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

(DS578)

THIRD PARTY INTEGRATED EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

October 19, 2020

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 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.