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

(DS578)

THIRD-PARTY ORAL STATEMENT
OF THE UNITED STATES OF AMERICA

September 24, 2020

Mr. Chairman, Members of the Panel:

1. The United States appreciates the opportunity to provide our views as a third party in this dispute.

2. The United States does not take a position on the facts of the dispute. In this statement, the United States will address the standard of review to be applied in the Panel's evaluation of claims and the legal interpretation of pertinent provisions of Article 3 of the Anti-Dumping Agreement[1] as relevant to certain injury-related issues in the dispute.

I. Standard of Review

3. Article 11 of the DSU states that a panel is "to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements." Specifically, a panel should "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."[2]

4. The nature of a panel's "objective assessment" will necessarily depend on "the matter" that is before the panel. In the case of an anti-dumping measure, Article 17.6 of the Anti-Dumping Agreement indicates the nature of the objective assessment.

5. In particular, pursuant to Article 17.6, the Panel's task in this dispute is to assess whether the authority properly established the facts and evaluated them in an unbiased and objective

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[1] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-Dumping Agreement").
[2] DSU, Article 11.

way.[3] 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 authority, could have—not would have—reached the same conclusions that the authority reached.

6. Under the standard of review set out in the WTO Agreement, the Panel must not conduct a *de novo* evidentiary review, but instead should "bear in mind its role as *reviewer* of agency action" and not as "*initial trier of fact*."[4] Indeed, 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.[5]

II. Injury Determination Claims With Respect to Articles 3.1 and 3.2 of the Anti-Dumping Agreement

7. Tunisia argues that the underselling analysis undertaken by the Moroccan Ministry of Industry, Trade and the Digital Economy ("MIICEN") was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement because it was based, *inter alia*, on the use of a constructed "target" domestic pricing.[6] Morocco responds that MIICEN properly relied on available record data to construct target domestic prices after determining that domestic sales prices were unreliable, including the profit data reported by Tunisian exporters.[7]

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[3] Anti-Dumping Agreement, Article 17.6(i). *See, e.g.*, *US – Countervailing Measures on Certain EC Products (21.5 – EC) (DS212)*, para. 7.82.
[4] *US – Countervailing Duty Investigation on DRAMS (AB) (DS296)*, paras. 187-188 (emphasis original).
[5] *US – Countervailing Duty Investigation on DRAMS (AB) (DS296)*, paras. 188-190.
[6] Tunisia's First Written Submission ("FWS"), para. 6.34.
[7] Morocco's FWS, paras. 115-120.

8. The United States observes that 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.

9. In the context of an underselling analysis, Article 3.2 directs an authority to examine whether subject imports significantly undercut the prices of like domestic products. It does not impose specific obligations on how an authority must conduct an underselling analysis, nor prescribe a particular methodology or set of factors that must apply in an underselling analysis.[8]

10. However, Article 3.1 of the Anti-Dumping Agreement does provide 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 effect of the dumped imports on prices in the domestic market for like products."

11. 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.[9]

12. With the above considerations in mind, the United State submits that the question before the Panel regarding Tunisia's challenge to MIICEN's use of constructed domestic prices is whether MIICEN's analysis was based on positive evidence and whether a reasonable, unbiased authority, looking at the same evidentiary record, could have—not would have—reached the same conclusions as MIICEN.

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8 *See China – HP-SSST (Japan) (DS454)/China – HP-SSST (EU) (AB) (DS460)*, para. 5.141.
9 *China – GOES (AB) (DS414)*, para. 200.

III. Injury Determination Claims With Respect to Articles 3.1 and 3.4 of the Anti-Dumping Agreement

13. Tunisia argues that MIICEN's analysis of the impact of subject imports on the domestic industry was inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement because it gave undue focus to declining profit and loss data, while ignoring or downplaying the importance of a number of other injury factors that were positive or improved during the period of investigation ("POI").[10] Morocco responds that Tunisia is incorrect in asserting that a number of injury factors were positive or improved, and that MIICEN appropriately focused on profit and loss as the key injury factor in the investigation.

14. The United States observes that 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.

15. 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."

16. 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

[10] Tunisia's FWS, paras. 6.99-6.106, 6.129-6.132.

out.[11] Relatedly, nothing in Article 3 requires the authority to undertake a rote checklist as to whether each factor points to injury.

17. 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 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."[12] 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.

18. With the above considerations in mind, the United States submits that the question before the Panel regarding Tunisia's challenge to MIICEN's reliance on profit/loss as the key factor in its overall analysis of impact is whether MIICEN's analysis was based on positive evidence and whether a reasonable, unbiased authority, looking at the same evidentiary record, could have—not would have—reached the same conclusions as MIICEN.

IV. Injury Determination Claims With Respect to Articles 3.1 and 3.5 of the Anti-Dumping Agreement

19. Tunisia argues that MIICEN's non-attribution analysis was inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because it ignored the role of intra-industry competition from two nonparticipating domestic producers during the POI.[13] Morocco responds that

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11 *EC – Tube or Pipe Fittings (AB) (DS219)*, para. 131.
12 *EU – Footwear (China) (Panel) (DS405)*, para. 7.413.
13 Tunisia's FWS, paras. 7.16-7.28.

MIICEN was not required to consider the role of these two producers as Tunisian exporters failed to substantiate their arguments on intra-industry competition in the underlying investigations.

20. The United States observes that Article 3.5 of the Anti-Dumping Agreement does not prescribe a particular methodology for an authority to analyse non-attribution factors**.**

21. 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.

22. The United States also notes the reasoning of prior panels that other "known factors" include those factors "clearly raised before the investigating authorities by interested parties in the course of an AD investigation."[14] And, where a party has failed to provide evidence substantiating that a purported other factor was causing injury to the domestic industry, an authority is not required to make a determination with regard to that factor.[15]

23. 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

[14] *Thailand – H-Beams (Panel) (DS122)*, para. 7.273. *See also Russia – Commercial Vehicles (Panel) (DS479)*, para. 7.208.
[15] *China – X-Ray Equipment (Panel) (DS425)*, para. 7.267.

"is free to choose the methodology it will use in examining the 'causal relationship' between dumped imports and injury."[16]

24. With the above considerations in mind, the United States submits that the question before the Panel regarding Tunisia's argument that MIICEN was required to consider intra-industry competition is whether a reasonable, unbiased authority, looking at the same evidentiary record, could have—not would have—reached the same conclusions as MIICEN.

V. Conclusion

25. This concludes the U.S. oral statement. We thank the Panel for its consideration of the views of the United States.

[16] *EC – Tube or Pipe Fittings (AB) (DS219)*, para. 189.