⁴²

3.37. However, we do not consider it useful to complete our finding in paragraph 7.391 that "with respect to an applicant's difficulty in obtaining such evidence, relying on comparable data for the same business operations in the same region appears to be relevant evidence in this case".

3.10 Paragraph 8.1.b.

3.38. Tunisia requests us to expand on our conclusions by reflecting the specific reasons that underpin the Panel's findings of violation.⁴³ Morocco objects to this request on the grounds that nothing "obliges a panel to set out, under separate headings, all the different arguments used to substantiate a panel's findings of violation".⁴⁴

3.39. We agree with Morocco that a panel is not required to set out in its conclusions the detailed reasons underpinning its findings. We consider that the conclusions reflected in section 8.1 of our Report, read in the light of our findings, allow the Panel's decision to be understood. Therefore, we decline Tunisia's request.

⁴² Footnote omitted; emphasis added.

⁴³ Tunisia's request for interim review, paras. 2.35-2.39.

⁴⁴ Morocco's comments on Tunisia's request for interim review, para. 39. (emphasis added)

ANNEX B

ARGUMENTS OF THE PARTIES

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ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF TUNISIA

1 INTRODUCTION

1.1. This dispute concerns the definitive anti-dumping measure imposed by the Ministry of Industry, Investment, Trade and the Digital Economy (MIICEN) and the Ministry of the Economy and Finance of the Kingdom of Morocco on imports from Tunisia of exercise books classified under heading 4820.20.00.00 of Morocco's customs tariff.

1.2. As Tunisia explains in this submission, MIICEN initiated the investigation on an insufficient factual basis at both the level of dumping and the level of injury to the domestic industry (DI). Furthermore, MIICEN erroneously found the existence of dumping, injury to the DI and a causal link between the two.

2 MOROCCO VIOLATED ARTICLES 2.2.2, 2.2 AND 2.1 OF THE ANTI-DUMPING AGREEMENT BY CALCULATING AN INFLATED CONSTRUCTED NORMAL VALUE

2.1. Tunisia raises three arguments in support of its claim under Articles 2.2.2, 2.2 and 2.1 of the Anti-Dumping Agreement that MIICEN made errors in the calculation of the constructed normal value.

2.1 First error in the calculation of the constructed normal value: the failure to exclude administrative costs and other expenses not part of the product price from the profit margin

2.2. Tunisia claims that MIICEN acted inconsistently with Articles 2.2.2, 2.2 and 2.1 of the Anti-Dumping Agreement by failing to exclude both administrative costs and certain expenses not part of the product price from the profit margin. In particular, the parties agree on how MIICEN calculated the profit margin by subtracting the "cost of production" from the "unit selling price" of each declared sale.¹ The parties also agree on the components of these variables. The "unit selling price" is made up of the cost of production, administrative, general and selling costs, and profit, as well as expenses not part of the ex-factory price.² Meanwhile, the "cost of production" is made up of the expenses incurred in production (for SITPEC), plus administrative and financing costs (for SOTEFI).³

2.3. The parties therefore agree that MIICEN calculated the amount of profit for each declared domestic sale by adding, to the profit *per se*, administrative costs (for SITPEC) as well as certain expenses not part of the ex-factory product price (for both exporters). MIICEN used this amount of profit for each declared sale to calculate the general profit margin of each exporter for the purpose of constructing the normal value.⁴

2.4. The only remaining substantive question before this Panel is whether the calculation of the profit margin is inconsistent with Articles 2.2.2, 2.2 and 2.1 of the Anti-Dumping Agreement. In this sense, a profit margin composed of administrative costs and other expenses is inflated and therefore cannot be qualified as "actual data pertaining to ... sales", as provided for in Article 2.2.2. Nor can an inflated profit margin be "reasonable", as required under Article 2.2. Lastly, an inflated profit margin also distorts the calculation of the constructed normal value and the overall margin of dumping, which is inconsistent with Article 2.1 of the Anti-Dumping Agreement.

2.5. Morocco appears to base its defence on an "objection to admissibility"⁵, claiming that this argument from Tunisia "could have [been] raised before the authority" but was not.⁶ Morocco

¹ Tunisia's first written submission, paras. 5.30-5.33; and Morocco's response to Panel question 1.1 following the first substantive meeting, para. 12.

² Tunisia's first written submission, paras. 5.36 and 5.49; and Morocco's response to Panel question 1.6 following the first substantive meeting, para. 25.

³ Tunisia's first written submission, paras. 5.36 and 5.49; and Morocco's response to Panel question 1.6 following the first substantive meeting, para. 25.

⁴ Tunisia's first written submission, paras. 5.45 and 5.56.

⁵ Morocco's second written submission, para. 89.

⁶ Morocco's first written submission, para. 62.

therefore appears to suggest that the errors made by an authority are justiciable before a WTO panel only if they are reported by the interested parties in the course of the investigation. In this regard, Tunisia referred to the extensive body of WTO case law rejecting Morocco's proposal that the complainant's arguments in WTO dispute settlement proceedings should previously have been raised before the investigating authority.⁷ While Morocco put forward this defence on several occasions, it did not specify the legal basis for its position.

2.6. Accordingly, Tunisia claims that an *inflated profit margin* including, in addition to the profit *per se*, administrative costs and other expenses not part of the product price (1) is not based on "actual data pertaining to ... sales" under Article 2.2.2 of the Anti-Dumping Agreement, (2) does not constitute a "reasonable amount" of profits for the purpose of constructing the normal value under Article 2.2, and (3) is not suitable for calculating the margin of dumping under Article 2.1 of the Anti-Dumping Agreement. Tunisia therefore requests the Panel to find that Morocco violated Articles 2.2.2, 2.2 and 2.1 by failing to exclude from the profit margin administrative costs and certain expenses not part of the product price.

2.2 Second error in the calculation of the constructed normal value: the exclusion of sales of numbered or watermarked exercise books from the calculation of the profit margin

2.7. Regarding the second error identified in the calculation of the constructed normal value, Tunisia claims that MIICEN violated Articles 2.2.2, 2.2 and 2.1 of the Anti-Dumping Agreement by excluding sales of numbered or watermarked exercise books from the calculation of the profit margin for the purpose of constructing the normal value.

2.8. Tunisia claims that domestic sales of numbered or watermarked exercise books meet all the conditions laid down in Article 2.2.2 of the Anti-Dumping Agreement to form part of the calculation of the profit margin for the purpose of constructing the normal value. In particular, these sales provide "actual data." Furthermore, Tunisian producers sell these exercise books to unaffiliated purchasers in such a way that these sales "indeed [reflect] the 'normal' price of the like product, in the home market of the exporter"⁸, and neither MIICEN nor Morocco has contended otherwise.⁹ Lastly, Morocco confirmed that numbered or watermarked exercise books fall within the scope of the product under consideration, as defined by MIICEN, and therefore sales of such exercise books are sales of the "like product". Accordingly, sales of numbered or watermarked exercise books meet all the conditions laid down in Article 2.2.2 to be taken into account for the purpose of calculating the profit margin.

2.9. Morocco responds that sales of numbered or watermarked exercise books "were not taken into account because [these products] were not exported".¹⁰ Morocco justifies MIICEN's approach by arguing that the "actual data" under Article 2.2.2 of the Anti-Dumping Agreement do not relate "to *all* sales, but to those likely to provide a fair comparison; i.e. to sales of *exported* product models".¹¹ These justifications are invalid for the following reasons.

2.10. *First*, Morocco conflates the functions of Article 2.2 and Article 2.4 of the Anti-Dumping Agreement. Article 2.2 concerns the determination of normal value in the absence of valid domestic sales, in order to calculate a "comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". Article 2.2.2, for its part, establishes the methods for calculating reasonable amounts for, most notably, profits. These profits relate to the "like product". Contrary to Morocco's claim, both Article 2.1 and Article 2.2.2 of the Anti-Dumping Agreement refer to the "like product" without characterizing it, meaning that it is *the like product as a whole*.

2.11. *Second*, it is established case law that the conditions of Article 2.2.2 of the Anti-Dumping Agreement do not permit the importation of concepts from other provisions of the Anti-Dumping Agreement. For instance, the Appellate Body and several panels have observed that Article 2.2.2 of the Anti-Dumping Agreement does not permit investigating authorities to exclude non-representative sales under Article 2.2. These sales are of course not valid and cannot be used for

⁷ Tunisia's second written submission, paras. 2.25-2.35.

⁸ Appellate Body Report, *US – Hot-Rolled Steel*, para. 140.

⁹ Morocco's first written submission, para. 71; and second written submission, para. 132.

¹⁰ Morocco's second written submission, para. 132.

¹¹ Morocco's second written submission, para. 142. (original italics)

the purposes of comparison with the export price. However, the profits of non-representative sales must be taken into account in the calculation of the profit margin under Article 2.2.2 of the Anti-Dumping Agreement. As indicated in the case law, Article 2.2.2 only concerns sales that were not made in the ordinary course of trade.¹² Any other sales of the like product must be taken into account for the purpose of calculating the profit margin.

2.12. *Third*, Morocco's position is at odds with MIICEN's approach of taking into account thousands of domestic sales of exercise books not exported to Morocco for the calculation of the profit margin. These sales are listed in Exhibit TUN-62 (BCI). This contradicts Morocco's position that only "sales of exported product models" can be taken into account by the investigating authority under Article 2.2.2 of the Anti-Dumping Agreement. Thus, it seems that Morocco's argument is, for the purposes of this dispute, that the "actual data" under Article 2.2.2 include domestic sales of exercise books that were not exported *but that could have been exported*, but exclude sales of exercise books that were not exported *and that cannot be exported (are not exportable)*.

2.13. In any event, Morocco's argument cannot be consistent with the customary rules of treaty interpretation as codified in Article 31 of the Vienna Convention on the Law of Treaties. More specifically, Morocco seeks "the importation into a treaty of concepts that were not intended"¹³ when it claims that MIICEN was entitled to disregard sales of exercise books that, despite the fact of containing actual data, being made in the ordinary course of trade, and concerning the like product, relate to models of the product under consideration that had not been exported or are not exportable. Of course, nothing in the relevant provisions supports this approach.

2.14. Tunisia therefore requests the Panel to find that the exclusion of sales of numbered or watermarked exercise books from the calculation of the profit margin is inconsistent with Articles 2.2.2, 2.2 and 2.1 of the Anti-Dumping Agreement.

2.3 Third error in the calculation of the constructed normal value: the inclusion of the "distribution cost"

2.15. With regard to Tunisia's argument that MIICEN wrongly included the "distribution cost" in the calculation of the constructed normal value, Morocco does not dispute the factual description provided by Tunisia in its first written submission. Accordingly, the establishment of the facts with respect to this argument is clear: MIICEN added the "distribution cost" to the constructed normal value at the ex-factory level.

2.16. Tunisia has explained why the approach taken by MIICEN and contested by Tunisia is inconsistent with Articles 2.1 and 2.2 of the Anti-Dumping Agreement. First, MIICEN calculated a normal value at the ex-factory level, i.e. the price when the product left the producer's premises. The "distribution cost", including the cost of transport, cannot of course be part of the ex-factory price.

2.17. Second, this "distribution cost" was never deducted from the constructed normal value, even though MIICEN asserted that it had done so.¹⁴ This assertion by MIICEN in fact relates to the normal value calculated on the basis of domestic sales for *[[* * *]]* models of exercise books.¹⁵ However, for the exercise book models for which MIICEN constructed the normal value, this "distribution cost" has always been part of the constructed normal value.

2.18. Third, even assuming that MIICEN added the distribution cost to, then deducted it from, the normal value (*quod non*), adding it in the first place had the effect of inflating the normal value, as profits were calculated on the basis of a higher normal value. These profits would remain inflated even if MIICEN intended to remove the "distribution cost" at a later stage. As a result, by adding the "distribution cost", MIICEN inflated the constructed normal value, regardless of whether it intended to deduct that cost afterwards.

¹² Panel Report, *US – OCTG (Korea)*, para. 7.47.

¹³ Appellate Body Report, *India – Patents (US)*, para. 45.

¹⁴ Report on the definitive determination, para. 90. (Exhibit TUN-7).

¹⁵ See Excel file containing the dumping margin calculation forwarded with the essential facts of 8 October 2018 (SOTEFI), tab "VENTEDOM". Exhibit TUN-14 (BCI).

2.19. As with several other arguments put forward by Tunisia, Morocco seems to base its defence concerning Tunisia's argument that MIICEN wrongly included the "distribution cost" in the constructed normal value on the fact that this error was not brought to MIICEN's attention during the investigation, and asserts that because of this, Tunisia's argument is inadmissible. Tunisia has repeatedly explained why this position is untenable. Morocco's approach would be tantamount to asking the Panel to conclude that the errors leading to the violations of the Anti-Dumping Agreement are justiciable before it only if they have been reported to the investigating authority. Neither the Anti-Dumping Agreement nor WTO case law supports such an approach.

2.20. Tunisia therefore requests the Panel to find that by adding the "distribution cost" to the calculation of the constructed normal value, MIICEN violated Articles 2.1 and 2.2 of the Anti-Dumping Agreement.

3 MIICEN VIOLATED ARTICLES 2.4 AND 2.1 OF THE ANTI-DUMPING AGREEMENT BY FAILING TO MAKE A "FAIR COMPARISON" BETWEEN THE NORMAL VALUE AND THE EXPORT PRICE

3.1. With regard to a "fair" comparison between the normal value and the export price, Tunisia puts forward two arguments to demonstrate that MIICEN violated Articles 2.4 and 2.1 of the Anti-Dumping Agreement.

3.1 First error concerning the comparison between the normal value and the export price: the use of an erroneous mathematical formula

3.2. MIICEN calculated the margin of dumping for each exporter on the basis of multiple averaging. However, the formula used by MIICEN to calculate the margin of dumping violates the fair comparison obligation under Articles 2.4 and 2.1 of the Anti-Dumping Agreement. In particular, both the numerator and the denominator of the mathematical operation were expressed in units of volume, and therefore the resulting margin of dumping was a percentage of a quantity expressed in units of volume.

3.3. Morocco agrees with Tunisia that the numerator was expressed in units of volume and not in monetary terms. In particular, Morocco acknowledges that the "QTE EN DUMPING" column in the Excel files containing the calculation of the dumping margin "is not, in fact, a quantity of dumping expressed in monetary terms".¹⁶ Furthermore, Morocco does not dispute that the denominator corresponds to the total volume of exports (in units for SITPEC and in tonnes for SOTEFI). As a result, there is no disagreement regarding Tunisia's factual description concerning the use of an erroneous mathematical formula for the calculation of the margin of dumping.

3.4. Tunisia also explained, without challenge by Morocco, that this erroneous mathematical formula had the effect of inflating the margin of dumping. For SITPEC, the margin of dumping resulting from an appropriate formula should have been 15.38% instead of 15.69%, while for SOTEFI it should have been 22.55% instead of 27.71%.¹⁷ The comparison between the normal value and the export price was therefore distorted and, as such, is inconsistent with Articles 2.4 and 2.1 of the Anti-Dumping Agreement.

3.5. Morocco claims that the errors in the calculation of the margin of dumping are not covered by the first sentence of Article 2.4 of the Anti-Dumping Agreement.¹⁸ This assertion is at odds with the vast body of case law on this matter. In this respect, it should be recalled that, firstly, the first sentence of Article 2.4 of the Anti-Dumping Agreement concerning the obligation to make a "fair comparison" between the normal value and the export price may be invoked even in the absence of other claims concerning the remainder of Article 2.4.¹⁹ Furthermore, the fair comparison obligation covers the calculation of the margin of dumping, meaning that any error in this calculation having the effect of inflating the margin of dumping results in a violation of the obligation set out in the first

¹⁶ Morocco's opening statement at the first substantive meeting, para. 143; and second written submission, para. 101.

¹⁷ Tunisia's first written submission, para. 5.122.

¹⁸ Morocco's opening statement at the first substantive meeting, para. 129.

¹⁹ Tunisia's second written submission, paras. 3.21-3.24.

sentence of Article 2.4, which is to make a "fair comparison" between the normal value and the export price.²⁰

3.6. Lastly, Morocco argues that "the exporters never raised these weighting methodology issues before the authority" and that therefore "Tunisia seeks a *de novo* review of the evidence".²¹ Once again, Morocco requests the Panel to declare the violations of the obligations contained in the Anti-Dumping Agreement non-justiciable insofar as the errors giving rise to these violations were not brought to the attention of the investigating authority. This position is untenable under the Anti-Dumping Agreement.

3.7. Accordingly, Tunisia requests the Panel to find that MIICEN, by using an erroneous mathematical formula resulting in the inflation of the margin of dumping, violated Article 2.4 (and consequently Article 2.1) of the Anti-Dumping Agreement.

3.2 Second error concerning the comparison between the normal value and the export price: the exclusion of the use of licences as a relevant factor for the classification of the exported product

3.8. Tunisia further claims that in dismissing the use of licences for certain exercise books for the purposes of the classification of the exported product, MIICEN failed to make a fair comparison between the normal value and the export price for SOTEFI. To recall, the exporters asked MIICEN to classify the product under consideration for the purposes of the comparison between the normal value and the export price on a model-by-model basis according to eight physical characteristics of the exercise books.

3.9. MIICEN retained five characteristics but rejected three others, most notably the use of licences, on the grounds that "there was no satisfactory justification for [their] effect on costs or prices" or that "[their] impact on price comparability is negligible".²² In this sense, the rejection of the use of licences as a factor affecting price comparability is inconsistent with Articles 2.1 and 2.4 of the Anti-Dumping Agreement.

3.10. MIICEN was aware of the existence of a difference affecting the price comparability of exercise books relating to the use of licences. Indeed, even before the investigation was initiated, the domestic industry (DI) had itself recognized that the price of exercise books varied between [[* * *]] depending on the use of licences.²³ MIICEN accepted this fact by calculating an adjusted normal value, for the purposes of the initiation of the investigation, on the basis of the use of licences in particular.²⁴

3.11. Furthermore, SOTEFI requested MIICEN to create a separate classification for licensed and unlicensed exercise books for the purposes of calculating the margin of dumping.²⁵ In support of this request, SOTEFI indicated that it [[***]].²⁶ SOTEFI also added to this assertion a list of licensed products sold in the export market²⁷, as well as a contract between SOTEFI and the company [[***]], which stipulates that SOTEFI was to pay [[***]] to use certain licensed designs on exercise books.²⁸

3.12. Furthermore, at the public hearing of 30 April 2018, SOTEFI explained the importance of this physical characteristic as a relevant criterion for the classification of the exported product. Following these explanations, MIICEN requested data on sales of licensed and unlicensed exercise books, which

²⁰ Tunisia's second written submission, paras. 3.25-3.29.

²¹ Morocco's opening statement at the first substantive meeting, para. 137.

²² Report on the definitive determination, para. 85. Exhibit TUN-7.

²³ See Tunisia's first written submission, paras. 5.128-5.133.

²⁴ Initiation report, Petition filed by exercise book producers for the implementation of anti-dumping measures on imports of exercise books from Tunisia (initiation report), p. 6. Exhibit TUN-2.

²⁵ Report on the definitive determination, para. 83. Exhibit TUN-7.

²⁶ Exporters' response of 4 September 2017 to the deficiency letter sent by MIICEN on 15 August 2017. Exhibit TUN-43 (BCI).

²⁷ Annex 2.1 to the exporters' response of 4 September 2017 to the deficiency letter sent by MIICEN on 15 August 2017. Exhibit TUN-44 (BCI).

²⁸ Annex 2.2 to the exporters' response of 4 September 2017 to the deficiency letter sent by MIICEN on 15 August 2017, clauses 8-10. Exhibit TUN-45 (BCI).

SOTEFI provided in an Excel file, *as requested by MIICEN*.²⁹ In particular, SOTEFI identified, in its Excel files, the exercise books that were sold under licence and without a licence, so as to enable MIICEN to classify them under separate codes.³⁰ On the basis of that data, MIICEN could easily have verified the significant price difference in respect of five models of exercise books sold under licence in one market and without a licence in another market. These price differences are shown in the table in paragraph 5.141 of Tunisia's first written submission.

3.13. MIICEN therefore wrongly excluded the use of licences from the relevant criteria for the classification of the product under consideration. In doing so, MIICEN compared the licensed exercise books sold in one market to the unlicensed exercise books sold in another market, even though the use of licences is a physical characteristic affecting price comparability. The failure to take into account the use of licences for the purpose of classifying the product under consideration is therefore clearly inconsistent with Articles 2.1 and 2.4 of the Anti-Dumping Agreement.

3.14. In response, Morocco raises a set of insufficient arguments to try to rebut Tunisia's claim. *First*, Morocco claims that certain models listed in the table in paragraph 5.130 of Tunisia's first written submission "are not included in the VENT[E]DOM file used for the calculation".³¹ However, all the references to these exercise books are clearly set out in the Excel file submitted by SOTEFI on 23 May 2018.³² Morocco's argument must therefore be rejected.

3.15. *Second*, Morocco submits that four of the exercise book models listed in the table in paragraph 5.130 of Tunisia's first written submission have characteristics other than the use of licences that may account for the price differences.³³ As regards the use of certified (PEFC) paper, the comparison of exercise books in the tables in paragraphs 5.130 and 5.131 of the first written submission includes *unlicensed* exercise books with this type of paper. If the exercise books with certified (PEFC) paper are removed, the price differential between the licensed and unlicensed exercise books is even higher. As a result, Morocco's reference to the use of certified (PEFC) paper is not relevant. Furthermore, as regards ruling, Morocco appears to attribute to this aspect an effect on the prices of exercise books, even though MIICEN itself had found in its final report that ruling had no impact on price or that such an impact was "negligible".³⁴ Morocco's argument is therefore at odds with MIICEN's findings and must be rejected.

3.16. *Third*, Morocco argues that the contract between SOTEFI and [[***]] covers only part of the investigation period.³⁵ This argument is irrelevant. The investigation period, as determined by MIICEN at the initiation stage, extends from 1 January 2016 to 30 April 2017.³⁶ Admittedly, the contract between SOTEFI and [[***]] expired on 31 December 2016.³⁷ However, all the sales of licensed exercise books in both Tunisia and Morocco declared by SOTEFI were made between the months of May and December 2016.³⁸ The fact that the contract in question expired before 31 December 2016 is of little consequence, since it was valid for assessing the impact of the use of licences on the prices of *all* exercise books sold under licence throughout the investigation period. Morocco's argument must therefore be rejected.

3.17. *Fourth*, Morocco asserts that "[t]he evidence relating to the costs of an exporter in its domestic market bears no relation to "the impact on prices» for exports on the import market" and that the "contract is not relevant to the matter before the Panel".³⁹ Contrary to Morocco's assertion, the production cost is essential for determining whether a given physical characteristic has an impact

²⁹ Email dated 4 May 2018 addressed to Mr Charles Julien, entitled "Relance/Tableaux de calcul de marge de dumping". Exhibit TUN-72.

³⁰ See Excel file containing the dumping margin calculation forwarded with the essential facts of 8 October 2018, tabs "VENTEMAR BRUT" and "VENTEDOM BRUT". Exhibit TUN-14 (BCI).

³¹ Morocco's first written submission, para. 96.

³² Exhibit TUN-11 (BCI).

³³ Morocco's first written submission, para. 102.

³⁴ Report on the definitive determination, para. 85. Exhibit TUN-7.

³⁵ Morocco's response to Panel question 2.3 following the first substantive meeting, para. 51.

³⁶ Notice of initiation, p. 4. Exhibit TUN-1.

³⁷ Annex 2.2 to the exporters' response of 4 September 2017 to the deficiency letter sent by MIICEN on 15 August 2017, p. 5. Exhibit TUN-45 (BCI).

³⁸ See Excel file containing the dumping margin calculation sent with the essential facts of 8 October 2018 (SOTEFI), tab "VENTEDOM BRUT" (column N) and tab "VENTEMAR BRUT" (column L). Exhibit TUN-14 (BCI).

³⁹ Morocco's response to Panel question 2.7 following the second substantive meeting, para. 14.

on price comparability. In addition, the exporter could provide evidence regarding the prices of two products with different physical characteristics, but these prices cannot be the only relevant information for determining the impact of certain physical characteristics, since they may mask the true impact on price comparability. The most important thing is to find out about the price structure (including the cost of production) rather than the final selling price.

3.18. *Fifth*, Morocco claims that the price difference associated with the use of licences was "negligible".⁴⁰ This argument does not stand, since the comparison between licensed exercise books in one market and unlicensed exercise books in another market inflated the margin of dumping, regardless of whether this involves a few decimal points. The main point is that this inflation results from an inappropriate comparison between the normal value and the export price of licensed and unlicensed exercise books. Morocco's argument must therefore be rejected.

3.19. *Sixth*, Morocco claims that SOTEFI was supposed to "quantify the impact of these licences on the price of the models".⁴¹ In this respect, SOTEFI submitted sufficient evidence to demonstrate the impact of the use of licences on the cost of production through the contract between SOTEFI and [[***]] and on the price of exercise books through the sales of licensed exercise books declared by SOTEFI, as shown in the tables in paragraphs 5.130 and 5.131 of Tunisia's first written submission. SOTEFI therefore provided sufficient information to demonstrate the impact of the use of licences on the costs and prices of exercise books sold under licence. Morocco's argument must therefore be rejected.

3.20. Accordingly, the central issue before the Panel is whether, by comparing licensed exercise books in one market to unlicensed exercise books in another market, MIICEN acted inconsistently with the Article 2.4 obligation to make a "fair" comparison. In addressing this issue, the Panel should consider whether an "unbiased and objective" investigating authority was entitled to reject (or ignore) highly relevant evidence at its disposal, including the introductory petition of the DI, a list of licensed exercise books exported to Morocco, the contract with [[***]] and the Excel file containing the selling price of unlicensed and licensed exercise books, organized according to the format indicated by MIICEN following the public hearing. Even if the Panel considers that MIICEN may need further information or additional explanations concerning the data already placed on the record, it should examine whether MIICEN was required to engage in a "dialogue" under the last sentence of Article 2.4 of the Anti-Dumping Agreement in order to obtain that information.⁴²

3.21. Tunisia therefore requests the Panel to find that MIICEN violated Articles 2.1 and 2.4 of the Anti-Dumping Agreement by failing to make a fair comparison between the normal value and the export price of exercise books sold under licence in one market and without a licence in another market.

4 MIICEN VIOLATED ARTICLE 12.2.2 OF THE ANTI-DUMPING AGREEMENT BY FAILING TO ADDRESS IN ITS REPORT THE KEY FACTUAL ELEMENTS RELATING TO THE IMPACT OF THE USE OF LICENCES ON THE PRICE OF EXERCISE BOOKS

4.1. In its report on the definitive determination, MIICEN ignored the extensive information available for analysing the impact of the use of licences on the price of exercise books, including: (1) the DI's assertion that the use of licences represented between [[***]]% of the product price⁴³; (2) the list of licensed exercise books exported to Morocco⁴⁴; (3) the contract with a foreign company, which provided for, *inter alia*, a payment enabling SOTEFI to use certain licensed designs on the exercise books⁴⁵; and (4) the Excel files in which SOTEFI separately declared the licensed and unlicensed exercise books.⁴⁶ All this evidence concerns "an issue that [had] arisen in the course of the investigation that [had] necessarily [to] be resolved in order for the investigating authorities to be

⁴⁰ Morocco's response to Panel question 2.3 following the first substantive meeting, para. 50.

⁴¹ Morocco's response to Panel question 2.3 following the first substantive meeting, para. 51.

⁴² Appellate Body Report, *EC – Fasteners (China)*, para. 489.

⁴³ Initiation report, para. 29. Exhibit TUN-2.

⁴⁴ Annex 2.1 to the exporters' response of 4 September 2017 to the deficiency letter sent by MIICEN on 15 August 2017. Exhibit TUN-44 (BCI).

⁴⁵ Annex 2.2 to the exporters' response of 4 September 2017 to the deficiency letter sent by MIICEN on 15 August 2017. Exhibit TUN-45 (BCI).

⁴⁶ Excel file containing the dumping margin calculation sent with the essential facts of 8 October 2018 (SOTEFI), tabs "VENTEMAR BRUT" and "VENTEDOM BRUT". Exhibit TUN-14 (BCI).

able to reach their determination".⁴⁷ By failing to address this evidence in its report on the definitive determination, MIICEN acted inconsistently with Article 12.2.2 of the Anti-Dumping Agreement.⁴⁸ Tunisia notes that Morocco did not respond directly to this claim.

5 MIICEN VIOLATED ARTICLES 3.1 AND 3.2 OF THE ANTI-DUMPING AGREEMENT BY ERRONEOUSLY FINDING AN INCREASE IN IMPORTS IN RELATIVE TERMS

5.1. Tunisia claims that MIICEN violated Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing to analyse the volume of Tunisian imports in relative terms in an objective manner.⁴⁹

5.2. In this case, MIICEN set out its analysis of imports in relative terms in four paragraphs. On this basis, it concluded that the volume of dumped imports of exercise books from Tunisia had significantly increased, most notably "relative to the domestic production and domestic consumption of exercise books".⁵⁰ Tunisia contests this analysis for a number of reasons.

5.3. *First*, MIICEN erroneously focused on the period January-April 2017 to find an increase in imports in relative terms, without taking into account the seasonality of sales of exercise books.⁵¹ Indeed, as MIICEN explained from the start of the investigation, school exercise books are products that follow a seasonal logic driven by the start of the school year: production begins after orders are placed around December time, and the exercise books are delivered in April and May in anticipation of the start of the school year.⁵² Given that the deliveries take place in April and May, it is quite possible that from one year to the next, they mainly occur in either April or May, in such a way that the January-April data for one year cannot be compared to the January-April data for another year. As Tunisia demonstrated, this is exactly what happened in 2016 and 2017 (the only years for which the investigation file contains the volume of imports for the first four-month period and for the entire year). Looking at the volume of imports in absolute terms, it can be seen that in 2016, 56% of Tunisian exercise books were imported between January and April, while in 2017 this figure rises to 80% for the same period.⁵³ The proportion of exercise books imported in the periods January-April 2016 and January-April 2017 is therefore not at all similar. Nevertheless, MIICEN based its conclusion regarding the increase in imports in relative terms on a comparison between these two sub-periods.

5.4. *Second*, MIICEN did not properly compare trends throughout the investigation period.⁵⁴ If one examines the share of imports in relation to domestic consumption and production between 2013 and 2016, a generally downward trend is observed. Moreover, the share of imports in relation to domestic production and consumption never exceeded the initial level of 2013. Nevertheless, MIICEN explained that the import share had "fluctuated"⁵⁵, "increased significantly"⁵⁶ and evolved in a "steady" manner⁵⁷, and focused on the period January-April 2017 to conclude that imports had increased. MIICEN thus provided a picture of trends that is not objective with regard to the data available because its analysis suggests that imports increased throughout the entire investigation period.⁵⁸

⁴⁷ See Panel Reports, *EC – Tube or Pipe Fittings*, para. 7.424; and *EU – Footwear (China)*, para. 7.844.

⁴⁸ Tunisia is aware that panels apply the principle of judicial economy in relation to claims under Article 12.2.2 of the Anti-Dumping Agreement when finding a violation of a substantial obligation of that agreement.

⁴⁹ Tunisia raised a third argument in its first written submission, based on apparent inconsistencies concerning the indexed figures contained in the non-confidential version of the report on the definitive determination (paras. 6.26-6.27). However, in light of the confidential data provided by Morocco with its first written submission, Tunisia is not pursuing this argument. It is therefore not reflected in this summary.

⁵⁰ Report on the definitive determination, para. 180. Exhibit TUN-7.

⁵¹ Tunisia's first written submission, paras. 6.28-6.31.

⁵² Initiation report, para. 11. Exhibit TUN-2; Report on the preliminary determination, para. 32. Exhibit TUN-5; Report on the definitive determination, para. 63. Exhibit TUN-7.

⁵³ Tunisia's first written submission, para. 6.29.

⁵⁴ Tunisia's first written submission, para. 6.32. See also Tunisia's response to Panel questions following the first substantive meeting, paras. 86-87.

⁵⁵ Report on the definitive determination, para. 125. Exhibit MAR-CONF-3.

⁵⁶ Report on the definitive determination, para. 122. Exhibit MAR-CONF-3.

⁵⁷ Report on the definitive determination, para. 123. Exhibit MAR-CONF-3.

⁵⁸ Tunisia's first written submission, para. 6.32.

5.5. Morocco requests the Panel to conclude that this claim has "no chance of success" and cannot hold, because MIICEN was not required to examine the increase in imports in relative terms under Article 3.2.⁵⁹ In response to Morocco's arguments, Tunisia explained that Article 3.2 does indeed provide that an investigating authority may analyse the increase in imports in absolute terms *or* in relative terms, and that it is therefore not required to conduct both reviews. However, if an investigating authority chooses to analyse imports in absolute *and* relative terms, it must comply with the requirements of Articles 3.1 and 3.2.⁶⁰ This is precisely the approach taken by several panels.⁶¹ In this case, MIICEN chose not only to analyse the increase in imports in relative terms, but also to use this analysis as the basis for concluding the existence of injury.⁶² MIICEN's analysis of imports in relative terms should therefore have complied with the requirements of Article 3.1, in particular the requirement to conduct an objective examination. For the reasons outlined by Tunisia above, MIICEN clearly failed to conduct such an objective examination of the volume of imports in relative terms.

5.6. For these reasons, Tunisia requests the Panel to conclude that Morocco acted inconsistently with Articles 3.1 and 3.2 by failing to analyse the volume of Tunisian imports in relative terms in an objective manner.

6 MIICEN VIOLATED ARTICLES 3.1 AND 3.2 OF THE ANTI-DUMPING AGREEMENT BY ERRONEOUSLY FINDING PRICE UNDERCUTTING

6.1. With regard to the price undercutting analysis, Tunisia puts forward three arguments to demonstrate that MIICEN violated Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

6.1 MIICEN acted inconsistently with Articles 3.1 and 3.2 by comparing the actual price of imports with a constructed domestic product price

6.2. Tunisia claims that MIICEN acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by comparing the *actual* price of imports with a *constructed* domestic product price.

6.3. In its price undercutting analysis, MIICEN reconstructed the price of the domestic product to obtain a "target selling price", which was then compared with the actual import price.⁶³ This approach is clearly contrary to the very nature of the concept of "price undercutting" under Article 3.2, which relates to a comparison between two actual prices in the importing Member's market.

6.4. The price undercutting analysis under Article 3.2 of the Anti-Dumping Agreement requires "a *dynamic assessment* of price developments and trends in the relationship between the prices of the dumped imports and those of domestic like products over the entire period of investigation (POI)".⁶⁴ This "dynamic assessment" can only be made using the *actual prices* of imports and of the domestic product in the importing Member's market. In this regard, Tunisia recalls that both the European Union and Canada, as third parties to this dispute, share Tunisia's view that a comparison between the actual import price and the constructed domestic product price for the purpose of analysing price undercutting would not be consistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement.⁶⁵

6.5. In response, Morocco puts forward three arguments. *First*, Morocco asserts that Article 3.2 does not contain any reference to the need to compare "actual" prices.⁶⁶ This assertion is not, however, relevant. The purpose of the price undercutting analysis in Article 3.2 is to examine the interaction (dynamic assessment) between the import and domestic product prices in the market of the importing country. Of course, this interaction requires an analysis of prices as posted in the market, that is, the (actual) prices that purchasers have to pay. Any attempt to construct the price of imports or the price of the domestic product for the purpose of price undercutting would inevitably have the

⁵⁹ Morocco's request for a preliminary determination, paras. 50-53.

⁶⁰ Tunisia's response to Morocco's request for a preliminary determination, paras. 8.8-8.14.

⁶¹ See Panel Reports, *Pakistan - BOPP Film (UAE)*, para. 7.281, and *Morocco - Hot-Rolled Steel (Turkey)*, para. 7.148; and Appellate Body Report, *US - Corrosion-Resistant Steel Sunset Review*, para.127.

⁶² Report on the definitive determination, para. 180. Exhibit TUN-7.

⁶³ Tunisia's first written submission, paras. 6.38-6.42.

⁶⁴ Appellate Body Report, *China - HP-SSST*, para. 5.159. (Emphasis added)

⁶⁵ See third-party written submissions of the European Union, para. 105, and Canada, para. 10.

⁶⁶ Morocco's second written submission, para. 199.

effect of distorting the interaction between the import and domestic product prices in the market of the importing country. As a result, Morocco's argument regarding the absence of the word "actual" in Article 3.2 is not relevant.

6.6. *Second*, Morocco refers to Article 2.2.1 of the Anti-Dumping Agreement in an attempt to demonstrate that "deficit prices may be set aside in the calculation of the normal value".⁶⁷ This, however, is not relevant. Article 2.2.1 relates to the calculation of the normal value, i.e. the value with which the export price will be compared in order to determine the margin of dumping. However, the price undercutting analysis in Article 3.2 relates to the comparison of the interaction between import and domestic product prices *as posted* in the market of the importing country. There is no relationship between the calculation of the margin of dumping and that of price undercutting.

6.7. *Third*, Morocco asserts that the three categories of effects of imports on prices listed in Article 3.2 of the Anti-Dumping Agreement are not "fixed and impermeable categories"⁶⁸, and that "the three phenomena can be observed *in the same set of data*".⁶⁹ Morocco appears to claim that an authority is entitled to conduct the examination required under Article 3.2 of the Anti-Dumping Agreement by carrying out a combined analysis of the three listed phenomena. Without even addressing the validity of this argument, it should be noted that MIICEN conducted a separate analysis of each phenomenon and, as a result, the analysis of consistency with Article 3.2 of the Anti-Dumping Agreement must be based on this approach. It is therefore not necessary for the Panel to address the issue of whether Article 3.2 of the Anti-Dumping Agreement permits a combined analysis of the effects of imports on the price of the domestic product.

6.8. Tunisia therefore requests the Panel to find that the price undercutting analysis violates Articles 3.1 and 3.2 of the Anti-Dumping Agreement because MIICEN compared an actual import price with a constructed (fictitious) domestic product price.

6.2 MIICEN acted inconsistently with Articles 3.1 and 3.2 by using as its basis a comparison of prices for a single year rather than the entire period of investigation

6.9. Tunisia claims that MIICEN acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by basing its price undercutting analysis on a static, fixed comparison of prices for a single year.⁷⁰

6.10. In conducting its price undercutting analysis, MIICEN only compared one import price with one (constructed) domestic product price calculated for a single sub-period from 1 May 2016 to 31 April 2017, i.e. the last 12 months of the period of investigation. As explained above, the price undercutting analysis requires a "dynamic assessment of price developments and trends in the relationship between the prices of the dumped imports and those of domestic like products over the entire period of investigation (POI)".⁷¹ This means that an investigating authority is violating its obligation under Articles 3.1 and 3.2 by conducting:

... a static examination of whether there is a mathematical difference at any point in time during the POI without any assessment of whether or how these prices interact over time.⁷²

6.11. The question therefore arises as to what is the appropriate period for conducting this "dynamic assessment". In the above quotation, the Appellate Body stated that this analysis must be conducted "over the entire period of investigation", i.e. the period of investigation chosen for the purposes of the injury assessment. Tunisia indicated that it was not necessary to address this issue in the abstract. The relevant question is whether there is consistency between the period used for price undercutting and the period used for the rest of the injury analysis. Given that MIICEN relied on the period from 1 January 2013 to 30 April 2017 for almost all of the factors and indices examined in

⁶⁷ Morocco's second written submission, para. 200.

⁶⁸ Morocco's second written submission, para. 203.

⁶⁹ Morocco's second written submission, para. 204.

⁷⁰ Tunisia's first written submission, paras. 6.43-6.47.

⁷¹ Appellate Body Report, *China – HP-SSST*, para. 5.159.

⁷² Appellate Body Report, *China – HP-SSST*, para. 5.160.

relation to injury and the causal link, it should have based its price undercutting analysis on the same period.

6.12. Morocco relies on Article 17, paragraph 3, of Decree No. 2-12-645 of 27 December 2012 (which requires a period for price undercutting like that set for the dumping analysis) in claiming that "the period selected is defined in a pre-existing rule of general and routine application".⁷³ Insofar as Morocco attempts to justify an inconsistency with the Anti-Dumping Agreement by invoking its internal law, Tunisia recalls the general principle of international law enshrined in Article 27 of the Vienna Convention on the Law of Treaties under which "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".⁷⁴ This principle is also codified in Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization, which provides that "[e]ach Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements". A violation of international obligations cannot therefore be justified on the grounds that the act or omission at issue is required under domestic legislation.

6.13. Accordingly, Tunisia requests the Panel to find that the price undercutting analysis violates Articles 3.1 and 3.2 of the Anti-Dumping Agreement because MIICEN made a static, fixed analysis between one import price and one domestic product price calculated for one single year of the investigation period.

6.3 MIICEN acted inconsistently with Articles 3.1 and 3.2 by erroneously using the Tunisian exporters' profit margin to construct the selling price of domestic exercise books

6.14. In constructing the price of the domestic product, MIICEN used the Tunisian exporters' profit margin obtained in the Tunisian market for domestic producers in the Moroccan market.⁷⁵ Tunisia claims that, even assuming that MIICEN was authorized to construct a price for the domestic product under Articles 3.1 and 3.2 of the Anti-Dumping Agreement (*quod non*), MIICEN's approach whereby the profit margin of Tunisian producers is attributed to Moroccan producers is without basis for two reasons.

6.15. *First*, MIICEN asserted that "it is legitimate for Moroccan producers to be able to aspire to the same level of profit made by their Tunisian counterparts in their domestic market".⁷⁶ However, this assertion has no factual basis. A company's "profit" depends on, *inter alia*, production costs, market conditions (interaction between supply and demand) and distribution channels. It is therefore normal for a producer's "profit" to be different from that of another producer, particularly in different markets.

6.16. MIICEN's assertion that it is "legitimate" for Moroccan producers to obtain the "same level of profit" in the Moroccan market as Tunisian producers in the Tunisian market does not hold in the absence of an in-depth analysis of the particular circumstances of both markets. Without even attempting to conduct such an analysis, MIICEN improperly attributed the profit margin of Tunisian exporters to domestic producers for the purposes of constructing the price of the domestic product. MIICEN should have used a more detailed analysis of the conditions in both markets in order to reach its conclusion that it was "legitimate for Moroccan producers to be able to aspire to the same level of profit made by their Tunisian counterparts in their domestic market".⁷⁷

6.17 *Second*, MIICEN calculated the profit margin attributed to Moroccan producers "on the basis of the average of the two weighted averages of the profit margins of both exporters for their domestic

⁷³ Response to Panel question 3.15 b. following the second substantive meeting, para. 41.a.

⁷⁴ See G.C. Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, Collected Courses of the Hague Academy of International Law, (volume 92), 1952, p. 85, where Professor Fitzmaurice considered that the principle preventing States from relying on internal law to avoid international obligations is "one of the great principles of international law, informing the whole [national] system and applying to every branch of it". Several decades later, the International Court of Justice recognized the customary law status of the principle codified in Article 27 of the Vienna Convention on the Law of Treaties. See *Case concerning certain questions of mutual assistance in criminal matters (Djibouti v. France)*, Judgment of 4 June 2008, para. 121.

⁷⁵ Report on the definitive determination, para. 136. Exhibit TUN-7.

⁷⁶ Report on the definitive determination, para. 140. Exhibit TUN-7.

⁷⁷ Report on the definitive determination, para. 140. Exhibit TUN-7.

sales".⁷⁸ However, as demonstrated by Tunisia in the context of its claims under Articles 2.1, 2.2 and 2.2.2 of the Anti-Dumping Agreement, this profit margin calculated for each of the Tunisian exporters was inflated due to errors made by MIICEN. As a result, the profit margin does not reflect the profit margin that the Tunisian exporters could in all likelihood have achieved for their domestic sales. Tunisia recalls that Morocco has not responded to this argument.

6.18. Tunisia therefore requests the Panel to find that the price undercutting analysis violates Articles 3.1 and 3.2 of the Anti-Dumping Agreement because MIICEN attributed an incorrectly calculated profit margin to the Moroccan producers, without analysing whether all the relevant conditions in the Moroccan and Tunisian markets were similar.

7 MIICEN VIOLATED ARTICLES 3.1 AND 3.2 OF THE ANTI-DUMPING AGREEMENT BY ERRONEOUSLY FINDING PRICE DEPRESSION

7.1. With regard to the price depression analysis, Tunisia puts forward two arguments to demonstrate that MIICEN violated Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

7.1 MIICEN violated Articles 3.1 and 3.2 of the Anti-Dumping Agreement by establishing a distorted factual basis for considering whether the price decline was "to a significant degree"

7.2. Tunisia claims that MIICEN acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by establishing a distorted factual basis for considering whether the price decline was "to a significant degree".

7.3. MIICEN analysed the trend in the price of imports in paragraph 146 of the report on the definitive determination, finding that the price had remained at very low levels and had fallen by 6% between 2013 and the first four months of 2017.

7.4. Tunisia claims that MIICEN did not establish a valid factual basis for considering whether the price decline was "to a significant degree", as required by Article 3.2 of the Anti-Dumping Agreement. In particular, Tunisia acknowledges that "the drafters of the provision intentionally left considerable margin for an investigating authority to determine whether price [depression] is "significant", based on the specific circumstances of the case."⁷⁹ However, case law has interpreted the word "significant" in Article 3.2 as requiring the investigating authority to "rely on all positive evidence" to arrive at an objective factual basis.⁸⁰

7.5. MIICEN did not explicitly analyse whether the observed price depression was "to a significant degree". The question may arise as to whether MIICEN was required under Article 3.2 of the Anti-Dumping Agreement to explicitly consider this, as this condition is contained in Article 3.2. As WTO case law has clarified, regardless of the method used by the investigating authority, the factual basis for analysing whether price depression is "to a significant degree" must be based on an objective analysis of all available evidence.⁸¹

7.6. Even assuming that MIICEN could fulfil its obligation to consider whether the observed price depression was "to a significant degree" on the basis of an implicit analysis, such an analysis was necessarily based on the 6% decrease, as found by MIICEN when comparing the whole of 2013 to the first four months of 2017. This price decline is the only observation made by MIICEN concerning price trends in paragraph 146 of the report on the definitive determination.

7.7. However, the comparison of the domestic product's price performance between 2013 and the first four months of 2017 is inappropriate due to the seasonal nature of exercise book sales and prices. As Tunisia has repeatedly explained, the data that were available to MIICEN show that the prices of exercise books vary according to *seasonality* stemming from the start of the school year. This is confirmed by the table in paragraph 148 of the report on the definitive determination.

⁷⁸ Report on the definitive determination, para. 140. Exhibit TUN-7.

⁷⁹ Panel Report, *US - Carbon Steel (India)* (Article 21.5 – *India*), para. 7.345.

⁸⁰ Appellate Body Report, *China – HP-SSST*, para. 5.161.

⁸¹ Appellate Body Report, *China – HP-SSST*, para. 5.161.

Table No. 4: Changes in local selling price

						(Index 2013=100)	
	2013	2014	2015	2016		2016 (Jan.-April)	2017 (Jan.-April)
Average unit selling price of the DI (MAD/tonne)	100	99.11	98.53	98.31		93	94

Source: DI's responses to investigation questionnaires

7.8. In this table, the price for the period January-April 2016 was 93, while the price was considerably higher, 98.31, for 2016 as a whole. The price for the period May-December was therefore 99.46. Hence, the price for the first four months was 6.46% lower than the price for the rest of the year.

7.9. The figures for 2016 should have served as an indication to MIICEN that the period January-April 2017 was unreliable. If MIICEN intended to rely on the data from that period for 2017, it should have at least verified the reliability of those figures. Unfortunately, MIICEN did not conduct such a verification analysis. As the figures for the period January-April 2017 were unreliable, MIICEN should have focused on analysing entire years, given that those figures were not affected by the seasonal nature of exercise book sales and prices. Such an analysis shows that, although the price fell continuously during the period under investigation, the decline was much less pronounced than MIICEN suggests, i.e.: 0.89% from 2013 to 2014; 0.58% from 2014 to 2015; and 0.22% from 2015 to 2016. The overall decrease between 2013 and 2016 was 1.69%.

7.10. In light of the above considerations, MIICEN erroneously relied on the sub-period January-April 2017 to try to accentuate the fall in the price of the domestic product. Of course, a 6% decrease based on this sub-period is more like to qualify as "significant" than a 1.69% decrease based on the four full years comprising the period covered by the investigation. MIICEN therefore acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by establishing a distorted factual basis for assessing whether the observed price decline was "to a significant degree".

7.2 MIICEN violated Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing to properly consider whether the decline in the price of the domestic product was due to Tunisian imports

7.11. Tunisia claims that MIICEN acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing to properly consider whether the decline in the price of the domestic product was due to Tunisian imports.

7.12. In the report on the definitive determination, MIICEN included two paragraphs attributing the decline in the price of the domestic product to imports. In particular, MIICEN justified its finding on price depression by stating that domestic producers of exercise books are forced to constantly match the low prices offered primarily by importers of Tunisian exercise books so that they can sell and maintain a certain level of market share.⁸²

7.13. Tunisia claims that MIICEN failed to properly consider whether the decline in the price of the domestic product was due to Tunisian imports. In this regard, Tunisia recalls Appellate Body case law, according to which "an investigating authority is required to consider whether a first variable - that is, subject imports - has explanatory force for the occurrence of significant depression or suppression of a second variable - that is, domestic prices".⁸³

7.14. The question therefore arises as to whether MIICEN properly assessed whether the decline in the price of the domestic product was due to imports. The answer is no. The confidential version of the report on the definitive determination (Exhibit MAR-CONF-3 (BCI)) confirms that MIICEN's assertions attributing the decline in the price of the domestic product to imports are misleading. In particular, MIICEN simply asserted, without any serious analysis of price trends, that domestic producers "are forced to constantly match the low prices offered... primarily [by] importers of

⁸² Report on the definitive determination, paras. 147 and 148. Exhibit TUN-7.

⁸³ Appellate Body Report, *China – GOES*, para. 136. (Emphasis added)

Tunisian exercise books".⁸⁴ However, this assertion is contradicted by a thorough analysis of the interaction between the price of imports and the price of the domestic product.

7.15. The price of imports and the price of the domestic product were virtually the same in 2013. However, while the price of imports increased in 2014, 2015 and 2016, the price of the domestic product declined over the same period. It should be noted that the price differentials increased year-on-year: they rose from 3.9% in 2014, to 4% in 2015, and to 5.6% in 2016. Based on these price trends, it should be asked how MIICEN was able to conclude that imports had "explanatory force for the occurrence of significant depression... [of] domestic prices".⁸⁵ The price trends of imports and the domestic product show instead that the DI's decision to lower the price of its exercise books had nothing to do with the price of imports.

7.16. MIICEN therefore did not analyse the trends in the interaction between the price of imports and the price of the domestic product. By disregarding this interaction, MIICEN did not conduct a serious examination of whether the decline in the price of the domestic product was due to imports, as required by Articles 3.1 and 3.2 of the Anti-Dumping Agreement. An analysis of price trends based on the data that were available to MIICEN calls into question, and even contradicts, any assertion that imports have "explanatory force for the occurrence of significant depression... [of] domestic prices".⁸⁶ Hence, by failing to properly consider whether the decline in the price of the domestic product was due to Tunisian imports, MIICEN acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

8 MIICEN VIOLATED ARTICLES 3.1 AND 3.2 OF THE ANTI-DUMPING AGREEMENT BY ERRONEOUSLY FINDING PRICE SUPPRESSION

8.1. With regard to the price suppression analysis, Tunisia puts forward two arguments to demonstrate that MIICEN violated Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

8.1 MIICEN violated Articles 3.1 and 3.2 of the Anti-Dumping Agreement by establishing a distorted factual basis for assessing whether the increase in the ratio between the selling price and the cost of production of the domestic product was "to a significant degree"

8.2. Tunisia claims that MIICEN acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by establishing a distorted factual basis for assessing whether the increase in the ratio between the selling price and the cost of production of the domestic product was "to a significant degree".

8.3. In its price suppression analysis, MIICEN found that the cost of production had increased by 1% between 2013 and 2016 and by 3% between 2013 and 2017, while the price of the domestic product had "gradually decreased since 2013".⁸⁷ MIICEN then found that "the ratio between the cost of production and the selling price of the locally produced exercise book had increased by 10% between 2013 and 2017" and that this finding "reflects the presence in the domestic market of pressure to prevent the domestic industry from increasing its prices to a level that will enable it to cover its production and marketing costs".⁸⁸

8.4. Tunisia submits the data on which MIICEN relied to conclude that the price of the domestic product had been suppressed:⁸⁹

⁸⁴ Report on the definitive determination, para. 147. Exhibit TUN-7.

⁸⁵ Appellate Body Report, *China – GOES*, para. 136. (Emphasis added)

⁸⁶ Appellate Body Report, *China – GOES*, para. 136. (Emphasis added)

⁸⁷ Report on the definitive determination, para. 149. Exhibit TUN-7.

⁸⁸ Report on the definitive determination, para. 149. Exhibit TUN-7.

⁸⁹ Report on the definitive determination, para. 149. Exhibit TUN-7.

Table No. 5: Changes in the share of the cost of production in the selling price

	2013	2014	2015	2016	<i>(Index 2013=100)</i>	
					2016 (Jan.-April)	2017 (Jan.-April)
Average cost of production of the DI (MAD/tonne)	100	102.26	98.76	101.24	103	102.81
Average selling price of the DI (MAD/tonne)	100	99.11	98.53	98.31	93	94
Unit margin	-100	-917.86	-157.14	-862.5	-2693	-2388
Cost of production / Selling price	100	104	101	103	111	110

Source: DI's responses to investigation questionnaires

8.5. Tunisia does not dispute the fact that the ratio between the cost of production and the selling price increased during the period of investigation. However, for this increase to meet the legal standard in the second sentence of Article 3.2 of the Anti-Dumping Agreement, the increase must be observed "to a significant degree". Regardless of the method chosen, Articles 3.1 and 3.2 of the Anti-Dumping Agreement require the investigating authority to "rely on all positive evidence" to arrive at an objective factual basis on the "significance" of the price suppression.⁹⁰

8.6. In this case, MIICEN did not explicitly address whether the price suppression was "to a significant degree". This raises the question of whether MIICEN was required, under Article 3.2 of the Anti-Dumping Agreement, to explicitly consider the "significance" of the price suppression. Even assuming that MIICEN could implicitly consider whether the price suppression was "to a significant degree", this examination was necessarily based on the 10% increase in the ratio between the cost of production and the price of the domestic product between 2013 and the first four months of 2017.⁹¹ However, as Tunisia has repeatedly explained, the data for the first four months of 2017 were not reliable because of the seasonality of exercise book sales, production and prices. This is confirmed by the data for 2016 that were available to MIICEN. In particular, the ratio between the cost of production and the price of the domestic product for the first four months of 2016 was 111%. However, the ratio for 2016 as a whole was 103%. This means that the ratio between the cost of production and the price of the domestic product for the period May-December 2016 was below 103%. The gap between the first four months and the rest of 2016 is therefore considerable, highlighting the seasonal nature of the ratio between the cost of production and the price of the domestic product.

8.7. Moreover, the ratio between the cost of production and the price of the domestic product in the first four months of 2016 and 2017 is similar (i.e. roughly 111% and 110%, respectively). The performance of this factor during the first four months and the rest of 2016 should have been a strong indication that the accuracy of the data for the first four months of 2017 was questionable. However, MIICEN disregarded the seasonal nature of the ratio between the cost of production and the price of the domestic product, by exclusively relying on an increase of 10% in that ratio between 2013 and the first four months of 2017 to implicitly find suppression of the price of the domestic product "to a significant degree". Of course, a 10% increase in the ratio between the cost of production and the price of the domestic product between 2013 and the first four months of 2017 is more likely to be "significant" than a 3% increase between 2013 and 2016 (full years).

8.8. As a result, MIICEN only relied on a 10% increase in the ratio between the cost of production and the price of the domestic product between 2013 and the first four months of 2017 to find that there was price suppression. It is on the basis of this 10% increase that MIICEN finally found, albeit implicitly, that the price suppression was "to a significant degree". MIICEN therefore acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by deeming that the price suppression was "to a significant degree" on the basis of the 10% increase in the ratio between the

⁹⁰ Appellate Body Report, *China – HP-SSST*, para. 5.161.

⁹¹ Report on the definitive determination, para. 149. Exhibit TUN-7.

cost of production and the selling price of the domestic product between 2013 and the first four months of 2017.

8.2 MIICEN failed to assess whether the alleged price suppression was due to imports

8.9. Tunisia claims that MIICEN acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing to objectively examine whether the observed price suppression was due to imports.

8.10. In particular, paragraph 149 of the report on the definitive determination does not contain any reference to imports, highlighting that MIICEN failed to consider whether the price suppression was due to imports. MIICEN found that the 10% increase in the ratio between the cost of production and the price of the domestic product between 2013 and the first four months of 2017 "reflects the presence in the domestic market of pressure to prevent the domestic industry from increasing its prices to a level that will enable it to cover its production and marketing costs".⁹² As this "pressure", according to MIICEN, came from imports, it should have explicitly said so and, more importantly, it should have explained how imports were exerting "pressure" on the ratio between the cost of production and the selling price of the DI's exercise books.

8.11. In any case, analysis of trends in the price of imports, the price of the domestic product and the cost of production confirms that the "pressure" on the Moroccan market preventing the DI from raising its prices does not come from imports. In 2014, 2015 and 2016, the price of imports exceeded the DI's cost of production, which exceeded the price of the domestic product. It is clear that imports had nothing to do with the DI's decision to set its selling price below the cost of production. If the DI's price had been aligned with the price of imports, it would have exceeded the cost of production throughout the period. These trends thus demonstrate that the so-called "pressure" mentioned by MIICEN in paragraph 149 of its report on the definitive determination does not come from imports.

8.12. MIICEN therefore acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement, as it failed to examine whether the observed price suppression was due to imports.

9 MIICEN VIOLATED ARTICLES 3.1 AND 3.4 OF THE ANTI-DUMPING AGREEMENT BY ERRONEOUSLY FINDING INJURY

9.1. Under Articles 3.1 and 3.4 of the Anti-Dumping Agreement, an investigating authority must objectively examine the relevant economic and financial factors listed in Article 3.4, based on positive evidence, to assess the DI's situation. The examination of each of these factors "requires a process of analysis and assessment of the role, relevance and relative weight of each factor in the particular investigation".⁹³ Moreover, the investigating authority's examination must be conducted in an unbiased manner, without favouring any of the interested parties.⁹⁴ This examination must draw a "streamlined, genuine and undistorted picture" from the facts to be considered as coming from an objective authority.⁹⁵

9.2. With regard to MIICEN's analysis of the DI's situation, Tunisia puts forward three interrelated arguments to demonstrate that MIICEN violated Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

9.1 MIICEN violated Articles 3.1 and 3.4 of the Anti-Dumping Agreement by failing to take into account that most of the factors showed positive trends

9.3. MIICEN based its conclusion of injury on four factors: DI profitability, production, sales and market share. MIICEN specified that profitability was the key indicator underlying its conclusion.

⁹² Report on the definitive determination, para. 149. Exhibit TUN-7.

⁹³ Panel Report, *Russia – Commercial Vehicles*, para. 7.111, referring to Appellate Body Report, *Thailand – H-Beams*, para. 125, and Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para 6.162 (footnotes omitted).

⁹⁴ Appellate Body Reports, *US – Hot-Rolled Steel*, para. 193; and *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.207.

⁹⁵ Panel Report, *EC – Tube or Pipe Fittings*, para. 7.316.

9.4. Tunisia alleges that MIICEN concluded that there was injury despite the positive performances of many other factors. Productive capacity, employment and investment increased on the whole during the period of investigation, as did three of the factors on which MIICEN relied to conclude that there was injury (production, sales and market share showed positive trends during most of the investigation period (2013-16)). Given the overall positive situation of the DI, it was not objective for MIICEN to conclude that there was injury by relying almost exclusively on profitability as a key factor and ignoring the positive performance of many factors.⁹⁶ The fact that certain factors show a positive performance does not prevent an investigating authority from concluding that there is injury.⁹⁷ However, in such cases, the authority must explain in a "thorough and persuasive manner" why the positive performance has been "outweighed by any other factors".⁹⁸ MIICEN failed to do this.

9.5. In response, Morocco argues that the context is one of an industry trying to remain competitive,⁹⁹ and that the overall picture was one of economic decline.¹⁰⁰ Tunisia maintains that the picture painted by Morocco of a suffering industry forced to sell at a loss in order to remain competitive is not convincing in light of the facts. An industry in which production, productive capacity, sales, market share, employment and investments have increased is a healthy industry. Given the positive trends in these factors, which suggest that the DI was in good health, MIICEN should have provided a "thorough and convincing" explanation as to why the DI was still suffering injury, as the Panel in *Thailand - H-Beams* suggested.¹⁰¹ Morocco still argues that the increase in stocks shows that the DI was suffering injury,¹⁰² while Tunisia argues that the fact that the DI increased its sales without disposing of its stocks points to an over-producing industry. Lastly, Morocco explains that investment increased to allow the DI to remain competitive. However, it makes no sense for a supposedly suffering industry, as MIICEN claims, to continue to massively increase its investments over several years. MIICEN therefore failed to analyse the DI's situation in an objective manner.

9.2 MIICEN violated Articles 3.1 and 3.4 of the Anti-Dumping Agreement by erroneously relying on the DI's production, sales and market share performance during the first four months of 2017

9.6. Tunisia claims that MIICEN erroneously relied on the DI's production, sales and market share performance during the first four months of 2017 to conclude that there was injury. However, this data was not reliable due to the seasonality of exercise books.

9.7. For example, production does not occur on a regular basis throughout the year, and it is therefore highly likely that it occurred during different periods from one year to the next. Thus, production from January-April of a given year cannot be compared to production during the same period from another year without ensuring that the comparison has not been distorted by the seasonality of exercise books.¹⁰³ Moreover, MIICEN concluded that there was injury based on the data for January-April 2017, even though production increased during the full years covered by the investigation period (from 2013 to 2016).

9.8. In response, Morocco explained that the period January-April was quite representative, as "most output must be available by May of each year".¹⁰⁴ However, the figures do not support this statement. Looking at the data for 2016 (the only year for which we have data for January-April and for the entire year), we can see that roughly one third of production took place during the first four months of the year, and not the majority, as Morocco suggests. As a result, the data for January-April are likely to create distortions, as the proportion of exercise books produced by the DI may

⁹⁶ Tunisia's first written submission, paras. 6.99-6.106; and opening statement at the first substantive meeting, para. 8.3.

⁹⁷ Tunisia's first written submission, para. 6.105.

⁹⁸ Panel Report, *Thailand - H-Beams*, para. 2.249.

⁹⁹ Morocco's first written submission, para. 179.

¹⁰⁰ Morocco's opening statement at the first substantive meeting, para. 99.

¹⁰¹ Panel Report, *Thailand - H-Beams*, para. 2.249.

¹⁰² Morocco's first written submission, paras. 180-181.

¹⁰³ Tunisia's first written submission, paras. 6.111-6.112.

¹⁰⁴ Morocco's first written submission, footnote 162.

change from one year to the next, for example, depending on when the orders are placed and when the producers provide the raw material.¹⁰⁵

9.9. With regard to sales and market share, MIICEN relied on the decrease observed in January-April 2017 compared to January-April 2016 to conclude that there was injury, despite the positive performance of these factors during the four full years covered by the period of investigation (2013-16). However, in 2017, a very large portion of imports (80%) occurred during the first four months of the year, when this share was much lower in 2016 (56%). Given that domestic exercise books compete directly with Tunisian exercise books, it is not surprising that their sales and market share decreased in January-April 2017 when Tunisian imports were, in proportion to the rest of the year, most significant. MIICEN therefore should not have relied on data from January-April 2017 to conclude that there was injury without ensuring that the comparison did not create distortions due to seasonality.¹⁰⁶

9.10. In response, Morocco explained that MIICEN's analysis was objective, as it had compared the same period (January-April) in 2016 and 2017.¹⁰⁷ However, the distorted nature of MIICEN's comparison does not stem from comparing different periods; rather, it stems from the fact that from one year to the next, the share of sales and market share observed in January-April may vary. Morocco also refers to the dispute *Russia - Commercial Vehicles* in an effort to defend MIICEN's approach.¹⁰⁸ However, in that dispute, the seasonality of the product at issue was not comparable to that of exercise books. Moreover, the investigating authority had taken into account data for temporal subsets (half-year data), but had also taken into account data for entire years,¹⁰⁹ whereas MIICEN relied on data for the first four months of 2017, without having data for the entire year. It is therefore clear that the approach used by the investigating authority in *Russia - Commercial Vehicles* does not in any way validate MIICEN's approach.¹¹⁰

9.3 MIICEN violated Articles 3.1 and 3.4 of the Anti-Dumping Agreement by erroneously relying on the DI's negative profitability

9.11. Tunisia claims that MIICEN erroneously gave decisive weight to the DI's negative profitability to conclude that there was injury.¹¹¹ Such an approach is not objective in this case for several reasons.¹¹²

9.12. First, there are several reasons why an enterprise may decide to sell at a loss, and selling at a loss can sometimes be part of normal commercial activity.¹¹³ It is therefore not a sign of injury *per se*. Second, MIICEN explained that the DI's negative profitability was due to the fact that it was forced to sell its exercise books at a loss as a result of Tunisian imports. However, the data available to MIICEN showed that the DI was pursuing an aggressive business strategy, as its selling price was still below the price of Tunisian exercise books and below the cost of production. Therefore, if the DI was actually suffering, it could have increased its selling price above the cost of production and below the price of Tunisian exercise books in order to be profitable, as well as competitive *vis-à-vis* imports. However, it strategically chose not to do so in order to increase its market share. MIICEN therefore should not have interpreted the DI's negative profitability as being synonymous with injury.¹¹⁴

¹⁰⁵ Tunisia's second written submission, para. 4.129.

¹⁰⁶ Tunisia's first written submission, paras. 6.116-6.120.

¹⁰⁷ Morocco's first written submission, para. 189 (footnote deleted).

¹⁰⁸ Morocco's first written submission, paras. 190-191.

¹⁰⁹ Panel Report, *Russia - Commercial Vehicles*, table in para. 7.32.

¹¹⁰ Tunisia's second written submission, para. 4.20.

¹¹¹ Tunisia's first written submission, paras. 6.129-6.132.

¹¹² In its first written submission, Tunisia put forward an argument based on apparent inconsistencies concerning the indexed figures in the non-confidential version of the report on the definitive determination (paras. 6.123-6.128). However, in light of the confidential data provided by Morocco in its first written submission, it does not pursue this argument. It is therefore not reflected in this summary.

¹¹³ Appellate Body Report, *Canada - Renewable Energy / Canada - Feed-In Tariff Program*, para. 5.71; Panel Report, *Canada - Renewable Energy / Canada - Feed-In Tariff Program*, para. 7.151.

¹¹⁴ Tunisia's first written submission, para. 6.131; and oral statement at the first substantive meeting, para. 8.9.

9.13. In response, Morocco explains that the DI was unable to adopt a multi-year loss-making strategy.¹¹⁵ However, when looking at the only producer with negative profitability throughout the investigation period, it is telling that despite the lack of profitability, it chose to increase its production and sales volume, but continuously lowered its selling price.¹¹⁶ Moreover, it should be noted that the three producers of Moroccan exercise books comprising the DI had diversified activities in addition to the production of exercise books, which could have offset the loss of profitability from exercise books.¹¹⁷ Lastly, Morocco considers that an industry such as the exercise book industry cannot react very quickly to changes in the cost of production and price movements.¹¹⁸ However, the DI had ample time to adapt to this reality, as its selling price remained below the cost of production and the price of Tunisian imports for several years. Tunisia also notes that for a seasonal product such as school exercise books, orders are placed every year in anticipation of the start of the next school year, and one can easily imagine that the selling price is also set every year.¹¹⁹ Moreover, even the DI indicated during the investigation that its prices were set according to the competition, mainly from Tunisian producers.¹²⁰ Morocco's argument that the DI could not adapt to changes in the costs of production and the price of the competition therefore does not hold.

9.14. Finally, Morocco emphasizes that the Panel must not take inferences into consideration, but rather, evidence to assess whether the DI was pursuing a business strategy.¹²¹ Tunisia notes in this regard that it is not asking the Panel to determine whether there was a business strategy in the DI. Rather, Tunisia is asking the Panel to assess whether MIICEN's conclusion that the DI was "forced" to sell at a loss in order to match the low prices of Tunisian imports was the conclusion of an objective and unbiased authority. As the figures on record do not support this conclusion in any way, but MIICEN nevertheless accepted this explanation from the applicants without questioning it, Tunisia considers that the analysis conducted by MIICEN lacked objectivity and impartiality.¹²²

9.15. For the above reasons, Tunisia requests the Panel to conclude that Morocco acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement by failing to analyse the factors related to injury in an objective manner.

10 MIICEN VIOLATED ARTICLES 3.1 AND 3.5 OF THE ANTI-DUMPING AGREEMENT BY ERRONEOUSLY FINDING A CAUSAL RELATIONSHIP

10.1. With regard to the causal relationship analysis, Tunisia puts forward two arguments.

10.1 MIICEN acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement by finding a causal relationship despite the multiple errors committed in the analyses under Articles 3.2 and 3.4 of the Anti-Dumping Agreement

10.2. Tunisia claims that MIICEN violated Articles 3.1 and 3.5 of the Anti-Dumping Agreement by finding a causal relationship despite the errors explained above in the analysis of the volume of imports, the effects of imports on the price of the domestic product, and injury factors.

10.3. Tunisia recalls that the provisions of Article 3 of the Anti-Dumping Agreement provide for "a logical progression of inquiry leading to an investigating authority's ultimate injury and causation determination".¹²³ If the examination of each step in this "logical progression" is biased and, as a result, inconsistent with the relevant provisions of Article 3 of the Anti-Dumping Agreement, the final finding on the causal relationship will inevitably be incorrect and inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement. Tunisia notes that Morocco does not refute this statement.

10.4. In this case, as Tunisia explains above, each stage of the injury analysis conducted by MIICEN is inconsistent with the relevant provisions of the Anti-Dumping Agreement, i.e. Articles 3.1, 3.2 and 3.4. Therefore, the price undercutting analysis is inconsistent with Articles 3.1 and 3.5 of the Anti-

¹¹⁵ Morocco's first written submission, para. 195.

¹¹⁶ See Tunisia's opening statement, para. 8.12; and second written submission, para. 4.149.

¹¹⁷ Tunisia's second written submission, para. 4.149.

¹¹⁸ Morocco's opening statement at the first substantive meeting, para. 100.

¹¹⁹ Tunisia's second written submission, para. 4.150.

¹²⁰ Tunisia's opening statement at the second substantive meeting, para. 7.7.

¹²¹ Morocco's opening statement at the first substantive meeting, para. 100.

¹²² Tunisia's second written submission, para. 4.151.

¹²³ Appellate Body Report, *China – GOES*, para. 128.

Dumping Agreement, as it is based on biased findings regarding the injury and causal relationship analysis.

10.2 MIICEN acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement by failing to analyse the effects of competition from Moroccan producers other than the applicants, particularly Imprimerie Moderne, on the state of the DI

10.5. Tunisia further claims that MIICEN violated Articles 3.1 and 3.5 of the Anti-Dumping Agreement by failing to examine the effects of competition from Moroccan producers other than the applicants in its non-attribution analysis. Both the DI and Tunisian exporters drew MIICEN's attention to the significant presence of Imprimerie Moderne on the Moroccan market, as well as the effects of the competition from this company on the DI since 2015. In particular, the introductory petition indicates that the Imprimerie Moderne's share of production increased from 0% to 28% of total production between 2015 and 2016. Moreover, Tunisian exporters have pointed out that Imprimerie Moderne performed very well and that it "[was] successfully develop[ing] new brands (e.g. Bleu Marine) and [had] expanded their production and sales".¹²⁴ As such, an unbiased and objective authority should have found that Imprimerie Moderne had a significant presence as a producer of exercise books and should have investigated whether (and how) the DI had responded to the competition from this new producer.

10.6. MIICEN was thus required, under Articles 3.1 and 3.5 of the Anti-Dumping Agreement, to "separat[e] and distinguish[...] the injurious effects of [the competition from Imprimerie Moderne] from the injurious effects of the [...] imports" at issue,¹²⁵ regarding the facts that were available to it. It therefore does not matter whether, as Morocco claims, "Imprimerie Moderne failed to cooperate with the authority" in the subsequent stages of the investigation.¹²⁶ MIICEN acknowledged that these companies explicitly supported the introductory petition.¹²⁷ Moreover, in the introductory petition, the DI provided information on the volume and value of these companies' sales.¹²⁸ Of course, due to its confidential nature, this information is only available if the companies holding it are forthcoming. This would suggest that both Imprimerie Moderne and Sopalemb cooperated in the preparation of the petition.

10.7. In any event, Morocco's claim that neither Imprimerie Moderne nor Sopalemb replied to MIICEN's questionnaire after the initiation of the investigation is irrelevant. It should be recalled that these producers supported the introductory petition and provided information on the volume and value of their production. Therefore, even if these producers decided not to cooperate, MIICEN already had highly relevant information to determine their impact on the DI's situation. More specifically, according to information available to MIICEN, Imprimerie Moderne's share of production increased from 0% to 28% of total domestic production between 2015 and 2016.

10.8. Therefore, an unbiased and objective authority could not have ignored that the sudden appearance of a domestic competitor accounting for a significant share of domestic production was likely to have had a significant effect on the DI's commercial decision-making (including price determination). However, MIICEN ignored the effects of the competition from Imprimerie Moderne on the state of the DI, even though it was well aware of this factor. Thus, by failing to analyse this non-attribution factor, MIICEN acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

11 MIICEN VIOLATED ARTICLES 5.2 AND 5.3 OF THE ANTI-DUMPING AGREEMENT BY ERRONEOUSLY INITIATING THE INVESTIGATION

11.1. Tunisia claims that the initiation of the investigation on 4 May 2017 is inconsistent with Articles 5.2, 5.3 and 5.8 of the Anti-Dumping Agreement.

¹²⁴ Comment by Tunisian exporters concerning the investigation, 27 February 2018, p. 10. Exhibit TUN-29.

¹²⁵ Appellate Body Report, *EU – PET (Pakistan)*, para. 5.171.

¹²⁶ Morocco's second written submission, para. 195.

¹²⁷ Initiation report, Petition filed by exercise book producers for the implementation of anti-dumping measures on imports of exercise books from Tunisia (initiation report), p 6. Exhibit TUN-2.

¹²⁸ Excel file entitled Annex 2 - PUBLIC Petition Participation, submitted with MAPAF, Med Paper and Promograph's petition of 10 March 2017. Exhibit TUN-30.

11.2. As a reminder, the introductory petition was filed by an applicant comprising the companies MAPAF, Med Paper and Promograph. The domestic product was defined as "the exercise book, which is broadly defined and includes all types of exercise books intended for writing, whose sheets of paper have been assembled and attached together. It is intended primarily for schoolchildren and students."¹²⁹ The applicant specified that the domestic product consisted of "different types of exercise books", including "any type of exercise book, whether stitched, bound or spiral bound; any type of format: small format (A5); large format (A4) and maxi format; any type of paper grammage between 55 and 120 g/m²; and any type of cover: soft or hard".¹³⁰

11.3. Furthermore, the dumped imported product is defined as "school exercise books in small, large and maxi formats with a grammage of 55 to 120 g/m², primarily for the use of schoolchildren and students".¹³¹ The applicant also "provided information on the export price to Morocco and the normal value of exercise books at the ex-factory level for the period 1 December 2015 to 30 November 2016".¹³²

11.4. The evidence of dumping provided by the applicant consisted of a single invoice for Tunisian exports of exercise books to Morocco in 2016 on the basis of the f.o.b./Tunisia price.¹³³ The invoice was only for exercise books with one type of paper grammage (60 g/m²) (despite the wide range of grammage of between 55 and 120 g/m²); and was limited to three formats: 21x29.7 cm, 9x14 cm and 11x17 cm; and to three forms of presentation: stitched, register and bound.¹³⁴

11.5. Regarding the normal value, the evidence consisted of sales catalogues published by Carrefour Tunisia and specialized bookshops at the retail level. The prices were only for "numbered" exercise books, with two specific grammages (60 and 64 g), in three formats (21x29.7 cm, 9x14 cm and 11x17 cm), and in three forms of presentation: stitched, register and bound.¹³⁵ The applicant also provided information on two adjustments to the normal value based on data on the Moroccan market.¹³⁶

11.6. Article 5.2 of the Anti-Dumping Agreement specifies that evidence of dumping, injury and a causal link between the imports concerned and the alleged injury must accompany the application. As pointed out by the Panel in *Mexico - Steel Pipes and Tubes*, Article 5.2 provides that "[s]imple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph";¹³⁷ and that "the absolute threshold of sufficiency will depend upon the circumstances of a given case" and "must be based on an assessment" of the criteria in Article 5.3.¹³⁸ Therefore, under Article 5.3 of the Anti-Dumping Agreement, the investigating authority must examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation. As explained by the Panel in *Mexico - Steel Pipes and Tubes*, a Panel review is to determine "whether an unbiased and objective investigating authority, looking at these facts, could properly have determined that there was sufficient evidence of dumping to justify the initiation of an anti-dumping investigation".¹³⁹

11.7. In addition, if the investigating authority considers that there is insufficient evidence to justify the initiation of an investigation, pursuant to Article 5.8 of the Anti-Dumping Agreement, the authority must promptly reject the application and terminate the investigation. This provision therefore applies not only to the end of an investigation that has already been initiated, but also to the rejection of an application prior to initiation.

11.8. In light of this legal standard, in this case, Tunisia considers that MIICEN acted inconsistently with Articles 5.2 and 5.3 for the following reasons. *First of all*, given the prices contained in the

¹²⁹ Initiation report, para. 8. Exhibit TUN-2.

¹³⁰ Initiation report, para. 9. Exhibit TUN-2.

¹³¹ Initiation report, para. 13. Exhibit TUN-2.

¹³² Initiation report, para. 22. Exhibit TUN-2.

¹³³ Initiation report, para. 24. Exhibit TUN-2.

¹³⁴ Initiation report, para. 26. Exhibit TUN-2.

¹³⁵ Initiation report, paras. 27 and 31. Exhibit TUN-2.

¹³⁶ Initiation report, para. 29. Exhibit TUN-2.

¹³⁷ Panel Report, *Mexico - Steel Pipes and Tubes*, para. 7.19.

¹³⁸ Panel Report, *Mexico - Steel Pipes and Tubes*, para. 7.24.

¹³⁹ Panel Report, *Mexico - Steel Pipes and Tubes*, para. 7.32.

export invoice¹⁴⁰ and the prices in the catalogues of wholesalers in Tunisia,¹⁴¹ which were limited to certain models of the product under investigation, MIICEN should have assessed whether these prices could be representative of the prices of the product under consideration in its entirety. However, as Tunisia explained, MIICEN simply accepted the prices proposed by the applicant and the explanation that "about 85% of the exercise books imported into Morocco from Tunisia" concerned the models for which prices were provided.¹⁴² There was no evidence to support this level of "popularity" of 85%.¹⁴³ MIICEN thus initiated the investigation without assessing whether the prices contained in the evidence concerning exports and domestic sales in Tunisia, which was limited to certain models (compared to the range of models of the product under investigation), could be representative of the export prices and normal values of the product under consideration in its entirety. MIICEN therefore acted inconsistently with Articles 5.2 and 5.3.

11.9. *Second*, based on the isolated, individual nature of the prices on the export invoice,¹⁴⁴ MIICEN should have assessed whether these export prices for one day (and one transaction) could be representative of export prices for the entire period of investigation. As the Panel in *Mexico - Steel Pipes and Tubes* noted, "it is [...] quite possible that an individual, isolated transaction may be an aberration from the typical prevailing prices and/or conditions, and therefore if the applicant has provided only such temporally isolated evidence, the authority should not assume without some corroboration that this evidence is representative of the period as a whole".¹⁴⁵ MIICEN simply accepted the applicant's price without questioning its temporal representativeness, and initiated the investigation without assessing whether the export prices for one day could be representative of export prices for the entire period of investigation. MIICEN therefore acted inconsistently with Articles 5.2 and 5.3.

11.10. *Third*, given the information (or lack thereof) on the origin of the products listed for the calculation of the normal value,¹⁴⁶ MIICEN should have assessed whether the information contained in the catalogues submitted as evidence was accurate and adequate in terms of the Tunisian producers involved in the petition, or in terms of the Tunisian origin of the good in question. As the Panel in *Mexico - Steel Pipes and Tubes* indicated in relation to a similar situation:

Where, as is the case here, it is obvious on its face that the normal value evidence before the authority at the time of initiation does not pertain to a producer or exporter and indeed pertains to a different level of trade, and may not even reflect products produced in the exporting country, the authority should make its best endeavours to verify that that evidence reflects the prevailing home market pricing at the level of producers and/or exporters.

In this case, Mexico has pointed to no evidence, and indeed does not argue, that Economía took any steps to determine whether the products reflected in the invoice and price quote were reflective of Tubac's prices - in spite of the fact that Tubac was the only identified Guatemalan producer or exporter of the product - or even that these products were of Guatemalan origin.* Nor does Mexico point to any evidence, or argue, that Economía asked Hylsa to confirm the Guatemalan origin of the products reflected in the invoice and price quote, or to provide any information as to whether and how these prices should be adjusted to reflect the producer/exporter level (e.g., by subtracting an amount for distributor mark-up).^{*147}

11.11. MIICEN failed to do this. As in the case of Mexico, Morocco has not submitted anything to the Panel indicating that MIICEN took steps to determine whether the products reflected in the catalogues, particularly Carrefour's, were reflective of the prices of the Tunisian producers mentioned in the petition for initiation or even that these products were of Tunisian origin. Nor does Morocco

¹⁴⁰ Tunisia's first written submission, paras. 8.23-8.24.

¹⁴¹ Tunisia's first written submission, paras. 8.31-8.32.

¹⁴² Tunisia's second written submission, para. 6.63(h).

¹⁴³ Tunisia's second written submission, para. 6.63(h).

¹⁴⁴ Tunisia's first written submission, paras. 8.21-8.22.

¹⁴⁵ Panel Report, *Mexico - Steel Pipes and Tubes*, para. 7.37.

¹⁴⁶ Panel Report, *Mexico - Steel Pipes and Tubes*, para. 7.37.

¹⁴⁷ Panel Report, *Mexico - Steel Pipes and Tubes*, paras. 7.35-7.36.

point to any evidence, or argue, that MIICEN asked the applicant to confirm the Tunisian origin of the products reflected in the catalogues.

11.12. MIICEN therefore initiated the investigation without assessing whether the information contained in the catalogues submitted as evidence of the normal value was accurate in terms of the producers involved or the origin of the good in question. MIICEN therefore acted inconsistently with Articles 5.2 and 5.3.

11.13. *Fourth*, MIICEN relied on the information submitted in the petition to calculate the domestic freight adjustment on exports. Given that certain variables made the adjustment insufficient (such as the variable weight of the models involved,¹⁴⁸ the arbitrary nature of double "round trip" freight¹⁴⁹ and freight based on a single distance (the longest one)¹⁵⁰), MIICEN should have assessed whether this adjustment was based on correct assumptions and supported by relevant evidence. However, MIICEN accepted the applicant's proposal without contesting it or taking additional verification measures in this regard,¹⁵¹ and initiated the investigation without assessing whether the adjustments to be applied to the export price and the normal value were based on correct assumptions. MIICEN therefore acted inconsistently with Articles 5.2 and 5.3.

11.14. *Fifth*, based on the information submitted in the petition for the calculation of the distribution margin adjustment, given that the evidence submitted concerned a market other than Tunisia's (the Moroccan market),¹⁵² MIICEN should have assessed whether the proposed adjustment was really based on a correct assumption and supported by relevant evidence. However, MIICEN accepted the applicant's proposal without contesting it or taking additional verification measures in this regard,¹⁵³ and initiated the investigation without assessing whether the adjustments to be applied to the export price and the normal value were based on correct assumptions. MIICEN's determination is therefore inconsistent with Articles 5.2 and 5.3.

11.15. *Sixth*, based on the information submitted in the petition, and given the intention to calculate the normal value at the ex-factory level (in order to make it comparable to the export price), MIICEN should have requested additional information on the retail profit margin.¹⁵⁴ However, MIICEN failed to do this,¹⁵⁵ and initiated the investigation without assessing whether the adjustments to be applied to the export price and the normal value were based on correct assumptions. MIICEN therefore acted inconsistently with Articles 5.2 and 5.3.

11.16. *Seventh*, given that the adjustment for the freight of domestic sales was the same as the adjustment for domestic freight for the export price,¹⁵⁶ MIICEN should have assessed whether this adjustment was based on correct assumptions. However, MIICEN accepted the applicant's proposal without contesting it or taking additional verification measures in this regard,¹⁵⁷ and initiated the investigation without assessing whether the adjustments to be applied to the export price and the normal value were based on correct assumptions. MIICEN therefore acted inconsistently with Articles 5.2 and 5.3.

11.17. *Eighth*, based on the information submitted in the petition for the calculation of the fees adjustment, given that the evidence submitted concerned a market other than Tunisia's (the Moroccan market),¹⁵⁸ MIICEN should have assessed whether the proposed adjustment was truly based on a correct assumption and supported by relevant evidence. However, MIICEN accepted the applicant's proposal without contesting it or taking additional verification measures in this regard,¹⁵⁹ and initiated the investigation without assessing whether the adjustments to be applied to the export

¹⁴⁸ Tunisia's first written submission, paras. 8.25-8.26.

¹⁴⁹ Tunisia's first written submission, para. 8.27.

¹⁵⁰ Tunisia's first written submission, paras. 8.28-8.30.

¹⁵¹ Tunisia's first written submission, para. 8.42.

¹⁵² Tunisia's first written submission, para. 8.35.

¹⁵³ Tunisia's first written submission, para. 8.42.

¹⁵⁴ Tunisia's first written submission, para. 8.35.

¹⁵⁵ Tunisia's first written submission, para. 8.42.

¹⁵⁶ Tunisia's first written submission, para. 8.37.

¹⁵⁷ Tunisia's first written submission, para. 8.42.

¹⁵⁸ Tunisia's first written submission, para. 8.38.

¹⁵⁹ Tunisia's first written submission, para. 8.42.

price and the normal value were based on correct assumptions. MIICEN therefore acted inconsistently with Articles 5.2 and 5.3.

11.18. For these reasons, in light of the shortcomings identified on the basis of Article 5.2, Tunisia considers that an unbiased and objective authority, using only the evidence in question as the evidentiary basis, could not have properly determined that there was sufficient evidence to justify the initiation of an anti-dumping investigation under Article 5.3.

11.19. In response, Morocco seems to rely on the theory that it was up to the exporters or Tunisia to prove that there was additional information on the wide range of models concerned or on the full period proposed that was reasonably available to the applicant.¹⁶⁰ In the absence of such evidence, the authority was bound to conclude that the information provided by the applicant was sufficient or met the requirements of Article 5.2.

11.20. In formulating this theory, Morocco admits that its attitude towards requests for initiation favours the acceptance of the information provided by the applicants, unless the exporters or the government of the exporting country demonstrate that there is better information that is reasonably available to the applicants. This attitude is biased and favours applicants.

11.21. Morocco's theory is inconsistent with Article 5.2 of the Anti-Dumping Agreement. The obligation contained therein is to provide not only the information that is available to the applicant, but "evidence". It does not permit the submission of simple assertions on the grounds that it is the only information available to the applicants. If an applicant accuses exporters of having engaged in dumping for an entire year, this must be "proven". The submission of information on a transaction on one day could prove the existence of a certain price level that day. However, this information does not prove the existing price level for the 365 days comprising the period of analysis. The same applies to models. A piece of information on certain models could prove the price level of those models, but is not evidence of the price level of other models of the product under investigation.

11.22. It would, of course, be unreasonable to require documents for every day and every model covered by the petition, and this is not what Tunisia proposes. However, in the absence of concrete evidence, reasonable assumptions must be made to address this lack of information, or a reasoned explanation must be provided on the reason why the information already provided is representative of the rest of the period or the range of products concerned. This is the least one would expect from a neutral and objective investigating authority.

11.23. In this case, MIICEN accepted the information provided by the applicant without questioning it or trying to fill the gaps in the petition. It is clear from the report and the notice of initiation of the investigation that the investigating authority simply reported on the information provided by the applicant and ordered the initiation of the investigation. There is no evidence to suggest that this information was contested or verified.

11.24. Moreover, Morocco argues that Tunisia overlooked an "element of a legal obligation" necessary to support its claim: i.e. that "[t]he application shall contain such information as is reasonably available to the applicant".¹⁶¹ However, Tunisia considers that the sufficiency of the evidence does not depend on its availability to the applicant. On the contrary, the sufficiency of the evidence depends on what is needed to prove the assertions in an introductory petition.¹⁶² Therefore, the fact that the evidence included in the petition was the only evidence available to the applicant does not justify the lack of sufficient and relevant evidence to prove dumping, injury and a causal link.

11.25. Morocco's argument would mean that, in order to establish a violation of Article 5.2, the complainant would have to prove not only that the evidence was insufficient, but also that there was other evidence available to the applicant. In the absence of such proof, there would be no violation of Article 5.2, even if the evidence accompanying the petition was not sufficient. This interpretation of Article 5.2 would run counter to the plain text of the second sentence of the provision, and would

¹⁶⁰ Morocco's first written submission, para. 255.

¹⁶¹ Morocco's second written submission, para. 267.

¹⁶² Tunisia's second written submission, para. 6.24.

also violate the condition provided for in Articles 5.6 and 5.8 on the need for "sufficient" evidence to justify the initiation of an investigation.

11.26. Therefore, the interpretation proposed by Morocco would render the requirement, under Article 5.2, to provide sufficient evidence inutile.¹⁶³ As explained by Tunisia, the purpose of the sentence in question on "such information as is reasonably available to the applicant" "is to limit the expectations of exporting Members so that they cannot require the submission of irrefutable evidence or evidence that would substantiate a preliminary or final determination for the initiation of an investigation".¹⁶⁴

11.27. Morocco also argues that Article 5.2 does not impose obligations on Members, but rather, on applicants only.¹⁶⁵ However, this argument disregards the fact that the Anti-Dumping Agreement, including Article 5.2, imposes international obligations on the 164 Members of the WTO as subjects of international law, and not on the domestic producers of each Member. Contrary to what Morocco suggests, a Member's actions would be inconsistent with Article 5.2 if its authority accepted a petition for initiation that lacked sufficient evidence, even if it was the only evidence reasonably available to the applicants. Therefore, shifting the "locus of obligation... to Articles 5.1 and 5.3"¹⁶⁶ as suggested by Morocco would have the effect of rendering Article 5.2 inutile as an international obligation. Morocco's arguments should therefore be rejected.

11.28. In light of the above considerations, Tunisia considers that the anti-dumping measure in question was adopted in violation of Articles 5.2 and 5.3. Given that the application did not contain sufficient evidence and that the authority failed to assess the adequacy and accuracy of the evidence submitted, the investigation should have been terminated pursuant to Article 5.8 of the Anti-Dumping Agreement.

12 CONCLUSION

12.1. In light of the explanations provided in its written and oral submissions in this proceeding, Tunisia requests the Panel to find that the anti-dumping measure at issue is inconsistent with Articles 2.1, 2.2, 2.2.2, 2.4, 3.1, 3.2, 3.4, 3.5, 5.2, 5.3, 5.8 and 12.2.2 of the Anti-Dumping Agreement.

12.2. Furthermore, Tunisia requests the Panel to issue a suggestion, under the second sentence of Article 19.1 of the Understanding, that Morocco comply with its obligations by revoking the anti-dumping measure at issue. The anti-dumping measure at issue is inconsistent with Morocco's obligations under the Anti-Dumping Agreement. Tunisia is of the view that these inconsistencies are of a "fundamental and pervasive" nature and, therefore, the only way for Morocco to comply with the recommendations and rulings of the DSB is to revoke the anti-dumping measure at issue.

¹⁶³ Tunisia's second written submission, para. 6.26.

¹⁶⁴ Tunisia's response to Panel question 6.6, para. 161.

¹⁶⁵ Morocco's second written submission, paras. 274, 281 and 283.

¹⁶⁶ Morocco's second written submission, para. 283.

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF MOROCCO

I. INTRODUCTION

1. Morocco regrets the fact that a dispute which, to its mind, could have been settled bilaterally and amicably, or at the very least, through a review, has given rise to the establishment of a Panel.¹

2. Tunisia's claims in this dispute are a combination of errors of comprehension and application of the provisions of the Anti-Dumping Agreement, misunderstandings of the Final Report of the investigating authority, attempts to conduct de novo reviews of the authority's determination by advancing arguments that were not raised before the investigating authority in good time, as well as claims that are outside the Panel's jurisdiction.²

3. By initiating the investigation, concluding as it did and imposing the measures at issue, Morocco has acted in accordance with its obligations under the Anti-Dumping Agreement. The Panel should refrain from any interpretation and conclusion that would have a systemic impact on the conduct of anti-dumping investigations or that could potentially unduly burden developing countries seeking merely to exercise their rights by virtue of the WTO Agreement.³

4. This executive summary outlines Morocco's arguments related first of all to the relevant legal framework for trade remedies at the WTO, then highlights those related to an authority's obligations by virtue of Articles 5, 2, 3 and 12, and lastly, it recalls the claims abandoned by Tunisia.

II. RELEVANT LEGAL FRAMEWORK FOR TRADE REMEDIES AT THE WTO

5. Morocco has drawn the Panel's attention to Tunisia's claims that are incompatible with Article 6.2 of the Dispute Settlement Understanding (DSU), but also to Tunisia's invitations to proceed with a de novo review in violation of Article 17.6 of the Anti-Dumping Agreement, as well as to Tunisia's invitations to breach the terms of the Anti-Dumping Agreement by ignoring the principles of treaty interpretation.

A. Tunisia's claims are incompatible with Article 6.2 of the DSU: Morocco's adjudicatory requests

6. Morocco submitted its request for a preliminary ruling during the proceedings promptly;⁴ that request was limited in scope and based on a good faith reading of the last sentence of each claim, which specified the allegation in accordance with the requirements of Article 6.2 of the DSU.⁵ Morocco *reiterated* its request in its first written submission: "Following Morocco's preliminary ruling request".⁶

7. The Panel's preliminary ruling on its jurisdiction was based solely on Morocco's limited request for a preliminary ruling.⁷ ⁸ In any event, the Panel has a duty to ensure its own jurisdiction,⁹ i.e. that the request for the establishment of a panel is in conformity with the provisions of Article 6.2.¹⁰ Morocco respectfully requests that the Panel examine this matter in the light of Appellate Body reports related to requests for the establishment of a panel that do not specify which obligations are

¹ Morocco's first written submission, para. 8.

² Morocco's first written submission, para. 9.

³ Morocco's first written submission, para. 10.

⁴ Morocco's preliminary request, 19 June 2020.

⁵ Morocco's comments on Tunisia's responses to the Panel's questions, para. 89.

⁶ Morocco's first written submission, para. 284.

⁷ Preliminary ruling of the Panel, para. 3.20.

⁸ Morocco's first opening statement, para. 6.

⁹ Report of the Appellate Body, *EC — Bananas III*, para. 142.

¹⁰ Report of the Appellate Body, *US — OCTG (Korea)*, para. 7.80.

challenged when a provision contains *multiple obligations*,¹¹ such as in *Korea - Pneumatic Valves (Japan)*.¹²

8. Far from disagreeing with the Panel's ruling, Morocco's request to determine jurisdiction with regard to paragraphs B.5 and B.6 *rests entirely on the merits* of the Panel's finding in its preliminary ruling,¹³ according to which the last sentence of paragraph B.5 did not limit the scope of that paragraph and the underlying analyses that were based on Tunisia's first written submission to clarify the scope of paragraph B.5.¹⁴

9. More specifically, Morocco, taking note of the Panel's preliminary ruling, requests that the Panel find that, *ipso facto*, claims B.5 and B.6 in Tunisia's panel request are not compatible with Article 6.2 of the DSU.

1. Claim B.5

10. With regard to paragraph B.5, in its preliminary ruling the Panel referred to Tunisia's first written submission to clarify the claims set forth in the panel request.¹⁵ The Panel concluded that paragraph 5.2 "relates to the conformity of the normal value constructed by the investigating authority with Articles 2.1, 2.2 and 2.2.2".¹⁶ However, in this case, paragraph B.5 refers to Articles 2.1, 2.2, **2.2.1.1** and 2.2.2; *nothing* in that paragraph or anywhere else in Tunisia's submission clarifies the relevance of Article **2.2.1.1**, which, in any case, is not specified in the panel request, thus, in accordance with the Panel's own approach, the entire paragraph is incompatible with the specificity required by Article 6.2 of the DSU.¹⁷

11. The finding of incompatibility is unavoidable since a claim must be examined as it is written and not just taking into account certain parts of it.¹⁸ As paragraph B.5 makes reference to **four** different provisions of the Anti-Dumping Agreement, one of which, Article **2.2.1.1**, sets forth three obligations, the Panel cannot exclude Article 2.2.1.1 from the claim in order to make it more specific and therefore compatible with Article 6.2.¹⁹ The absence of clarification regarding the relevance of Article **2.2.1.1** to paragraph B.5, means that, on this basis alone, the claim does not specify a "distinct and well-defined obligation" and therefore does not meet the requirements of Article 6.2.²⁰

12. Furthermore, from a structural perspective and contrary to each of the claims in *Korea – Pneumatic Valves*, paragraph B.5 refers to multiple provisions which, both individually and as a whole, set forth "**multiple obligations**".²¹ Because of its reference to multiple obligations, paragraph B.5 would only have been compatible with Article 6.2 *if* it had been worded in a more specific manner.²²

13. Lastly, through its response to Panel question 1.28,²³ Tunisia confirmed that nothing in the text of paragraph B.5 restricts in any way the scope of Article 2.2.1.1, listed in that paragraph, and that nothing indicates which of the obligations set forth in that provision is the subject of the claim, thus confirming that paragraph B.5 as a whole is incompatible with Article 6.2 of the DSU.²⁴

14. Morocco therefore respectfully requests that the Panel find that paragraph B.5 is incompatible with Article 6.2 of the DSU.

¹¹ Report of the Appellate Body, *Korea - Dairy*, para. 124; Report of the Appellate Body, *China - Raw materials*, para. 220.

¹² Appellate Body Report, *Korea - Pneumatic valves*, para. 5.118.

¹³ Morocco's comments on Tunisia's responses to the Panel's questions, para. 95.

¹⁴ Preliminary ruling of the Panel, para. 3.33.

¹⁵ Preliminary ruling of the Panel, para. 3.29.

¹⁶ Preliminary ruling of the Panel, para. 3.30.

¹⁷ Morocco's first opening statement, para. 7.

¹⁸ Morocco's second written submission, para. 51.

¹⁹ Morocco's second written submission, para. 58.

²⁰ Morocco's second written submission, para. 59.

²¹ Morocco's second written submission, para. 58.

²² Morocco's second written submission, para. 60.

²³ Panel question 1.28.

²⁴ Morocco's comments on Tunisia's responses to the Panel's questions, para. 107.

2. Claim B.6

15. With regard to paragraph B.6, a similar line of reasoning to that used for paragraph B.5 shall apply, *mutatis mutandis*.²⁵

16. In fact, Article 2.4 is a provision that stipulates a "fair comparison" and like many other provisions of the Anti-Dumping Agreement, Article 2.4 includes **multiple** and various **obligations**.²⁶ There are at least **three**, and perhaps even six, distinct obligations under Article 2.4, and the mere fact of reaffirming the first sentence of Article 2.4 does not satisfy the requirements of Article 6.2 of the DSU.²⁷

17. Lastly, through its response to Panel question 1.28, Tunisia also confirmed that paragraph B.6 as a whole is incompatible with Article 6.2 of the DSU.²⁸

18. Morocco therefore respectfully requests that the Panel find that paragraph B.6 is incompatible with Article 6.2 of the DSU.

B. The Panel's terms of reference under Article 17.6 of the Anti-Dumping Agreement: Tunisia's invitations to proceed with a de novo review

19. It is indisputable that the Anti-Dumping Agreement prohibits the Panel from undertaking a de novo review,²⁹ just as it is undisputed, in this case, that certain *arguments* brought by Tunisia before the Panel were never specifically raised by the exporters before the authority, even though they could have done so, since all these new arguments are basic and routine questions on the application of formulas by the authority.³⁰ As a result, the authority was not able to consider or address those arguments,³¹ so any examination of them by the Panel would necessarily constitute a de novo review.³² The Panel should reject these arguments by Tunisia,³³ which are incompatible with Article 17.6 (i).³⁴

C. The principles of treaty interpretation: Tunisia's invitations to breach the terms of the Anti-Dumping Agreement

20. The usual principles of treaty interpretation,³⁵ codified in part in the *Vienna Convention on the Law of Treaties*,³⁶ and also present in the legal maxims and logical axioms applied by domestic and international jurisdictions, as well as by quasi-jurisdictions, prohibit any interpretation aimed at replacing words used in the treaty with others.³⁷ Furthermore, the references to "context", "object" and "purpose" in Article 31 of the Vienna Convention precludes the mechanical interpretation of a treaty by simply selecting and applying *one* definition in *one* dictionary³⁸ as revealing or clarifying the meaning of a provision.³⁹

21. The Agreement uses specialized terms but does not include specific methodologies, or even a definition, for most of them, and the Panel should therefore be very prudent when setting, for

²⁵ Morocco's second opening statement, para. 63.

²⁶ Morocco's second written submission, para. 70.

²⁷ Morocco's second written submission, para. 72.

²⁸ Morocco's comments on Tunisia's responses to the Panel's questions, para. 107.

²⁹ Report of the Panel, *United States - Shrimp II*, para. 7.8.

³⁰ Morocco's second opening statement, para. 9.

³¹ Morocco's first written submission, para. 31.

³² Morocco's second written submission, para. 8.

³³ In its submissions, Morocco explicitly brought to the attention of the Panel each of Tunisia's arguments that was never specifically raised by the exporters before the authority and which must, consequently, all be rejected by virtue of Article 17.6 (i).

See notably: Morocco's first written submission, paras. 43, 60, 65, 265 and 275; Morocco's first oral statement, para. 56 and 137; Morocco's responses to the Panel's questions of 12 October 2020, paras. 26 and 36; Morocco's second written submission, paras. 87, 97 and 101; Morocco's second oral statement, paras. 41, 64 and 94; Morocco's responses to the Panel's questions of 15 February 2021, para. 36.

³⁴ Morocco's second written submission, para. 22.

³⁵ Morocco's first written submission, para. 221.

³⁶ *Vienna Convention on the Law of Treaties*, concluded at Vienna on 23 May 1969.

³⁷ *India — Patents (United States)*, para 45.

³⁸ *EC — Chicken Cuts*, paras. 175 and 176.

³⁹ Morocco's first written submission, para. 32.

purposes of "clarification" using non-specialized dictionaries, the meaning of a term not defined in its particular specialized context.⁴⁰ The Agreement already provides specific indications to panels as far as questions of interpretation are concerned, and relying on the Larousse Dictionary alone as Tunisia advocates, even if the principles of treaty interpretation allow for the use of a dictionary, is not permitted by the Anti-Dumping Agreement.⁴¹ Moreover, the terms used in the Anti-Dumping Agreement are the fruit of lengthy, historic negotiations and were used as *specialized terms* even before the Uruguay Round and the entry into force of the WTO Agreement, so anyone interpreting a treaty must presume that the Members who negotiated, ratified and implemented the treaty were aware of the specialized nature of the terms used and that, when they decided to not provide a definition or methodology, that choice was deliberate and should, consequently, be respected.⁴²

22. Lastly, Articles 31 and 32 of the Vienna Convention outline an approach in favour of interpreting the *entire* provision in its literal, historical and practical context; and the legal maxims and logical axioms that predated the Vienna Convention and that continue to be used by international tribunals (*effectiveness, ejusdem generis, expressio unius*, etc.) came into being precisely because a purely literal interpretative approach is inadequate for the task at hand.⁴³ As such, taking a negotiated technical term out of its treaty context is a clear error of law and replacing said term with an expression that is not tried and tested in order to define it using other words by means of decontextualized references taken from a non-specialized dictionary, in addition to constituting an unsound interpretation technique, discredits the very task of interpretation.⁴⁴

III. TUNISIA'S CLAIMS UNDER ARTICLE 5 MUST BE REJECTED

23. Morocco explained in detail to the Panel its position regarding the relationship between Articles 5.2 and 5.3, and on the correct interpretation of Article 5.3, and has demonstrated that, in this case, the authority acted in compliance with Article 5. Morocco has therefore respectfully requested that the Panel reject all Tunisia's claims under Article 5.

A. Relationship between Articles 5.2 and 5.3

24. First, Tunisia never addressed the only key condition in the chapeau of Article 5.2, i.e. that the information at issue must be "reasonably available to the applicant".⁴⁵ When a complaining party fails to demonstrate and, *a fortiori*, **does not even address** one element of an obligation, it cannot be considered as having established a *prima facie* violation.⁴⁶

25. Second, Tunisia puts forward numerous contentions regarding Article 5.2 without once demonstrating how the *wording* of the provision might impose obligations on a Member.⁴⁷

26. In fact, nothing in the letter of Article 5.2 imposes any obligation whatsoever on an authority.⁴⁸ Similarly, nothing in the combined operation of Articles 5.1 and 5.2 imposes obligations *on an authority* as far as the *quality* of the content of an application is concerned.⁴⁹ The letter of Article 5.2 establishes, however, a *negative proof threshold* regarding claims brought by the domestic industry, without providing the authority with guidance on how to assess the required content.⁵⁰ Lastly, the chapeau of Article 5.2 expressly limits information required to that "*as is reasonably available*" to the domestic industry, which is an assessment that must necessarily be made on a case-by-case basis.⁵¹

⁴⁰ Morocco's second written submission, para. 19 a).

⁴¹ Morocco's second written submission, para. 19 b).

⁴² Morocco's second written submission, para. 20.

⁴³ Morocco's first oral statement, para. 32.

⁴⁴ Morocco's first oral statement, para. 33.

⁴⁵ Morocco's first written submission, para. 255; Morocco's first oral statement, para. 122; Morocco's second written submission, para. 266.

⁴⁶ Morocco's second opening statement, para. 19.

⁴⁷ Morocco's second opening statement, para. 17.

⁴⁸ Morocco's second opening statement, para. 32 a).

⁴⁹ Morocco's second opening statement, para. 32 b).

⁵⁰ Morocco's second opening statement, para. 32 c).

⁵¹ Morocco's second opening statement, para. 32 d).

27. Article 5.3 addresses the authority directly: "The authorities shall examine the accuracy and adequacy of the evidence provided".⁵² It is nevertheless important to note, in the light of the relationship between Articles 5.2 and 5.3, that the letter of Article 5.3 follows the chapeau of Article 5.2, such that "the adequacy of the evidence provided" simply refers to the negative standard of proof enshrined in Article 5.2.⁵³ Lastly, the letter of Article 5.3 is unambiguous with regard to the fact that the examination is justified "to determine whether there is sufficient evidence to justify *the initiation of an investigation*".⁵⁴ Thus, the obligation under Article 5.3 to conduct an examination and, in particular, its scope are necessarily contingent on its *rationale* and the so-called minimum threshold ("**initiation of an investigation**"), so there is no question here of conducting a *pre-investigation* before the authority can proceed with initiating the main investigation, which lasts at least one year.⁵⁵ This is why the evidence to be provided by the domestic industry *before an investigation*, that is to say for the purposes of initiating an investigation, is necessarily different, in terms of volume, quality and probative value, to the evidence that an authority gathers and on which it can base its findings.⁵⁶

28. In this case, Morocco has described on several occasions the efforts made by the domestic industry to ensure that the application met with the requirements of Article 5.2; the application that was before the authority, from the perspective of form and substance (supporting information in annex), could not be considered a simple assertion.⁵⁷

29. Lastly, if the Panel were to apply the interpretation proposed by Tunisia of Articles 5.2 and 5.3, it could, in addition to discrediting the dispute settlement mechanism due to the interpretation's incompatibility with the text and context of Article 5, have the systemic consequence of denying most small and medium-sized enterprises, even in developed countries, access to the Anti-Dumping Agreement.⁵⁸

B. Correct interpretation of Article 5.3

30. The obligation under Article 5.3 is linked to the purpose of the exercise (which is to initiate an investigation and not to end it, as enshrined in Article 5.1) and to the letter of Article 5.2 (that the "application shall contain such information as is reasonably available to the applicant", for example).⁵⁹ Thus, the obligation under Article 5.3 to conduct an examination and, in particular, its scope are necessarily contingent on its rationale and the so-called minimum threshold: the "**initiation of an investigation**".⁶⁰

31. If Morocco is correct in its assessment of the relationship between Articles 5.2 and 5.3, the fact that Tunisia ignores a fundamental requirement of Article 5.2, concerning the adequacy of the evidence, means that its arguments concerning Article 5.3 must also founder.⁶¹

C. Application of Article 5 to the present case: the authority acted in accordance with Article 5

32. The Panel should reject Tunisia's claims under Article 5 because, in view of its application to the present case, Tunisia *ignores* a critical legal condition of Article 5,⁶² *replaces* the text of the treaty with other words,⁶³ *proposes* unilaterally to modify the standards of proof⁶⁴ and legal

⁵² Morocco's second opening statement, para. 32 e).

⁵³ Morocco's second opening statement, para. 32 f).

⁵⁴ Morocco's second opening statement, para. 32 g).

⁵⁵ Morocco's second opening statement, para. 33.

⁵⁶ Morocco's comments on Tunisia's responses to the Panel's questions, para. 255.

⁵⁷ Morocco's first written submission, para. 258; Morocco's first oral statement, para. 125.

⁵⁸ Morocco's second written submission, para. 17; Morocco's second written submission, paras. 262 and 287.

⁵⁹ Morocco's second written submission, paras. 284-287.

⁶⁰ Morocco's second opening statement, para. 34.

⁶¹ Morocco's second written submission, para. 288.

⁶² Article 5.2 of the Anti-Dumping Agreement: "The application shall contain such information as is **reasonably** available to the applicant [...]" [emphasis added to the relevant part].

⁶³ Tunisia's first written submission, para. 10.8.

⁶⁴ Tunisia's first written submission, para. 10.8.

standards not negotiated in the Agreement,⁶⁵ and *objects* to a "theory"⁶⁶ that Morocco has never put forward.⁶⁷

33. The issue before the Panel concerns the *evidence* required and the *actions* taken by the authority with respect to that evidence (or lack thereof), with Article 5.2 setting out two evidentiary requirements: (a) the domestic industry must provide evidence to *support* each of its claims, *but* (b) only to the extent that such information is *reasonably available to it*.⁶⁸

34. Morocco has submitted the table of contents of the application to illustrate both the rigour and scope of the domestic industry's initial submission to the authority.⁶⁹

35. Tunisia's arguments concerning the key condition of "reasonably available" under Article 5.2 are found to be lacking, and *a fortiori* it has also failed to establish the evidence that applicants were supposed to provide.⁷⁰

36. Moreover, the exporters and Tunisia have never specifically raised arguments before the authority and the Panel, respectively, relating to *information as is reasonably available* to the domestic industry composed of small and medium-sized enterprises in a developing country. In fact, the exporters did not contest the relevance or veracity of the invoice before the authority,⁷¹ instead they simply pointed out that other evidence, it is not clear where, said something different to the invoice, without ever justifying that assertion.⁷²

37. Lastly, it is completely incorrect, in addition to being absurd, to characterize the wholesale invoice, as Tunisia does, as being a "one-off and exceptional" and as representing an "export price set for one day (and one transaction)",⁷³ as the invoice, because it was issued by one of the exporters, has the highest probative value possible, and that it cannot reasonably be expected that the domestic industry would be able to obtain - where necessary - abundant evidence of this nature.⁷⁴

38. Thus, *in this case*, the application could not be considered a simple assertion,⁷⁵ rather it included all the *elements* required by Article 5.2; the authority having accepted an invoice for a large order covering the most popular models of the products at issue as a conclusive piece of evidence, after ensuring that the invoice, bearing in mind its nature, was the best evidence that was reasonably available to the domestic industry.⁷⁶

39. Accordingly, the authority met the requirements of Article 5.3 to the extent that after receiving the investigation initiation request, the authority conducted a series of internal analyses and informal exchanges with the applicants on all elements of the application. In the context of these exchanges, the authority forwarded the lists of failures established in the confidential and non-confidential versions, organized working and information meetings on the application (as well as information visits to the exercise book manufacturers at the application review stage, on 15 and 16 March 2017) and meetings with the Foreign Exchange Board to obtain import data.⁷⁷

40. Morocco therefore respectfully requests that the Panel reject Tunisia's claims under Article 5.

⁶⁵ Tunisia's first oral statement, para. 10.11.

⁶⁶ Tunisia's first oral statement, para. 10.8.

⁶⁷ Morocco's second written submission, para. 292-299.

⁶⁸ Morocco's second written submission, para. 301.

⁶⁹ Morocco's first written submission, para. 219.

⁷⁰ Morocco's first written submission, paras. 251-255.

⁷¹ Morocco's extraordinary request, para. 3.

⁷² Morocco's first written submission, paras. 243-246.

⁷³ Tunisia's responses to the Panel's questions, 15 February 2021, para. 178.

⁷⁴ Morocco's comments on Tunisia's responses to the Panel's questions, para. 258-259.

⁷⁵ Morocco's first written submission, para. 258. Morocco's first oral statement, para. 125.

⁷⁶ Morocco's second written submission, para. 304.

⁷⁷ Morocco's first written submission, para. 220.

IV. TUNISIA'S CLAIMS UNDER ARTICLE 2 MUST BE REJECTED

41. First, under Article 2.1, Tunisia puts forward a flawed interpretation of the scope of Article 2.1, which is not an *ancillary* obligation that can be invoked as a consequential argument in order to exacerbate the violation.⁷⁸

42. Second, under Article 2.2, Tunisia's many arguments are outside the Panel's jurisdiction, pursuant to Article 17.6 of the Anti-Dumping Agreement prohibiting an *de novo* review, to the extent that these arguments were never specifically invoked before the authority.⁷⁹

43. Third, Tunisia proposes a flawed interpretation of Article 2.2.2, because the exporters' calculation of their own "profit margin" is not "actual data" within the meaning of Article 2.2.2,⁸⁰ the letter of Article 2.2.2 does not allow the provision to be interpreted as being *consequential and ancillary*,⁸¹ and, above all, Article 2.2.2 does not require an authority to examine products that, pursuant to the laws of the exporting country, are not allowed to be exported.⁸²

44. Fourth, Tunisia has put forward a flawed interpretation and application of the first sentence of Article 2.4, because there is no basis, either in the letter of the first sentence of Article 2.4, or in the reports cited by Tunisia,⁸³ for asserting that the first sentence of Article 2.4 alone can be used to address all the claims of problems with the mathematical formulas that are not associated with zeroing, or the alleged problems with the weighted average in specific cases.⁸⁴

45. Fifth, Tunisia has proposed a flawed interpretation and application of the third sentence of Article 2.4 by requesting that the Panel introduce a "dialogue" requirement of the authority with regard to the burden of proof imposed on the exporter, because Tunisia ignores the letter of Article 2.4, which unequivocally states that it is the responsibility of the exporter to demonstrate the impact on domestic market prices.⁸⁵

46. Lastly, under Article 2.4, Tunisia's arguments concerning the weighted average by weight must be rejected because the authority acted in accordance with Article 2.4 and because the first sentence of Article 2.4 is not applicable to *all* calculation errors. In any case, Tunisia's arguments are outside the Panel's jurisdiction, in accordance with Article 17.6 (i) of the Anti-Dumping Agreement prohibiting any *de novo* review, because they were never raised before the authority and, consequently, the authority never had the opportunity to consider those arguments.⁸⁶

47. Morocco respectfully requests that the Panel reject all Tunisia's claims under Article 2 for the reasons set out below.

A. Interpretation of the scope of Article 2.1 and its irrelevance to this particular case

48. Tunisia has put forward a flawed interpretation of Article 2.1, according to which the authority's violation of Article 2.1 would be consequential for the other alleged violations under Article 2.

49. When considering the text of Article 2 in its entirety, it appears that Article 2.1 has an independent nature and it not an ancillary obligation that can be invoked as a "consequential" argument in order to exacerbate the violation.⁸⁷ Moreover, in so far as Articles 2.2 and 2.3 envisage

⁷⁸ Morocco's comments on Tunisia's responses to the Panel's questions, para. 18-19.

⁷⁹ Morocco's first written submission, para. 12.

⁸⁰ Morocco's second written submission, paras. 106-125.

⁸¹ Morocco's comments on Tunisia's responses to the Panel's questions, para. 56-65.

⁸² Morocco's second opening statement, para. 66.

⁸³ Morocco's comments on Tunisia's responses to the Panel's questions, paras. 140-150.

⁸⁴ Morocco's comments on Tunisia's responses to the Panel's questions, para. 151.

⁸⁵ Morocco's comments on Tunisia's responses to the Panel's questions, para. 185.

⁸⁶ Morocco's second opening statement, para. 64.

⁸⁷ Morocco's comments on Tunisia's responses to the Panel's questions, para. 18-19.

an *exception* to the situation described in Article 2.1, this means, *ipso facto*, that the "definition" in Article 2.1 is a substantially independent *general* obligation.⁸⁸

50. Furthermore, Article 2.1 is not applicable to this case. Tunisia claimed that Morocco had violated its obligations under international law, but failed to put forward even the beginnings of an argument in support of the claim at issue and when Tunisia was asked about this matter, it admitted that the claim is purely incidental and consequential. When further clarification was sought, Tunisia then admitted that the claim is irrelevant to the basic obligation at issue, so the Panel should not let itself be influenced by the shift in Tunisia's position with which it is attempting to conceal the fact that it has failed to fulfil its responsibility as complainant under international law by relying on the "principle of judicial economy".⁸⁹ Tunisia brought a claim but was unsuccessful in its argumentation and, *a fortiori*, in its formulation; this should be the Panel's finding.

51. Morocco therefore respectfully requests that the Panel reject Tunisia's claim under Article 2.1.

B. Tunisia's arguments under Article 2.2 that are outside the Panel's terms of reference

52. In the context of a dispute under the Anti-Dumping Agreement, a panel cannot conduct a *de novo* review of the issues before an authority.⁹⁰

53. Under Article 2.2, Tunisia requests that the Panel make findings on the arguments that the exporters never specifically invoked before the authority, by enjoining the Panel to examine the evidence before the authority but on the basis of a new rationale - on new arguments - and not on the arguments, comments and explanations presented and elaborated on by the exporters. Nevertheless, these arguments are inadmissible because Article 17.6 (i) does not permit a panel to undertake such an examination.⁹¹ Any examination by the Panel of the evidence before the authority ignoring the arguments presented in support of the evidence would be tantamount to conducting a *de novo* review prohibited under Article 17.6.⁹²

54. Tunisia's arguments under Article 2.2 that are outside the Panel's terms of reference are the following: (1) the arguments in support of the claim based on the exclusion of administrative costs and certain expenses not included in the product price used to calculate the profit margin; and (2) the arguments in support of the claim based on the inclusion of the "distribution cost" when constructing the normal value of certain models of SOTEFI exercise books.

1. Tunisia's arguments in support of the claim based on the exclusion of administrative costs were never specifically invoked before the authority

55. By putting forward its arguments in support of the claim based on the exclusion of administrative costs and certain expenses not included in the product price used to calculate the profit margin, Tunisia is inviting the Panel to conduct a *de novo* review.

56. These arguments have never been specifically invoked before the authority; the authority did not have the opportunity to evaluate these arguments and draw conclusions from them, and, if necessary, to make corrections or to explain why corrections were not required. Therefore, Tunisia's claim based on these contentious arguments is not within the Panel's terms of reference pursuant to Article 17.6 (i) of the Anti-Dumping Agreement.⁹³ This solution is justified by the fact that when a Member in the role of applicant brings, as in this particular case, arguments before the Dispute Settlement Body (DSB) that were never brought before the responding party's authority, it puts the respondent and its authority in an untenable position, forcing them to respond, without *ex post facto* reasoning, in the context of a WTO dispute and after the facts at issue, to arguments that were never raised during the investigation.⁹⁴

⁸⁸ Morocco's comments on Tunisia's responses to the Panel's questions, para. 20.

⁸⁹ Morocco's comments on Tunisia's responses to the Panel's questions, para. 72.

⁹⁰ Morocco's second written submission, para. 21.

⁹¹ Morocco's second written submission, para. 22.

⁹² Morocco's second opening statement, para. 65.

⁹³ Morocco's first written submission, para. 60.

⁹⁴ Morocco's first written submission, para. 61.

57. The Panel should reject such an attempt and should declare inadmissible all Tunisia's claims regarding arguments that Tunisia or its exporters could have brought before the authority, but were not.⁹⁵

2. The arguments in support of the claim based on the inclusion of the "distribution cost" were never specifically invoked before the authority

58. By putting forward arguments in support of the claim based on the inclusion of the "distribution cost" when constructing the normal value of certain models of SOTEFI exercise books, Tunisia is also seeking a de novo review.

59. Despite long exchanges between SOTEFI and the authority, and, in particular, despite the reference to SOTEFI in footnotes 100 and 102 of the Excel file containing the margin of dumping calculation (SOTEFI) submitted with the Essential Facts,⁹⁶ the claim concerning the distribution costs was never raised before the authority.⁹⁷

60. Thus, Tunisia's claim requires a de novo review of the evidence by the Panel because, despite having numerous opportunities to comment on the authority's methodology, the exporters never specifically invoked this argument with regard to the data that they themselves provided, and for that reason, Morocco respectfully requests that the Panel reject the claim at issue.⁹⁸

C. Interpretation of Article 2.2.2 and its application in this particular case

61. Tunisia's interpretation of Article 2.2.2 is flawed, and the Panel should reject its claim because Article 2.2.2 is not *consequential and incidental*, and, in any event, it does not apply in this particular case.

1. Tunisia's interpretation of Article 2.2.2 is flawed

62. With regard to the interpretation of Article 2.2.2, Tunisia's position is flawed.

63. Article 2.2.2 obliges an authority to ensure that "the amounts for administrative, selling and general costs and for profits **shall be based on actual data pertaining to production and sales**". (Emphasis added). In other words, *prima facie*, Article 2.2.2 does not require an authority to necessarily accept each exporter's specific internal accounting categories with regard to the categories listed in Article 2.2.2.⁹⁹ Moreover, Article 2.2.2 refers to actual data pertaining to *production and sales*, and not to any other data;¹⁰⁰ the exporters' calculation of their own "profit margin" does not, in any way, constitute "actual data" within the meaning of Article 2.2.2.¹⁰¹

64. For the interpretation and application of Article 2.2.2, Article 2.2.2 (iii) provides some additional context: there is no single methodology that is required by Article 2.2.2 to determine a profit margin, as the provision refers only to "any other reasonable method". In fact, Article 2.2.2 (iii) provides for a ceiling that is based on the "profit normally realized by other exporters" and not on each exporter's own internal accounting categories.¹⁰²

65. Furthermore, it should be noted that the obligation "shall be **based on** actual data" in Article 2.2.2 has been an undisputed principle of WTO law since the *Hormones* case,¹⁰³ that this obligation is by no means an obligation to "conform to" or to "use directly" and that this principle,

⁹⁵ Morocco's first written submission, para. 62.

⁹⁶ Essential Facts. (MOR-7)

⁹⁷ Morocco's first written submission, para. 64.

⁹⁸ Morocco's first written submission, para. 65.

⁹⁹ Morocco's second written submission, para. 112.

¹⁰⁰ Morocco's second written submission, para. 112.

¹⁰¹ Morocco's second written submission, paras. 106-125.

¹⁰² Morocco's second written submission, para. 113.

¹⁰³ Report of the Appellate Body, *EC - Hormones*, para. 164.

as the Panel in *US - Softwood Lumber V* observed,¹⁰⁴ is also relevant to data provided by exporters in the context of Article 2.2.2.¹⁰⁵

66. Morocco therefore respectfully requests that the Panel reject Tunisia's interpretation of Article 2.2.2.

2. Article 2.2.2 is not consequential and incidental

67. Tunisia seems to argue that when a panel finds that a profit margin is "inflated" - presumably under other provisions of the Anti-Dumping Agreement - this "inflated" profit margin cannot be considered to be based on "actual data". Nevertheless, nothing in Article 2.2.2 points to such a conclusion.¹⁰⁶

68. Article 2.2.2 contains a limited and circumscribed obligation according to which the authority must *base* its calculation of the amounts at issue on actual underlying data provided by the exporters, whereas Article 2.2 provides for a qualitative assessment ("reasonable") of the amounts at issue and Article 2.2.2 (iii) requires a "reasonable *method*" and sets an upper limit for the profit margin *when the data are unusable for the purposes of calculating the amounts*.¹⁰⁷

69. In the present case, for all its calculations, the authority used the data submitted to it by the exporters, *and only the data pertaining to production and sales*, so there is no doubt that "the amounts for administrative, selling and general costs and for profits" were "**based on actual data pertaining to production and sales**".¹⁰⁸

70. The Panel need not make findings under Article 2.2.2 because Tunisia put forward this argument too late in the proceedings, but also because Tunisia's initial interpretation of that provision was flawed, and above all because Tunisia has admitted that the allegation of a violation is unavailing.¹⁰⁹

71. Furthermore, Tunisia has not contested the interpretation and clarification proposed by Morocco with regard to Article 2.2.2. If the Panel agrees with Morocco,¹¹⁰ Tunisia's responses confirm that Morocco has acted in accordance with Article 2.2.2.¹¹¹

3. Article 2.2.2 does not apply in this particular case

72. With regard to the watermarked exercise books, the parties agree that they *could not be exported* under Tunisian legislation; the Essential Facts state in this regard "these exercise books are sold only on the domestic market and it is strictly forbidden to export them. Thus, in view of the foregoing, sales of these types of exercise books have not been taken into account when calculating the normal value, insofar as there are no comparable types of exercise books sold for export to Morocco."¹¹²

73. The matter at issue with respect to the watermarked exercise books is based entirely on the authority's *specific* determination on watermarked exercise books¹¹³ and the fact that Article 2.2.2 does not require an authority to examine the products that, pursuant to the laws of the exporting country, are not allowed to be exported.¹¹⁴

74. During an anti-dumping investigation, the exported product is the product concerned; accordingly, the exported product is the focus of any dumping calculation, so that Tunisia's

¹⁰⁴ Report of the Panel, *US — Softwood Lumber V*, para. 7.263.

¹⁰⁵ Morocco's second opening statement, para. 52.

¹⁰⁶ Morocco's comments on Tunisia's responses to the Panel's questions, para. 56.

¹⁰⁷ Morocco's comments on Tunisia's responses to the Panel's questions, para. 58.

¹⁰⁸ Morocco's comments on Tunisia's responses to the Panel's questions, para. 59.

¹⁰⁹ Morocco's comments on Tunisia's responses to the Panel's questions, para. 73.

¹¹⁰ Morocco's responses to the Panel's questions of 12 October 2020, para. 37-44. Morocco's second written submission, paras. 112-127.

¹¹¹ Morocco's comments on Tunisia's responses to the Panel's questions, para. 65.

¹¹² Essential Facts, para. 89. (MOR-7)

¹¹³ Morocco's first written submission, para. 71.

¹¹⁴ Morocco's second opening statement, para. 66.

argument, in the event that it is accepted, would mean that after the initiation of the investigation, an authority would have to identify not only those products sold on the domestic market that are similar to the exported products, but also, *in this case*, products that are, by definition, unlikely to be exported.¹¹⁵

75. Tunisia's claim would lead to a ludicrous outcome for the anti-dumping investigation, as that outcome would mean that, for the purposes of the dumping calculation, products would have to be taken into account which, under the legislation of the exporters' host country, cannot be exported and, *ipso facto*, cannot be dumped.¹¹⁶

76. Morocco therefore respectfully requests that the Panel reject Tunisia's claim under Article 2.2.2.

D. Interpretation of Article 2.4 and its application in this particular case

77. Tunisia's interpretation and application of the first and third sentences of Article 2.4 is flawed.

78. First, with regard to Tunisia's claim concerning the weighting methodology, this must be rejected because the first sentence of Article 2.4 does not apply in this particular case and, in any event, the exporters have never specifically raised the matter of the weighting methodology with the authority.

79. Second, with regard to Tunisia's claim concerning the licensed exercise books, this must also be rejected because the exporters and Tunisia have not argued, nor have they demonstrated, that there was an impact on prices on the domestic market, and because Tunisia's belated attempt to introduce new procedural requirements under the third sentence of Article 2.4 amounts to a breach of the letter of this provision.

1. Tunisia's claim concerning the weighting methodology must be rejected

80. Tunisia's interpretation and application of the scope of the first sentence of Article 2.4 is flawed and, moreover, Tunisia is seeking a *de novo* review.

a) Tunisia's flawed interpretation and application of the scope of the first sentence of Article 2.4

81. First, there is clearly no specific requirement in the Anti-Dumping Agreement that individual margins (calculated on the basis of weighted averages) be *weighted* by value, as Tunisia submits.¹¹⁷ The Panel in *EC - Bed Linen* noted that the Anti-Dumping Agreement provisions that refer to the weighted average (Articles 2.2.1 and 2.4.2) do not contain any guidance on the factor or factors to be used in weighting the average to be calculated, and that the most logical conclusion to be drawn is that the choice of factor is up to the investigating authority.¹¹⁸ Moreover, weighting by volume is statistically correct when, as in the present case, exporters' sales are quantified by *volume*; the distributive character of the multiplications and divisions allows the investigating authority to carry out certain mathematical steps in the order it considers most appropriate when calculating the margin of dumping, with the result remaining the same.¹¹⁹

82. Second, Tunisia's interpretation of the scope of the first sentence of Article 2.4 is flawed because there is no basis, either in the letter of the first sentence of Article 2.4, or in the reports cited by Tunisia,¹²⁰ for asserting that the first sentence of Article 2.4 alone can be used to address all the claims of problems with the mathematical formulas that are not associated with zeroing, or the alleged problems with the weighted average in specific cases.¹²¹

¹¹⁵ Morocco's first written submission, para. 72.

¹¹⁶ Morocco's first written submission, para. 73.

¹¹⁷ Morocco's first opening statement, para. 142.

¹¹⁸ *EC - Bed Linen (Article 21.5 - India)*, para. 6.87.

¹¹⁹ Morocco's first opening statement, para. 143.

¹²⁰ Morocco's comments on Tunisia's responses to the Panel's questions, paras. 140-150.

¹²¹ Morocco's comments on Tunisia's responses to the Panel's questions, para. 151.

83. It should be noted that it is an incontrovertible, even irrefutable, fact that in the last 25 years and as a result of over 100 trade remedies, only *one* comparison method has been recognized as falling within the ambit of the first sentence of Article 2.4, which should lead the Panel to refrain from expanding the scope of the first sentence of Article 2.4 to cover "any error in the calculation of the margin of dumping".¹²²

84. More importantly, Tunisia has not demonstrated that the first sentence of Article 2.4 applies to all comparison calculation errors (since it does not), nor has it provided an interpretative approach that would allow the Panel to determine which errors, beside those made in the context of zeroing, fall within the scope, or not, of the first sentence of Article 2.4 and why.¹²³

85. Furthermore, Tunisia's complaint of an "inflated margin of dumping" illustrates the absence of a proper interpretative approach to the legal provision at issue; even if the Panel were to confirm that the authority had made an error in its calculations, it is not "appropriate, nor feasible, for the Panel to assume the role of an investigating authority and analyse"¹²⁴ what a *correct* margin of dumping would be, and for that reason, the Panel is not in a position to determine whether the authority's margin of dumping was "inflated".

86. Moreover, apart from the cases linked to *zeroing*, an argument that opens with an "inflated margin of dumping" is entirely rhetorical and no legal conclusion can be drawn from that description.¹²⁵ In fact, according to *United States - Orange Juice (Brazil)*,¹²⁶ when it is demonstrated that a particular method is "inherently unfair" to the extent that it necessarily leads to a margin of dumping that is "artificially inflated", such a method is incompatible with Article 2.4, which is the case with zeroing.¹²⁷ Nevertheless, Tunisia has not demonstrated that the weighted average method based on volume is "inherently unfair", because that is evidently not the case, nor has Tunisia demonstrated that the volume weighted average necessarily leads, in all cases, to an "artificially inflated" margin of dumping (which was the case with zeroing), for the simple reason that it is not the case either.¹²⁸

87. Morocco therefore respectfully requests that the Panel reject Tunisia's interpretation and application of the first sentence of Article 2.4.

b) Tunisia's arguments concerning the weighting methodology have never been raised specifically with the authority

88. Presenting its arguments under Article 2.4 regarding the weighting methodology, Tunisia requests that the Panel undertake a de novo review.

89. However, the exporters have never specifically raised these weighting methodology issues with the authority.¹²⁹

90. Morocco therefore respectfully requests that the Panel reject Tunisia's claim under Article 2.4 based on inadmissible arguments relating to the weighting methodology.

2. Tunisia's claim regarding licensed exercise books must be rejected

91. The Panel should reject Tunisia's claim regarding licensed exercise books because the exporters have failed to demonstrate the impact on domestic market prices, and because Tunisia is again seeking a de novo review. Furthermore, Tunisia's belated attempt to introduce a new procedural requirement under the third sentence of Article 2.4 is a breach of the letter of that provision.

¹²² Morocco's comments on Tunisia's responses to the Panel's questions, para. 169.

¹²³ Morocco's comments on Tunisia's responses to the Panel's questions, para. 172.

¹²⁴ Report of the Appellate Body, *EC - Fasteners*, para. 520. [emphasis added]

¹²⁵ Morocco's comments on Tunisia's responses to the Panel's questions, para. 193 d).

¹²⁶ Report of the Panel, *United States - Orange Juice (Brazil)*, para. 7.156.

¹²⁷ Morocco's comments on Tunisia's responses to the Panel's questions, para. 163.

¹²⁸ Morocco's comments on Tunisia's responses to the Panel's questions, paras. 165-166.

¹²⁹ Morocco's first oral statement, para. 137.

a) The exporters and Tunisia have failed to demonstrate the impact on domestic market prices

92. Article 2.4 states that the burden of proof lies with the exporter; an exporter must demonstrate the impact on domestic market prices.¹³⁰ Otherwise, *should the exporter fail to satisfy its burden of proof*, the authority has "no obligation to make an adjustment".¹³¹

93. In this particular case, neither the exporter nor Tunisia have made the case or, *a fortiori*, demonstrated to the authority or to the Panel, respectively, that the contract had any impact on the prices in Morocco; in fact, Tunisia has even admitted that it was a question of the exporter's domestic market costs.¹³²

94. The exporter has nevertheless provided information on the *quality* of licensed products and on prices that were both *higher and lower* than the price of unlicensed products, so without any additional arguments or evidence, the authority was unable to determine on the basis of raw data alone *whether and to what extent* the licenses were responsible for the observed pricing differences; the Panel is clearly not in a position to make that assessment itself.¹³³ Lastly, the exporter based its position on licensed products solely on the contract but, given that the contract was not *relevant* to the impact of licensing on domestic prices, the investigating authority had "no obligation to make an adjustment"¹³⁴ or a different classification.¹³⁵

95. Morocco therefore respectfully requests that the Panel reject the claim at issue.

b) Tunisia's arguments concerning the licenses Excel file have never been specifically raised with the authority

96. Presenting its arguments under Article 2.4 concerning the licenses Excel file, Tunisia once again invites the Panel to undertake a de novo review.

97. The Excel file figures were never specifically cited by SOTEFI.¹³⁶ However, despite this oversight by SOTEFI, the authority still examined the Excel file and noted that the price of one of the six exercise books was lower than that of the unlicensed exercise books.¹³⁷ The authority also confirmed SOTEFI's assertions that the products concerned were of a better quality.¹³⁸ In any case, the information presented in the Excel file does not, in itself, constitute an *argument* that licenses had an impact on prices.¹³⁹

98. Furthermore, not only did SOTEFI not refer to the Excel file, but SOTEFI also actively diverted the authority's attention away from the file by insisting firmly on the contract as the basis for its fair comparison legal arguments, so the evidence and arguments presented by SOTEFI did not provide a sufficient basis for the authority to determine whether the licenses had an impact on domestic market prices by justifying a different classification.¹⁴⁰

99. Moreover, the information contained in the Excel file also revealed that licensed products accounted for just [[***]] of exports and that the impact of using licenses was insignificant.¹⁴¹

100. Morocco therefore respectfully requests that the Panel reject Tunisia's claim under Article 2.4 based on inadmissible arguments with regard to the licenses Excel file.

¹³⁰ Morocco's comments on Tunisia's responses to the Panel's questions, para. 185.

¹³¹ Report of the Appellate Body, *EC - Fasteners*, para. 488. [emphasis added]

¹³² Morocco's comments on Tunisia's responses to the Panel's questions, para. 185.

¹³³ Morocco's comments on Tunisia's responses to the Panel's questions, para. 193 c) 2).

¹³⁴ Report of the Appellate Body, *EC - Fasteners*, para. 488. [emphasis added]

¹³⁵ Morocco's comments on Tunisia's responses to the Panel's questions, para. 193 c) 3).

¹³⁶ Morocco's comments on Tunisia's responses to the Panel's questions, para. 113 b).

¹³⁷ Morocco's responses to the Panel's questions, 15 February 2021, para. 14 f).

¹³⁸ Morocco's responses to the Panel's questions, 15 February 2021, para. 16.

¹³⁹ Morocco's responses to the Panel's questions, 15 February 2021, para. 14 e); Report of the Appellate Body, *United States - Gambling*, para. 140.

¹⁴⁰ Morocco's comments on Tunisia's responses to the Panel's questions, para. 113 b).

¹⁴¹ Morocco's comments on Tunisia's responses to the Panel's questions, para. 113 b).

c) Tunisia's belated attempt to include a new procedural requirement under the third sentence of Article 2.4 amounts to a breach of the letter of this provision

101. Lastly, the Panel should not accede to Tunisia's request which deviates from the text and case law to include, erroneously, a requirement for "dialogue" under Article 2.4.¹⁴²

102. The Panel should reject Tunisia's request to include a new procedural requirement under Article 2.4, and to deviate from case law and redo the work of the authority, which, could potentially discredit the WTO's dispute settlement mechanism.¹⁴³

3. The first sentence of Article 2.4 does not apply in this particular case

103. Morocco therefore respectfully requests that the Panel reject Tunisia's claim under Article 2.4.

V. TUNISIA'S CLAIMS UNDER ARTICLE 3 MUST BE REJECTED

104. First, Tunisia's claims under Article 3.2 must be rejected because Tunisia's interpretation of Article 3.2 is flawed.

105. Second, Tunisia's claim under Article 3.4 must be rejected because the arguments underpinning it are unsound.

106. Third, Tunisia's claim under Article 3.5 must be rejected because it lacks any factual basis.

A. Interpretation of Article 3.2 and its application in this particular case

107. The Panel should reject Tunisia's claims under Article 3.2 because: (1) the first sentence of Article 3.2 provides an alternative obligation; (2) Tunisia's approach to the examination of price effects is evidence of a mechanical reading of Article 3.2 rather than a dynamic analysis as called for by case law; (3) Tunisia's claim concerning the review period under Article 3.2 is flawed; (4) Tunisia's claim under Article 3.2 concerning the determination of the domestic industry's profit margin is flawed; and (5) the authority's determination is consistent with Article 3.2 and the Panel may exercise judicial economy with regard to Tunisia's outstanding claims under Article 3.2.

1. The first sentence of Article 3.2 provides an alternative obligation

108. First, Tunisia's claim regarding the examination of the "import volume in relative terms" must be rejected because there are two options for the examination required under Article 3.2: an authority must consider the volume effect either in absolute or relative terms, but in no way is it required to examine it cumulatively.¹⁴⁴

109. In fact, Tunisia does not claim that Morocco's examination of the volume effect in absolute terms violates Article 3.2.¹⁴⁵

110. Morocco therefore respectfully requests that the Panel reject Tunisia's claim relating to the examination of the import volume in relative terms.¹⁴⁶

¹⁴² Morocco's comments on Tunisia's responses to the Panel's questions, para. 196.

¹⁴³ Morocco's comments on Tunisia's responses to the Panel's questions, para. 197.

¹⁴⁴ Morocco's request for a preliminary determination, para. 52.

¹⁴⁵ Morocco's request for a preliminary determination, para. 52.

¹⁴⁶ Morocco's first written submission, para. 14.

2. Tunisia's approach to the examination of price effects is evidence of a mechanical reading of Article 3.2 rather than a dynamic analysis as called for by case law

111. Tunisia's interpretation of the price effects of Article 3.2 should be rejected by the Panel because Tunisia requests that the Panel endorse a purely formalistic finding on the basis of a term - "actual price" - which does not appear anywhere in Article 3 or in the Anti-Dumping Agreement.¹⁴⁷

112. Morocco suggests that the correct approach to evaluating the examination of evidence of the price effects of dumped imports should instead be drawn from the letter of Articles 3.1 and 3.2: (a) Did the authority have "positive evidence" of at least one of the phenomena identified in Article 3.2? (b) Was the authority's methodology for considering the evidence before it justified in the light of the complexity of the required analysis? and (c) Has the authority explained its methodology adequately?¹⁴⁸

113. Article 3.2 should be interpreted in the light of market realities taking into consideration the complexity of pricing strategies, but also in the light of the object and purpose of Article 3.2.¹⁴⁹

114. In this case, the central issue was the fact that, in the face of imported products, the domestic industry's sales were made at a loss,¹⁵⁰ thus the authority reasonably concluded that "the domestic industry's terms of sale or marketing for the exercise books seem to have been unusually affected so that a comparison based on actual sales price would be conclusive for the purposes of a price undercutting assessment".¹⁵¹ Consequently, the authority undertook an additional step in order to produce a comprehensive and relevant analysis of market realities by asking the following question: would undercutting have occurred even if the domestic price reflected normal market conditions?¹⁵²

115. With regard to the reasonable profit margin, the authority relied exclusively on the data before it, since they were for producers of similar exercise books with sales in a market similar to Morocco's, but not affected by dumped imports.¹⁵³ The analysis revealed significant price undercutting, particularly in the final part of the period of investigation.¹⁵⁴

116. Thus, the authority carried out an active examination of the evidence before it, taking into account *the reality of price dynamics in a competitive market*.¹⁵⁵

117. Morocco therefore respectfully requests that the Panel reject Tunisia's purely formalistic approach and reject its claim under Article 3.2 regarding the examination of the price effect.

3. Tunisia's claim concerning the review period under Article 3.2 is flawed

118. Tunisia's claim concerning the review period is flawed because Tunisia appears to confuse the dumping investigation period and the injury data collection period. For the purposes of a price comparison, the domestic price is compared with the price of the dumped imports, which is determined by reference only to the dumping investigation period, so the authority's choice of 1 May 2016 to 31 April 2017 was quite appropriate.¹⁵⁶

119. In addition, Tunisia's use of case law in support of its claim is both erroneous and irrelevant,¹⁵⁷ but more importantly, Articles 3.1 and 3.2 do not stipulate a particular period of investigation.¹⁵⁸

¹⁴⁷ Morocco's first written submission, para. 131.

¹⁴⁸ Morocco's first written submission, para. 132.

¹⁴⁹ Morocco's second opening statement, para. 82.

¹⁵⁰ Final Report, para. 134 (MOR-1): "examination of the data collected from the domestic industry has revealed that, during the injury investigation period, the domestic industry sold exercise books at a loss."

¹⁵¹ Final Report, para. 134. (MOR-1)

¹⁵² Morocco's first written submission, para. 118.

¹⁵³ Morocco's first written submission, para. 120.

¹⁵⁴ Morocco's first written submission, para. 121.

¹⁵⁵ Morocco's first written submission, para. 125.

¹⁵⁶ Morocco's first written submission, para. 135.

¹⁵⁷ Morocco's first written submission, paras. 136-138.

¹⁵⁸ Morocco's first written submission, para. 139.

120. Moreover, Tunisia's invitation to the Panel to read into Article 3 a "same period" requirement is misleading, because that approach is not supported by the letter or the context of Article 3, not even in the vast WTO case law on Articles 3.1, 3.2, 3.4 and 3.5, and is, in addition to being legally inadmissible, institutionally imprudent, as it is impossible for this particular Panel to anticipate all the factual circumstances in which this issue might arise in the future.¹⁵⁹ The ill-considered interpretative approach proposed by Tunisia is in sharp contrast to the care with which the Panel in *Mexico — Anti-Dumping Measures on Rice* assumed its interpretation responsibility.¹⁶⁰

4. Tunisia's claim under Article 3.2 concerning the determination of the domestic industry's profit margin must be rejected

121. Tunisia's claim under Article 3.2 concerning the determination of the domestic industry's profit margin must be rejected since the authority constructed a target price because the domestic industry sold at a loss,¹⁶¹ a situation that does not reflect normal market sales conditions; the sole purpose of constructing a target domestic sales price was to reproduce those normal conditions, in order to conduct a relevant analysis of the price effect of the dumped imports in accordance with Article 3.2.¹⁶²

122. Based on its in-depth knowledge of not only its own market but also the regional market and stakeholders, those companies that use practically the same distribution channels (large retail stores sometimes from the same chain, such as *Carrefour*, bookshops), the authority determined the most relevant value in the light of the evidence before it – the profit margin of businesses of a similar size in a similar market in the same region – and explained its reasoning in sufficient detail, pursuant to *Russia — Commercial Vehicles*.¹⁶³

123. In the absence of any instructions in Article 3.2 on methodology or evidence, *in this case*, the authority chose to consider the evidence relating to lost sales under the heading "price undercutting", and as nothing in the letter of Article 3.2 requires an authority to make a definitive *determination* in either of the categories, the authority's only obligation is to *examine* evidence of price developments in at least one category¹⁶⁴ and that is what the authority did.¹⁶⁵ The price of the *dumped imports*, during the dumping investigation period, was higher than the domestic price; the domestic price was *a price below cost*, and given that loss-making prices over a prolonged period do not provide an appropriate basis for comparisons, the authority therefore used a constructed price to analyse whether the import price had the effect of undercutting what would have been a sustainable market price; which was revealed to be the case.¹⁶⁶

124. Morocco therefore respectfully requests that the Panel reject Tunisia's claim under Article 3.2 concerning the determination of the domestic industry's profit margin.

5. The authority's determination is consistent with Article 3.2 and the Panel may exercise judicial economy with regard to Tunisia's outstanding claims under Article 3.2

125. Morocco respectfully requests that the Panel find that the authority's determination is not inconsistent with Article 3.2 because the authority took into account the price effects of the dumped imports in its findings and the methodology used by Morocco was *reasonable* and *objective*.¹⁶⁷

¹⁵⁹ Morocco's comments on Tunisia's responses to the Panel's questions, para. 213.

¹⁶⁰ Morocco's responses to the Panel's questions, 15 February 2021, para. 38; Report of the Appellate Body, *Mexico — Anti-Dumping Measures on Rice*, para. 165.

¹⁶¹ Final Report, para. 134 (MOR-1): "examination of the data collected from the domestic industry has revealed that, during the injury investigation period, the domestic industry sold exercise books at a loss."

¹⁶² Morocco's first written submission, para. 143.

¹⁶³ Morocco's first written submission, para. 144.

¹⁶⁴ Report of the Panel, *US — Countervailing Duty Investigation on DRAMs*, para. 7.265.

¹⁶⁵ Morocco's second written submission, para. 209.

¹⁶⁶ Morocco's second written submission, para. 209.

¹⁶⁷ Morocco's second written submission, para. 211; *EC — Countervailing Measures on DRAM Chips*, para. 7.336.

126. Lastly, regarding Tunisia's other claims under Article 3.2, Morocco respectfully requests that the Panel exercise judicial economy in terms of the cumulative nature of the examination requirement.¹⁶⁸

B. The arguments in support of the claim under Article 3.2 are unsound

127. First, Tunisia's argument regarding the "upward trends" of certain factors is flawed because these "upward trends" are not illustrative of either "positive developments" or a "healthy industry".

128. Second, the Panel should reject Tunisia's "seasonality" argument because the comparison of periods was not an issue.

129. Third, the Panel should also reject Tunisia's argument regarding the domestic industry's alleged "strategy", because it is simply a baseless assumption.

1. The "upward trends" of certain factors are not illustrative of either "positive developments" or a "healthy industry"

130. Tunisia's argument in support of its claim relating to Article 3.4 with respect to the alleged "upward trends" of certain factors is flawed.

131. A 137% increase in inventories of an industry that is, as Tunisia noted, seasonal and depends on rapid production and sales, is not a "positive" increase but a rise that, on the contrary, shows an *industry in poor health* that is no longer able to clear its stock even though it has been selling at a loss since the arrival of the dumped goods on the market, and this, more than an increase in inventories, incurs capital costs, causing the situation of the domestic industry to deteriorate further.¹⁶⁹

132. Similarly, a significant increase in investments may, under certain circumstances, be a sign of a "healthy industry"; *in this case*, the domestic industry invested more in 2015 and 2016 (up 790% in 2015 and 145% in 2016) in order to remain competitive in the face of higher volumes of dumped imports on the market. Nevertheless, despite these investments, the increase in productive capacity and price cuts, the domestic industry was still unable to sell its products, so its stock levels inevitably grew.¹⁷⁰

133. Morocco therefore respectfully requests that the Panel reject Tunisia's arguments in support of its claim relating to Article 3.4 regarding the "upward trends".

2. The comparison of periods was not an issue in the light of the "seasonal" nature

134. Tunisia's argument in support of its claim relating to Article 3.4 regarding the comparison of periods in the light of "seasonality" is flawed.

135. This would have been a relevant argument if and only if the authority had compared the first four months of 2017 to the last four months of 2016, and whether there was evidence that these two periods have different seasonal characteristics. Nevertheless, the fact that in 2017 Tunisian exporters sold more than during the same "season" in 2016 is in no way evidence that comparing these same periods is problematic because this comparison does not take "seasonality" into account.¹⁷¹

136. Morocco therefore respectfully requests that the Panel reject Tunisia's arguments in support of its claim relating to Article 3.4 on the comparison of periods.

¹⁶⁸ Morocco's first oral statement, title III, B, 5.

¹⁶⁹ Morocco's first written submission, para. 181.

¹⁷⁰ Morocco's first written submission, para. 182.

¹⁷¹ Morocco's first written submission, para. 189.

3. The alleged "strategy" of the domestic industry is simply a baseless assumption

137. Tunisia accepted that its argument concerning the domestic industry's alleged "strategy" is only an assumption, and on that basis alone, the Panel should reject this argument because the issue before the Panel is not based on assumptions, but rather on *evidence* before the authority. With regard to the domestic industry's alleged "business strategy", no evidence of that was submitted to the authority.¹⁷²

138. Tunisia argues that "Tunisia's explanation is a plausible explanation, that is consistent with the figures, unlike the explanation put forward by MIICEN",¹⁷³ but a violation of the WTO Agreement cannot be based on "a plausible explanation".¹⁷⁴

139. Morocco respectfully requests that the Panel reject Tunisia's contentious arguments under Article 3.4.

C. Tunisia's claims under Article 3.5 must be rejected

140. Tunisia's claims under Article 3.5 must be rejected because its argument regarding causation under Article 3.5 is unsound and because its argument on "non-attribution" is untenable.

1. Tunisia's argument regarding causation under Article 3.5 is unsound

141. Tunisia's arguments regarding causation under Article 3.5 are based¹⁷⁵ on its arguments relating to Articles 3.2¹⁷⁶ and 3.4.¹⁷⁷

142. In the light of Morocco's arguments relating to Tunisia's claims under Articles 3.2 and 3.4, set out above, Morocco requests that the Panel reject Tunisia's derivative argument concerning "causation".

2. Tunisia's argument on "non-attribution" is untenable

143. Tunisia's "non-attribution" argument with regard to *Imprimerie Moderne* must be rejected because the exporters, *in this case*, have made claims about competition in the market, but did not however submit any evidence - not even an invoice, not even an affidavit from its trade representatives, not even any business information, not even a photograph of the exercise books of rival brands on shelves - in support of their claim of alleged "fierce competition" from *Imprimerie Moderne*.¹⁷⁸

144. With regard to Article 3.5, the authority is required to examine only those factors for which evidence and arguments have been submitted to the authority,¹⁷⁹ as was pointed out by the panel in the case of *Thailand - H-Beams*.¹⁸⁰

145. Furthermore, the authority considered that the evidence concerning *Imprimerie Moderne*'s share of *domestic production* was accurate, appropriate and sufficient to initiate an investigation into the dumping by SOTEFI and SIPEC. Following the initiation of the investigation, the authority sent letters to all interested parties, including *Imprimerie Moderne*, which did not however respond to the authority's questionnaire. So the only piece of evidence before the authority was *Imprimerie Moderne*'s production volume during the final year of the injury data collection period and, as a result, there was no evidence regarding domestic sales, prices or exports. In these circumstances,

¹⁷² Morocco's first oral statement, para. 100.

¹⁷³ Tunisia's responses to the Panel's written questions, para. 140.

¹⁷⁴ Morocco's second written submission, para. 239.

¹⁷⁵ Tunisia's first written submission, para. 7.11.

¹⁷⁶ Tunisia's first written submission, para. 7.12.

¹⁷⁷ Tunisia's first written submission, para. 7.13.

¹⁷⁸ Morocco's comments on Tunisia's responses to the Panel's questions, para. 245 a).

¹⁷⁹ Morocco's first oral statement, para. 108.

¹⁸⁰ Panel Report, *Thailand - H-Beams*, para. 7.273.

and in the absence of any evidence from exporters, the authority could not be expected to speculate on *Imprimerie Moderne's* business competition.¹⁸¹

146. Morocco therefore respectfully requests that the Panel reject Tunisia's "non-attribution" claim under Article 3.5 with regard to *Imprimerie Moderne*.

VI. TUNISIA'S CLAIMS UNDER ARTICLE 12.2.2 MUST BE REJECTED

147. Tunisia has treated its claim under Article 12 as an afterthought and the Panel should not give any credence to this attempt and should therefore reject the request.¹⁸²

148. Furthermore, with regard to Article 12.2.2, the legal "position" of SOTEFI before the authority was based on the *contract*, it being specified that an Excel file does not in itself constitute a "position" or "relevant information, on matters of fact **and law**". So, *in this case*, the authority set out all the relevant facts and arguments, as well as its reasoning in that regard, and it is only because the exporters chose not to bring arguments concerning facts before the authority or the authority's treatment of those facts, that the authority, naturally, did not present any findings with regard to the arguments not submitted, and there was therefore nothing to be disclosed under Article 12.2.2, there is therefore no basis for a review under Article 12 and, by the same logic, there is nothing for the Panel to consider under Article 17.6.¹⁸³

149. Morocco therefore respectfully requests that the Panel reject Tunisia's claims under Article 12.

VII. THE CLAIMS ABANDONED BY TUNISIA

150. Tunisia's has abandoned the following claims set out in its request for the establishment of a panel: claims B.3 and B.4.

A. Claim B.3

151. Tunisia has maintained¹⁸⁴ - and the Panel has also agreed¹⁸⁵ - that the specific claim set out in paragraph B.3 is also found in paragraph **B.5**. Morocco respectfully requests that the Panel resolve the tensions arising from this finding in the light of the principle of effectiveness of the claims as well as the presumption to avoid redundancy¹⁸⁶

152. Furthermore, Morocco requests that the Panel note that Tunisia has abandoned the claim set out in paragraph B.3.¹⁸⁷

B. Claim B.4

153. Morocco respectfully requests that the Panel also note that Tunisia has abandoned the claim set out in paragraph B.4.¹⁸⁸

VIII. CONCLUSION

154. Morocco respectfully requests that the Panel make the following findings:

In the light of the Panel's jurisdiction,

- a. that claim B.5 in the panel request, according to which Morocco acted inconsistently with Articles 2.1, 2.2, 2.2.1.1 and 2.2.2, is inconsistent with Article 6.2 (i) because in the absence of clarification regarding the relevance of Article 2.2.1.1, the claim does not specify "a distinct

¹⁸¹ Morocco's comments on Tunisia's responses to the Panel's questions, para. 245 b) 2).

¹⁸² Morocco's second written submission, para. 307.

¹⁸³ Morocco's responses to the Panel's questions of 15 February 2021, para. 27.

¹⁸⁴ Tunisia's reply to Morocco's preliminary ruling request, para. 4.4.

¹⁸⁵ Preliminary ruling of the Panel, para. 3.46.

¹⁸⁶ Morocco's second written submission, para. 76.

¹⁸⁷ Morocco's second written submission, para. 77.

¹⁸⁸ Morocco's second written submission, para. 81.

and well defined obligation"; and (ii) because the wording of the claim is too imprecise given that it refers to provisions with multiple obligations;

- b. that claim B.6 in the panel request, according to which Morocco acted inconsistently with Article 2.4, is inconsistent with Article 6.2 because the wording of the claim is too imprecise given it refers to a provision with multiple obligations;

With regard to the claims abandoned by Tunisia,

- c. that claim B.3 in the request for the establishment of a panel, according to which Morocco acted inconsistently with Articles 2.1, 2.2 and 2.2.1, was abandoned by Tunisia;
- d. that claim B.4 in the request for the establishment of a panel, according to which Morocco acted inconsistently with Articles 2.1, 2.2, 2.4, 6.8 and paragraphs 3, 5, 6 and 7 of Annex II of the Anti-Dumping Agreement, and Article VI:1 of GATT 1994, was abandoned by Tunisia;
- e. that Tunisia's claim under Article 5.3 must be considered to have been abandoned because Tunisia has stated that it is not pursuing its claim;
- f. that Tunisia's claim under Article 12.2.2 with regard to sales of numbered or watermarked exercise books must be considered to have been abandoned because Tunisia has stated that it is not pursuing its claim;

With regard to Tunisia's outstanding claims,

- g. under Article 5
 - i. on Article 5.2, that Tunisia's claims must be rejected because:
 - a. Tunisia has failed to demonstrate that the authority had any obligation so its claims have no legal basis; and
 - b. in any case, Tunisia has failed to establish a *prima facie* case by ignoring the key condition of "reasonably available".
 - ii. on Article 5.3, that Tunisia's claims must be rejected because:
 - a. in the light of the relationship between Articles 5.2 and 5.3, the fact that Tunisia ignores a fundamental requirement of Article 5.2, concerning the adequacy of the evidence, undermines Tunisia's arguments under Article 5.3; and
 - b. Tunisia has not established that the authority acted inconsistently with Article 5.3.
- h. under Article 2
 - iii. on Article 2.1, that Tunisia's claims must be rejected because:
 - a. Article 2.1 is not an incidental obligation that can be invoked as a consequential argument in order to exacerbate the violation; and
 - b. Tunisia has failed to establish a substantial violation of Article 2.1 such that its claims have no legal basis.
 - iv. on Article 2.2, that Tunisia's claims must be rejected because:
 - a. the arguments relating to the claim based on the exclusion of administrative costs and certain expenses not included in the product price used to calculate the profit margin are outside the Panel's jurisdiction, pursuant to Article 17.6 of the

Anti-Dumping Agreement prohibiting any de novo review, to the extent that these arguments were never specifically submitted to the authority;

- b. the arguments relating to the claim based on the inclusion of the "distribution cost" in constructing the normal value of certain models of exercise books by SOTEFI are outside the Panel's jurisdiction, pursuant to Article 17.6 of the Anti-Dumping Agreement prohibiting any de novo review, to the extent that these arguments were never specifically submitted to the authority;
 - c. the arguments relating to the claim based on the mathematical formulas are outside the Panel's jurisdiction, pursuant to Article 17.6 of the Anti-Dumping Agreement prohibiting any de novo review, to the extent that these arguments were never specifically submitted to the authority.
 - v. *on Article 2.2.2*, that Tunisia's claims must be rejected because:
 - a. the exporters' calculation of their own "profit margin" is not "actual data" within the meaning of Article 2.2.2, the authority is not required to *use* the data provided but it is required to *base* its calculations on those data;
 - b. the letter of Article 2.2.2 does not allow this provision to be interpreted as being consequential and incidental; and
 - c. Article 2.2.2 does not require an authority to examine products that, pursuant to the laws of the exporting country, are not allowed to be exported;
 - vi. *on Article 2.4*, that Tunisia's claims must be rejected because:
 - a. Tunisia's claim relating to the weighting methodology has no legal basis in so far as the first sentence of Article 2.4 cannot be used to address all claims of problems with the mathematical formulas that are not associated with zeroing, or the alleged issues with the weighted average in specific cases, and in any event, Tunisia is seeking a de novo review since Tunisia's arguments related to the weighting methodology have never been specifically submitted to the authority.
 - b. Tunisia's claim concerning licensed exercise books must be rejected because the exporters and Tunisia failed to demonstrate that there was an impact on domestic market prices in accordance with the third sentence of Article 2.4, and in any case, Tunisia is seeking a de novo review since its arguments relating to the licences Excel file were never specifically submitted to the authority.
- i. under Article 3:
 - vii. *on Article 3.2*, that Tunisia's claims must be rejected because:
 - a. The first sentence of Article 3.2 provides an alternative obligation;
 - b. Tunisia's interpretation of Article 3.2 is flawed;
 - c. Tunisia's claim concerning the review period is flawed;
 - d. Tunisia's claim concerning the determination of the domestic industry's profit margin is flawed;
 - e. The authority's determination is consistent with Article 3.2 and the Panel may exercise judicial economy with regard to Tunisia's outstanding claims under Article 3.2 on the cumulative nature of the obligation to conduct reviews.
 - viii. *on Article 3.4*, that Tunisia's claims must be rejected because:

- a. the arguments relating to "upward trends", the alleged "seasonality" and to the domestic industry's alleged "strategy" are all devoid of any factual and legal basis.
 - ix. *on Article 3.5*, that Tunisia's claims must be rejected because:
 - a. Tunisia's argument regarding causation is linked to Tunisia's arguments relating to Articles 3.2 and 3.4, and is therefore unsound because it is devoid of any legal basis;
 - b. Tunisia's argument on "non-attribution" is untenable because it is devoid of any factual and legal basis, to the extent that the neither the exporters before the authority nor Tunisia before the Panel have met the condition expressly set out in Article 3.5.
 - j. under Article 12
 - x. *on Article 12.2.2*, that the allegedly still active claim concerning the difference in the use of licences must be rejected because:
 - a. Tunisia did not submit it in a timely manner, treating it instead as an afterthought; and
 - b. the claim is devoid of any factual basis.
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ANNEX C

ARGUMENTS OF THE THIRD PARTIES

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ANNEXE C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA*

I. ANALYSIS OF SIGNIFICANT PRICE UNDERCUTTING

1. Article 3 of the Anti-Dumping Agreement does not prescribe specific methodologies as to how an investigating authority is to analyse the effects of dumped imports on the prices of domestic like products. The investigating authority, therefore, has a measure of discretion as to how it chooses to conduct this assessment.¹ However, this discretion is bound by the general provisions of Article 3.1, which stipulates that any injury determination must be based on positive evidence and must involve an objective examination.²

2. The phenomena covered by Article 3.2 – price undercutting, price depression and price suppression – involve different factual situations and therefore will need to be examined differently. This difference is highlighted by the fact that the terms "or" and "otherwise" separate the significant undercutting of prices from the other phenomena covered by Article 3.2, "indicating that the elements relevant to the consideration of significant price undercutting may differ from those relevant to the consideration of significant price depression and suppression".³

3. Price undercutting involves "situations where imports are being sold at prices lower than the domestic like products".⁴ Therefore, as the Appellate Body indicated in *China – GOES*, examining price undercutting in accordance with Article 3.2 involves comparing the prices of the subject imports and the domestic like products.⁵

4. Nevertheless, as the examination provided for under Article 3.2 focuses on the effects of dumped imports, the examination of price undercutting should not be limited to a mere mathematical comparison. As the Appellate Body explains, "Article 3.2 requires a dynamic assessment of price developments and trends in the relationship between the prices of the dumped imports and those of like domestic products over the duration of the period of investigation".⁶

5. Contrary to the analysis of price suppression, examination of significant price undercutting is not based on a hypothetical scenario of what might have occurred in the absence of dumping. This aspect of price suppression analysis is highlighted by the words "which otherwise would have occurred", in reference to price increases.⁷ Such words denote a hypothetical situation with regard to analysis of price undercutting. Canada is thus of the view that any examination of significant price undercutting should be based on real prices and not on hypothetical prices in a situation where there is no import dumping.

6. Construction of a target price to reflect the price at which domestic products would have been sold in the absence of the subject imports is based on the idea that the real price is distorted as a result of the price effects of the imports. Therefore, even if the examination provided for under Article 3.2 is intended to determine if the imports had any effects on prices, the target price construction method is based on the premise that the imports did have such effects. In other words,

* In French original language.

¹ Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.233; Panel Reports, *Thailand – H Beams*, para. 7.159; *EU – Biodiesel (Indonesia)*, para. 7.137; *EC – Fasteners (China)*, para. 7.328; and *China – Broiler Products*, para. 7.474.

² Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.233; Panel Report, *EU – Biodiesel (Indonesia)*, para. 7.137. See also Panel Reports, *China – Broiler Products*, para. 7.476; *China – X-Ray Equipment*, para. 7.41; *China – Cellulose Pulp*, para. 7.62; and *Korea – Pneumatic Valves (Japan)*, para. 7.266.

³ Appellate Body Report, *China – GOES*, para. 137; and Panel Reports, *China – HP-SSST (Japan)/China – HP-SSST (EU)*, para. 7.124.

⁴ Appellate Body Report, *China – HP-SSST (Japan)/China – HP-SSST (EU)*, para. 5.160 (emphasis omitted).

⁵ Appellate Body Report, *China – GOES*, para. 136 (emphasis omitted).

⁶ Appellate Body Report, *China – HP-SSST (Japan)/China – HP-SSST (EU)*, para. 5.160.

⁷ Article 3.2 of the Anti-Dumping Agreement.

in the context of price undercutting, resorting to a constructed price presupposes that the dumped imports had an effect on the price of like domestic products.

7. The target price construction method may be appropriate for determining if there is price suppression or prevention of price increases. This is so because examination of these price phenomena is based on comparison with a situation where there is no dumping of imports. In this context, the investigating authority must ask itself how the prices of domestic products would have evolved in the absence of the subject imports.

8. However, for the examination of price undercutting, Canada considers that the comparison between the real price of imports and a constructed target price of like domestic products is not appropriate. This comparison should rather be based on the real prices of the subject imports and those of the domestic like products.

II. LEGAL STANDARD FOR THE INITIATION OF AN INVESTIGATION

9. Article 5 of the Anti-Dumping Agreement sets out the conditions governing the initiation of an anti-dumping investigation and imposes obligations on the applicant and the investigating authority in this regard.

10. Article 5.2 of the Anti-Dumping Agreement imposes an obligation on the applicant as to the content of the request to justify initiating an anti-dumping investigation. It requires the petition to include evidence of dumping, injury and a causal link between dumped imports and the alleged injury.

11. By virtue of this Article, the applicant is required to provide only the information reasonably available to it. As the Panel in *US – Softwood Lumber V* highlighted, Article 5.2 does not require the applicant to provide all the information reasonably available to it, but only such information that substantiates a *prima facie* case of dumping, injury and causal link.⁸

12. Article 5.2 also stipulates that simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this provision. In this sense, Article 5.2 imposes a minimum threshold of sufficiency with regard to the evidentiary weight of information reasonably available to the applicant that it is bound to provide in its application.

13. Article 5.3 requires the authorities to examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation⁹. During its examination, the investigating authority shall examine notably if the application meets the requirements set forth in Article 5.2. The matter of sufficiency of evidence to justify the initiation of an investigation is incumbent on the investigating authority by virtue of Article 5.3 of the Anti-Dumping Agreement.

14. Although it has an obligation to examine the evidence provided by the applicant, the investigating authority does not need to limit itself to such evidence to determine whether an investigation should be initiated. Indeed, the authority may collect information on its own initiative to meet the requirement set forth in Article 5.3.¹⁰ Thus, the authority may conduct its own research to supplement the information provided by the applicant, which may in itself be insufficient, to justify the initiation of an investigation.¹¹ Consequently, the threshold of sufficiency of the evidence for the purposes of initiating an investigation is determined on the basis of the evidence provided by applicant in its application, and any evidence that the authority may have gathered.

15. This is also so because, by virtue of Article 5.2, the applicant is only bound to present in its application information that may be reasonably available to it. Should the investigating authority limit itself to the content of the application to rule on whether or not to initiate an investigation, an

⁸ Panel Report, *US – Softwood Lumber V*, para. 7.87.

⁹ Panel Reports, *Guatemala – Cement II*, para. 8.31; *US – Softwood Lumber V*, para. 7.79; and *Argentina – Poultry anti-dumping duties*, para. 7.60.

¹⁰ Panel Reports, *Guatemala – Cement II*, para. 8.62; and *US – Softwood Lumber V*, para. 7.75.

¹¹ Panel Report, *Guatemala – Cement I*, para. 7.53.

investigation can only be opened in cases where "sufficient evidence" is reasonably available to the applicant.

16. If it is satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to the provisions of Article 5, the investigating authority is required to issue a public notice of initiation of an investigation in conformity with Article 12.1 of the Anti-Dumping Agreement.

17. In accordance with the provisions of Article 12.1.1, this notice, or a separate report, shall contain adequate information, including the basis of the dumping allegation made in the application and a summary of the factors on which the injury allegation is based.

18. Article 12.1 does not require the investigating authority to explain, in the notice of initiation of the investigation, the conclusions it has reached in determining if there is sufficient evidence to justify initiation of an investigation.¹²

19. Nevertheless, the fact that Article 12.1 makes explicit reference to Article 5 demonstrates that the substantial obligation contained in Article 5.3 on initiation of an investigation is relevant to understanding the procedural obligation of Article 12.1. For example, the time at which the notice is to be published under the terms of Article 12.1 depends on the time at which the investigating authority determines that there is sufficient evidence to initiate an investigation, in conformity with Article 5.3. Similarly, the information contained in the notice of initiation of an investigation, in particular information on which the dumping and injury allegations are based, depend on the information which the investigating authority has examined or gathered during its examination in accordance with Article 5.3.

¹² Panel Report, *Mexico – Corn Syrup*, para. 7.88.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES*

EXECUTIVE SUMMARY OF U.S. THIRD PARTY SUBMISSION

1. As set out in Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), the Panel is to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements". Pursuant to the Panel's terms of reference, as established by Article 7.1 of the DSU, the Panel is then to "make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for" in the covered agreements, as required by Article 19.1 of the DSU.

2. With respect to the specific standard of review for anti-dumping measures under Article 17.6 of the Anti-Dumping Agreement, it is the Panel's task to assess whether the investigating authority properly established the facts and evaluated them in an unbiased and objective way. The Panel's task is not to determine whether it would have reached the same results as the investigating authority. Put differently, the Panel's task is to determine whether a reasonable, unbiased person, looking at the same evidentiary record as the investigating authority, could have—not would have—reached the same conclusions that the investigating authority reached.

3. The Panel must not conduct a *de novo* evidentiary review. It would be inconsistent with a panel's function under Article 11 of the DSU to go beyond its role as reviewer and instead substitute its own assessment of the evidence and judgment for that of the investigating authority.

EXECUTIVE SUMMARY OF U.S. THIRD PARTY ORAL STATEMENT

4. Article 3 of the Anti-Dumping Agreement does not prescribe a particular methodology or mandatory set of factors to be considered in an underselling analysis by the authority.

5. In the context of an underselling analysis by the authority, Article 3.2 directs an authority to examine whether subject imports significantly undercut the prices of like domestic products and Article 3.1 provides that a determination of injury shall be based on positive evidence and involve an objective examination.

6. In addition, Articles 3.1 and 3.2 require the authority to ensure comparability between the domestic and subject imported products for which prices are being examined by making adjustments where required to reflect any material differences.

7. Article 3 of the Anti-Dumping Agreement does not prescribe a particular methodology for an authority to analyse impact of dumped imports on the domestic industry.

8. With respect to an authority's obligation to ascertain the impact of dumped imports on the domestic industry, Article 3.4 mandates that "[t]he examination of the impact of dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry", and lists a series of factors to be evaluated. As the text of Article 3.4 states, no one injury factor is necessarily "decisive".

9. Article 3.4 does not dictate the methodology that should be employed in conducting the examination under this article, or the manner in which the results of this evaluation are to be set out.

10. The United States also notes that a negative material injury determination is not compelled merely because a domestic industry has reported a number of positive or improving injury indicators during the POI. As the *EU – Footwear* panel explained, it is "clear" that "it is not necessary that all

* In the original English.

relevant factors, or even most or a majority of them, show negative developments in order for an investigating authority to make a determination of injury". Thus, an authority is not required to find that any certain number of injury factors declined during the POI in order to make an affirmative determination of injury.

11. Article 3.5 of the Anti-Dumping Agreement does not prescribe a particular methodology for an authority to analyse non-attribution factors.

12. The third sentence of Article 3.5 requires an authority to examine "any known factors other than the dumped imports which at the same time are injuring the domestic industry" to ensure that "the injuries caused by these other factors must not be attributed to the dumped imports". A non-attribution analysis is therefore necessary only if (1) there are one or more other known factors other than the dumped imports that (2) are injuring the domestic industry (3) at the same time.

13. In situations where there are such other injury-causing factors as defined in Article 3.5, the article does not require an investigating authority to utilize any particular methodology in examining such factors. In light of this, the Appellate Body has acknowledged that an authority "is free to choose the methodology it will use in examining the 'causal relationship' between dumped imports and injury".

EXECUTIVE SUMMARY OF U.S. THIRD PARTY RESPONSES TO QUESTIONS

14. Response on Question 3.1: With respect to an investigating authority's obligation to ascertain the impact of dumped imports on the domestic industry, Article 3.4 of the AD Agreement mandates that "[t]he examination of the impact of dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry", and lists a series of factors that must be evaluated if they are relevant and have a bearing on the state of the industry under investigation – including the "actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity".

15. The inquiry under Article 3.4 is not limited to its list of enumerated factors; as the text of Article 3.4 confirms, the list is "not exhaustive", and no one factor is necessarily "decisive". Rather than undertake a rote checklist as to whether each factor points to injury in an underlying investigation, an authority "must consider, in light of the interaction among injury indicators and the explanations given" whether a domestic industry is injured.

16. Response on Question 3.2: Article 3.1 of the AD Agreement provides that "[a] determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of ... the consequent impact of [dumped] imports on the domestic producers of [the like domestic] products". The approach taken by a number of panels is instructive with respect to applying the concepts of balancing negative and positive factors in a practical manner. For example, the panel in *EU – Footwear (China)* considered it "clear" that a negative material injury determination is not compelled merely because a domestic industry has reported a number of positive or improving injury indicators during the POI. As that panel explained "it is not necessary that all relevant factors, or even most or a majority of them, show negative developments in order for an investigating authority to make a determination of injury".

17. Response on Question 4.3: Article 5.2 and Article 5.3 of the Anti-Dumping Agreement set out the following requirements for applications and obligations on investigative authorities in order to initiate an anti-dumping investigation. First, under Article 5.2, the application must contain evidence of dumping, injury within the meaning of Article VI of GATT 1994 as interpreted in the Anti-Dumping Agreement, and a causal link between the dumped imports and the alleged injury. Article 5.2 explains that the application shall contain such information that is reasonably available to the applicant on the items identified in 5.2(i)-(iv). Second, under Article 5.3 of the Anti-Dumping Agreement, the investigative authority must examine the accuracy and adequacy of the evidence in the application to determine whether there is sufficient evidence to justify initiation.

18. The text of Articles 5.2 and 5.3 does not provide the Panel with a standard of review that is unique to initiations. Rather, Article 17.6 of the Anti-Dumping Agreement provides the applicable standard of review for anti-dumping disputes. In the context of Articles 5.2 and 5.3 of the Anti-Dumping Agreement, the Panel is to determine whether a reasonable, unbiased person, looking

at the same evidentiary record as the authority, could have—not would have—reached the same conclusions that the authority reached. In particular, whether a reasonable, unbiased person, after looking at the information contained in the application could reach the same decision to initiate an anti-dumping investigation.

19. Response on Question 4.7: The use of the term "evidence" in Articles 5.2 and 5.3 of the Anti-Dumping Agreement does not dictate that the applicant or the investigating authority—at the point at which Article 5.2 or 5.3 is implicated in an antidumping proceeding—must demonstrate how the information provided justifies the initiation of an investigation. Of course, it befits the applicant to explain how the information in the application constitutes "evidence" of, and demonstrates, dumping, injury, and causation for purposes of the investigating authority examining the accuracy and adequacy of that evidence. However, neither of the aforementioned Articles *require* a demonstration at that stage. If the applicant fails to demonstrate that the information in the application is sufficient to justify initiation of an investigation, it risks the investigating authority not initiating on the basis of the application.

20. Response on Question 4.8: As an initial matter, the evidence in the application need not "prove" the existence of all elements of dumping. As the panel in *US Softwood Lumber V* stated, "[w]hat constitutes sufficient evidence to justify the initiation of an anti-dumping investigation, is not defined in the *Anti-Dumping Agreement*". Furthermore, "the quantity and quality of evidence required to meet the threshold of sufficiency of the evidence is of a different standard for purposes of initiation of an investigation compared to that required for a preliminary or final determination of dumping".

21. An investigating authority may request supplemental information from the applicant. Indeed, an investigating authority's request for supplemental information from an applicant is fully consistent with the Article 5.3 obligation that the investigating authority examine the accuracy and adequacy of the information contained in the application.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN*

I. THE "LOGICAL PROGRESSION" UNDER ARTICLE 3 OF THE ANTI-DUMPING AGREEMENT

1. The paragraphs of Article 3 of the Anti-Dumping Agreement have been described as contemplating a "logical progression of inquiry". The inquiries under Articles 3.2 and 3.4 are accordingly required for the overall causation analysis contemplated in Article 3.5 and their outcomes form the basis of such analysis.¹ Without a proper examination under these provisions, an affirmative finding of the effect of the dumped imports or the impact of the dumped imports would be neither reasonable nor objective because it would lack positive evidence inconsistently with Article 3.1. Japan therefore considers that an investigating authority must undertake thorough analyses of the price and volume effects and of the impact of dumped imports on the domestic industry, in order to properly determine the existence of injury and causation.

II. THE ANALYSIS OF VOLUME EFFECTS UNDER ARTICLE 3.2 OF THE ANTI-DUMPING AGREEMENT

2. Japan considers that an investigating authority should consider whether and to what extent dumped imports are increasing by substituting for the domestic like products in the market. As Japan sees it, an increase in the dumped imports, with no substitution effect, cannot be characterized as "significant". The absence of such an effect indicates that the sales quantity of the domestic like product would have been the same in the absence of the dumping, and logically, the domestic industry has not been injured by the dumped imports.

3. With respect to the case at issue, if the market share of the dumped imports had fluctuated during the period of investigation ("POI"), it would be questionable whether it could be concluded that the increase during a period shorter than a year properly represents the true trend of the dumped imports, or that the dumped imports were increasing and replacing the domestic like products on a volume basis. In particular, considering that the product under investigation is school exercise books, it appears reasonable to consider that there could have been seasonal trends. The Panel should carefully review whether Morocco's Ministry of Industry, Investment, Trade and the Digital Economy ("MIICEN") took into account such a seasonal trend, as alleged, and the domestic market situation throughout the entire year when determining whether the imports increased relative to production or consumption.

III. THE ANALYSIS OF PRICE EFFECTS UNDER ARTICLE 3.2 OF THE ANTI-DUMPING AGREEMENT

A. Price Effect Analysis

4. Prior panels and the Appellate Body have underscored that the analysis under the second sentence of Article 3.2 must be dynamic and must consider the interaction of the prices of dumped imports and domestic products in the specific market. In this regard, Japan is of the view that a mere demonstration of correlation between the prices of dumped imports and domestic prices does not provide a sufficient basis for the existence of price effects within the meaning of Article 3.2, because it does not show whether the price of dumped imports had an effect on the domestic like products and thus is not based on positive evidence. It is common knowledge that the correlation between two figures does not necessarily entail a causal relationship between the two.

5. In Japan's view, for all three types of price effects set out in Article 3.2—that is, price undercutting, price depression, and price suppression—the key question is the same: *the price effects analysis must consider what the domestic price would have been without the dumped imports*

* In the original English.

¹ Appellate Body Report, *China – GOES*, para. 128.

(i.e., if the imports had been priced at their normal value), compared to the actual price of the domestic like products where there are dumped imports. Article 3.2 requires a consideration of "the relationship between subject imports and domestic prices, so as to understand whether the former may have explanatory force" for the observed pricing trends, and an investigating authority may not "disregard evidence that calls into question the explanatory force of subject imports".² Further, the analysis must be based on an objective examination and positive evidence.³

6. In conducting the analysis contemplated in Article 3.2, the investigating authority would normally need to examine market interactions between subject imports and the domestic like products. Without such market interaction, there will be no positive evidence that the observed price differences of the domestic like products were caused by the dumped imports (i.e., constituting price effects), and the observation will not provide a basis for the next step of the "logical progression".

7. Specifically, the investigating authority should carefully consider factors that may explain why the domestic industry of the importing Member could not have raised its prices, or factors that show what the price would have been had it not been for the dumped imports, before finding that the dumped imports have price effects. This consideration must be reflected in the relevant documents of the investigating authority.⁴

B. Price Undercutting

8. Japan does not comment on the particular price effect analysis carried out by MIICEN in the case at issue. Having said that, as far as the legal standard for the "price undercutting" analysis is concerned, Japan first has doubts about MIICEN's understanding of the "comparability" reflected in the aforesaid analysis. The key question under Article 3.2 is again, whether the price of the domestic like products would have been higher but for the dumped imports. Japan requests that the Panel carefully examine whether MIICEN's approach conforms to the requirement of "comparability", in particular as regards the use of the profit margins earned by the exporters in Tunisia as a representative of the profit margins that should have been earned by the domestic producers.

9. Japan's view is that the use of a constructed price is not per se inconsistent with Articles 3.1 and 3.2. It is recognized that investigating authorities enjoy a certain discretion in adopting a methodology to guide their injury analysis.⁵ However, Japan also considers that the mere comparison with actual prices does not provide a sufficient basis for the affirmative finding of "significant" price undercutting. Even in the absence of an actual decrease in prices, where the investigating authority has found that prices are lower than they would have been (because the profit margin of domestic products was set lower than it would have been), to allow the "logical progression" leading to the subsequent impact and causal link inquiries, the investigating authority would need to find that the lower-priced imports caused the domestic producers' inability to increase their sales price despite their cost increase.

10. Leaving aside MIICEN's decision to use a constructed price, it does not appear that a reasonable explanation was provided for the use of the profit margins of Tunisian exporters in the case at hand. If the approach was based on an assumption that the profits of the domestic industry should have been higher than the actual profit because the price of school exercise books of the domestic industry should have been higher, the finding cannot be considered adequate or reasonable unless the underlying assumption is otherwise established by positive evidence. There should be an explanation based on positive evidence to substantiate that the domestic producers would have earned the same profit rate but for the dumped imports. A mere allegation that the Tunisian competitors were earning such a profit rate is insufficient to use the same profit rate to reach a constructed price of domestic producers.

C. Price Depression

11. In the case at issue, MIICEN found that the price of the like products was depressed every year during the POI. However, it is unclear whether the relationship between the subject imports

² Appellate Body Report, *China – GOES*, para. 151.

³ Appellate Body Report, *China – GOES*, para. 152.

⁴ Appellate Body Report, *China – GOES*, para. 131. (original emphasis)

⁵ See, for example, Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 204 and Panel Report, *EC – Tube or Pipe Fittings*, paras. 7.278 and 7.281.

and the domestic prices was considered in determining whether the effect of subject imports was to depress domestic prices.

D. Price Suppression

12. Japan reiterates that, if the affirmative finding of price suppression is based solely on a mere price comparison, it must be concluded that the finding is not supported by positive evidence. An affirmative finding of "price suppression" must be based on an assessment of the market interaction between the dumped imports and the domestic like products. As the existence of domestic competitors, not included within the scope of the domestic industry in the investigation, has been pointed out when conducting the injury inquiries, for example, it should be carefully reviewed whether or not the price suppression is indeed caused by the dumped imports. Japan requests that the Panel examine these arguments from the aforesaid viewpoint.

IV. INJURY ANALYSIS UNDER ARTICLE 3.4 OF THE ANTI-DUMPING AGREEMENT

13. While Article 3.2 concerns the volume and price effect of dumped imports, Article 3.4 concerns "the consequent impact" of the dumped imports on the domestic industry. Japan understands that "the impact of" the dumped imports on the state of the domestic industry within the meaning of Article 3.4 refers to the impact of the volume/price effect identified under Article 3.2. Therefore, Japan considers that Article 3.4 requires an investigating authority to examine whether and to what extent the factors showing certain trends in the domestic industry can be explained as *resulting from the identified effects of dumped imports (i.e., volume effects and price effects)* under Article 3.2.

14. Further, if the investigating authority finds that the "impact of the dumped imports" is one that results from the volume/price effect of dumped imports, the investigating authority must also provide an adequate and reasonable explanation on why such impact demonstrates an injury to the domestic industry to satisfy the explanatory force requirement of Article 3.4.

15. In this regard, while Japan does not take a position as to the facts of the case, if MIICEN engaged in a selective examination, and did not examine or provide a satisfactory explanation of certain factors and indices, it would have failed to undertake the examination required by Article 3.4. In addition, if there were cost factors that impacted profits, the investigating authority should have explained how it considered such factors. Without such an explanation, it would be incorrect to assume that the impact on profits reflects the impact of dumped imports.

16. Japan does not believe that the mere presence of factors other than the dumped imports that explain in part certain negative trends necessarily denies the "explanatory force" of the dumped imports for the state of the domestic industry. However, it appears that MIICEN did not find any price effects or volume effects of the dumped imports other than that the domestic industry's profits were lower than what it would have earned without the dumped products. There should be some explanation as to why the changes in production, sales, and market share reflect the impact of dumped imports when there appears to be no price or volume effect of dumped imports other than the impact on profits.

V. ARTICLE 3.5 - CAUSAL LINK

17. In Japan's view, an investigating authority's consideration of other factors in the price effects analysis under Article 3.2 does not duplicate, but rather contributes to, the non-attribution analysis under the third sentence of Article 3.5. In fact, Article 3.5 requires that an investigating authority "demonstrate[] that the dumped imports are, *through the effects of dumping, as set forth in [Articles 3.2 and 3.4], causing injury within the meaning of this Agreement*".⁶ Therefore, factors that do not affect prices, and that accordingly are not considered within the price effect analysis, cannot constitute "factors attributable to dumped imports" by definition.

18. If MIICEN had obtained information regarding domestic competitors of the "domestic industry", the Panel should carefully consider whether there were any effects caused by the above

⁶ Emphasis added.

mentioned domestic competitors as alleged that should not have been attributed to the dumped imports.

19. In addition, although Tunisia does not appear to have raised the issue in this dispute, Japan has questions as to whether the determination of the scope of the "domestic industry" was appropriate. In the present case, had the MIICEN included all domestic producers within the scope of the "domestic industry", the competition among all domestic producers would have been appropriately considered within the injury determination, especially when considering the price effects of dumped imports under Article 3.2.

VI. FINDING OF DUMPING UNDER ARTICLES 2.1 AND 2.4 OF THE ANTI-DUMPING AGREEMENT

20. In order to determine a comparable price and to undertake a fair comparison in accordance with Articles 2.1 and 2.4, it is necessary to take into account the status of competition within the relevant market. Although Japan does not take a position on the specific factual allegations made by the parties, Japan respectfully requests the Panel to examine carefully whether the calculation of the normal value by the MIICEN was indeed proper. If there is no explanation about how the authority compared several models taking into account market practices, seasonality and other factors that affect competition in the market, the lack of an explanation may suggest that the comparison is arbitrary.

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION *

1. The European Union is exercising its right to participate as a third party in this dispute owing to its systemic interest in the proper and consistent interpretation and application of the covered agreements and other relevant documents, and the multilateral nature of the rights and obligations contained therein.
2. With regard to the construction of normal value, Tunisia has detected two errors that the Moroccan authority, MIICEN, made in **calculating the profit margin of Tunisian producers**.
3. The European Union understood the first error raised by Tunisia to be the fact that MIICEN included in the profit margin of producers certain costs and expenses that do not count as profits, such as taxes, duties, transport costs and the cost of credit. According to Articles 2 and 2.2.2 of the Anti-Dumping Agreement, the cost of production may only be increased by reasonable amounts for administrative, selling and general costs, as well as profits, based, to the extent possible, on actual data.
4. In the view of the European Union, the Panel is not prevented from considering the issue of interpretation of the Anti-Dumping Agreement raised by Tunisia due to the mere fact that this issue was not previously submitted to the investigating authority. Article 17 of the Anti-Dumping Agreement does not require that matters referred to the Dispute Settlement Body first be submitted to the investigating authorities.
5. An erroneous calculation of the reasonable profit margin could be considered by a Panel as an improper establishment of the facts by the investigating authority if the claim brought to the Panel concerns a calculation error that results from the facts established in the course of the investigation or assessment. In this case, the claim must be examined by the Panel on the basis of "the facts made available in accordance with appropriate domestic procedures to the authorities of the importing Member" as required by Article 17.5(ii) of the Anti-Dumping Agreement, and in relation to the test under Article 17.6(i). Under this standard, in its assessment of the facts of the case, 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 if the Panel may have reached a different conclusion, the evaluation shall not be overturned. The European Union shares the view expressed by the United States regarding this measure¹.
6. However, if the allegation concerning the wrong calculation of the profit margin of the producers is not based on an error in the establishment of the facts or their evaluation, but rather on an error of interpretation of the provisions of the Anti-Dumping Agreement applicable to the calculation of that margin, the Panel must examine this claim under Article 17.6(ii).
7. With respect to the second error in the calculation of the profit margin of the producers alleged by Tunisia, the matter brought to the Panel appears to be of a completely different nature.
8. The European Union considers the decision by MIICEN to exclude sales of numbered or watermarked exercise books from the calculation of the profit margin of the producers can be justified due to the fact that these are product models or types of product whose export is strictly prohibited and is therefore not sold on the market of the importing country. In this case, the exclusion of sales of this model from the calculation of normal value appears to be in conformity with the obligation under Article 2.4 of the Anti-Dumping Agreement to ensure a fair comparison between normal value and export price. Therefore, no breach of Articles 2.1, 2.2 and 2.2.2 can be found to exist as a result of this exclusion.

* French original.

¹ United States' third-party written submission, para. 6.

9. Tunisia's claim regarding **determination of the normal value of SOTEFI** raises the question of whether "distribution cost" is part of the "administrative and selling expenses" or "general costs" which, under Article 2.2 of the Anti-Dumping Agreement, may be added to the "production cost" to reconstruct the normal value of the product concerned in the country of origin. In the view of the European Union, this is a matter of interpretation of Article 2.2, which may be considered by the Panel, even if it was not raised during the investigation.

10. Article 2.2 of the Anti-Dumping Agreement does not make an explicit reference to distribution costs. The ordinary meaning of the terms "production cost" and "profits" does not appear a priori to cover costs associated with the distribution of products. However, doubts about what is covered by the ordinary meaning of the terms "administrative and selling expenses" and/or "general costs" could be justified.

11. Article 2.2 of the Anti-Dumping Agreement must therefore be interpreted in its context, including the provisions of Article 2.4 in particular.

12. According to Article 2.4 of the Anti-Dumping Agreement, the fair comparison between the export price and the normal value, which the investigating authority must make, must be "made at the same level of trade, normally at the ex-factory level".

13. If the fair comparison between the export price and the normal value is "normally" made at the "ex-factory level", it is reasonable to conclude that distribution costs, in particular the costs of transporting products to customers within the country of origin, should normally not be included in the constructed normal value in accordance with Article 2.2 of the Anti-Dumping Agreement.

14. Nevertheless, the last sentence of Article 2.4 should also be taken into account, whereby the authorities "shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties". This provision would suggest that it is incumbent on the interested parties to provide the authorities with the necessary information to identify the domestic transport costs of the products concerned by the investigation, with a view to enabling a fair comparison between the export price and the normal value.

15. With respect to **the fair comparison stipulated under Article 2.4** of the Anti-Dumping Agreement, the European Union considers that a comparison methodology that results in collection from importers of anti-dumping duties in excess of the amount of the exporter's or foreign producer's margin of dumping cannot lead to a "fair comparison" within the meaning of the first sentence of Article 2.4, even if this is due to an error in the mathematical formula. When the investigating authority uses the so-called weighted-average comparison methodology, it must first establish the differences observed between export unit prices and normal values for each model (which will then be weighted). These intermediate results are not "margins of dumping". As a result, they are correctly expressed in monetary terms, not as percentages, as MIICEN appears to have done. Expressing these intermediate results as percentages would amount to basing the calculations not on absolute values, but on relative values and thus could distort the calculations.

16. On the use of licences, the European Union considers that the key question is the fact of whether the exporters did indeed provide, in the course of the investigation, sufficiently concrete elements of information to demonstrate that the use of licences actually affected price comparability. It is obviously not sufficient for the complaining party to itself demonstrate this fact to the Panel.

17. With regard to **determination of injury**, the European Union submits that Article 3.2 of the Anti-Dumping Agreement enumerates three specific effects that the imported volumes may have on prices in the importing country, namely: significant price undercutting; significant price depression or significant price suppression.

18. The European Union considers that the relationship between these three types of price effects is as follows:

19. *First*, these three types of effects are alternatives. The concepts of price undercutting, price depression and price suppression describe three distinct forms of price development that may be caused by imports. The specificity of each of these three forms of price effects must be recognized.

20. *Second*, these three types of price effects are not completely set in stone as concepts; nor are they unrelated. These three types of effects may be present at the same time or may occur sequentially over time in a given market. The application of Article 3.2 of the Anti-Dumping Agreement must be balanced and must accurately reflect the economic reality.

21. Price undercutting refers to a direct comparison between the prices of the imported products and the prices of the domestic industry products at issue. Such a comparison may well make it necessary to adjust observed price data, to ensure comparability. However, it is not consistent with the very idea of a price comparison to fully rebuild the price of domestic products. Rather, establishment of price undercutting should be based, in principle, on the actual prices observed in the markets.

22. Examination of the state of the domestic industry in terms of Article 3.4 of the Anti-Dumping Agreement does not require an analysis of whether lack of profitability is due to causes other than import of dumped products.

23. The European Union considers that the fact that certain factors or indicators relating to the domestic industry show positive developments during the period concerned does not preclude a determination that dumped imports may have caused injury to that industry within the meaning of Article 3 of the Anti-dumping Agreement.

24. However, the requirement to conduct an objective examination requires, in such a situation, that the investigating authority convincingly explain its examination of the various factors and indicators. The European Union does not, however, consider that Article 3 of the Anti-Dumping Agreement stipulates that the explanation provided by that authority in such a situation must be particularly in-depth.

25. Lastly, regarding the **initiation of the investigation**, the European Union considers that the standard of review under Article 5.2 (reasonably available elements) is different from that under Article 5.3 (sufficiency of evidence). Both obligations, nevertheless, are incumbent on the authorities of the Member concerned. It is up to the investigating authority to verify whether the petition on which it initiates the investigation satisfies the requirements of Article 5.2. Should an investigating authority initiate an investigation on the basis of a petition that does not meet the criteria of Article 5.2, this will constitute a breach of Articles 5.1 and 5.2 (as well as Article 1 and footnote 1) of the Anti-Dumping Agreement.

26. The review under Article 5.3 of the Anti-Dumping Agreement establishes whether an unbiased and objective authority, taking into account the accuracy and adequacy of the facts before it, could properly have determined that there was sufficient evidence to justify the initiation of an anti-dumping investigation.

27. The evidence referred to in Article 5.3 are those referred to in the chapeau of Article 5.2, that is, evidence of the existence of (a) dumping; (b) injury; and (c) a causal link between the dumped imports and the alleged injury. The evidence relating to the three elements necessary to impose an anti-dumping measure may be inferred in Article 5.3 from Article 5.2, by considering the contextual relevance of Articles 2 and 3 of the Anti-Dumping Agreement.

28. Article 5.3 of the Anti-Dumping Agreement requires an investigating authority to determine whether the initiation of an investigation is justified in light of the evidence that it can objectively possess. This obligation includes an examination of the petition and whether it meets the requirements of Article 5.2 or Article 5.4 of the Anti-Dumping Agreement, but not only. The obligation to determine whether the initiation of an investigation is warranted also includes the possibility for an investigating authority to rely on other necessary evidence that the authority would have to decide on the initiation of an investigation. Article 5.3 does not rule on how to communicate the results of this analysis to the interested parties. The question of how much detail and at what stage of the proceedings the investigating authority must provide the underlying facts and analyses in its decision to initiate the investigation is therefore governed by the general rules on the rights of defence of interested parties, and in particular Article 6 of the Anti-Dumping Agreement.

29. With regard to the sufficiency of evidence in this dispute, the European Union notes that, where the product concerned consists of a multitude of models, other panels have previously

determined that an isolated piece of evidence, concerning an *insignificant* sub-category of the subject product or prices, without any effort by the investigating authority to establish its representativeness, is insufficient to justify the initiation of an investigation. Such jurisprudence may usefully guide the Panel in its consideration of this dispute.
