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

(DS578)

RESPONSES OF THE UNITED STATES OF AMERICA TO QUESTIONS FROM THE PANEL TO THIRD PARTIES

October 12, 2020

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China – GOES (AB)	Appellate Body Report, *China — Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012
EC – Bed Linen (Panel)	Panel Report, *European Communities — Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001
EU – Footwear (China) (Panel)	Panel Report, European Union — Anti-Dumping Measures on Certain Footwear from China, WT/DS405/R, adopted 22 February 2012
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US – Softwood Lumber V (Panel)	Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, adopted on 31 August 2004
Thailand – H-Beams (Panel)	Panel Report, *Thailand — Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H Beams from Poland*, WT/DS122/R, adopted on 5 April 2001

1. The United States welcomes the opportunity to present its views on the questions from the Panel to the third parties in this dispute. This submission addresses the following questions: 3.1, 3.2, 4.1, 4.2, 4.3, 4.4, 4.5, 4.6, 4.7, and 4.8.

Question 3.1: Dans le cadre de son allégation au titre des articles 3.1 et 3.4 de l'Accord antidumping, au paragraphe 6.130 de sa première communication écrite, la Tunisie affirme que l'autorité d'enquête "aurait dû évaluer si la profitabilité négative de la BPN ne s'inscrivait pas dans le cadre d'une stratégie de la BPN". L'autorité d'enquête est-elle tenue au titre des articles 3.1 et 3.4 de l'Accord antidumping d'examiner si la profitabilité négative s'explique par des raisons autres que les importations faisant l'objet d'un dumping?

2. 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."

3. 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.[1] In accordance with Article 3.1, an authority's consideration of these criteria must be based on an "objective examination" of "positive evidence." The "examination" contemplated by Article 3.4 should be based on a "thorough evaluation of the state of the industry."[2]

4. 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." In an appropriate case, an authority may need to consider additional factors in its analysis under Article 3.4. The United States observes, in this respect, that Article 3.4 requires an investigating authority to consider whether changes in the state of the domestic industry are the consequence of subject imports and whether subject imports thus have "explanatory force" for the industry's performance trends.[3]

5. The reasons underlying observed trends, however, is generally more relevant to an analysis of causation under Article 3.5 of the AD Agreement. For example, information purporting to show that financial indicators declined during the POI for reasons unrelated to subject imports could be identified as an "other known factor" to be examined for non-attribution purposes.[4]

[1] *EC – Bed Linen (21.5 India) (Panel)*, para. 6.163.
[2] *Thailand – H-Beams (Panel)*, para. 7.236.
[3] *China – GOES (AB)*, para. 149.
[4] *See* AD Agreement Article 3.5 ("The authorities shall also examine any *known factors other than the dumped imports* which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports") (emphasis added).

Question 3.2: La Tunisie s'appuie sur les constatations du Groupe spécial dans l'affaire *Thaïlande – Poutres en H* pour affirmer, au paragraphe 6.105 de sa première communication écrite, que face à l'évolution positive de plusieurs facteurs, l'autorité d'enquête aurait dû "expliquer de manière 'approfondie et convaincante' pourquoi les performances positives ont été 'largement neutralisées par d'autres facteurs'". Êtes-vous d'accord avec cette constatation du Groupe spécial?

6. 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." As found by the panel in *Thailand – H-Beams*, the "examination of the impact of dumped imports" contemplated by Article 3.4, read in conjunction with Article 3.1, should be based on a "thorough evaluation of the state of the industry.[5]

7. 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."[6]

Question 4.1: Le Groupe spécial dans l'affaire *Argentine — Droits antidumping sur la viande de volaille* a exprimé son point de vue sur l'obligation contenue dans l'article 5.2 de l'Accord antidumping:

> **Les deux parties sont donc d'accord pour dire que l'article 5.2 impose des obligations aux Membres. Sans nous prononcer sur la question, nous n'excluons pas la possibilité que l'article 5.2 puisse obliger les Membres à vérifier que les demandes contiennent des éléments de preuve, et non une simple affirmation, de l'existence d'un dumping, d'un dommage et d'un lien de causalité. […] Cette obligation pourrait déboucher sur le rejet des demandes ne satisfaisant pas aux prescriptions de l'article 5.2.[7]**

Êtes-vous d'accord que les obligations contenues dans l'article 5.2 pèsent sur l'autorité d'enquête?

8. Article 5.2 of the Anti-Dumping Agreement requires that an application include evidence of dumping, injury within the meaning of Article VI of GATT 1994, and a causal link between the dumped imports and the alleged injury.

[5] *Thailand – H-Beams (Panel)*, para. 7.236.
[6] *EC – Footwear (China) (Panel)*, para. 7.413.
[7] *Argentina - Anti-Dumping Duties on Poultry Meat (Panel*), para. 7.98.

9. The applications described in Article 5.2 are applications submitted under Article 5.1 of the Anti-Dumping Agreement.[8] Article 5.1 discusses applications "by or on behalf of the domestic industry." Therefore, the application at issue is one by or on behalf of the domestic industry.

10. Thus, Article 5.2 requires that an application submitted by or on behalf of the domestic industry include evidence of dumping, injury, and causation. In other words, Article 5.2 describes what information an application must contain. These requirements apply to the application, and do not impose obligations directly to the authority.

11. Rather, the pertinent obligation on the authority is in the following article. In particular, Article 5.3 provides that "The authorities shall 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." Whether the application meets the requirements in Article 5.2 would be relevant to the authority's examination of the application under Article 5.3.

Question 4.2: L'Union européenne suggère dans sa déclaration orale que certaines obligations de l'article 5.2 de l'Accord antidumping pourraient peser sur les requérants. Pouvez-vous commenter? Si c'est le cas, le non-respect de ces obligations par des personnes privées peut-il aboutir à une violation par un Membre de l'OMC de ses obligations?

12. As explained in the U.S. response to Question 4.1, the requirements in Article 5.2 pertain to the application. Specifically "an application . . .shall include evidence of" and "the application shall contain such information as is reasonably available . . ."

13. Article 5.2 simply describes what information an application shall contain. The consequences of a failure to include in an application the information described in Article 5.2 is that an applicant risks an investigating authority not finding sufficient evidence to initiate an investigation under Article 5.3.

Question 4.3 : Quelle distinction le Groupe spécial doit-il faire entre le critère d'examen au titre de l'article 5.2 et celui au titre de l'article 5.3 de l'Accord antidumping?

14. 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

[8] *See* Article 5.2 ("An application *under paragraph 1* shall include evidence of (a) dumping, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and (c) a causal link between the dumped imports and the alleged injury." (emphasis added)).

of the evidence in the application to determine whether there is sufficient evidence to justify initiation.[9]

15. 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 particular, pursuant to Article 17.6, the Panel's task is to assess whether the authority properly established the facts and evaluated them in an unbiased and objective way.[10] For a more extensive discussion of the appropriate standard of review, the United States would refer the panel to its third party submission in this dispute.

16. 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.

17. The Panel must not conduct a de novo evidentiary review of Morocco's investigative authority's assessment of the application and sufficiency determination of the evidence, as 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 authority.[11]

Question 4.4: L'Union européenne affirme au paragraphe 123 de sa communication écrite qu'"au moment de l'ouverture de l'enquête, il n'est pas nécessaire que l'autorité chargée d'une enquête dispose de la quantité et de la qualité des éléments de preuve qui seraient requises pour étayer une détermination préliminaire ou finale". Les renseignements cités aux alinéas (i) à (iv) de l'article 5.2 de l'Accord antidumping doivent-ils être d'une quantité ou d'une qualité particulière? Si oui, de quelle disposition de l'Accord antidumping découle cette obligation ?

18. The United States agrees with the statement that for purposes of initiating an investigation, the evidence provided in an application need not be of the same quality and quantity that would be necessary to make a preliminary or final determination of dumping.[12] Additionally, Article 5.2 of the Anti-Dumping Agreement includes the qualifier that the information contained in the application shall be information reasonably available to the applicant.

[9] *Mexico – Corn Syrup (Panel)*, para. 7.76 (footnote).
[10] Anti-Dumping Agreement, Article 17.6(i). *See, e.g., US – Countervailing Measures on Certain EC Products (21.5 – EC)*, para. 7.82.
[11] *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 188-190.
[12] Previous panels have appropriately stated that the evidence provided in an application need not be of the same quantity and quality that would be necessary to make a preliminary or final determination of dumping. *See US – Softwood Lumber V (Panel), paras 7.83 – 7.84*.

19. The requisite amount and quality of the information is "sufficient evidence to justify the initiation of an investigation," a standard contained in Article 5.3 of the Anti-Dumping Agreement.

Question 4.5: L'article 5.2 de l'Accord antidumping impose-t-il au plaignant de justifier et/ou à l'autorité de s'assurer que les "renseignements" figurant dans la requête étaient les seuls raisonnablement à la disposition du requérant?

20. No, Article 5.2 places no requirement on the applicant to justify and/or the investigating authority to demonstrate that the information in the application was the only information reasonably available to the applicant where the information in the application is sufficient to support initiation of an investigation.

21. To recall, Article 5.2 states that an application shall include evidence of (a) dumping, (b) injury and causation, and shall contain such information as is reasonably available to the applicant. Article 5.2 does not include language dictating that the information in the application be the only information reasonably available to an applicant. Previous panels agree with that interpretation. For example, the Panel in *US- Softwood Lumber V* addressed a similar question and stated that, "Considering the requirements of Article 5.2, we are of the view that we have to establish, when considering the specific facts of this case, whether the application contained information on the matters specified in Article 5.2, . . ., not whether it contained all such information as is reasonably available to the applicant"[13] Inherent in the *US- Softwood Lumber V* panel's finding that an application need not contain *all* such information that is reasonably available is that the information in the application need not be the *only* information reasonable available. In other words, there can be other information reasonably available that is not included in the application (because the application need not include all information reasonably available).

Question 4.6: Les "éléments de preuve" évoqués dans l'article 5.3 de l'Accord antidumping sont-ils les mêmes que les "renseignements" figurant aux alinéas (i) à (iv) de l'article 5.2 de l'Accord antidumping?

22. Article 5.2 of the Anti-Dumping Agreement refers to "evidence" of dumping, injury, and causation. Article 5.3 talks about an examination of the "evidence" provided. Article 5.2 also talks about "information" required in the application. Some of that information may constitute evidence of dumping, injury and/or causation, but the term "information" as used in subparagraphs (i) through (iv) of Article 5.2 is broader than the term "evidence" used in that paragraph. For example, the identity of the applicant, discussed in subparagraph (i) of Article 5.2 of the Anti-Dumping Agreement is not evidence of dumping, injury, or causation on its own. Likewise, the identity of each known exporter or foreign producer and a list of known persons importing the product are not evidence of dumping, injury, or causation on their own. Accordingly, while some information referred to in subparagraphs (i) to (iv) of Article 5.2 of the Anti-Dumping Agreement may serve as evidence within the meaning of that term as used in Articles 5.2 and 5.3 of the Anti-Dumping Agreement, the two terms need not be synonymous.

[13] *US- Softwood Lumber V (Panel)*, para. 7.57.

Question 4.7: L'expression "éléments de preuve" figurant à l'article 5.2 et à l'article 5.3 signifie-t-elle que le requérant d'une part et/ou l'autorité d'enquête d'autre part, doivent démontrer en quoi les renseignements fournis justifient l'ouverture d'une enquête? Si c'est le cas, dans quel document l'autorité d'enquête devrait-elle fournir cette explication?

23. 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.

24. The United States would note that Article 12.1 of the Anti-Dumping Agreement requires public notice of the initiation of an investigation. Article 12.1.1 states that the public notice should contain or make available through a separate report adequate information on the "basis on which dumping is alleged in the application" and "a summary of the factors on which the allegation of injury is based," among other items. Therefore, the notice and/or report contemplated by Article 12.1.1 could be one place in which an investigating authority explains the basis for, and evidence upon which it relied for, its initiation of an investigation.

Question 4.8: Si les éléments de preuve contenus dans la requête apparaissent insuffisants pour "prouver" l'existence de tous les éléments du dumping, l'autorité d'enquête doit-elle rejeter la plainte ou peut-elle demander ou rechercher par elle-même des éléments complémentaires permettant de justifier l'ouverture de l'enquête? Si l'autorité d'enquête complète ainsi les éléments de la requête, comment les parties intéressées peuvent-elles en avoir connaissance?

25. 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.*"[14] 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."[15] Thus, instead of "proving" dumping, the standard for initiating an investigation based on an application, pursuant to Article 5.3 of the Anti-Dumping Agreement, is that the application should contain "sufficient evidence to justify the initiation of an investigation."

26. Keeping that "sufficiency" standard in mind, an investigating authority may request additional information to supplement information provided in an application. Indeed, doing so is consistent with an investigating authority's obligations under Article 5.3 of the Antidumping

[14] *US- Softwood Lumber V (Panel)*, para. 7.78.
[15] *US- Softwood Lumber V (Panel)*, para. 7.84.

Agreement 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 investigation.

27. If an investigating authority considers that additional information could be desirable to determine whether there is sufficient evidence to justify the initiation of an investigation, there is no bar in the Antidumping Agreement on it requesting such information from the applicant. This line of thinking is supported by the panel in *US- Softwood Lumber V*, which stated that "an investigating authority is not precluded from gathering information itself to ensure that it is satisfied that it has sufficient evidence before it . . . .." [16]

28. Accordingly, an investigating authority may request supplemental information. 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.

29. The Panel's question also asks whether interested parties must be informed of information requested by the administering authority to supplement the application. Article 5.2 and Article 5.3 do not speak to public notice requirements. Public notice requirements upon initiation of an investigation are set out in Article 12.1 of the AD Agreement. The United States notes that this dispute does not involve any claims under Article 12.1.

[16] *US- Softwood Lumber V (Panel)*, para. 7.75.