



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

**NOTIFICATION OF AN APPEAL BY MOROCCO UNDER ARTICLE 16.4 AND ARTICLE 17.1
OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE
SETTLEMENT OF DISPUTES (DSU), AND UNDER RULE 20(1) OF THE
WORKING PROCEDURES FOR APPELLATE REVIEW**

The following communication, dated 28 July 2021, from the delegation of Morocco, is being circulated to Members.

I. NOTIFICATION OF APPEAL

1. In accordance with Article 16.4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), Morocco notifies the Dispute Settlement Body (DSB) of the World Trade Organization (WTO) of its decision to appeal certain findings, legal interpretations, and rulings of the Panel in its final report in *Morocco – Definitive Anti-Dumping Measures on School Exercise Books from Tunisia* (WT/DS578/R).

II. OVERVIEW

2. Morocco appreciates the difficult context in which the Panel in DS578 assessed and addressed the complaints of Tunisia. Morocco thanks the Panellists for accepting to serve in the middle of a pandemic, and for their active engagement with the Parties in online hearings. As against their challenging task and this difficult background – and especially given the costs imposed on Morocco in defending itself – Morocco deeply regrets the multiple, fundamental, and manifest errors of the Panel in respect of jurisdiction, standard of review, and interpretation and application of the Anti-Dumping Agreement. These errors are of such magnitude that they have impeded a mutually satisfactory resolution of the dispute and now leave no choice for Morocco but to have recourse to the Appellate Body, when it is reconstituted.

3. The Panel made four types of error that go to the heart of dispute settlement in the WTO:

- failure to correctly determine and apply its jurisdiction;
- failure to correctly interpret and apply the standard of review under the Anti-Dumping Agreement;
- failure to correctly identify and apply the customary rules of interpretation in public international law, and therefore failure to correctly interpret and apply certain provisions of the Anti-Dumping Agreement; and
- failure to correctly and objectively appreciate and address certain of Morocco's arguments and evidence.

4. Each group of errors is enough to justify the need for a rigorous functioning Appellate Body; together, they underline the critical importance of a speedy resolution of the current impasse.

Morocco sets out below its grounds for appeal and asks the Appellate Body to reverse each of the erroneous findings and rulings.

III. THE PANEL'S MULTIPLE AND MANIFEST ERRORS

A. The Panel's jurisdictional errors

5. In its preliminary jurisdictional ruling set out in **Annex A-3** the Panel made six material and reversible errors of law:

i. The Panel's exposition of the arguments of the Parties in sections 3.2.1.1 and 3.2.1.2 of Annex A-3 evinces at best a lack of understanding and appreciation of Morocco's arguments inconsistently with Article 11 of the DSU, and vitiates the entirety of section 3.2 of the preliminary ruling.

ii. The Panel's jurisdiction is set out in Tunisia's Panel Request.¹ And yet, as a *general approach* the Panel purported in paragraph 3.21 of Annex A-3 to examine the Panel Request in the light of the Tunisia's First Written Submission without having undertaken even a cursory review of the terms of its jurisdictional document on its own. In doing so it acted inconsistently with Articles 3.2, 6.2, 7, and 11 of the DSU, vitiating the entirety of subsection 3.2.2 of the preliminary ruling.

iii. In addressing Morocco's *specific* requests about the lack of coherence between claims set out in Tunisia's First Written Submission and the Panel Request, in paragraph 3.29 of Annex A-3 the Panel purported to use Tunisia's First Written Submission to "clarify" the Panel Request *without first* examining the wording of the Panel Request itself. In doing so, the Panel acted inconsistently with Articles 3.2, 6.2, 7, and 11 of the DSU, vitiating its findings under paragraphs 3.35, 3.48, and 4.1 of Annex A-3.

iv. In paragraph 3.33 of Annex A-3, the Panel's *partial* recitation of a claim of violation set out in its jurisdictional document effectively amended the document and corrected manifest legal deficiencies in the Panel Request. In doing so, the Panel acted inconsistently with Articles 3.2, 6.2, 7, and 11 of the DSU, vitiating its findings under paragraphs 3.35 and 4.1 of Annex A-3.

v. In paragraph 3.41 of Annex A-3, the Panel improperly characterized the *specific* qualification of a claim as an *argument*. In doing so, the Panel acted inconsistently with Articles 3.2, 6.2, 7, and 11 of the DSU, vitiating its findings under paragraphs 3.42 and 4.1 of Annex A-3.

vi. In paragraph 3.56 of Annex A-3, the Panel erred by accepting a mere recitation of a broad and "overarching" provision of the Anti-Dumping as a "specific" claim. In doing so, the Panel acted inconsistently with Articles 6.2 and 11 of the DSU, vitiating its findings under paragraphs 3.58 and 4.1 of Annex A-3.

6. The Panel made two reversible errors in its jurisdictional findings in its **final report**.

i. The Panel observed in paragraph 7.21 that Morocco's second set of jurisdictional objections could have been presented in its request for a preliminary ruling. However, Morocco's second set of jurisdictional objections were expressly based on and arose from the Panel's [erroneous] preliminary findings. Because Morocco could not have anticipated the Panel's errors in its preliminary decision, Morocco could not have presented its second set of jurisdictional arguments earlier. The Panel's observation is on its face inconsistent with Article 11 of the DSU, vitiating its findings under paragraphs 7.34 and 8.1(a).

¹ WT/DS578/2, 20 September 2019.

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- ii. In paragraphs 7.26-7.33, the Panel purported to:
 - a) read four distinct provisions of the Anti-Dumping Agreement together to arrive at a conclusion that expressly excluded one of the listed provisions (Article 2.2.1.1 of the Anti-Dumping Agreement);
 - b) find explicit links between the measure in question and the listed provisions where the justification proffered had nothing to do with the provision at issue (Article 2.2.1.1 of the Anti-Dumping Agreement); and
 - c) confirm its erroneous interpretation of the jurisdictional document by referring to the first written submission of Tunisia, even as this submission made no reference to the provision at issue (Article 2.2.1.1 of the Anti-Dumping Agreement).

In doing so, the Panel read Article 2.2.1.1 out of the Panel Request, impermissibly amended the Panel Request, acted inconsistently with Articles 6.2 and 11 of the DSU, and improperly accepted jurisdiction inconsistently with Article 7 of the DSU, vitiating its findings under paragraphs 7.34 and 8.1(a).

B. The Panel's errors in respect of "normal value"

7. The Panel made six material and reversible errors in its assessment of and findings on the normal value claims of Tunisia:

- i. The Panel excluded, in the title of section 7.2.1.1, a provision *explicitly listed in the Panel Request*. Whether deliberate or accidental, this evinces lack of due attention or objectivity inconsistent with Article 11 of the DSU, vitiating the Panel's findings in section 7.2.1.1 in its entirety and paragraph 8.1(b)(i).
- ii. Acting inconsistently with Articles 3.2 and 11 of the DSU, the Panel failed in paragraphs 7.42 and 7.43 to undertake a correct interpretation of Article 17.6 of the Anti-Dumping Agreement, resulting in an erroneous application of the standard of review under the Anti-Dumping Agreement and vitiating its findings under paragraphs 7.41, 7.43, 7.59, and 8.1(b)(i).
- iii. The Panel erred in its interpretation and application of Article 2.2.2 in at least two ways:
 - a) acting inconsistently with Article 3.2 of the DSU, the Panel adopted an incorrect interpretive approach to Article 2.2.2 of the Anti-Dumping Agreement, resulting in an erroneous interpretation and application of that Article, vitiating its findings under paragraphs 7.54, 7.59, and 8.1(b)(i); and
 - b) the Panel otherwise incorrectly applied Article 2.2.2 of the Anti-Dumping Agreement to the facts of the case, vitiating its findings under paragraphs 7.82, 7.86, and 8.1(b)(i).
- iv. The Moroccan authority excluded certain subsidized notebooks from the calculation of normal value on the grounds that Tunisia had prohibited the notebooks from being exported. The Panel made certain adverse findings in this respect. To arrive at its findings, however, the Panel failed to engage with evidence and argument before it and impermissibly addressed arguments never made. In doing so, the Panel acted inconsistently with Article 11 of the DSU, vitiating its findings vitiating its findings under paragraphs 7.82, 7.86, and 8.1(b)(i).
- v. Acting inconsistently with Articles 3.2 and 11 of the DSU, the Panel failed in paragraphs 7.92 and 7.93 to undertake a correct interpretation of Article 17.6 of the Anti-Dumping Agreement, resulting in an erroneous application of the standard of review under the Anti-Dumping Agreement, vitiating its findings under paragraphs 7.91, 7.93, 7.103, 7.107, and 8.1(b)(ii).

C. The Panel's error in applying Article 12.2.2

8. Acting inconsistently with Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement, the Panel failed to read the reasoning of the Moroccan authority in its proper context and substituted, in paragraphs 7.141 and 7.142, its own preferred formulation for that of the Moroccan authority. In doing so, the Panel also misapplied Article 12.2.2 of the Anti-Dumping Agreement, vitiating its finding in paragraphs 7.143, 7.144, and 8.1(b)(viii).

D. The Panel's errors in respect of "fair comparison"

9. The Panel made six material and reversible errors in its assessment of and findings on the fair comparison claims of Tunisia:

- i. Acting inconsistently with Articles 3.2 and 11 of the DSU, the Panel failed in paragraphs 7.152 and 7.153 to undertake a correct interpretation of Article 17.6 of the Anti-Dumping Agreement, resulting in an erroneous application of the standard of review under the Anti-Dumping Agreement, vitiating its findings under paragraphs 7.151, 7.152, 7.153, 7.184, and 8.1(b)(iii).
- ii. Acting inconsistently with Articles 3.2 of the DSU and 17.6 of the Anti-Dumping Agreement, the Panel failed in paragraphs 7.165, 7.167, and 7.168 to undertake a correct interpretation of the first sentence of Article 2.4 of the Anti-Dumping Agreement. In particular, the Panel:
 - a) impermissibly extended and applied panel and Appellate Body findings in respect of *zeroing* to the facts of this case even as the Panel found, in paragraph 7.176, that the *methodological prerequisite* for those findings did not exist in this case; and
 - b) incorrectly found that the first sentence of Article 2.4 of the Anti-Dumping Agreement applies to all calculation methodologies.

In doing so, the Panel misapplied Article 2.4 of the Anti-Dumping Agreement, vitiating its findings under paragraphs 7.165, 7.167, 7.168, 7.184, and 8.1(b)(iii).

- iii. Acting inconsistently with Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement, the Panel in paragraphs 7.159 and 7.160 incorrectly found that ponderation by volume is not consistent with Article 2.4 of the Anti-Dumping Agreement. In doing so, the Panel misinterpreted and misapplied Article 2.4 of the Anti-Dumping Agreement, vitiating its findings under paragraphs 7.161, 7.184, and 8.1(b)(iii).
- iv. Acting inconsistently with Articles 3.2, 6.2, 7, and 11 of the DSU, and Articles 2.4 and 17.6 of the Anti-Dumping Agreement:
 - a) having correctly observed in paragraph 7.171 that the provision specifically applicable to the facts and claim at issue was Article 2.4.2 of the Anti-Dumping Agreement, and in paragraph 7.172 that Tunisia had not made a claim under Article 2.4.2, the Panel inexplicably and impermissibly read the disciplines of Article 2.4.2 into Article 2.4, and improperly found a violation of this latter; and
 - b) despite Morocco's repeated submissions to the Panel concerning the customary rules of interpretation of public international law – starting as early as the comments of the Parties on the *working procedures* – the Panel inexplicably and impermissibly replaced the treaty text with decontextualized references to the Larousse and the Robert.

In doing so, the Panel misinterpreted and misapplied Article 2.4 of the Anti-Dumping Agreement, vitiating its findings under paragraphs paras. 7.171, 7.184, and 8.1(b)(iii).

E. The Panel's errors in respect of "material injury"

10. The Panel made five material and reversible errors in its assessment of and findings on the material injury claims of Tunisia:

- i. Acting inconsistently with Articles 3.2 and 11 of the DSU, instead of properly interpreting Article 3.2 of the Anti-Dumping Agreement, in paragraph 7.196 the Panel purported to rely on an existing Appellate Body report, materially *misquoting* the report in the process. In doing so, the Panel misinterpreted and misapplied Article 3.2 of the Anti-Dumping Agreement, vitiating its findings under section 7.3.1.2.2, and paragraphs 7.196, 7.252, and 8.1(b)(iv).
- ii. Acting inconsistently with Article 3.2 of the DSU, in paragraph 7.208 the Panel made certain observations about the relevance of Article 3.1 of the Anti-Dumping Agreement in the interpretation of Article 3.2 of the Anti-Dumping Agreement that are manifestly inconsistent with the text of the latter. In doing so, the Panel misinterpreted and misapplied Article 3.2 of the Anti-Dumping Agreement, vitiating its findings in paragraphs 7.208, 7.209, 7.252, and 8.1(b)(iv).
- iii. The Panel found, in paragraphs 7.216 and 7.217, that Article 3.2 of the Anti-Dumping Agreement requires that the period of price analysis must be the same as the period for the evaluation of the economic situation of the domestic industry under Article 3.4. In doing so, the Panel misinterpreted and misapplied Article 3.2 of the Anti-Dumping Agreement, vitiating its findings in paragraphs 7.216, 7.217, 7.252, and 8.1(b)(iv).
- iv. Acting inconsistently with Articles 3.2 and 11 of the DSU, in paragraphs 7.219-7.221, instead of interpreting the legal provisions at issue, the Panel purported to follow previous panel findings that were inapposite to the facts of the case and thereby drew irrelevant conclusions from those other cases, misunderstood or mischaracterized the arguments of Morocco, and misapplied Article 3.1 of the Anti-Dumping Agreement. In doing, the Panel also made an error of law under Article 3.2 of the Anti-Dumping Agreement, vitiating its findings under paragraphs 7.219, 7.220, 7.221, 7.222, 7.252, and 8.1(b)(iv).
- v. Acting inconsistently with Article 11 of the DSU, the Panel appears to have misunderstood Morocco's position concerning exercise of judicial economy in respect of price effects analyses under Article 3.2 of the Anti-Dumping Agreement. Despite its own findings in paragraph 7.252, and its exercise of judicial economy in respect of the *volume effects* analysis of the same provision, the Panel proceeded to make *obiter* findings that will not serve in any way in resolving the dispute. The Panel's failure to correctly appreciate, clarify, and engage with Morocco's arguments vitiate its findings in paragraphs 7.224-7.252, and 8.1(b)(iv).

F. The Panel's errors in respect of the launch of an investigation

11. The Panel made five material and reversible errors in its assessment of and findings on the claims of Tunisia related to the launch of the investigation:

- i. Despite Morocco's repeated submissions to the Panel concerning the customary rules of interpretation of public international law – starting as early as the comments of the Parties on the *working procedures* – in paragraph 7.358 the Panel inexplicably and impermissibly replaced the treaty text with a decontextualized and unhelpful reference to the Larousse. In doing so, the Panel acted inconsistently with Articles 3.2 and 11 of the DSU, and misinterpreted and misapplied Article 5.3 of the Anti-Dumping Agreement, vitiating its findings under paragraphs 7.358, 7.381, 7.395, and 8.1(b)(ix).
- ii. The Panel refused to accept evidence on the grounds that Morocco submitted it late in the proceedings without a valid reason. Having deprived itself of cogent evidence, the Panel found that Morocco had not submitted the document to the Panel. In making each of these findings, the Panel acted inconsistently with Article 11 of the DSU, vitiating its findings under paragraphs 7.378, 7.381, 7.395, and 8.1(b)(ix).

- iii. Acting inconsistently with Articles 3.2 and 11 of the DSU, in paragraphs 7.380 and 7.387, instead of interpreting the legal provisions at issue, the Panel purported to follow previous panel findings that were inapposite to the facts of the case and thereby drew irrelevant conclusions from those other cases. In doing so, the Panel misinterpreted and misapplied Article 5.3 of the Anti-Dumping Agreement, vitiating its findings under paragraphs 7.380, 7.381, 7.395, and 8.1(b)(ix).
- iv. Acting inconsistently with Article 11 of the DSU, in paragraph 7.393 the Panel failed to engage with the totality of Morocco's response, vitiating its findings under paragraphs 7.393, 7.394, 7.395, and 8.1(b)(ix).

IV. CONCLUSION

12. Morocco requests that the Appellate Body, consistently with Article 17.12 of the DSU, address each of the issues of law covered in the report of the Panel, legal interpretations developed by the panel, and the conduct of the Panel pursuant to Article 11 of the DSU, as set out in this Notification of Appeal.

13. Morocco further requests that the Appellate Body reverse the erroneous findings set out in this Notification of Appeal.

Note by the Secretariat: Annex not reproduced.
