



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

FINAL REPORT OF THE PANEL

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

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### CASES CITED IN THIS REPORT

Short title	Full case title and citation
Argentina – Poultry Anti-Dumping Duties	Panel Report, <i>Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil</i> , <a href="#">WT/DS241/R</a> , adopted 19 May 2003
Canada – Wheat Exports and Grain Imports	Appellate Body Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , <a href="#">WT/DS276/AB/R</a> , adopted 27 September 2004
EC – Tube or Pipe Fittings	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , <a href="#">WT/DS219/AB/R</a> , adopted 18 August 2003
EC – Tube or Pipe Fittings	Panel Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , <a href="#">WT/DS219/R</a> , adopted 18 August 2003, as modified by Appellate Body Report <a href="#">WT/DS219/AB/R</a>
EC – Fasteners (China)	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , <a href="#">WT/DS397/AB/R</a> , adopted 28 July 2011
EC – Hormones	Appellate Body Report, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones)</i> , <a href="#">WT/DS26/AB/R</a> , <a href="#">WT/DS48/AB/R</a> , adopted 13 February 1998
EC – Bed Linen	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India</i> , <a href="#">WT/DS141/AB/R</a> , adopted 12 March 2001
EC – Bed Linen	Panel Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India</i> , <a href="#">WT/DS141/R</a> , adopted 12 March 2001, as modified by Appellate Body Report <a href="#">WT/DS141/AB/R</a>
EC – Poultry	Appellate Body Report, <i>European Communities – Measures Affecting the Importation of Certain Poultry Products</i> , <a href="#">WT/DS69/AB/R</a> , adopted 23 July 1998
China – GOES	Appellate Body Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , <a href="#">WT/DS414/AB/R</a> , adopted 16 November 2012
China – GOES	Panel Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , <a href="#">WT/DS414/R</a> and Add.1, adopted 16 November 2012, upheld by Appellate Body Report <a href="#">WT/DS414/AB/R</a>
China – X-Ray Equipment	Panel Report, <i>China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union</i> , <a href="#">WT/DS425/R</a> and Add.1, adopted 24 April 2013
China – Autos (US)	Panel Report, <i>China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States</i> , <a href="#">WT/DS440/R</a> and Add.1, adopted 18 June 2014
China – HP-SSST (Japan) / China – HP-SSST (EU)	Appellate Body Reports, <i>China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union</i> , <a href="#">WT/DS454/AB/R</a> and Add.1 / <a href="#">WT/DS460/AB/R</a> and Add.1, adopted 28 October 2015
China – HP-SSST (Japan) / China – HP-SSST (EU)	Panel Reports, <i>China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union</i> , <a href="#">WT/DS454/R</a> and Add.1 / <a href="#">WT/DS460/R</a> , Add.1 and Corr.1, adopted 28 October 2015, as modified by Appellate Body Reports <a href="#">WT/DS454/AB/R</a> / <a href="#">WT/DS460/AB/R</a>
China – Cellulose Pulp	Panel Report, <i>China – Anti-Dumping Measures on Imports of Cellulose Pulp from Canada</i> , <a href="#">WT/DS483/R</a> and Add.1, adopted 22 May 2017
China – Broiler Products (Article 21.5 – US)	Panel Report, <i>Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States – Recourse to Article 21.5 of the DSU by the United States</i> , <a href="#">WT/DS427/RW</a> and Add.1, adopted 28 February 2018
Korea – Pneumatic Valves (Japan)	Appellate Body Report, <i>Korea – Anti-Dumping Duties on Pneumatic Valves from Japan</i> , <a href="#">WT/DS504/AB/R</a> and Add.1, adopted 30 September 2019
US – Carbon Steel	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , <a href="#">WT/DS213/AB/R</a> and Corr.1, adopted 19 December 2002

US – Hot-Rolled Steel	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , <a href="#">WT/DS184/AB/R</a> , adopted 23 August 2001
US – Softwood Lumber V	Panel Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , <a href="#">WT/DS264/R</a> , adopted 31 August 2004, as modified by Appellate Body Report <a href="#">WT/DS264/AB/R</a>
US – Softwood Lumber V (Article 21.5 – Canada)	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , <a href="#">WT/DS264/AB/RW</a> , adopted 1 September 2006
US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , <a href="#">WT/DS277/AB/RW</a> , adopted 9 May 2006, and Corr.1
US – Countervailing Duty Investigation on DRAMS	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea</i> , <a href="#">WT/DS296/AB/R</a> , adopted 20 July 2005
US – COOL	Appellate Body Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , <a href="#">WT/DS384/AB/R</a> / <a href="#">WT/DS386/AB/R</a> , adopted 23 July 2012
US – Orange Juice (Brazil)	Panel Report, <i>United States – Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil</i> , <a href="#">WT/DS382/R</a> , adopted 17 June 2011
US – OCTG (Korea)	Panel Report, <i>United States – Anti-Dumping Measures on Certain Oil Country Tubular Goods from Korea</i> , <a href="#">WT/DS488/R</a> and Add.1, adopted 12 January 2018
US – Zeroing (EC)	Panel Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")</i> , <a href="#">WT/DS294/R</a> , adopted 9 May 2006, as modified by Appellate Body Report <a href="#">WT/DS294/AB/R</a>
US – Zeroing (Japan)	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , <a href="#">WT/DS322/AB/R</a> , adopted 23 January 2007
US – Lamb	Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , <a href="#">WT/DS177/AB/R</a> , <a href="#">WT/DS178/AB/R</a> , adopted 16 May 2001
US – Poultry (China)	Panel Report, <i>United States – Certain Measures Affecting Imports of Poultry from China</i> , <a href="#">WT/DS392/R</a> , adopted 25 October 2010
Guatemala – Cement II	Panel Report, <i>Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico</i> , <a href="#">WT/DS156/R</a> , adopted 17 November 2000
India – Agricultural Products	Panel Report, <i>India – Measures Concerning the Importation of Certain Agricultural Products</i> , <a href="#">WT/DS430/R</a> and Add.1, adopted 19 June 2015, as modified by Appellate Body Report <a href="#">WT/DS430/AB/R</a>
Japan – DRAMS (Korea)	Panel Report, <i>Japan – Countervailing Duties on Dynamic Random Access Memories from Korea</i> , <a href="#">WT/DS336/R</a> , adopted 17 December 2007, as modified by Appellate Body Report <a href="#">WT/DS336/AB/R</a>
Mexico – Anti-Dumping Measures on Rice	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , <a href="#">WT/DS295/AB/R</a> , adopted 20 December 2005
Mexico – Anti-Dumping Measures on Rice	Panel Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , <a href="#">WT/DS295/R</a> , adopted 20 December 2005, as modified by Appellate Body Report <a href="#">WT/DS295/AB/R</a>
Mexico – Corn Syrup (Article 21.5 – US)	Appellate Body Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States</i> , <a href="#">WT/DS132/AB/RW</a> , adopted 21 November 2001
Mexico – Steel Pipes and Tubes	Panel Report, <i>Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala</i> , <a href="#">WT/DS331/R</a> , adopted 24 July 2007
Pakistan – BOPP Film (UAE)	Panel Report, <i>Pakistan – Anti-Dumping Measures on Biaxially Oriented Polypropylene Film from the United Arab Emirates</i> , <a href="#">WT/DS538/R</a> and Add.1, circulated to WTO Members on 18 January 2021 [appealed by Pakistan 22 February 2021]
Russia – Commercial Vehicles	Appellate Body Report, <i>Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy</i> , <a href="#">WT/DS479/AB/R</a> and Add.1, adopted 9 April 2018
Russia – Commercial Vehicles	Panel Report, <i>Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy</i> , <a href="#">WT/DS479/R</a> and Add.1, adopted 9 April 2018, as modified by Appellate Body Report <a href="#">WT/DS479/AB/R</a>

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<i>Thailand – H-Beams</i>	Panel Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , <a href="#">WT/DS122/R</a> , adopted 5 April 2001, as modified by Appellate Body Report <a href="#">WT/DS122/AB/R</a>
<i>EU – Fatty Alcohols (Indonesia)</i>	Panel Report, <i>European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia</i> , <a href="#">WT/DS442/R</a> and Add.1, adopted 29 September 2017, as modified by Appellate Body Report <a href="#">WT/DS442/AB/R</a>
<i>EU – Footwear (China)</i>	Panel Report, <i>European Union – Anti-Dumping Measures on Certain Footwear from China</i> , <a href="#">WT/DS405/R</a> , adopted 22 February 2012
<i>Ukraine – Ammonium Nitrate</i>	Panel Report, <i>Ukraine – Anti-Dumping Measures on Ammonium Nitrate</i> , <a href="#">WT/DS493/R</a> , Add.1 and Corr.1, adopted 30 September 2019, as upheld by Appellate Body Report <a href="#">WT/DS493/AB/R</a>



**EXHIBITS REFERRED TO IN THIS REPORT**

<b>Exhibit</b>	<b>Short title</b>	<b>Description/Long title</b>
MAR-CONF-3 (BCI)	Report on the definitive determination	Ministère de l'industrie, de l'investissement, du commerce et de l'économie numérique du Royaume du Maroc, Rapport final sur la détermination de l'existence du dumping, du dommage et du lien de causalité (version confidentielle)
MAR-6	Reply from SOTEFI to the deficiency letter dated 15 August 2017	Réponse de la SOTEFI à la lettre de défaillance du 15 août 2017 (4 septembre 2017)
MAR-11	Submission by SITPEC and SOTEFI	Enquête antidumping concernant des importations de cahiers originaires de Tunisie, soumission de SITPEC et SOTEFI (27 février 2018)
MAR-CONF-15 (BCI)	SOTEFI's responses to the questionnaire	Réponse de SOTEFI au questionnaire d'enquête pour la mise en œuvre des mesures antidumping; questionnaire destiné aux producteurs/exportateurs de cahiers en Tunisie
MAR-21		SOTEFI, Catalogue 2017-2018
MAR-22	SOTEFI, Catalogue 2016	SOTEFI, Catalogue 2016 (27 October 2016)
TUN-2, MAR-10	Initiation report	Ministère de l'industrie, de l'investissement, du commerce et de l'économie numérique du Royaume du Maroc, Rapport d'ouverture d'enquête, requête déposée par les producteurs de cahiers concernant la mise en œuvre des mesures antidumping sur les importations de cahiers originaires de la Tunisie
TUN-3, MAR-9	Petition	Requête pour la mise en œuvre des mesures antidumping sur les importations de cahiers originaires de Tunisie déposée par La MAPAF, Med Paper et Promograph (10 mars 2017)
TUN-5, MAR-17	Report on the preliminary determination	Ministère de l'industrie, de l'investissement, du commerce et de l'économie numérique du Royaume du Maroc, Rapport sur la détermination préliminaire de l'existence du dumping, du dommage et du lien de causalité
TUN-7, MAR-1	Report on the definitive determination	Ministère de l'industrie, de l'investissement, du commerce et de l'économie numérique du Royaume du Maroc, Rapport final sur la détermination de l'existence du dumping, du dommage et du lien de causalité
TUN-8	Circular No. 5895/211	Ministère de l'économie et des finances du Royaume du Maroc, Circulaire n° 5895/211 relative à l'institution d'un droit de douane antidumping définitif sur les importations des cahiers originaires de Tunisie
TUN-9	Official Journal No. 6744 of 17 January 2019	Bulletin Officiel n° 6744, Arrêté conjoint du Ministère de l'industrie, de l'investissement, du commerce et de l'économie numérique et du Ministère de l'économie et des finances n° 3758.18 (10 décembre 2018)
TUN-10 (BCI)	Revised data provided by SITPEC	Fichier Excel intitulé SITPEC COP 28.5.2018, données rerévisées fournies par la SITPEC
TUN-11 (BCI)	Revised data provided by SOTEFI	Fichier Excel intitulé SOTEFI VENTEDOM COPDOM REVISE CONFIDENTIEL du 23 mai 2018, données révisées fournies par la SOTEFI
TUN-12 (BCI)	Excel file containing the dumping margin calculation (SITPEC)	Fichier Excel contenant le calcul de la marge de dumping transmis avec les faits essentiels du 8 octobre 2018 (SITPEC)
TUN-14 (BCI)	Excel file containing the dumping margin calculation (SOTEFI)	Fichier Excel contenant le calcul de la marge de dumping transmis avec les faits essentiels du 8 octobre 2018 (SOTEFI)
TUN-16 (BCI)	Excel file submitted as an attachment to SITPEC's responses to the initial questionnaire dated 10 July 2017	Fichier Excel intitulé "SITPEC réponse questionnaire annexes VENTEMAR VENTEDOM VENTETIER", soumis en pièce jointe aux réponses de la SITPEC au questionnaire initial le 10 juillet 2017
TUN-21	Presentation by SITPEC and SOTEFI (30 April 2018)	Enquête antidumping sur les importations de cahiers originaires de Tunisie Audition publique (30 avril 2018) présentation de la SITPEC et de la SOTEFI
TUN-29	Tunisian exporters' comments on the investigation (27 February 2018)	Commentaires de la SOTEFI et de la SITPEC sur l'enquête (27 février 2018)

<b>Exhibit</b>	<b>Short title</b>	<b>Description/Long title</b>
TUN-30 (BCI)	Excel file on the applicants	Fichier Excel intitulé Annexe 2 Participation Requête PUBLIC, soumis avec la requête de la MAPAF, Med Paper et Promograph (10 mars 2017)
TUN-35 (BCI)	SITPEC's responses to the initial questionnaire	Réponses de la SITPEC au questionnaire initial d'enquête (10 juillet 2017)
TUN-44 (BCI)	List of licensed products sold in the domestic and export markets	Annexe 2.1 à la réponse des exportateurs du 4 septembre 2017 à la lettre de défaillance transmise par le MIICEN (15 août 2017)
TUN-48	Annex 17, export invoice	Annexe 17 à la requête pour l'ouverture de l'enquête - Facture à l'exportation
TUN-49		Annexe 11b à la requête pour l'ouverture de l'enquête - Preuves valeur normale
TUN-50 (BCI)	Annex 14a, domestic transportation in Tunisia	Annexe 14a à la requête pour l'ouverture de l'enquête - Transport interne en Tunisie
TUN-51 (BCI)	Annex 14b, input costs in Tunisia	Annexe 14b à la requête pour l'ouverture de l'enquête - Coût des facteurs en Tunisie
TUN-55 (BCI)	Excel file provided with SOTEFI's responses to the MIICEN questionnaire	Réponses de la SOTEFI au questionnaire d'enquête relatif aux cahiers vendus sur le marché tunisien
TUN-66	MAPAF's responses to the questionnaire	Réponses de la MAPAF au questionnaire d'enquête pour la mise en œuvre des mesures antidumping; questionnaire destiné aux producteurs/exportateurs de cahiers en Tunisie
TUN-67	Promograph's responses to the questionnaire	Réponses de Promograph au questionnaire d'enquête pour la mise en œuvre des mesures antidumping; questionnaire destiné aux producteurs/exportateurs de cahiers en Tunisie
TUN-72	Email dated 4 May 2018	Courriel en date du 4 mai 2018 adressé à M. Charles Julien, intitulé "Relance/Tableaux de calcul de marge de dumping"

### ABBREVIATIONS USED IN THIS REPORT

<b>Abbreviation</b>	<b>Description</b>
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
BCI	Business Confidential Information
Dhs	dirham
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
FOB	Free on board
GATT 1994	General Agreement on Tariffs and Trade 1994
Imprimerie Moderne	Imprimerie Moderne S.à.r.l.
Le Livre	Imprimerie Le Livre
MAPAF	Manufacture de Papiers et Fournitures
Med Paper	Med Paper S.A.
MIICEN	Ministry of Industry, Investment, Trade and the Digital Economy of Morocco
Promograph	Promograph S.à.r.l.
SITPEC	Société industrielle de transformation de papiers, d'emballage et de cartons
Sopalemb	Sopalemb S.A.
SOTEFI-Selecta	SOTEFI S.à.r.l.
Vienna Convention	Vienna Convention on the Law of Treaties, done at Vienna, 23 May 1969, 115 UNTS 331; 8 International Legal Materials 679
WTO	World Trade Organization
Yamama	Yamama Group

## **1 INTRODUCTION**

### **1.1 Tunisia's complaint**

1.1. On 21 February 2019, Tunisia requested consultations with Morocco pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article 17.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) and Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994) with respect to the measures and claims set out below.<sup>1</sup>

1.2. Consultations were held on 11 and 12 June 2019 but failed to resolve this dispute.

### **1.2 Establishment and composition of the Panel**

1.3. On 19 September 2019, Tunisia requested the establishment of a panel pursuant to Article 6 of the DSU with standard terms of reference.<sup>2</sup> At its meeting on 28 October 2019, the Dispute Settlement Body (DSB) established a panel, in accordance with Article 6 of the DSU.<sup>3</sup>

1.4. The Panel's terms of reference are the following:

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Tunisia in document WT/DS578/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.<sup>4</sup>

1.5. On 9 March 2020, Tunisia requested that the Director-General determine the composition of the Panel, pursuant to Article 8.7 of the DSU. On 19 March 2020, the Director-General accordingly composed the Panel as follows:

Chair:	Mr Gilles Le Blanc
Members:	Ms Vera Kanas Grytz Mr Gustavo Nerio Lunazzi

1.6. Brazil, Canada, China, the European Union, Japan, Madagascar, the Russian Federation and the United States notified their interest in participating in the Panel proceedings as third parties.

### **1.3 Panel proceedings**

#### **1.3.1 General**

1.7. Following consultation with the parties, the Panel adopted its Working Procedures<sup>5</sup> on 8 May 2020 and Additional Working Procedures Concerning Business Confidential Information (BCI)<sup>6</sup> on 28 May 2020.

1.8. The Panel issued a partial timetable on 8 May 2020 and revised it on 29 January 2021. Pursuant to Article 12.10 of the DSU, which provides that "in examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation", the Panel took into account the respondent's status as a developing country Member when preparing and revising the timetable for the process. Thus, the Panel accommodated both Morocco's and Tunisia's requests for ample time to prepare the first and second written submissions.

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<sup>1</sup> Tunisia's request for consultations, WT/DS578/1.

<sup>2</sup> Tunisia's request for establishment of a panel, WT/DS578/2 (Tunisia's panel request).

<sup>3</sup> DSB, Minutes of Meeting held on 28 October 2019, WT/DSB/M/436.

<sup>4</sup> Constitution note of the Panel, WT/DS578/3.

<sup>5</sup> Working Procedures of the Panel (Annex A-1).

<sup>6</sup> Additional Working Procedures of the Panel Concerning Business Confidential Information (Annex A-2).

1.9. The parties presented their first written submissions on 11 June 2020 (Tunisia) and 23 July 2020 (Morocco). The Panel held a first substantive meeting with the parties on 23 and 24 September 2020. A session with the third parties took place on 24 September 2020. As restrictions to curb the spread of COVID-19 prevented the panelists from travelling to Geneva, the Panel conducted the meeting via secure videoconference.

1.10. The Panel held a second substantive meeting with the parties on 27 and 28 January 2021. In view of the public health restrictions in force, the entire meeting took place via secure videoconference.

1.11. On 8 March 2021, the Panel issued the descriptive part of its Panel Report to the parties. The Panel issued its Interim Report to the parties on 7 May 2021 and issued its Final Report to the parties on 28 June 2021.

### **1.3.2 Preliminary ruling**

1.12. On 19 June 2020, Morocco submitted to the Panel a request for a preliminary ruling, arguing that certain grievances set forth in Tunisia's first written submission do not appear in the panel request or are too vague. Morocco requested the Panel to make a preliminary ruling that the submission of those claims was not in accordance with Article 6.2 of the DSU and that they were therefore not properly before the Panel's jurisdiction. Morocco thus requested the Panel to find that<sup>7</sup>:

- a. the claim under Articles 2.1, 2.2 and 2.2.2, relating to the "distribution costs", is outside the Panel's terms of reference because it was not specified in the panel request<sup>8</sup>;
- b. the claim under Article 2.2.2, relating to the exclusion of domestic sales in Tunisia, made in Tunisia's first written submission, is outside the Panel's terms of reference because it was not specified in the panel request<sup>9</sup>;
- c. the claim under Articles 2.1, 2.2 and 2.2.2, relating to the exclusion "from the calculation of the profit margin of administrative costs and certain expenses not part of the product price", made in Tunisia's first written submission, is outside the Panel's terms of reference because it was not specified in the panel request<sup>10</sup>;
- d. the claim under Article 2.4 of the Anti-Dumping Agreement, relating to the mathematical formulas used by Morocco to calculate the margin of dumping, made in Tunisia's first written submission, is outside the Panel's terms of reference because it was not specified in the panel request<sup>11</sup>;
- e. the claim under Articles 3.1 and 3.2 is outside the Panel's terms of reference because it was not clearly stated in the panel request, in violation of Article 6.2 of the DSU<sup>12</sup>;
- f. the following claims made by Tunisia in the panel request have been abandoned: the violation of Article 5.8 of the Anti-Dumping Agreement specified in paragraph 1 of the panel request; the violation of Article 6.8 and paragraphs 3, 5, 6 and 7 of Annex II of the Anti-Dumping Agreement specified in paragraph 4 of the panel request; the violation of Article 2.2.1.1 of the Anti-Dumping Agreement specified in paragraph 5 of the panel request; the violation of Articles 3.1 and 3.2 of the Anti-Dumping Agreement, concerning the fact that "the investigating authority failed to properly and objectively consider the volume of the dumped imports, in absolute terms", specified in paragraph 7 a) of the panel request; the claim specified in paragraph B.11 of the panel request<sup>13</sup>; and

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<sup>7</sup> Morocco's preliminary ruling request. See also Morocco's first written submission, para. 284.

<sup>8</sup> Morocco's preliminary ruling request, section II.B.1.

<sup>9</sup> Morocco's preliminary ruling request, section II.B.2.

<sup>10</sup> Morocco's preliminary ruling request, section II.B.3.

<sup>11</sup> Morocco's preliminary ruling request, section II.B.4.

<sup>12</sup> Morocco's preliminary ruling request, section II.B.5.

<sup>13</sup> Morocco's preliminary ruling request, section III.A.

- g. Tunisia's claim under Articles 3.1 and 3.2 of the Anti-Dumping Agreement, according to which the Ministry of Industry, Investment, Trade and the Digital Economy (MIICEN) of Morocco failed to objectively consider the volume of imports in relative terms, concerns an examination that Morocco was not required to carry out, and therefore cannot be upheld.<sup>14</sup>

1.13. Tunisia submitted its response to the preliminary ruling request to the Panel on 8 July 2020. Canada, the European Union, Japan and the United States submitted their comments on the request on 10 July 2020.

1.14. The Panel issued its preliminary ruling on 14 September 2020.<sup>15</sup>

## **2 FACTUAL ASPECTS**

### **2.1 The measures at issue**

2.1. This dispute concerns the definitive anti-dumping measure imposed by Morocco on imports of school exercise books from Tunisia, as a result of the investigation initiated by MIICEN.

2.2. On 5 November 2018, MIICEN published the Report on the Definitive Determination of Dumping, Injury and Causation, recommending the imposition of definitive anti-dumping duties on imports of Tunisian exercise books.<sup>16</sup> The definitive measure imposed by Morocco came into force on 14 January 2019 for a period of five years.<sup>17</sup> The anti-dumping duty rates imposed by Morocco on Tunisian exporters of school exercise books are as follows: SOTEFI - 27.71%, SITPEC - 15.69%, other Tunisian exporters - 27.71%.<sup>18</sup>

## **3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS**

3.1. This section contains the parties' requests for findings and recommendations, as set forth in their respective first and second written submissions.

3.2. Tunisia requests that the Panel find that Morocco acted inconsistently with<sup>19</sup>:

- a. Articles 2.1, 2.2 and 2.2.2 of the Anti-Dumping Agreement, by failing to exclude administrative costs and other expenses from the profit margin calculation used to calculate the constructed normal value;
- b. Articles 2.1, 2.2 and 2.2.2 of the Anti-Dumping Agreement, by improperly excluding sales of numbered or watermarked exercise books from the profit margin calculation used to calculate the constructed normal value;
- c. Articles 2.1 and 2.2 of the Anti-Dumping Agreement, by including the "distribution cost", comprising the domestic transportation cost, port charges and ocean freight costs, in the calculation of the constructed normal value for the [[\*\*]] models of SOTEFI exercise books;
- d. Articles 2.1 and 2.4 of the Anti-Dumping Agreement, by using an erroneous formula to compare normal value to the export price;
- e. Articles 2.1 and 2.4 of the Anti-Dumping Agreement, by disregarding the use of licences as a characteristic that affects the product's price when classifying the product under consideration;

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<sup>14</sup> Morocco's preliminary ruling request, section III.B.

<sup>15</sup> Preliminary Ruling of the Panel (Annex A-3).

<sup>16</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1).

<sup>17</sup> Circular No. 5895/211 (Exhibit TUN-8); Official Journal No. 6744 of 17 January 2019 (Exhibit TUN-9), pp. 38 and 39.

<sup>18</sup> Tunisia's first written submission, paras. 3.1-3.8; Tunisia's panel request, section A.

<sup>19</sup> Tunisia's second written submission, para. 7.1. See also Tunisia's first written submission, para. 9.1.

- f. Article 12.2.2 of the Anti-Dumping Agreement, by failing to address, in its report on the definitive determination, the key factual elements when determining the impact of licensing on the cost and price of the exercise books under licence;
- g. Articles 3.1 and 3.2 of the Anti-Dumping Agreement, by failing to conduct an objective examination of the evolution of Tunisian imports in relative terms and by finding that those imports had increased during the investigation period;
- h. Articles 3.1 and 3.2 of the Anti-Dumping Agreement, by finding, erroneously, that there was price undercutting;
- i. Articles 3.1 and 3.2 of the Anti-Dumping Agreement, by finding, erroneously, that the domestic product's price was depressed;
- j. Articles 3.1 and 3.2 of the Anti-Dumping Agreement, by finding, erroneously, that the domestic product's price was suppressed;
- k. Articles 3.1 and 3.4 of the Anti-Dumping Agreement, by determining that the domestic industry had been materially injured on the basis, erroneously, of the negative performance of four economic factors;
- l. Articles 3.1 and 3.5 of the Anti-Dumping Agreement, by finding a causal link based on invalid considerations;
- m. Articles 3.1 and 3.5 of the Anti-Dumping Agreement, by ignoring the negative effects resulting from competition from Moroccan producers not part of the domestic industry; and
- n. Articles 5.2, 5.3 and 5.8 of the Anti-Dumping Agreement, by considering, improperly, that there was sufficient evidence to justify initiating an investigation.

3.3. Tunisia further requests that the Panel recommend that Morocco immediately bring its measures into conformity with its WTO obligations.<sup>20</sup> Moreover, Tunisia requests the Panel to issue a suggestion, under the second sentence of Article 19.1 of the DSU, that Morocco meet its obligations by revoking the anti-dumping measure at issue.<sup>21</sup>

3.4. With regard to the Panel's jurisdiction, Morocco requests the Panel to find that<sup>22</sup>:

- a. claim B.5 in Tunisia's panel request is, by reason of the reference to multiple obligations, not consistent with Article 6.2 of the DSU because the wording is too imprecise;
- b. claim B.6 in Tunisia's panel request is, by reason of the reference to multiple obligations, not consistent with Article 6.2 of the DSU because the wording is too imprecise;
- c. claim B.3 in Tunisia's panel request has, by reason of the absence of any further development of arguments under Article 2.2.1 of the Anti-Dumping Agreement by Tunisia, been abandoned by Tunisia; and
- d. claim B.4 in Tunisia's panel request has, by reason of the absence of any further development of arguments under Article 6.8 of the Anti-Dumping Agreement, been abandoned by Tunisia.

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<sup>20</sup> Tunisia's first written submission, para. 9.2; second written submission, para. 7.2.

<sup>21</sup> Tunisia's first written submission, para. 9.3; second written submission, para. 7.3.

<sup>22</sup> Morocco's second written submission, para. 308.

3.5. Furthermore, with regard to Tunisia's claims under Article 2 of the Anti-Dumping Agreement, Morocco requests the Panel to find that<sup>23</sup>:

- a. under Articles 2.1, 2.2 and 2.2.2 of the Anti-Dumping Agreement:
  - i. the claim relating to the "profit margin" is inadmissible because the arguments in support thereof were never raised before the authority;
  - ii. Tunisia's claim regarding the "actual declared profit margins" is legally flawed and, in any case, is not properly before the Panel; and
  - iii. the claim relating to "numbered or watermarked exercise books" must be rejected because it lacks any factual or proper legal basis.
- b. under Articles 2.1 and 2.2 of the Anti-Dumping Agreement, the claim relating to "distribution costs" is inadmissible because the arguments in support thereof were never raised before the authority; and
- c. under Articles 2.1 and 2.4 of the Anti-Dumping Agreement:
  - i. the claim relating to "formulas" is inadmissible because the arguments in support thereof were never raised before the authority and the claim is, in any case, devoid of any factual or legal basis; and
  - ii. the claim relating to "licences" must be rejected because it lacks any factual or legal basis.

3.6. With regard to Tunisia's claims under Article 3 of the Anti-Dumping Agreement, Morocco requests the Panel to find that<sup>24</sup>:

- a. under Articles 3.1 and 3.2 of the Anti-Dumping Agreement:
  - i. Tunisia's conditional claims are not necessary to dispose of the dispute and that judicial economy should be exercised in respect thereof;
  - ii. the claim relating to the examination of "import volumes in relative terms" must be rejected because it is devoid of any legal basis;
  - iii. the claim relating to "undercutting" must be rejected because it is devoid of any legal basis;
  - iv. the claim relating to the "investigation period" must be rejected because it is devoid of any legal basis; and
  - v. the Panel may exercise judicial economy with regard to Tunisia's other claims, given the cumulative nature of the examination obligation.
- b. under Articles 3.1 and 3.4 of the Anti-Dumping Agreement, Tunisia's claim must be rejected because the arguments relating to "upward trends", to the alleged "seasonality" and to the domestic industry's alleged "strategy" are all devoid of any factual and legal basis; and
- c. under Articles 3.1 and 3.5 of the Anti-Dumping Agreement, Tunisia's claim must be rejected because the arguments relating to the causation determination and to non-attribution are devoid of any factual and legal basis.

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<sup>23</sup> Morocco's second written submission, para. 308. See also Morocco's first written submission, para. 284.

<sup>24</sup> Morocco's second written submission, para. 308. See also Morocco's first written submission, para. 284.



3.7. With regard to Tunisia's claims under Article 5 of the Anti-Dumping Agreement, Morocco requests the Panel to find that<sup>25</sup>:

- a. under Article 5.2 of the Anti-Dumping Agreement:
  - i. Tunisia's claims must be rejected because Tunisia has failed to establish a *prima facie* case by ignoring the key condition of "reasonably available to the applicant"; and
  - ii. alternatively, Tunisia's claims must be rejected because they are devoid of any legal basis.
- b. under Article 5.3 of the Anti-Dumping Agreement, Tunisia's claims must be rejected because Article 5 does not provide for a succession of multiple obligations and, furthermore, Tunisia's claims are devoid of any legal basis; and
- c. under Article 5.4 of the Anti-Dumping Agreement, Tunisia's claim must be considered to have been abandoned because Tunisia stated that it is not pursuing its claim.

3.8. Lastly, with regard to Tunisia's claims under Article 12 of the Anti-Dumping Agreement, Morocco requests the Panel to find that<sup>26</sup>:

- a. Tunisia's claim under Article 12.2.2 of the Anti-Dumping Agreement, with respect to sales of numbered or watermarked exercise books, must be considered to have been abandoned because Tunisia stated that it is not pursuing its claim; and
- b. Tunisia's allegedly still active claim under Article 12.2.2 of the Anti-Dumping Agreement, concerning the difference in the use of licences, must be rejected because it has been treated as an afterthought.

#### **4 ARGUMENTS OF THE PARTIES**

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 24 of the Working Procedures adopted by the Panel (see Annexes B-1 and B-2).

#### **5 ARGUMENTS OF THE THIRD PARTIES**

5.1. The arguments of Canada, the European Union, Japan and the United States are reflected in their executive summaries, provided in accordance with paragraph 27 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, C-3 and C-4). Brazil, China, Madagascar and the Russian Federation did not submit written or oral arguments to the Panel.

#### **6 INTERIM REVIEW**

6.1. On 21 May 2021, Tunisia submitted a written request for the review of precise aspects of the Interim Report. Morocco, meanwhile, did not request an interim review. The parties did not request an interim review meeting. On 4 June 2021, Morocco submitted comments on Tunisia's requests for review. Our discussion and disposition of those requests and comments are set out in Annex A-4.

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<sup>25</sup> Morocco's second written submission, para. 308. See also Morocco's first written submission, para. 284.

<sup>26</sup> Morocco's second written submission, para. 308. See also Morocco's first written submission, para. 284.

## 7 FINDINGS

### 7.1 General principles regarding treaty interpretation, the applicable standard of review and burden of proof

#### 7.1.1 Treaty interpretation

7.1. Article 3.2 of the DSU provides that the WTO dispute settlement system serves to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". Article 17.6(ii) of the Anti-Dumping Agreement similarly requires panels to interpret that Agreement's provisions in accordance with the customary rules of interpretation of public international law. The principles codified in Articles 31 and 32 of the Vienna Convention are generally accepted as such customary rules.

#### 7.1.2 Standard of review

7.2. Article 11 of the DSU provides, in relevant part, that:

[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.

7.3. In addition, Article 17.6 of the Anti-Dumping Agreement sets forth the special standard of review applicable to disputes under the Anti-Dumping Agreement:

(i) in its assessment of the facts of the matter, 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 though the panel might have reached a different conclusion, the evaluation shall not be overturned;

(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

7.4. Thus, Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement together establish the standard of review we will apply with respect to both the factual and the legal aspects of the present dispute. When a panel is reviewing an investigating authority's determination, the "objective assessment" standard in Article 11 of the DSU requires a panel to review whether the authority has provided a reasoned and adequate explanation as to (a) how the evidence on the record supported its factual findings; and (b) how those factual findings support the overall determination.<sup>27</sup> In reviewing an investigating authority's determination, a panel should not conduct a *de novo* review of the evidence, nor substitute its judgement for that of the investigating authority. A panel must limit its examination to the evidence that was before the investigating authority during the investigation and must take into account all such evidence submitted by the parties to the dispute.<sup>28</sup> At the same time, a panel must not simply defer to the conclusions of the investigating authority; a panel's examination of those conclusions must be "critical and searching".<sup>29</sup>

7.5. In the context of Article 17.6(i) of the Anti-Dumping Agreement, the Appellate Body has noted that, while the text of this provision is couched in terms of an obligation on a panel, in effect it defines when an investigating authority can be considered to have acted inconsistently with the Anti-Dumping Agreement in the course of its "establishment" and "evaluation" of the relevant facts.<sup>30</sup> Therefore, a panel must assess if the establishment of the facts by the investigating authority

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<sup>27</sup> Appellate Body Reports, *US – Countervailing Duty Investigation on DRAMS*, para. 186; *US – Lamb*, para. 103.

<sup>28</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 187.

<sup>29</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

<sup>30</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 55.

was proper and if the evaluation of those facts by that authority was unbiased and objective.<sup>31</sup> If these broad standards have not been met, a panel must hold the investigating authority's establishment or evaluation of the facts to be inconsistent with the Anti-Dumping Agreement.<sup>32</sup>

7.6. We note, as a preliminary remark, that Morocco requests us to reject two of Tunisia's grievances relating to the calculation of normal value<sup>33</sup> and one of its grievances relating to fair comparison<sup>34</sup>, on the grounds that the issues raised before the Panel were not first raised before the investigating authority. Morocco thus requests us to:

[D]eclare as inadmissible all Tunisia's claims concerning arguments that Tunisia or its exporters *could have raised* before the authority, *but did not*.<sup>35</sup>

7.7. Morocco considers that, by examining those arguments made by Tunisia, the Panel would be conducting a *de novo* review, prohibited under Article 17.6(i) of the Anti-Dumping Agreement, since "the authority could not consider and address them".<sup>36</sup>

7.8. Before examining Tunisia's arguments in support of its claims concerning the determination of normal value and fair comparison, we will therefore ensure that the findings requested from us do not lead to a *de novo* review of any evidence or arguments that might not have been submitted to the investigating authority.

### 7.1.3 Burden of proof

7.9. The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO agreement must assert and prove its claim. Therefore, as the complaining party in this proceeding, Tunisia bears the burden of demonstrating that the challenged aspects of the measures at issue are inconsistent with the Anti-Dumping Agreement and GATT 1994. A complaining party satisfies its burden when it establishes a *prima facie* case, namely a case which, in the absence of effective refutation by the defending party, leads a panel to rule in favour of the complaining party.<sup>37</sup> Lastly, it is generally for each party asserting a fact to provide proof thereof.

## 7.2 Tunisia's claims concerning dumping

7.10. In this dispute, Tunisia presents two sets of grievances to the Panel concerning the margin of dumping determined by the Moroccan investigating authority in its anti-dumping investigation on exercise books.

7.11. The first set of grievances is based on Articles 2.1, 2.2 and 2.2.2 of the Anti-Dumping Agreement and addresses the establishment of the normal value of the exercise books. Tunisia explains that it raises "three arguments" on this issue<sup>38</sup>:

- a. MIICEN acted inconsistently with Articles 2.1, 2.2 and 2.2.2 of the Anti-Dumping Agreement by not excluding administrative costs and certain expenses that are not part of the product's price from the calculation of the profit margin;
- b. MIICEN acted inconsistently with Articles 2.1, 2.2 and 2.2.2 of the Anti-Dumping Agreement by, erroneously, excluding sales of numbered or watermarked exercise books from the calculation of the profit margin used for the constructed normal value; and

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<sup>31</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 56.

<sup>32</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 56.

<sup>33</sup> Morocco's first written submission, paras. 60, 61, 64 and 65. See also Morocco's response to Panel questions No. 1.8, para. 34; and No. 1.7, para. 27.

<sup>34</sup> Morocco's second written submission, para. 101.

<sup>35</sup> Morocco's first written submission, para. 62 (bold type original; italics added). See also *ibid.*, para. 31.

<sup>36</sup> Morocco's second written submission, paras. 8 and 22.

<sup>37</sup> Appellate Body Report, *EC – Hormones*, paras. 98 and 104.

<sup>38</sup> Tunisia's second written submission, para. 2.1.

- c. MIICEN acted inconsistently with Articles 2.1 and 2.2 of the Anti-Dumping Agreement by including a "distribution cost" in the reconstructed normal value of most of SOTEFI's exercise book models.

7.12. The second set of grievances, based on Articles 2.1 and 2.4 of the Anti-Dumping Agreement, accuses the Moroccan investigating authority of failing to carry out a fair comparison between the normal value and export price of the exercise books. Tunisia explains that it raises two arguments on this issue<sup>39</sup>:

- a. MIICEN acted inconsistently with Articles 2.1 and 2.4 of the Anti-Dumping Agreement by using an erroneous formula to compare the normal value with the export price; and
- b. MIICEN acted inconsistently with Articles 2.1 and 2.4 of the Anti-Dumping Agreement by disregarding the use of licences of certain exercise books sold by SOTEFI for the purposes of comparing the normal value with the export price.

7.13. In the following sections, we examine these claims, starting with those addressing the determination of normal value. Before carrying out this examination, we note, nevertheless, that Morocco requests us to find that some of the claims made by Tunisia in its Panel request fall outside our jurisdiction.<sup>40</sup>

7.14. We already answered, in our preliminary decision of 14 September 2020, the question of whether the "claims" relating to (a) the distribution cost, (b) the exclusion of administrative costs and certain expenses that are not part of the product's price from the calculation of the profit margin, and (c) the mathematical formulas used to calculate the margin of dumping, were "missing" from the panel request.<sup>41</sup> In this regard, we noted 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 in conformity with Article 6.2, and that these claims therefore fall outside the Panel's terms of reference.<sup>42</sup>

7.15. We had concluded that Morocco had failed to demonstrate that the grievances concerning the distribution cost, the exclusion of administrative costs and certain expenses from the calculation of the profit margin, and the mathematical formulas used to calculate the margin of dumping were "claims" that were "missing" from the panel request.<sup>43</sup>

7.16. In its second written submission, Morocco presents new objections concerning our jurisdiction. This time, the objections directly address the conformity of paragraphs B.5 and B.6 of the panel request with Article 6.2 of the DSU. These objections concern the same grievances relating to (i) the distribution cost, (ii) the exclusion of administrative costs and certain expenses that are not part of the product's price from the calculation of the profit margin, and (iii) the mathematical formulas used to calculate the margin of dumping. Morocco no longer asserts that these "claims" are "missing" from the panel request, but rather that the manner in which Tunisia formulated paragraphs B.5 and B.6 of its request is not in conformity with the requirements of Article 6.2, as interpreted by the Appellate Body in *Korea – Pneumatic Valves (Japan)*.<sup>44</sup>

7.17. Tunisia considers that Morocco's new submission was late and argues that the Panel should not reopen the question of its terms of reference at this stage of the procedure. Nevertheless, Tunisia addresses the merits of Morocco's objections.<sup>45</sup>

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<sup>39</sup> Tunisia's second written submission, para. 3.1.

<sup>40</sup> Morocco's second written submission, para. 6.

<sup>41</sup> Preliminary ruling of the Panel, section 3.2

<sup>42</sup> Preliminary ruling of the Panel, para. 3.20.

<sup>43</sup> Preliminary ruling of the Panel, paras. 3.35 and 3.42.

<sup>44</sup> Morocco's second written submission, paras. 61 and 72.

<sup>45</sup> Tunisia's response to Panel question Nos. 1.27 and 1.28, paras. 28-51.

7.18. We recall that our working procedures provide that:

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, within a reasonable period to be determined by the Panel in light of the request.

7.19. Paragraph 4. (2), however, provides that "[t]his 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."

7.20. The working procedures therefore require parties to submit their objections concerning the Panel's jurisdiction "at the earliest possible opportunity and in any event no later than in its first written submission to the Panel". This rule allows the Panel to take note of any objections concerning its jurisdiction as soon as possible and, if it sees fit, to resolve those matters in the form of a preliminary ruling, after having gathered the comments of the requesting party (Tunisia in this particular case) and third parties, if appropriate.

7.21. In the present case, we find that Morocco did not submit all its objections concerning the panel request in its preliminary ruling request of 19 June 2020. In its request, Morocco presented arguments concerning the conformity of Tunisia's claim under Articles 3.1 and 3.2 of the Anti-Dumping Agreement with Article 6.2 of the DSU, to which we responded in our preliminary ruling. Other objections on the same grounds could therefore have been submitted as part of the same request.

7.22. Although we share Tunisia's view that Morocco's new submissions were late, we believe it is important to leave no room for doubt concerning our jurisdiction before examining Tunisia's substantive requests. We have therefore decided to respond to Morocco's objections, after having invited Tunisia to submit a full response.<sup>46</sup>

7.23. In our preliminary ruling we recalled the requirements under Article 6.2.<sup>47</sup>

7.24. In this particular case, Morocco's request relates to the fact that the provisions raised by Tunisia in paragraphs B.5 (Articles 2.1, 2.2 and 2.2.2) and B.6 (Articles 2.1 and 2.4) contain several obligations<sup>48</sup> and therefore do not set out an "obligation that is distinct and well defined"<sup>49</sup>, contrary to the requirements of Article 6.2 as interpreted by the Appellate Body in *Korea – Pneumatic Valves (Japan)*.<sup>50</sup>

7.25. We disagree with Morocco's objections for the following reasons.

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<sup>46</sup> Tunisia's response to Panel question Nos. 1.27 and 1.28, paras. 28-51. See also Tunisia's response to Morocco's preliminary ruling request.

<sup>47</sup> Preliminary ruling of the Panel, section 3.1

<sup>48</sup> Morocco's second written submission, paras. 58, 59, 71 and 72.

<sup>49</sup> Morocco's second written submission, para. 60. See also *ibid.* para. 42 (quoting Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.89).

<sup>50</sup> Morocco's second written submission, paras. 31-49.

7.26. Paragraph B.5<sup>51</sup> of Tunisia's panel request refers to Articles 2.1, 2.2, 2.2.1.1 and 2.2.2 of the Anti-Dumping Agreement. These provisions concern the establishment of normal value by the investigating authority and contain multiple obligations in that regard. When read together, however, these provisions relate to the obligation to establish normal value based on the cost of production plus a reasonable amount for administrative, selling and general costs and for profits. Furthermore, Tunisia asserts that MIICEN committed errors "leading to the calculation of an artificially high normal value".<sup>52</sup>

7.27. Given these factors and the standard of review recalled above, it is clear to us that this panel request, as drafted, is consistent with Article 6.2 of the DSU, since:

- a. it clearly establishes which specific aspect of the measure at issue is being addressed (the construction of normal value); and
- b. it clearly sets out the provisions of the Anti-Dumping Agreement that are alleged to have been violated: as such, although Articles 2.1 and 2.2 of the Anti-Dumping Agreement contain multi-layered obligations in relation to the establishment of normal value, Articles 2.2.1.1 and 2.2.2 refer, "[f]or the purpose of paragraph 2" (i.e. for the purposes of constructing normal value), to the amount of "costs" that the investigating authority must use in its calculation.

7.28. Tunisia also explicitly connected the measure at issue with the obligation that is alleged to have been violated, by stating that the investigating authority committed errors leading to the calculation of an artificially high normal value.

7.29. The exact manner in which the investigating authority violated the provisions in question, i.e. the demonstration that the measure does indeed infringe the identified treaty provisions, comes under *arguments*, which Tunisia must develop in its submissions. In particular, in our opinion, Tunisia did not have to indicate which element in the calculation led to "the calculation of an artificially high normal value".

7.30. Furthermore, in its preliminary ruling, the Panel recalled that "in 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".<sup>53</sup>

7.31. In this particular case, the Panel's review of Tunisia's first written submission allowed it to "confirm the meaning of the words used", in particular, which aspect of the calculation Tunisia is challenging and the distinction it made between its claims and its arguments.

7.32. With respect to paragraph B.6<sup>54</sup> of the panel request, it also seems to us that Tunisia indicated:

- a. what the specific aspect of the measure at issue was (the comparison between the normal value and the export price); and

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<sup>51</sup> In paragraph B.5 of its panel request, Tunisia requests the Panel to find that Morocco violated: "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 exclusively, when reconstructing normal value, the authority failed to take into account all the sales made in Tunisia for the calculation of the profit margin".

<sup>52</sup> Panel request, para. B.5.

<sup>53</sup> Preliminary ruling, para. 3.4, (quoting Appellate Body Report, *US – Carbon Steel*, para. 127).

<sup>54</sup> In paragraph B.6 of its panel request, Tunisia requests the Panel to find that Morocco violated: "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".

- b. the provisions alleged to have been violated: Article 2.4 of the Anti-Dumping Agreement, which obliges the investigating authority to make a fair comparison between the export price and the normal value<sup>55</sup>, and Article VI:1 of GATT 1994.<sup>56</sup>

7.33. Tunisia also explicitly connected the measure at issue with the obligation that is alleged to have been violated by stating that "the investigating authority failed to make a fair comparison between the export price and the normal value", which indicates that the relevant legal basis is limited to the first sentence of Article 2.4 of the Anti-Dumping Agreement.<sup>57</sup> We do not believe that Tunisia should have explained in its panel request which factual aspects of the comparison lead to an unfair comparison and, in particular, which adjustments were not made by the authority or which aspects of the calculation led to an unfair comparison.

7.34. In the light of the foregoing, we decide to reject Morocco's objections concerning the conformity of paragraphs B.5 and B.6 of the panel request with Article 6.2 of the DSU.

7.35. We shall now examine Tunisia's claims concerning the determination of dumping.

### **7.2.1 Tunisia's claims concerning the construction of the normal value of certain models of exercise books**

#### **7.2.1.1 Whether the reasonable amount for profits was calculated in a manner consistent with Articles 2.1, 2.2 and 2.2.2 of the Anti-Dumping Agreement**

##### **7.2.1.1.1 Introduction**

7.36. We recall that under certain circumstances, listed in Article 2.2 of the Anti-Dumping Agreement, an investigating authority may decide to "construct" the normal value of the product subject to an anti-dumping investigation. This happens when sales of the like product in the domestic market of the exporting country do not permit a "proper comparison". The normal value may then be constructed using "the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits".<sup>58</sup> To that end, the Anti-Dumping Agreement provides that the amount for profits shall be based on "actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation".<sup>59</sup>

7.37. To "construct" the normal value of certain exercise book models of the two Tunisian producers/exporters that took part in the investigation<sup>60</sup>, the Moroccan investigating authority used a "reasonable amount" for profits, within the meaning of Article 2.2 of the Anti-Dumping Agreement.

7.38. Tunisia claims that MIICEN overestimated ("inflated"<sup>61</sup>) the amount for profits by including expenditure that was unrelated to profits.<sup>62</sup> While recognizing that the Anti-Dumping Agreement does not prescribe a methodology or define a reasonable profit, "Tunisia considers that a reasonable amount for profits must, at the very least, exclude all elements that are not part of the profits".<sup>63</sup>

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<sup>55</sup> The Appellate Body in *EC – Bed Linen* distinguished, in Article 2.4, between a "general obligation to make a 'fair comparison'" and the "specific obligations" set forth in the subsequent sentences of Article 2.4. (Appellate Body Report, *EC – Bed Linen*, para. 59)

<sup>56</sup> In the end, Tunisia did not pursue its claim under Article VI:1 of GATT 1994. (Tunisia's response to Panel question No. 2.22, para. 132).

<sup>57</sup> A reading of Tunisia's first written submission confirms that the legal basis selected by Tunisia is indeed limited to the first sentence of Article 2.4 of the Anti-Dumping Agreement. See Tunisia's first written submission, paras. 5.93-5.97.

<sup>58</sup> Article 2.2 of the Anti-Dumping Agreement.

<sup>59</sup> Article 2.2.2 of the Anti-Dumping Agreement.

<sup>60</sup> MIICEN constructed a normal value for "models of exercise book exported to Morocco and not sold in the Tunisian market, as well as for models that did not exceed the standing threshold and models that were not sold in the ordinary course of trade". (Tunisia's first written submission, para. 5.12)

<sup>61</sup> Tunisia's second written submission, para. 2.17.

<sup>62</sup> Tunisia's response to Panel question No. 1.4, para. 21.

<sup>63</sup> Tunisia's response to Panel question No. 1.4, para. 26.

7.39. Tunisia is of the opinion that such a profit margin is not a "reasonable amount ... for profits"<sup>64</sup> within the meaning of Article 2.2 and that, contrary to the requirements of Article 2.2.2, it does not reflect "actual data"<sup>65</sup> pertaining to domestic "sales".<sup>66</sup> Lastly, Tunisia considers that, as a result of the error in the calculation of the profit margin of the two producers/exporters, "MIICEN did not have a valid factual basis to 'consider', under Article 2.1 of the Anti-Dumping Agreement, the product "as being dumped".<sup>67</sup>

#### **7.2.1.1.2 Analysis**

7.40. We recall that Morocco requests, in the first instance, that we do not to examine this argument put forward by Tunisia, on the grounds that it would amount to asking the Panel to conduct a *de novo* review, which is prohibited under Article 17.6(i) of the Anti-Dumping Agreement. In this case, Morocco asserts that the interested parties never raised this matter before the authority and therefore cannot do so for the first time before us.<sup>68</sup>

7.41. We consider Morocco's objection to be without merit.

7.42. We recall that Article 17.6(i) of the Anti-Dumping Agreement, read together with the provisions of Article 11 of the DSU, sets out the standard to be applied by panels when assessing whether a Member's investigating authorities have "established" and "evaluated" the facts consistently with that Member's obligations under the covered agreements.<sup>69</sup> This provision precludes a panel from substituting the investigating authority by engaging in an independent fact-finding exercise. However, if requested to do so by the parties, a panel must determine whether the authority's establishment of the facts was proper and whether its evaluation of those facts was unbiased and objective.

7.43. In this case, Tunisia is not asking us to re-evaluate the facts and substitute our evaluation for that of the authority. It is asking us to find, on the basis of the facts contained in the investigating authority's record, that the authority did not apply a reasonable amount for profits, in a manner inconsistent with Articles 2.2 and 2.2.2 of the Anti-Dumping Agreement. It is therefore a question of application of the rules of the Anti-Dumping Agreement, which clearly falls within our jurisdiction.

7.44. We will therefore proceed to examine the arguments put forward by Tunisia.

#### **7.2.1.1.2.1 Has Tunisia established that the amount used by MIICEN as a reasonable amount for profits was inconsistent with Articles 2.2 and 2.2.2 of the Anti-Dumping Agreement?**

7.45. Tunisia's argument under Article 2.2.2 of the Anti-Dumping Agreement "relates to the fact that a profit margin that includes, in addition to ordinary profits, administrative costs and other expenses that are not part of the price of the product could not be based on 'actual data' pertaining to sales in the ordinary course of trade of the like product".<sup>70</sup> Furthermore, "since the profit margin was obtained using an erroneous formula, it cannot be described as 'reasonable' within the meaning of Article 2.2 of the Anti-Dumping Agreement".<sup>71</sup>

7.46. The relevant provisions of Articles 2.2 and 2.2.2 of the Anti-Dumping Agreement stipulate that when an investigating authority constructs the normal value of the like product, it does so based on the "cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits". In turn, the reasonable amount for profits must be "based on actual data pertaining to production and sales in the ordinary course of trade of the like product

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<sup>64</sup> Tunisia's second written submission, para. 2.45.

<sup>65</sup> Tunisia's second written submission, para. 2.18.

<sup>66</sup> In response to a Panel question, Tunisia confirmed that it does not dispute that MIICEN decided to estimate a reasonable amount for profits rather than use the exporters' actual declared profits. (Tunisia's response to Panel question No. 1.24, para. 18. See also Morocco's second written submission, paras. 126 and 127)

<sup>67</sup> Tunisia's response to Panel question No. 1.4, para. 29.

<sup>68</sup> Morocco's first written submission, paras. 60 and 61.

<sup>69</sup> Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 84.

<sup>70</sup> Tunisia's response to Panel question No. 1.24, para. 18. See also Tunisia's response to Panel question No. 1.4, para. 23; and second written submission, paras. 2.16 and 2.18.

<sup>71</sup> Tunisia's first written submission, para. 5.58.



by the exporter or producer under investigation". Article 2.2.2 does not provide for any particular methodology in order to determine those amounts<sup>72</sup> based on "actual data": only if these amounts cannot be determined on that basis does the Anti-Dumping Agreement envisage alternative methods in subparagraphs (i), (ii) and (iii) of Article 2.2.2.

7.47. MIICEN's report on the definitive determination<sup>73</sup> and the electronic files provided by MIICEN to producers/exporters show how the Moroccan investigating authority determined the reasonable amount for profits attributable to sales of exercise books in the Tunisian market. Specifically, the report on the definitive determination states:

[T]he profit margin was obtained from *costs of production* data and *sales prices* and *adjustments* data provided by the Tunisian exporters in their responses to the questionnaires and in the additional information submitted to the Ministry in response to the deficiency letters.<sup>74</sup>

7.48. The electronic files sent to the two Tunisian producers/exporters that cooperated with the investigation with the essential facts<sup>75</sup> show that the average profit margin of exercise books sold in the domestic market was determined by MIICEN by subtracting a unit cost of production for each declared sale from the unit sales price, then adding the profit/loss amount from all sales. Tunisia challenges before us the respective composition of the unit sales price and the unit cost of production used for each of the two producers/exporters.<sup>76</sup>

7.49. *With respect to SITPEC*, in its response to MIICEN, the company declared a non-adjusted unit price (as charged to the customer) and an adjusted unit price, i.e. taking into account certain selling expenses charged to the customer.<sup>77</sup> The company also declared a cost of production for each sale, which consisted of fixed and variable manufacturing costs.<sup>78</sup> For its calculation of the profit margin, MIICEN used the non-adjusted unit price and the cost of production declared by SITPEC.<sup>79</sup> Subtracting these two figures therefore results in a profit margin that includes not only the profit itself, but also expenses that are not linked to the profit (such as "taxes", "credit costs", "discounts" and "domestic transportation").

7.50. *With respect to SOTEFI*, in its response to MIICEN, the company declared the value and quantity sold for each transaction, as well as an adjusted unit price, which thus takes into account certain selling expenses charged to the customer.<sup>80</sup> Concerning the cost of production, the company declared a cost of production that included "administrative costs and financing costs". It also declared separately a distribution cost and a marketing cost.<sup>81</sup> In response to MIICEN's deficiency letter, SOTEFI clarified that those cost categories comprised the following:

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<sup>72</sup> Panel Report, *US – Softwood Lumber V*, para. 7.263. See also Morocco's comments on Tunisia's response to Panel question No. 1.24, para. 64.

<sup>73</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1).

<sup>74</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 95. (emphasis added)

<sup>75</sup> Excel file containing the dumping margin calculation (SITPEC) (Exhibit TUN-12 (BCI)); Excel file containing the dumping margin calculation (SOTEFI) (Exhibit TUN-14 (BCI)).

<sup>76</sup> Tunisia's first written submission, para. 5.36.

<sup>77</sup> SITPEC declared the unit price per tonne in the Excel file submitted as an attachment to SITPEC's responses to the initial questionnaire dated 10 July 2017 (Exhibit TUN-16 (BCI)). In its responses to the initial questionnaire, SITPEC indicated that the mode of delivery for domestic sales was "*rendu dépôt client*" (return delivery customer), which means that the sales price included certain selling costs charged to the customer. (SITPEC's responses to the initial questionnaire (Exhibit TUN-35 (BCI)))

<sup>78</sup> The cost of production is taken from the "Copdomvaleur harmonie pivot" sheet. (Revised data provided by SITPEC (Exhibit TUN-10 (BCI)), column P)

<sup>79</sup> The non-adjusted unit price appears in column N of the "Profitabilité" sheet of the Excel file containing the dumping margin calculation (SITPEC) (Exhibit TUN-12 (BCI)). The adjusted unit price appears in column Q of the same sheet.

<sup>80</sup> These price data come from the Excel file provided with SOTEFI's responses to the MIICEN questionnaire (Exhibit TUN-55 (BCI)). The mode of delivery given for domestic sales is "*rendu magasin*" (in-store), which means that the invoice price included certain selling costs charged to the customer. We understand that these data were revised in the Excel file named SOTEFI VENTEDOM COPDOM REVISE CONFIDENTIEL dated 23 May 2018 (Exhibit TUN-11 (BCI)).

<sup>81</sup> Those data come from column F of the COPDOM and H.2 sheets of the Excel file provided with SOTEFI's responses to the MIICEN questionnaire (Exhibit TUN-55 (BCI)). We understand that these data were

The cost of production comprises: consumed purchases of raw materials or consumables, staff costs other than distribution and marketing costs, depreciation and provision expenses, State, tax and duties payments, and net financial costs. The distribution cost consists of: transportation costs and distribution staff costs. The marketing costs comprises the marketing expenditure (sponsorship, advertising, fairs, licences, etc.) and the staff costs of the marketing service.<sup>82</sup>

7.51. To calculate SOTEFI's profit margin, MIICEN used a non-adjusted unit price, which therefore includes not only the cost of production declared by SOTEFI, but also certain selling expenses charged to the customer.<sup>83</sup> Meanwhile, the unit cost of production used by MIICEN comprises fixed and variable manufacturing costs, as well as a "distribution cost" and a "marketing cost".<sup>84</sup> Subtracting these two figures therefore results in a profit margin that includes not only the profit itself, but also expenses that are not linked to the profit (such as credit costs, rebates and refunds).

7.52. We note that Morocco does not contest these factual elements presented by Tunisia.<sup>85</sup> In particular, Morocco does not contest that the "profit" used by MIICEN for the two exporters is greater than the difference between the ex-factory level sales price and the cost of production. Nevertheless, Morocco asserts that MIICEN did indeed use actual data provided by the two producers/exporters.<sup>86</sup> Therefore:

[I]n all its calculations, the authority used the data it received from the exporters, and *only those data pertaining to production and sales*. There is therefore no doubt that the amounts "for administrative, selling and general costs and for profits" were "based on actual data pertaining to production and sales".<sup>87</sup>

7.53. Morocco states that the cost of production and profits data submitted by one of the two Tunisian exporters (SOTEFI) were not presented in the format required by MIICEN, which created a certain amount of "confusion" regarding the exact composition of the cost of production, the administrative costs, the cost price and the profits.<sup>88</sup>

7.54. We are aware that it can be difficult for a company to extract the data required by an investigating authority from its accounts, and that errors may slip into responses to the investigation questionnaires. Similarly, it can be difficult for the investigating authority to interpret the responses provided by the interested parties. Nevertheless, any error or ambiguity in the manner in which a company responds to the authority's questions does not exempt the investigating authority from its obligation to ensure "the accuracy of the information supplied by interested parties upon which their findings are based"<sup>89</sup> and to establish the facts "proper[ly]". Nor does such an error or ambiguity exempt a Member from its obligation to establish the product's normal value, in accordance with the provisions of Articles 2.2 and 2.2.2 of the Anti-Dumping Agreement. The obligation to "base" the amount used for the profits on "actual data" unquestionably rests with the investigating authority: that obligation is not limited to gathering data from businesses, but also implies that the authority must use the data correctly to determine the amount for profits on that basis. In this case, MIICEN did gather the relevant data, but failed to establish the actual profit from the sale of exercise books.

#### **7.2.1.1.2.2 Has Tunisia established a consequential violation of Article 2.1?**

7.55. Lastly, we recall that Tunisia requests us to find that, as a result of the error in the calculation of the profit margin of the two producers/exporters, "MIICEN did not have a valid factual basis to

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revised in the Excel file named SOTEFI VENTEDOM COPDOM REVISE CONFIDENTIEL dated 23 May 2018 (Exhibit TUN-11 (BCI)).

<sup>82</sup> Reply from SOTEFI to the deficiency letter dated 15 August 2017 (Exhibit MAR-6), p. 7.

<sup>83</sup> Excel file containing the dumping margin calculation (SOTEFI) (Exhibit TUN-14 (BCI)), column Q of the "Profitabilité" sheet.

<sup>84</sup> Excel file containing the dumping margin calculation (SOTEFI) (Exhibit TUN-14 (BCI)), column R of the "Profitabilité" sheet; Fichier Excel intitulé SOTEFI VENTEDOM COPDOM REVISE CONFIDENTIEL du 23 mai 2018, données révisées fournies par la SOTEFI (Exhibit TUN-11 (BCI)), columns I, J and K.

<sup>85</sup> Morocco's response to Panel question No. 1.1, para. 12.

<sup>86</sup> Morocco's comments on Tunisia's response to Panel question No. 1.24, para. 53.

<sup>87</sup> Morocco's comments on Tunisia's response to Panel question No. 1.24, para. 59. (emphasis original)

<sup>88</sup> Morocco's response to Panel question No. 1.2, paras. 13, 14, 15 and 17.

<sup>89</sup> Article 6.6 of the Anti-Dumping Agreement.

'consider', under Article 2.1 of the Anti-Dumping Agreement, the product 'as being dumped'.<sup>90</sup> In particular, Tunisia considers that normal value established on the basis of an "inflated" amount for profits cannot constitute a "comparable price" within the meaning of Article 2.1 of the Anti-Dumping Agreement. In response to a Panel question, Tunisia indicated that its claim under Article 2.1 was "consequential to its claims under Article 2.2 and Article 2.2.2. As a result, a finding of violation of the latter provisions would necessarily lead to a finding of violation of Article 2.1".<sup>91, 92</sup> In general, Tunisia "is of the opinion that any inconsistency with any obligation under Article 2 of the Anti-Dumping Agreement that has the effect of inflating the margin of dumping leads to an inconsistency with the requirement in Article 2.1 that a product 'is to be considered as being dumped' only if the normal value is higher than the export price".<sup>93</sup>

7.56. Morocco responds that "when an authority makes a calculation error in relation to one of the other provisions of Article 2, a panel cannot find, on that basis alone, that there was no dumping under Article 2. Indeed, a panel is simply not in a position to duplicate an authority's calculations based on its own assessment of what a correct method would be in a given set of circumstances". Moreover, Morocco considers that:

Article 2.1 is *not* a consequential obligation to be invoked as a result of another violation, but is instead a separate obligation that must be asserted and established.<sup>94</sup>

7.57. We note that other panels and the Appellate Body have regarded Article 2.1 of the Anti-Dumping Agreement as a purely definitional provision, i.e. as not itself imposing obligations.<sup>95</sup> Furthermore, we do not share Tunisia's view that a violation of Article 2.2 and/or Article 2.2.2 of the Anti-Dumping Agreement "would necessarily result in a finding of violation of Article 2.1". In that sense, we consider that, in order to establish a violation of Article 2.1, even a consequential violation, the party requesting those findings must explain how the measure at issue specifically violates that provision of the Anti-Dumping Agreement.

7.58. In the present case, we consider that Tunisia's arguments in support of its claim under Article 2.1 are the same as those developed in support of its claim under Articles 2 and 2.2.2 of the Anti-Dumping Agreement. In our view, they are not sufficient to establish what Morocco's obligations under Article 2.1 are, or how those obligations were violated as a result of errors made by MIICEN when it established a reasonable amount for profits.

#### **7.2.1.1.3 Conclusion on the reasonable amount for profits**

7.59. We therefore conclude that Tunisia has shown that the amount used by the investigating authority to construct the exercise books' normal value was not based "on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation" and, therefore, is not in conformity with Article 2.2.2 of the Anti-Dumping Agreement. Consequently, the figure used by MIICEN to establish the profit margin of the two Tunisian exporters was not a "reasonable amount" for profits within the meaning of Article 2.2 of the Anti-Dumping Agreement. We also conclude, however, that Tunisia has failed to demonstrate any violation of Article 2.1 of the Anti-Dumping Agreement.

7.60. We now turn to Tunisia's argument concerning MIICEN's decision to exclude subsidized numbered and watermarked exercise books from the determination of the reasonable amount for profits.

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<sup>90</sup> Tunisia's response to Panel question No. 1.4, para. 29.

<sup>91</sup> Tunisia's response to Panel question No. 1.26, para. 20.

<sup>92</sup> Tunisia also considers that the Panel could apply the principle of judicial economy to this claim in the event of a finding of violation of Article 2.2. (Tunisia's response to Panel question No. 1.25, para. 19)

<sup>93</sup> Tunisia's response to Panel question No. 1.26, para. 24.

<sup>94</sup> Morocco's comments on Tunisia's response to the Panel questions, para. 22. (emphasis added)

<sup>95</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 140; Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.120.

### **7.2.1.2 Whether excluding sales of subsidized numbered and watermarked exercise books from the establishment of the reasonable amount for profits was inconsistent with Articles 2.1, 2.2 and 2.2.2 of the Anti-Dumping Agreement**

#### **7.2.1.2.1 Introduction**

7.61. The second issue raised by Tunisia in this case also concerns the determination of the reasonable amount for profits within the meaning of Article 2.2 of the Anti-Dumping Agreement. We recall that MIICEN constructed the normal value of certain models of exercise books<sup>96</sup> and sought to determine a "reasonable amount" for profits using the sales price and the cost of production reported by the two Tunisian producers/exporters that cooperated with the investigation.

7.62. The investigation record shows that MIICEN decided nevertheless that, for this calculation, it would disregard the sales price and the cost of production of certain models sold in the domestic market, on the grounds that they were subject to an export ban. Those models were the numbered and watermarked exercise books subsidized by the Tunisian Government. The profit margin used to construct the normal value of certain exercise book models is therefore not based on the profit generated from the sale of numbered and watermarked exercise books in the domestic market.

7.63. Tunisia makes the case before us that the investigating authority had "no valid justification for excluding the numbered or watermarked exercise books from the calculation of the profit margin"<sup>97</sup>, because:

- a. numbered and watermarked exercise books are actually included in the definition of the product under investigation and are therefore "like" products within the meaning of Article 2.2.2 (which is not contested by Morocco)<sup>98, 99</sup>; and
- b. the authority did not determine that the sales of numbered and watermarked exercise books were made at a loss during the investigation period or that they did not take place in the ordinary course of trade (which is not contested by Morocco).<sup>100</sup>

7.64. Tunisia's argument is therefore that:

Sales of numbered and watermarked exercise books – which are covered by the definition of the product under consideration – [are] (1) "actual" sales (2) made "in the ordinary course of trade" (3) of the "like product" and, therefore, these sales should have been taken into account for the purpose of calculating the profit margin.<sup>101</sup>

7.65. Regarding the alleged violations of the Anti-Dumping Agreement, Tunisia argues that, by excluding numbered and watermarked exercise books from the calculation, MIICEN acted inconsistently with Article 2.2.2 of the Anti-Dumping Agreement. According to Tunisia, Morocco also breached its obligation under Article 2.2 to add a "reasonable amount" for profits when constructing normal value.

7.66. Tunisia adds that the market share of subsidized numbered exercise books in Tunisia was sizeable during the investigation period (up to [[\*\*\*]] % of domestic sales of the two Tunisian exporters/producers that cooperated with the investigation).<sup>102</sup> As a result, the exclusion of numbered and watermarked exercise books from the calculation of the profit margin of each producer greatly inflated the profit margin, "since the profits from sales of this type of exercise book

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<sup>96</sup> MIICEN constructed a normal value for "exercise book models exported to Morocco and not sold in the Tunisian market, as well as for models that did not exceed the standing threshold and models that were not sold in the ordinary course of trade". (Tunisia's first written submission, para. 5.12; report on the definitive determination (Exhibits TUN-7, MAR-1), paras. 91 and 92)

<sup>97</sup> Tunisia's first written submission, section 5.2.4.2.

<sup>98</sup> Tunisia's first written submission, paras. 5.62 and 5.63.

<sup>99</sup> Tunisia's response to Panel question No. 1.4, para. 39 (quoting the report on the definitive determination (Exhibit MAR-CONF-3 (BCI)), para. 56).

<sup>100</sup> Tunisia's first written submission, para. 5.67.

<sup>101</sup> Tunisia's response to Panel question No. 1.4, para. 42.

<sup>102</sup> Tunisia's response to Panel question No. 1.20, para. 14.

are lower".<sup>103</sup> Therefore, according to Tunisia, "an inflated profit margin necessarily results in both an inflated normal value and an inflated margin of dumping, which is inconsistent with the definition of 'dumping' set forth in Article 2.1 of the Anti-Dumping Agreement".<sup>104</sup>

7.67. Tunisia clarifies, however, that it does not dispute the fact that MIICEN decided to calculate a profit margin instead of relying on the profits declared by the exporters<sup>105</sup>, and that it is not pursuing its claim under Article 12.2.2 of the Anti-Dumping Agreement concerning sales of numbered or watermarked exercise books.<sup>106</sup>

7.68. Lastly, concerning the order of analysis of its claims, we note that Tunisia requests us to address first the claim under Articles 2.2 and 2.2.2, then, if we find that both provisions or either of the two were violated, to find that there was a "consequential" violation of Article 2.1 of the Anti-Dumping Agreement<sup>107</sup> or to "take note of the fact that Tunisia requested a finding of inconsistency with each of those provisions but that the Panel decided to exercise judicial economy".<sup>108</sup>

### **7.2.1.2.2 Analysis**

#### **7.2.1.2.2.1 Has Tunisia established that excluding sales of subsidized numbered and watermarked exercise books from the establishment of the reasonable amount for profits was inconsistent with Articles 2.2 and 2.2.2 of the Anti-Dumping Agreement?**

7.69. On the matter of the exclusion of numbered and watermarked exercise books, MIICEN's report on the definitive determination indicates:

Concerning sales of so-called "numbered" exercise books, these types of exercise books are produced using state-subsidized offset paper, which is watermarked, unlike the so-called "super" school exercise books, which are made of paper that is not subsidized. These numbered exercise books are sold only in the domestic market and it is strictly prohibited to export them. In addition, the exporters explained that the watermarked paper used to produce the numbered exercise books is purchased from the Tunisian National Cellulose and Esparto Paper Company (a public company) at a regulated transfer price and that this watermarked paper may not be used for exercise books destined for export ... Furthermore, heavy penalties are imposed if exercise books made of watermarked paper are exported. Thus, given these facts, and for the purposes of a fair comparison between the normal value and the export price, sales of these (numbered) types of exercise books were not included in the calculation of the normal value, since no comparable types of exercise books made with watermarked paper are sold for export to Morocco.<sup>109</sup>

7.70. In practice, although sales of numbered and watermarked exercise books were indeed declared by the two producers/exporters that cooperated with the investigation, those sales were excluded from the calculation of the reasonable amount for profits used to construct the normal value of certain other models of exercise books.<sup>110</sup> It is clear from the passage quoted above that the reason why numbered and watermarked exercise books were excluded was because of the export ban imposed on these exercise books.<sup>111</sup> Tunisia notes, however, that MIICEN did include

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<sup>103</sup> Tunisia's response to Panel question No. 1.4, para. 43. See also Tunisia's first written submission, para. 5.68.

<sup>104</sup> Tunisia's response to Panel question No. 1.4, para. 43.

<sup>105</sup> Tunisia's response to Panel question No. 1.24, para. 18.

<sup>106</sup> Tunisia's response to Panel question No. 1.5, para. 44.

<sup>107</sup> Tunisia's response to Panel question No. 1.26, para. 20.

<sup>108</sup> Tunisia's response to Panel question No. 1.25, para. 19.

<sup>109</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 94. (fns omitted)

<sup>110</sup> Excel file containing the dumping margin calculation (SITPEC) (Exhibit TUN-12 (BCI)); Excel file containing the dumping margin calculation (SOTEFI) (Exhibit TUN-14 (BCI)): although sales of these exercise books do appear in the "Ventedom brut" sheet, they do not appear in the "Ventedom" sheet, which was used as the basis for calculating the reasonable amount for profits. (See also Tunisia's first written submission, para. 5.8)

<sup>111</sup> We note that, in its preliminary determination, the investigating authority had asserted that numbered and watermarked exercise books were "excluded from the scope of the definition of the product

other models of exercise books that were not exported in the calculation of the reasonable amount for profits.<sup>112</sup>

7.71. We recall that Article 2.2 of the Anti-Dumping Agreement establishes how the normal value of the product under investigation is determined when domestic sales of the like product do not allow for a proper comparison with the export price. In those specific circumstances, the normal value may be constructed. This constructed normal value includes, in particular, a "reasonable amount" for profits, which is determined pursuant to Article 2.2.2:

For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation.

7.72. This provision sets out three principles on which these costs and profits must be "based": the investigating authority must use (a) actual data from domestic production and sales, (b) of the like product, and (c) in the ordinary course of trade.

7.73. Morocco's defence is based primarily on the argument that any determination of dumping is, by definition, a matter of comparing two prices – a domestic price (normal value) and an export price<sup>113</sup> – for the same product or for a like product, and that the reference to "actual data pertaining to production and sales" in Article 2.2.2 is not a reference to all sales, but to those that are subject to a fair comparison.<sup>114</sup>

7.74. We share Morocco's view that the reference to "actual data pertaining to production and sales" in Article 2.2.2 "does not refer to all sales" of the like product by the producer/exporter concerned. In point of fact, that article states that the investigating authority should disregard sales that were not in the ordinary course of trade.

7.75. In this dispute, however, Morocco insists that sales of the numbered and watermarked exercise books were excluded not because of the "extraordinary" nature of those sales in the Tunisian market, and therefore the potentially "extraordinary" nature of the profits from those sales, but solely because the exercise books are subject to an export ban. Therefore, although MIICEN's report on the definitive determination notes that the paper used is "state-subsidized" and is purchased "at a regulated transfer price", and therefore might not reflect "sales [made] under normal conditions of competition in the domestic market"<sup>115</sup>, Morocco confirmed, in response to the Panel's questions, that "[t]he question ... of the watermarked exercise books is very simple and is based entirely on the authority's specific determination in respect of the watermarked exercise books: does Article 2.2.2 require an authority to examine products which, under the legislation of the exporting country, are not allowed to be exported?"<sup>116</sup> Similarly, in response to Tunisia's arguments pertaining to whether sales of numbered and watermarked exercise books were "ordinary" or not, Morocco considered that those assertions were "not relevant".<sup>117</sup> In the light of Morocco's explanations, we will not examine whether sales of numbered and watermarked exercise

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under consideration". (Report on the preliminary determination, (Exhibit MAR-17), para. 25) Nevertheless, in response to a Panel question, Morocco accepted that "[t]he purpose of paragraph 25 of the preliminary determination was to explain that numbered exercise books had been excluded from the calculation of the normal value, and not from the definition of the product". (Morocco's response to Panel question No. 1.5, para. 24) We note also that MIICEN's final report states that "the exclusion of the so-called 'numbered' exercise books is for technical needs linked to the dumping calculation (comparison of normal value and export price of comparable sales) and in no way influences the definition of the product under investigation and/or the product under consideration, since this definition is established on the basis of the product's technical considerations and customs considerations stemming from the customs tariff". (Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 56)

<sup>112</sup> Tunisia's second written submission, para. 2.47.

<sup>113</sup> Morocco's second written submission, para. 141.

<sup>114</sup> Morocco's second written submission, para. 142.

<sup>115</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 94 and fn 26.

<sup>116</sup> Morocco's response to Panel question No. 1.22, para. 13 (quoting Morocco's opening statement at the second meeting of the Panel, para. 66). See also Morocco's first written submission, para. 69: "the fundamental issue, already underlined in the Essential Facts (a document on which the exporters have commented) and confirmed several times by Tunisia and the exporters, was the fact that **these exercise books are not exported, under penalty of heavy sanctions**". (emphasis original)

<sup>117</sup> Morocco's first written submission, para. 71.

books could have been excluded from the calculation of the reasonable amount for profits, on the grounds that those sales did not take place in the ordinary course of trade.

7.76. The question before us, therefore, is whether excluding sales that did not take place in the ordinary course of trade, as explicitly envisaged in Article 2.2.2, is the only possible exclusion, or whether other domestic sales may be excluded from the determination of the reasonable amount for profits for other reasons. Since Article 2.2.2 does not provide for other exceptions, we must consider the context of this provision and, in particular, the other paragraphs of Article 2.

7.77. Before us, Morocco and the European Union justify the exclusion of the numbered and watermarked exercise books based on the need to make a fair comparison between the normal value and the export price, within the meaning of the first sentence of Article 2.4. Thus, the European Union asserts that:

When the type of product, not -exported or rarely exported, is sold in substantial quantities in the market of the country of origin, consideration of the price of domestic sales of this type of product is likely to distort the normal value of the product under consideration, either by inflating its normal value or by unduly reducing it.<sup>118</sup>

7.78. The European Union therefore considers that "insofar as the exclusion of sales of numbered or watermarked exercise books from the calculation of the profit margin of Tunisian exporters seeks to ensure a *fair comparison* between the export price and the normal value, no breach of Articles 2.1, 2.2 and 2.2.2 of the Anti-Dumping Agreement can be found to exist as a result of that exclusion".<sup>119</sup> For its part, Morocco asserts that:

The authority simply excluded sales of products that, under Tunisian law, are not exported from Tunisia "for technical needs linked to the dumping calculation (comparison of normal value and export price for comparable sales)".<sup>120</sup>

7.79. Morocco also considers that:

Tunisia's claim would have an absurd outcome for anti-dumping investigations, since it would mean that, for the purposes of the dumping calculation, products would have to be taken into account that, under the laws of the exporters' host country, are unable to be dumped.<sup>121</sup>

7.80. We recall that Article 2.2 concerns the determination of the normal value, and in particular a constructed normal value. It states that the purpose of constructing a normal value is to allow a "fair comparison" when domestic sales of the like product do not permit such a comparison. Therefore, in this case, MIICEN constructed the normal value of certain models (other than numbered and watermarked exercise books) the sales of which did not permit a "proper comparison", either because they did not take place in the ordinary course of trade or because their volume in the sense of Article 2.2 was too small.<sup>122</sup> This is therefore a separate issue to the one addressed by Article 2.4, which concerns (a) comparability between the normal value so ascertained and the export price; and (b) the comparison of these two prices, i.e. the calculation of the margin of dumping.

7.81. We also recall that Tunisia does not challenge before us Morocco's right to exclude numbered and watermarked exercise books from the comparison, on the grounds that numbered and watermarked exercise books are not exported and are, therefore, in fact, unable to be dumped. What Tunisia does contest is that these sales not being taken into account in the calculation of the reasonable amount for profits under Article 2.2, i.e. in the construction of the normal value of those models of exercise books that are exported.

7.82. In our opinion, it is not clear from the investigation record – and Morocco has failed to demonstrate before us – that including sales of numbered and watermarked exercise books in the

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<sup>118</sup> European Union's third-party submission, para. 25.

<sup>119</sup> European Union's third-party submission, para. 27. (emphasis added)

<sup>120</sup> Morocco's first written submission, para. 71 (quoting the report on the definitive determination, (Exhibit MAR-1), para. 56).

<sup>121</sup> Morocco's first written submission, para. 73.

<sup>122</sup> Tunisia's first written submission, para. 5.12.

determination of the reasonable amount for profits would not result in a normal value that would permit a "proper comparison" with the export price. Conversely, disregarding domestic sales of those exercise books led to a reasonable amount for profits that was not "based" on "actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation", within the meaning of Article 2.2.2 of the Anti-Dumping Agreement.

#### **7.2.1.2.2.2 Has Tunisia established a consequential violation of Article 2.1?**

7.83. Lastly, we recall that Tunisia requests that, if a violation is found under Articles 2.2 and 2.2.2, we find a "consequential" violation of Article 2.1 of the Anti-Dumping Agreement<sup>123</sup> or "take note of the fact that Tunisia requested a finding of inconsistency with each of those provisions but that the Panel decided to exercise judicial economy".<sup>124</sup> In this regard, we note that Tunisia does not develop specific arguments in support of its claim under Article 2.1 and does not explain how additional findings under Article 2.1 would help to settle the dispute.

7.84. We noted above<sup>125</sup> that other panels and the Appellate Body have regarded Article 2.1 of the Anti-Dumping Agreement as a purely definitional provision, i.e. as not itself imposing obligations.<sup>126</sup> Furthermore, we indicated that we did not share Tunisia's opinion that a violation of Article 2.2 or Article 2.2.2 of the Anti-Dumping Agreement "would necessarily result in a finding of violation of Article 2.1". In that sense, we consider that, in order to establish a violation of Article 2.1, even a consequential violation, the requesting party must explain how the measure at issue specifically violates that provision of the Anti-Dumping Agreement.

7.85. In the present case, we consider that Tunisia's arguments in support of its claim under Article 2.1 are the same as those developed in support of its claim under Articles 2 and 2.2.2 of the Anti-Dumping Agreement. In our view, they are not sufficient to establish what Morocco's obligations are under Article 2.1, or how those obligations were violated by the exclusion of the numbered and watermarked exercise books.

#### **7.2.1.2.3 Conclusion on the decision to exclude numbered and watermarked exercise books**

7.86. In the light of the foregoing, we conclude that Tunisia has demonstrated that, by excluding sales of numbered and watermarked exercise books, MIICEN did not base the reasonable amount for profits on "actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation", thereby violating Article 2.2.2. Morocco therefore violated Article 2.2 of the Anti-Dumping Agreement by not using a "reasonable amount" for profits when constructing the normal value of certain models of exercise books. We also conclude, however, that Tunisia has failed to demonstrate any violation of Article 2.1 of the Anti-Dumping Agreement.

#### **7.2.1.3 Whether including the distribution cost in the constructed normal value was inconsistent with Articles 2.1 and 2.2 of the Anti-Dumping Agreement**

##### **7.2.1.3.1 Introduction**

7.87. Tunisia takes issue with MIICEN for including in the constructed normal value expenses related to the distribution cost (domestic transportation and port fees), which are not among the normal value components described in Article 2.2 of the Anti-Dumping Agreement.

7.88. Tunisia maintains that "domestic transportation costs are not included in the 'cost of production' or in the 'administrative [and] selling...costs'" described in Article 2.2. Therefore, MIICEN erred by including domestic transportation costs in the reconstructed normal value.<sup>127</sup>

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<sup>123</sup> Tunisia's response to Panel question No. 1.26, para. 20; second written submission, para. 2.50.

<sup>124</sup> Tunisia's response to Panel question No. 1.25, para. 19.

<sup>125</sup> Para. 7.57.

<sup>126</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 140; Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.120.

<sup>127</sup> Tunisia's first written submission, para. 5.83; second written submission, para. 2.52.



7.89. Tunisia also claims that "including the 'per-unit distribution cost' in the normal value calculation caused the margin of dumping to increase" in a manner that is inconsistent with the provisions of Article 2.1 of the Anti-Dumping Agreement.<sup>128</sup>

#### **7.2.1.3.2 Analysis**

7.90. We recall that Morocco requests, in the first instance, that we do not examine this argument put forward by Tunisia, on the grounds that it would amount to asking the Panel to conduct a *de novo* review, prohibited under Article 17.6(i) of the Anti-Dumping Agreement. In this case, Morocco asserts that the interested parties never raised this matter before the authority and therefore cannot do so for the first time before us.<sup>129</sup>

7.91. We consider Morocco's objection to be without merit.

7.92. We recall that Article 17.6(i) of the Anti-Dumping Agreement, read together with the provisions of Article 11 of the DSU, sets out the standard to be applied by panels when assessing whether a Member's investigating authorities have "established" and "evaluated" the facts consistently with that Member's obligations under the covered agreements.<sup>130</sup> This provision precludes a panel from substituting the investigating authority by engaging in an independent fact-finding exercise. However, if requested to do so by the parties, a panel must determine whether the authority's establishment of the facts was proper and whether its evaluation of those facts was unbiased and objective.

7.93. In this case, Tunisia is not asking us to re-evaluate the facts and substitute our evaluation for that of the authority. It is asking us to find, on the basis of the facts contained in the investigating authority's record, that the authority did not construct the normal value in a manner consistent with Articles 2.1 and 2.2 of the Anti-Dumping Agreement. It is therefore a question of application of the rules of the Anti-Dumping Agreement, which clearly falls within our jurisdiction.

7.94. We will therefore proceed to examine the arguments put forward by Tunisia.

#### **7.2.1.3.2.1 Has Tunisia established that the normal value constructed by MIICEN was inconsistent with Article 2.2 of the Anti-Dumping Agreement?**

7.95. We recalled above that the investigating authority constructed a normal value for certain models sold by SOTEFI.<sup>131</sup>

7.96. The investigation record shows that, for SOTEFI, this normal value was constructed by adding the "cost price"<sup>132</sup> and the "profit" established by MIICEN on the basis of data provided by SOTEFI.<sup>133</sup> However, the spreadsheet that MIICEN provided with the essential facts shows that, in this case, the "cost price" was the sum of a "unit production cost"<sup>134</sup> and a "unit distribution cost", including domestic transportation and port fees.<sup>135</sup> Morocco does not dispute this factual description of the composition of the normal value established by MIICEN.

7.97. Tunisia therefore takes issue with the investigating authority for including a "unit distribution cost" in the constructed normal value of certain SOTEFI models, even though Article 2.2 of the Anti-Dumping Agreement describes constructed normal value as being composed of the "cost of

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<sup>128</sup> Tunisia's first written submission, paras. 5.85 and 5.87.

<sup>129</sup> Morocco's first written submission, paras. 63-65.

<sup>130</sup> Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 84.

<sup>131</sup> Excel file containing the dumping margin calculation (SOTEFI) (Exhibit TUN-14 (BCI)), in the "Cout de production" sheet. See also Tunisia's first written submission, paras. 5.77-5.79; second written submission, paras. 2.54-2.56.

<sup>132</sup> Excel file containing the dumping margin calculation (SOTEFI) (Exhibit TUN-14 (BCI)), column M of the "Cout de production" sheet.

<sup>133</sup> Excel file containing the dumping margin calculation (SOTEFI) (Exhibit TUN-14 (BCI)), column N of the "Cout de production" sheet.

<sup>134</sup> Excel file containing the dumping margin calculation (SOTEFI) (Exhibit TUN-14 (BCI)), column J of the "Cout de production" sheet.

<sup>135</sup> Excel file containing the dumping margin calculation (SOTEFI) (Exhibit TUN-14 (BCI)), column K of the "Cout de production" sheet.

production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profit".<sup>136</sup>

7.98. The question before us is therefore whether a distribution cost that includes domestic transportation and port fees could, in this case, be included in the constructed normal value of certain SOTEFI models.

7.99. The parties agree that the Anti-Dumping Agreement does not contain a precise definition (or a methodology for determining the amount) of each component of normal value.<sup>137</sup> Morocco therefore asserts that "what should be included in the 'cost of production' depends on the specific circumstances of each case".<sup>138</sup> Tunisia, for its part, accepts that "the terms 'cost of production in the country of origin' and 'administrative, selling and general costs' are not explicitly defined in the Anti-Dumping Agreement".<sup>139</sup> Thus, while "administrative, selling and general costs" is a concept "widely used in the fields of business management and accountancy... there is no formal definition that can be used to identify its components. Each company therefore has some margin of discretion in determining how to classify certain expenses".<sup>140</sup>

7.100. Nevertheless, Tunisia recalls that "Article 2.2.1 mentions that 'per unit ... costs of production' refers to 'fixed and variable' costs".<sup>141</sup> On the other hand, it considers that, if the investigating authority decides to construct normal value at the "ex-factory stage", it should take into account only administrative, selling and general costs and expenses that are part of an ex-factory level price.<sup>142</sup> In this case, the "distribution cost" (and, in particular, the costs for transportation from the factory door to the delivery point specified in the contract) is not part of the ex-factory level price. It would therefore not be "reasonable" to include the "distribution cost" in a constructed normal value at the ex-factory level.<sup>143</sup>

7.101. Morocco responds that the authority is not accountable for any error that may occur in the construction of normal value when that error is based on data provided by the producers/exporters that cooperated with the investigation. In the case at hand, MIICEN considers that it simply accepted exporters' data as presented and that "if an error occurred in the formula for the constructed profit margin, that was not brought to its attention".<sup>144</sup>

7.102. We disagree with Morocco's argument. First, we note, like Tunisia, that SOTEFI did declare a unit distribution cost separately from the cost of production<sup>145</sup> and that it broke down the content of that distribution cost ("domestic transportation + port fees"). There was therefore no ambiguity regarding the components of these different elements. Furthermore, as we already noted above<sup>146</sup>, any error or ambiguity in the manner in which an interested party responds to the authority's questions does not exempt the investigating authority from its obligation to ensure "the accuracy of the information supplied by interested parties upon which their findings are based"<sup>147</sup> and to establish the facts "proper[ly]". Nor does such an error or ambiguity exempt a Member from its obligation to establish the product's normal value, in accordance with the provisions of Article 2.2 of the Anti-Dumping Agreement.

7.103. In the case at hand, we consider that Tunisia has demonstrated that, although MIICEN constructed the normal value of certain models of exercise books at the ex-factory level<sup>148</sup>, it

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<sup>136</sup> Tunisia's first written submission, para. 5.83.

<sup>137</sup> Morocco's response to Panel question No. 1.9, paras. 37 and 38.

<sup>138</sup> Morocco's response to Panel question No. 1.9, para. 39.

<sup>139</sup> Tunisia's response to Panel question No. 1.9, para. 55.

<sup>140</sup> Tunisia's response to Panel question No. 1.9, para. 57. See also Tunisia's second written submission, paras. 2.58 and 2.59.

<sup>141</sup> Tunisia's response to Panel question No. 1.9, para. 56.

<sup>142</sup> Tunisia's response to Panel question No. 1.9, para. 58. See also European Union's third-party response to Panel question No. 1.2, paras. 11-13.

<sup>143</sup> Tunisia's response to Panel question No. 1.9, para. 59.

<sup>144</sup> Morocco's response to Panel question No. 1.9, para. 43.

<sup>145</sup> Tunisia's second written submission, para. 2.65; Excel file containing the dumping margin calculation (SOTEFI) (Exhibit TUN-14 (BCI)), column K in the "Cout de production" sheet.

<sup>146</sup> See paragraph 7.54 above.

<sup>147</sup> Article 6.6 of the Anti-Dumping Agreement.

<sup>148</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 103.

included domestic transportation costs and port fees in its calculation<sup>149</sup>, which are not part of normal value at the ex-factory level. We therefore conclude that the amount used by MIICEN as normal value for certain SOTEFI models is not a correct "normal value" within the meaning of Article 2.2 of the Anti-Dumping Agreement.

#### **7.2.1.3.2.2 Has Tunisia established a consequential violation of Article 2.1?**

7.104. Lastly, we recall that Tunisia requests us to find that "MIICEN acted inconsistently with Article 2.1 of the Anti-Dumping Agreement, because a normal value inflated by the inclusion of the 'distribution cost' results in an inflated margin of dumping".<sup>150</sup> In this regard, we note that Tunisia does not develop specific arguments in support of its claim under Article 2.1 and does not explain how additional findings under Article 2.1 would help to settle the dispute.

7.105. We noted above<sup>151</sup> that other panels and the Appellate Body have regarded Article 2.1 of the Anti-Dumping Agreement as a purely definitional provision, i.e. as not itself imposing obligations.<sup>152</sup> Furthermore, we indicated that we did not share Tunisia's view that a violation of Article 2.2 or Article 2.2.2 of the Anti-Dumping Agreement "would necessarily result in a finding of violation of Article 2.1". In that sense, we consider that, in order to establish a violation of Article 2.1, even a consequential violation, the requesting party must explain how the measure at issue specifically violates that provision of the Anti-Dumping Agreement.

7.106. In the present case, we consider that Tunisia's arguments in support of its claim under Article 2.1 are the same as those developed in support of its claim under Article 2.2 of the Anti-Dumping Agreement. In our view, they are not sufficient to establish what Morocco's obligations are under Article 2.1, or how those obligations were violated as a result of errors made by MIICEN when it established the normal value.

#### **7.2.1.3.3 Conclusion on the inclusion of distribution costs in the constructed normal value**

7.107. In view of the foregoing, we conclude that Tunisia has established that the inclusion of distribution costs in the constructed normal value of certain models of SOTEFI exercise books was inconsistent with the obligation under Article 2.2 of the Anti-Dumping Agreement to construct normal value on the basis of the "cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profit". We also conclude, however, that Tunisia has failed to demonstrate any violation of Article 2.1 of the Anti-Dumping Agreement.

7.108. We now turn to Tunisia's claims concerning Articles 2.1 and 2.4 of the Anti-Dumping Agreement.

### **7.2.2 Tunisia's claims concerning fair comparison**

#### **7.2.2.1 Whether the determination concerning licences as a factor affecting price comparability was inconsistent with Articles 2.1, 2.4 and 12.2.2 of the Anti-Dumping Agreement**

##### **7.2.2.1.1 Introduction**

7.109. Tunisia asserts that MIICEN should have taken into account the existence of a licence agreement between SOTEFI and the [[\*\*\*]] company under the factors affecting price comparability.<sup>153</sup> According to Tunisia, the investigating authority had all the information necessary

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<sup>149</sup> Tunisia's second written submission, para. 2.62.

<sup>150</sup> Tunisia's second written submission, para. 2.73.

<sup>151</sup> See paragraph 7.57 above.

<sup>152</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 140; Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.120.

<sup>153</sup> For Tunisia, this licence agreement constitutes an authorization to use an intellectual property right (for example, a design on the cover of the exercise books) and generates a significant price difference, particularly as a result of the royalties to be paid by SOTEFI. (Tunisia's first written submission, paras. 5.127-5.132; second written submission, para. 3.37)

to make allowance for this difference in the typology of the different exercise book models<sup>154</sup> or to make an adjustment for physical characteristics<sup>155</sup> when comparing the normal value and the export price. Thus, according to Tunisia:

**First**, the [domestic industry] itself acknowledged in the petition that licence use affected the price of exercise books by up to 5-10%. **Second**, SOTEFI provided a list of all the licensed exercise book models exported to Morocco. **Third**, SOTEFI placed on the record the contract entered into with the [[\*\*\*]] company requiring SOTEFI to pay [[\*\*\*]] so that the exercise books could bear an image of this entertainment company. **Fourth**, SOTEFI reported all sales of licensed and non-licensed exercise books in the Excel file dated 23 May 2018.<sup>156</sup>

7.110. Tunisia considers that if, despite the information on the investigation record, MIICEN considered that it required additional information, or wished that the information before it be submitted in a different format, MIICEN should have "'indicate[d] ... what information [was] necessary to ensure a fair comparison' as required by Article 2.4 of the Anti-Dumping Agreement".<sup>157</sup>

7.111. According to Tunisia, this difference had a significant impact on the margin of dumping calculated by MIICEN since, "by lumping together licensed and unlicensed exercise books in order to compare normal value and export price, the 'margin of dumping' for such models was inflated significantly".<sup>158</sup>

7.112. Tunisia therefore claims that the investigating authority violated the fair comparison obligation under Article 2.4 of the Anti-Dumping Agreement by failing to make due allowance for this difference in physical characteristics. It also requests the Panel to find that this violation of Article 2.4 gives rise to a "consequential" violation of Article 2.1 of the Anti-Dumping Agreement.<sup>159</sup> Lastly, Tunisia claims that MIICEN's decision to not take licences into account is not based on the evidence on the record and is, therefore, inconsistent with Article 12.2.2 of the Anti-Dumping Agreement.<sup>160</sup>

### 7.2.2.1.2 Analysis

#### 7.2.2.1.2.1 Tunisia's claim under Article 2.4 of the Anti-Dumping Agreement

7.113. The relevant provisions of Article 2.4 of the Anti-Dumping Agreement state that:

A fair comparison shall be made between the export price and the normal value. ... Due allowance shall be made in each case, on its merits, for differences which affect price comparability ... and any other differences which are also *demonstrated* to affect price comparability. ... The authorities shall indicate to the parties in question what

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<sup>154</sup> The record shows that MIICEN classified the exercise books according to certain characteristics "affecting price comparability", namely: the types of binding, the exercise books' format, the number of pages, the paper grammage, the types of cover and the types of varnish used on the cover. However, it refused to make allowances for three other physical characteristics requested by SOTEFI: the presence of round corners, the ruling and the use of licences. (Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 85; see also Tunisia's first written submission, para. 5.138; and second written submission, para. 3.36)

<sup>155</sup> Tunisia's first written submission, para. 5.139.

<sup>156</sup> Tunisia's response to Panel question No. 2.7, paras. 53 and 54 (italics original; fns omitted; bold type added). Tunisia adds that in the presentation by the exporters' representative at the public hearing on 30 April 2018, it was also noted that the determination of "types/specifications" should include the use of licences. (Presentation by SITPEC and SOTEFI (30 April 2018) (Exhibit TUN-21), p. 8; Tunisia's first written submission, para. 5.133. See also Tunisia's second written submission, paras. 3.41-3.45)

<sup>157</sup> Tunisia's response to Panel question No. 2.7, para. 54. See also Tunisia's second written submission, para. 3.53.

<sup>158</sup> Tunisia's first written submission, para. 5.138; second written submission, para. 3.59.

<sup>159</sup> Tunisia's response to Panel question No. 2.9, paras. 68 and 69. See also Tunisia's second written submission, para. 3.38.

<sup>160</sup> Tunisia's first written submission, para. 5.143; second written submission, para. 3.67. In response to a Panel question, Tunisia states, however, that it does not "object to the Panel exercising judicial economy with respect to Tunisia's claim under Article 12.2.2 of the Anti-Dumping Agreement, insofar as the Panel finds an inconsistency with Articles 2.4 and 2.1 of the Anti-Dumping Agreement". (Tunisia's response to Panel question No. 2.20, para. 130. See also Tunisia's second written submission, fn 90)

information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.<sup>161</sup>

7.114. This article focuses on the comparison between the normal value and the export price and contains the requirements enabling an investigating authority to ensure a "fair" comparison. In particular, it provides that the investigating authority shall, in its comparison, "make allowance" for differences which affect the "comparability" between the normal value and the export price. Article 2.4 does not prescribe a specific methodology for making allowance for such differences and therefore leaves the authorities the choice to classify the product under investigation by types presenting the same characteristics and/or to make the necessary adjustments when making the comparison.

7.115. Article 2.4 also allocates the burden of proof between the interested parties and the investigating authority in order to make allowance for differences affecting price comparability.

7.116. Thus, the obligation to ensure a "fair comparison" is lies on the investigating authorities<sup>162</sup> and it is therefore up to them to "make allowance" for differences when making a comparison. However, it is up to the party seeking an adjustment to "demonstrate" that there is a difference and that it affects price comparability. Therefore, in other dispute settlement proceedings, exporters were found to bear the burden of substantiating, "as constructively as possible", their requests for adjustments. Failing this, there is no obligation for the authority to make an adjustment.<sup>163</sup> In turn, the last sentence of Article 2.4 further states that the authorities shall nevertheless indicate to the parties what information is necessary to ensure a fair comparison, without imposing an "unreasonable" burden of proof on those parties.

7.117. This process, which is likely to continue throughout the investigation, has been described as a "dialogue" between the authority and interested parties.<sup>164</sup> The distribution of the burden of proof between the authority and the interested parties is the same, regardless of the method used by the authority to "make allowance" for differences affecting price comparability. Article 2.4 does not differentiate in this regard between whether the investigating authority uses - for the purposes of comparability - a typology of models or makes adjustments at the comparison stage.

7.118. In the present dispute, we are therefore faced with two questions in the light of Tunisia's arguments:

- a. Did the investigating authority indicate to SOTEFI what information was necessary to ensure a fair comparison?
- b. Did SOTEFI demonstrate that licenses affected price comparability?

7.119. In the following paragraphs, we examine these two questions in turn.

#### **7.2.2.1.2.1.1 Did MIICEN indicate to SOTEFI what information was necessary to ensure a fair comparison?**

7.120. The investigation record shows that MIICEN did establish a "dialogue" with SOTEFI in respect of the requested adjustments:

- a. The questionnaire sent to SOTEFI upon initiation of the investigation requested the company to explain "in detail" each of the requested adjustments, including by reporting "actual expenditure" and indicating whether such expenditure is subsidized. A specific section was provided for the requested adjustments relating to the physical characteristics of the exercise books. The company was also requested to identify the market value of those adjustments and the corresponding references in the company's accounts, so that

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<sup>161</sup> Fn omitted; emphasis added.

<sup>162</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 487 (quoting Appellate Body Report, *US – Hot-Rolled Steel*, para. 178).

<sup>163</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 488 (quoting Panel Report, *EC – Tube or Pipe Fittings*, para. 7.158).

<sup>164</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 489.

they could be verified.<sup>165</sup> Lastly, the company was asked to report the adjustments in the electronic file in the "Ventedom" sheet.<sup>166</sup>

- b. Subsequently, "[o]n 15 August 2017, MIICEN sent the exporters a deficiency letter in which it asked the following question: '[p]lease explain further whether there are any licensed trademarks used on the covers of the exercise books'".<sup>167</sup>
- 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.)".<sup>168</sup>

#### **7.2.2.1.2.1.2 For its part, did SOTEFI "demonstrate" that licences affected price comparability?**

7.121. The record shows that SOTEFI did not request an adjustment in its questionnaire response. It is only in response to the deficiency letter that SOTEFI provided a list of licensed exercise books sold in the Tunisian and export markets<sup>169</sup>, and the licence contract between SOTEFI and the [[\*\*]] company.<sup>170</sup> It also appears that in a revised version of its initial response to MIICEN's questionnaire, SOTEFI included a column in the "Ventedom" sheet of its electronic file to distinguish between those exercise books that were sold under licence and those that were sold without a licence.<sup>171</sup>

7.122. Subsequently, the report on the definitive determination states that "[f]ollowing the publication of the preliminary determination ... [the exporters] requested that other criteria be included in the classification and comparison, namely: types of covers (coated paper, coated cardboard, rigid, PP-rigid), cover varnishes (without varnish, UV varnish or acrylic varnish, polypropylene, film), the presence of round corners (with or without), ruled (5/5, 10/10, seyes, uniseyes-uni) and the use of licences".<sup>172</sup>

7.123. It can therefore be deduced that, having not requested an adjustment for licences in its initial response to the questionnaire, SOTEFI clarified its request in various exchanges with the investigating authority.

7.124. However, as Morocco notes before us<sup>173</sup>, it is clear from the record that SOTEFI never provided the information requested by the authority in the questionnaire, that is to say, by explaining the requested adjustment in detail, reporting the actual expenditure, as well as the market value of these adjustments and the corresponding references in the company's accounts. 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.<sup>174</sup>

7.125. Another panel considered that an exporter was not obliged to request an adjustment in its response to the initial questionnaire and could do so later in the investigation.<sup>175</sup> We agree. However, we believe that there remains a requirement to provide the information requested by the authority, provided that the burden of proof imposed on the exporter is not "unreasonable", within the meaning

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<sup>165</sup> SOTEFI's responses to the questionnaire (Exhibit MAR-CONF-15 (BCI)), p. 31.

<sup>166</sup> SOTEFI's response to the questionnaire (Exhibit MAR-CONF-15 (BCI)), p. 31.

<sup>167</sup> Tunisia's response to Panel question No. 2.1, para. 81; Morocco's second written submission, para. 152.

<sup>168</sup> Email dated 4 May 2018 (Exhibit TUN-72).

<sup>169</sup> List of licensed products sold in the domestic and export markets (Exhibit TUN-44 (BCI)).

<sup>170</sup> Tunisia's response to Panel question No. 2.1, para. 81.

<sup>171</sup> Tunisia's response to Panel question No. 2.7, para. 53 and fn 31. See also revised data provided by SOTEFI (Exhibit TUN-11 (BCI)), column N of the "Ventedom" sheet. The data relating to licences also appear in the file provided by MIICEN. (Excel file containing the dumping margin calculation (SOTEFI) (TUN-14 (BCI)), column M of the "Ventedom brut" sheet). In this regard, see Tunisia's second written submission, para. 3.43.

<sup>172</sup> Report on the definitive determination (Exhibit MAR-CONF-3 (BCI)), para. 83.

<sup>173</sup> Morocco's first written submission, fn 75. See also Morocco's response to Panel question No. 2.3, para. 51.

<sup>174</sup> Morocco's first written submission, fn 75.

<sup>175</sup> Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.83.

of the last sentence of Article 2.4 of the Anti-Dumping Agreement. We note that in the present dispute, Tunisia does not assert that the burden of proof imposed by MIICEN was "unreasonable".

#### **7.2.2.1.2.1.3 Conclusion on consistency with Article 2.4**

7.126. In view of the foregoing, it therefore appears that the investigating authority did comply with the requirement of Article 2.4 of the Anti-Dumping Agreement by indicating to SOTEFI what information was necessary to ensure a fair comparison. However, the record shows that 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.<sup>176</sup>

7.127. Tunisia insists that, in this case, SOTEFI was not asking for a precise adjustment for each transaction, but for an allowance to be made for licences in the classification of the exercise books by model. It asserts that, unlike a strict adjustment, the creation of a classification by model at the start of the investigation would not require specific information on the magnitude of the price difference.<sup>177</sup>

7.128. As noted above<sup>178</sup>, 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. It is up to the party seeking an adjustment to "demonstrate" that there is a difference and that it affects price comparability. It is also incumbent on this party to respond "as constructively as possible" to requests for information made by the authority, provided that it does not impose an unreasonable burden of proof.

7.129. We therefore conclude that Tunisia has failed to demonstrate that Morocco violated the provisions of Article 2.4 in this case.

#### **7.2.2.1.2.2 Tunisia's claim under Article 2.1 of the Anti-Dumping Agreement**

7.130. Tunisia also requests the Panel to find that the alleged violation of Article 2.4 gives rise to a "consequential" violation of Article 2.1 of the Anti-Dumping Agreement.<sup>179</sup>

7.131. In particular, Tunisia explains that, "any inconsistency with Article 2.4 of the Anti-Dumping Agreement that has the effect of inflating the margin of dumping leads to an inconsistency with the requirement under Article 2.1 that a product 'is to be considered as being dumped' only if the normal value is higher than the export price".<sup>180</sup>

7.132. It also explains that:

[I]nsofar as the Panel finds that, by disregarding the use of licences as a relevant criterion for the classification of the product under consideration, MIICEN failed to make a fair comparison, this is inconsistent not only with Article 2.4 but also, and consequentially, with Article 2.1, which requires a comparison between the normal value and the export price.<sup>181</sup>

7.133. Having failed to find any "inconsistency with Article 2.4 of the Anti-Dumping Agreement that has the effect of inflating the margin of dumping", or find that "by disregarding the use of licences, MIICEN failed to make a fair comparison", we need not consider whether there is a "consequential" violation of Article 2.1.

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<sup>176</sup> The panel in *EC – Tube or Pipe Fittings*, faced with similar facts, reached the same conclusion. (Panel Report, *EC – Tube or Pipe Fittings*, para. 7.189)

<sup>177</sup> Tunisia's second written submission, para. 3.52.

<sup>178</sup> See para. 7.117 above.

<sup>179</sup> Tunisia's response to Panel question No. 2.9, paragraphs 68 and 69.

<sup>180</sup> Tunisia's response to Panel question No. 2.9, para. 68. (with italics in the original)

<sup>181</sup> Tunisia's response to Panel question No. 2.9, para. 69.

### 7.2.2.1.2.3 Tunisia's claim under Article 12.2.2 of the Anti-Dumping Agreement

7.134. We recall that Tunisia makes a claim under Article 12.2.2 of the Anti-Dumping Agreement.<sup>182</sup>

7.135. Thus, Tunisia considers that MIICEN's explanation that the record lacked "satisfactory justification of [the effect of the licences] on costs and prices and ... their impact on price comparability is insignificant"<sup>183</sup> does not comply with the obligation contained in Article 12.2.2 to indicate all relevant information.<sup>184</sup>

7.136. The provisions of Article 12.2.2, relevant to this case, state that:

A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty ... shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures. ... In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers[.]

7.137. Tunisia refers to several panel reports that have interpreted Article 12.2.2 as follows:

[Requiring] that the investigating authority set forth in the relevant opinion or report "the findings and conclusions reached on all issues of fact ... considered material by the investigating authorities". An "issue of fact" under Article 12.2.2 was interpreted to be an "issue that [had] arisen in the course of the investigation and that must necessarily be resolved in order for the investigating authorities to be able to reach their determination".<sup>185</sup>

7.138. Conversely, Morocco insists that Article 12.2.2 of the Anti-Dumping Agreement only requires an authority to discuss the "relevant" arguments in its report.<sup>186</sup> It considers that "[w]here an interested party has not presented arguments before an authority, there is consequently no 'argument' to be evaluated by the authority and, a fortiori, there is no argument to be disclosed under Article 12.2.2 and, ultimately, there is nothing for a panel to examine".<sup>187</sup>

7.139. In this case, MIICEN referred in its report on the definitive determination to SOTEFI's arguments concerning the licences, as follows:

- a. The report states that at the meetings held on 30 April 2018, "the matter of allowance not being made for characteristics was discussed at length" and that MIICEN informed the exporters "that their background files did not allow certain characteristics to be taken into consideration because [the files] were not completed, nor did they make it possible to justify [the characteristics] importance".<sup>188</sup>
- b. The report then states that MIICEN "did not include in the classification certain characteristics for which there was no satisfactory justification of their effect on costs or prices, and whose impact on price comparability was found to be insignificant. This concerns ruling, round corners and the use of licences".<sup>189</sup>

7.140. The report on the definitive determination therefore does explain that the exporters requested that allowance be made for licences as a difference affecting price comparability. The

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<sup>182</sup> Tunisia's first written submission, para. 5.143; second written submission, para. 3.67. See also Tunisia's response to Panel question No. 1.5, para. 48.

<sup>183</sup> Tunisia's first written submission, para. 5.143 (quoting the report on the definitive determination, (Exhibit TUN-7), para. 85).

<sup>184</sup> Tunisia's response to Panel question No. 1.5, para. 48.

<sup>185</sup> Tunisia quotes Panel Reports, *EC – Tube or Pipe Fittings*, para. 7.424; and *EU – Footwear (China)*, para. 7.844. (Tunisia's response to Panel question No. 1.5, para. 46)

<sup>186</sup> Morocco's response to Panel question No. 2.23, para. 21.

<sup>187</sup> Morocco's response to Panel question No. 2.23, para. 26.

<sup>188</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 84.

<sup>189</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 84.



report does not cite all the evidence on the record, which, according to Tunisia, should have led MIICEN to grant an adjustment for the licences, such as the contract between SOTEFI and the [[\*\*\*]] company, or the revised spreadsheet indicating which models were sold under licence. However, like other previous panels, we do not understand Article 12.2.2 to "impose a formalistic obligation to identify each and every relevant argument and explicitly provide the reasons for accepting or rejecting each such argument".<sup>190</sup> On the other hand, we consider it essential that the report explain "the reasons" for rejecting the argument that MIICEN should have "made allowance" for licences as a factor affecting price comparability.

7.141. However, on this point, Tunisia considers<sup>191</sup> (and Morocco recognizes<sup>192</sup>) that paragraph 85 of the report on the definitive determination is imprecise. Thus, this paragraph can be read as indicating both that there was no satisfactory justification for the effect of the licences on costs or prices and that MIICEN nevertheless found that their impact on price comparability was "insignificant". We consider that this sentence is contradictory since an authority could only find that the impact of licences on price comparability is insignificant if the record contained justifications in this regard.

7.142. Moreover, before us, Morocco adds that the term "insignificant" used in this context was, in fact, referring to the share of licensed exercise books in the volume of exercise books exported to Morocco.<sup>193</sup> However, this aspect of MIICEN's findings does not appear on the investigation record and therefore cannot be used before us to explain MIICEN's decision to reject SOTEFI's request for an adjustment. We also find that the adjective, "insignificant", does apply to "the impact on price comparability" in MIICEN's report.

7.143. We therefore consider that the contradictory nature of paragraph 85 of the report on the definitive determination does not allow interested parties to understand why the request for an adjustment or classification for licences was rejected by MIICEN. We conclude, for this reason, that the report on the definitive determination does not give "the reasons for the ... rejection of relevant arguments or claims made by the exporters" and that Morocco did not therefore act in conformity with the provisions of Article 12.2.2 of the Anti-Dumping Agreement.

### **7.2.2.1.3 Conclusion on licences**

7.144. In view of the foregoing, we therefore conclude that Morocco did not act in conformity with the provisions of Article 12.2.2, by failing to explain clearly the reasons for the rejection of the exporters' argument to take licences into account as a factor that may affect price comparability. However, we reject Tunisia's claim that Morocco violated the fair comparison obligation by failing to take due account of licences as a factor affecting price comparability. Having failed to find any inconsistency with Article 2.4, we need not consider whether there is a "consequential" violation of the provisions of Article 2.1 of the Anti-Dumping Agreement.

### **7.2.2.2 Whether the mathematical formula used by MIICEN to calculate the margin of dumping was inconsistent with Articles 2.1 and 2.4 of the Anti-Dumping Agreement**

#### **7.2.2.2.1 Introduction**

7.145. Tunisia contests the mathematical formula used by MIICEN to establish the margin of dumping of the two Tunisian exporters that participated in the investigation. Tunisia contests, in particular, the numerator and the denominator chosen by the Moroccan investigating authority, for the following reasons:

MIICEN calculated, erroneously, the overall dumping amount placed in the numerator of the dumping margin formula, as well as the total export value placed in the denominator of that formula. These errors resulted, against all logic, in a "margin of dumping" expressed in a unit of volume (a percentage of the volume of sales in the

<sup>190</sup> Panel Report, *US – OCTG (Korea)*, para. 7.301.

<sup>191</sup> Tunisia's response to Panel question No. 2.8, para. 64.

<sup>192</sup> Morocco's response to Panel question No. 2.3, paras. 49-53.

<sup>193</sup> Morocco's response to Panel question No. 2.3, para. 52.

Moroccan market), instead of a margin of dumping in a unit of currency (a percentage of the export price), which is contrary to the very nature of the margin of dumping.<sup>194</sup>

7.146. Tunisia summarizes its claims as follows:

Tunisia requests the Panel to examine whether the calculation of the margin of dumping obtained on the basis of a formula containing a numerator and a denominator expressed in a unit of volume violates the obligation under Articles 2.4 and 2.1 to make a "fair comparison" between the normal value and the export price.<sup>195</sup>

7.147. It asserts that these errors led to an "inflated" margin of dumping for the two exporters and that this margin is inconsistent both with the obligation to make a "fair comparison" between the normal value and the export price within the meaning of Article 2.4, and, in a "consequential" manner<sup>196</sup> (i.e. subject to a finding of violation of Article 2.4), with Article 2.1 of the Anti-Dumping Agreement.<sup>197</sup>

7.148. Morocco, for its part, takes the view that Tunisia is contesting intermediate calculations that do not represent the margin of dumping as such, and that therefore cannot be contested on the basis of Article 2.4.<sup>198</sup> Morocco also asserts that the fair comparison obligation in Article 2.4 of the Anti-Dumping Agreement does not apply to the facts described by Tunisia. Morocco thus explains that:

Tunisia requests the Panel to build from the first sentence of Article 2.4 a "catch-all" obligation where any calculation error in the "comparison after having obtained both the normal value and the export price" results in a twofold violation of Article 2.4 and, "consequentially", Article 2.1.<sup>199</sup>

7.149. Thus, if Tunisia had wanted to contest MIICEN's calculation method, it should have relied on Article 2.4.2 of the Anti-Dumping Agreement and not on the first sentence of Article 2.4:

Tunisia chose not to make a claim under Article 2.4.2 in its panel request. The Panel should reject Tunisia's attempt to raise arguments concerning issues specifically addressed in Article 2.4.2 by erroneously importing them to the first sentence of Article 2.4 through Article VI:2 of GATT 1994.<sup>200</sup>

#### **7.2.2.2.2 Analysis**

7.150. We recall that Morocco requests, in the first instance, that we do not examine this argument put forward by Tunisia, on the grounds that it would amount to asking the Panel for a *de novo* review, prohibited under Article 17.6(i) of the Anti-Dumping Agreement. In this case, Morocco asserts that the interested parties never raised this matter before the authority and therefore cannot do so for the first time before us.<sup>201</sup>

7.151. We consider Morocco's objection to be without merit.

7.152. We recall that Article 17.6(i) of the Anti-Dumping Agreement, read together with Article 11 of the DSU, sets out the standard to be applied by panels when assessing whether a Member's investigating authorities have "established" and "evaluated" the facts consistently with that Member's obligations under the covered agreements.<sup>202</sup> This provision precludes a panel from substituting the investigating authority by engaging in an independent fact-finding exercise.

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<sup>194</sup> Tunisia's first written submission, para. 5.88.

<sup>195</sup> Tunisia's response to Panel question No. 2.14, para. 88.

<sup>196</sup> Tunisia's response to Panel question No. 2.18, paras. 113 and 114.

<sup>197</sup> Tunisia's panel request contains a claim under Article VI:1 of GATT 1994 relating to the fair comparison obligation. However, in its responses to the Panel's questions, Tunisia indicates that it is not pursuing this claim. (Tunisia's response to Panel question No. 2.21, para. 132)

<sup>198</sup> Morocco's second written submission, para. 101.

<sup>199</sup> Morocco's comments on Tunisia's response to Panel question No. 2.16, para. 155.

<sup>200</sup> Morocco's comments on Tunisia's response to Panel question No. 2.16, para. 158.

<sup>201</sup> Morocco's second written submission, para. 101.

<sup>202</sup> Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 84.

However, if requested to do so by the parties, a panel must determine whether the authority's establishment of the facts was proper and whether its evaluation of those facts was unbiased and objective.

7.153. In this case, Tunisia is not asking us to re-evaluate the facts and substitute our evaluation for that of the authority. It is asking us to find, on the basis of the facts contained in the investigating authority's record, that the authority determined the margin of dumping of Tunisian producers/exporters in a manner that was inconsistent with Articles 2.1 and 2.4 of the Anti-Dumping Agreement. It is therefore a question of application of the rules of the Anti-Dumping Agreement, which clearly falls within our jurisdiction.

7.154. We will therefore proceed to examine the arguments put forward by Tunisia.

7.155. In the sections that follow, we conclude that the mathematical formula used by MIICEN to calculate the margin of dumping was erroneous, and we analyse whether this error constitutes, as Tunisia asserts, a violation of the fair comparison obligation in Article 2.4 of the Anti-Dumping Agreement.

#### **7.2.2.2.2.1 The mathematical formula used by MIICEN was erroneous**

7.156. The record, and particularly the electronic spreadsheets sent by the authority to the producers/exporters cooperating in the investigation, show that the margins of dumping for each of them were established as follows:

7.157. As regards the formula's numerator, the spreadsheets show that MIICEN compared, for each exercise book model, the normal value and the export price and, in doing so, obtained a dumping amount per model<sup>203</sup> that it then expressed as a percentage of the export price.<sup>204</sup> The problem identified by Tunisia does not stem from this intermediate calculation, but from the fact that MIICEN then, for each model, multiplied the exported amounts<sup>205</sup> by the percentage of dumping obtained per model<sup>206</sup> and presented this result as the "dumping amount"<sup>207</sup> for each model. This result does not, however, represent the value of dumping per model, but simply a portion of the exports of each model. The sum of these "dumping amounts" is therefore, in reality, only a sum of fractions of exports by model. This figure is, logically, irrelevant to the calculation of a margin of dumping.

7.158. As regards the formula's denominator, these same exhibits show that MIICEN divided this "dumping amount" by the amounts exported.<sup>208</sup>

7.159. The result of this division does not allow for the expression of a percentage of dumping for the product exported by each producer/exporter, insofar as it represents the division of a partial export volume by the total volume of exports. The calculation made by MIICEN does not therefore represent a margin of dumping.

7.160. In making this finding, we are not questioning the fact that a margin of dumping can be expressed in different ways and, in particular, in *ad valorem* form, i.e. by expressing the dumping value as a percentage of the export value, or in a specific form, i.e. in a unit of currency per unit of volume. What is at issue here is the ability of MIICEN's formula to express dumping when using as a numerator a figure that does not represent an amount of dumping but rather an irrelevant export volume.

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<sup>203</sup> Excel file containing the dumping margin calculation (SITPEC) (Exhibit TUN-12 (BCI)); Excel file containing the dumping margin calculation (SOTEFI) (Exhibit TUN-14 (BCI)), column H of the "Dumping" sheet.

<sup>204</sup> Excel file containing the dumping margin calculation (SITPEC) (Exhibit TUN-12 (BCI)); Excel file containing the dumping margin calculation (SOTEFI) (Exhibit TUN-14 (BCI)), column K of the "Dumping" sheet.

<sup>205</sup> Excel file containing the dumping margin calculation (SITPEC) (Exhibit TUN-12 (BCI)); Excel file containing the dumping margin calculation (SOTEFI) (Exhibit TUN-14 (BCI)), column G of the "Dumping" sheet.

<sup>206</sup> Excel file containing the dumping margin calculation (SITPEC) (Exhibit TUN-12 (BCI)), column J of the "Dumping" tab; Excel file containing the dumping margin calculation (SOTEFI) (Exhibit TUN-14 (BCI)), column K of the "Dumping" sheet.

<sup>207</sup> Excel file containing the dumping margin calculation (SITPEC) (Exhibit TUN-12 (BCI)); Excel file containing the dumping margin calculation (SOTEFI) (Exhibit TUN-14 (BCI)), column L of the "Dumping" sheet.

<sup>208</sup> Excel file containing the dumping margin calculation (SITPEC) (Exhibit TUN-12 (BCI)); Excel file containing the dumping margin calculation (SOTEFI) (Exhibit TUN-14 (BCI)), cell L116 of the "Dumping" sheet.

7.161. Having established that the formula used by MIICEN was erroneous, there are two questions we must address in order to respond to Tunisia's claim under Article 2.4 of the Anti-Dumping Agreement:

- a. whether the fair comparison obligation really applies to the issue of the calculation of margins of dumping, which is more specifically covered by the second subparagraph of Article 2.4 (Article 2.4.2); and, if so,
- b. whether the error identified by Tunisia in the mathematical formula used to calculate the margin of dumping really violates the fair comparison principle set out in Article 2.4.

7.162. We will address these two questions in turn in the following paragraphs.

#### **7.2.2.2.2 Does the fair comparison principle apply to the formula used to calculate the margin of dumping?**

7.163. In other dispute settlement proceedings, the obligation to make a fair comparison was found to apply not only to price comparability issues, but also to the calculation of the margin of dumping, as described in Article 2.4.2.<sup>209</sup>

7.164. That finding was based primarily on the following elements:

- a. the fact that provisions on currency conversions and the establishment of margins of dumping during the investigation phase are not contained in separate paragraphs of Article 2 but are indented as subparagraphs of Article 2.4 means that these provisions and the provisions in the chapeau of Article 2.4 are part of a whole<sup>210</sup>; and
- b. the expression "[s]ubject to the provisions governing fair comparison in paragraph 4" in Article 2.4.2 supports an interpretation that the "fair comparison" requirement is of broader application than the issue of price comparability.<sup>211</sup>

7.165. We find this approach to be convincing and are adopting it in this dispute.

7.166. In the present case, we note that the comparison between the normal value and the export price of each exercise book model is not - in itself - the root of the problem: this comparison was made for each model sold and gave rise to the establishment of intermediate margins expressed in percentage terms, which are accurate.<sup>212</sup> The problem identified by Tunisia instead concerns the aggregation of these intermediate margins and, in particular, the use, as numerator, of a figure that is irrelevant to the calculation of the margin of dumping.

7.167. Another panel took the view that the process of aggregation was an integral part of the comparison that is undertaken between export prices and weighted-average normal values and thus fell "squarely within the 'comparison' that is envisaged and regulated under the first sentence of Article 2.4".<sup>213</sup> We also note that Tunisia refers to the provisions of Article VI:2 of GATT to provide context and asserts that:

Article VI:2 of GATT 1994 defines the "margin of dumping" as "the price difference determined" between the export price and the normal value. This "price difference" is, necessarily, related to the comparison between the normal value and the export price. Therefore, the obligation to make a "fair comparison" within the meaning of the first sentence of Article 2.4 (in order to identify the "price difference" referred to in Article VI:2 of GATT 1994) applies to the entire dumping margin calculation, i.e. to the whole

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<sup>209</sup> See, for example, Panel Report, *US — Zeroing (EC)*, para. 7.258.

<sup>210</sup> Panel Report, *US - Zeroing (EC)*, para. 7.254.

<sup>211</sup> Panel Report, *US - Zeroing (EC)*, para. 7.255.

<sup>212</sup> Excel file containing the dumping margin calculation (SITPEC) (Exhibit TUN-12 (BCI)), column J of the "Dumping" sheet; Excel file containing the dumping margin calculation (SOTEFI) (Exhibit TUN-14 (BCI)), column K of the "Dumping" sheet.

<sup>213</sup> Panel Report, *US - Orange Juice (Brazil)*, para. 7.144.

mathematical process of comparison after having identified both the normal value and the export price.<sup>214</sup>

7.168. We agree with the finding that the fair comparison obligation applies not only to the comparison made between the normal value and the export price for each model or transaction, but also to the aggregation of these individual margins so as to reflect a margin of dumping for the product as a whole. From this perspective, we therefore agree with Tunisia's argument that the fair comparison principle does apply to the mathematical formula used by MIICEN to calculate the margin of dumping of the two Tunisian exporters.

#### **7.2.2.2.3 Does the calculation error made by MIICEN violate Article 2.4 of the Anti-Dumping Agreement?**

7.169. Having decided that the fair comparison principle was indeed applicable to the mathematical formula used by MIICEN, we still need to determine whether the error identified by Tunisia constitutes a violation of this obligation.

7.170. In the case on the zeroing of margins of dumping, the panel considered that:

[I]n order to determine what is "fair" under the [Anti-Dumping] Agreement in relation to the calculation of margins of dumping, we must take into account substantive rules and concepts in the [Anti-Dumping] Agreement relevant to the issue of the determination of margins of dumping. In particular, our analysis must take into account Article 2.4.2 of the [Anti-Dumping] Agreement, which is the only provision of the [Anti-Dumping] Agreement that specifically addresses the subject of methods of determining margins of dumping.<sup>215</sup>

7.171. While the conclusion drawn by that panel at the time - that zeroing negative margins of dumping is not necessarily inconsistent with the fair comparison obligation - was subsequently invalidated by the Appellate Body, its reasoning relating to "what is fair" for the calculation of margins of dumping seems, in our view, to be relevant in the context of the present dispute. Indeed, as the same panel observed, Article 2.4.2 of the Anti-Dumping Agreement is "the only provision of the ... Agreement that specifically addresses the subject of methods of determining margins of dumping". Article 2.4.2 of the Anti-Dumping Agreement "explains how domestic investigating authorities must proceed in establishing 'the existence of margins of dumping', that is, it explains how they must proceed in establishing that there *is* dumping".<sup>216</sup>

7.172. In the present case, we recall that Tunisia does not claim in its written submissions that the erroneous methodology used by MIICEN is inconsistent with Article 2.4.2 of the Anti-Dumping Agreement. We cannot therefore examine the conformity of the formula used by MIICEN with the provisions of Article 2.4.2 in order to draw conclusions as to its conformity with Article 2.4. Nevertheless, Tunisia has demonstrated that the mathematical formula used by MIICEN was incorrect and did not therefore represent a dumping calculation. The fact that Tunisia did not raise an argument under Article 2.4.2 does not therefore, in our view, preclude a finding that Morocco violated the Article 2.4 fair comparison obligation.

7.173. The Larousse dictionary defines the term "équitable" (fair) as that which is "conforme à l'équité, à la justice" (in accordance with fairness, with justice).<sup>217</sup> Similarly, the Le Robert dictionary, defines it as that which is "conforme à l'équité, qui ne lèse personne" (in accordance with fairness, which does not wrong anyone).<sup>218</sup>

7.174. In *US — Softwood Lumber V*, the Appellate Body defined the "[t]he term 'fair' ... [as] connot[ing] impartiality, even-handedness, or lack of bias".<sup>219</sup> In that case, the Appellate Body

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<sup>214</sup> Tunisia's response to Panel question No. 2.16, para. 96. (with italics in the original)

<sup>215</sup> Panel Report, *US - Zeroing (EC)*, para. 7.262.

<sup>216</sup> Appellate Body Report, *EC - Bed Linen*, para. 51. (emphasis original)

<sup>217</sup> Dictionnaire Larousse, definition of "équitable" [https://www.larousse.fr/dictionnaires/francais/per\\_centa3\\_per\\_centa9equitable/30708](https://www.larousse.fr/dictionnaires/francais/per_centa3_per_centa9equitable/30708) (accessed 15 April 2021).

<sup>218</sup> Dictionnaire Le Robert, definition of "équitable" <https://dictionnaire.lerobert.com/definition/equitable> (accessed 15 April 2021).

<sup>219</sup> Appellate Body Report, *US — Softwood Lumber V (Article 21.5 — Canada)*, para. 138.

considered that the use of zeroing in a transaction-to-transaction comparison was not "fair" within the meaning of Article 2.4 of the Anti-Dumping Agreement because:

[T]he use of zeroing under the transaction-to-transaction comparison methodology artificially inflates the magnitude of dumping, resulting in higher margins of dumping and making a positive determination of dumping more likely. This way of calculating cannot be described as impartial, even-handed, or unbiased. For this reason, we do not consider that the calculation of "margins of dumping", on the basis of a transaction-to-transaction comparison that uses zeroing, satisfies the "fair comparison" requirement within the meaning of Article 2.4 of the Anti-Dumping Agreement.<sup>220</sup>

7.175. In the present case, we are not ruling on whether the error identified by Tunisia "tends to result in higher margins of dumping". Indeed, we recall another panel's conclusion that:

[T]he obligation under Article 2.4 is focused on the "comparison" between export price and normal value, not its impact. In other words, it is the nature of the "comparison" itself, and not the results of that comparison, that is disciplined under Article 2.4.<sup>221</sup>

7.176. We share this view. The fact that MIICEN's error "accidentally" led to a margin of dumping higher than that which would have been the case with a correct mathematical formula is not sufficient to prove a violation of Article 2.4.

7.177. In this case, we found that the calculation methodology used was incapable of:

- a. correctly expressing dumping, i.e. determining whether Tunisian exercise books are introduced into the commerce of Morocco at less than their normal value; and
- b. yielding a result that correctly reflects the margin of dumping for each producer/exporter.

7.178. This is therefore the nature of the comparison made by MIICEN, which (a) by not permitting dumping to be expressed correctly, i.e. by not permitting a determination as to whether Tunisian exercise books are introduced into the commerce of Morocco at less than their normal value; and (b) by not reflecting the reality of the dumping attributable to each exporter, is incapable of ensuring a fair comparison.

7.179. In the light of the foregoing, we therefore conclude that MIICEN's use of an erroneous formula did indeed violate the fair comparison obligation contained in Article 2.4 of the Anti-Dumping Agreement.

7.180. We turn next to Tunisia's claim under Article 2.1.

#### **7.2.2.2.4 Does the calculation error made by MIICEN violate Article 2.1 of the Anti-Dumping Agreement?**

7.181. With regard to the alleged violation of Article 2.1 of the Anti-Dumping Agreement, Tunisia summarizes its claim as follows:

MIICEN failed to make a fair comparison as required under Article 2.4, and therefore did not correctly establish whether the product under consideration "is to be considered as being dumped" under the terms of Article 2.1 of the Anti-Dumping Agreement.

Accordingly, if the Panel finds inconsistency with the first sentence of Article 2.4 in respect of the use of an erroneous mathematical formula to calculate the margin of dumping, any inconsistency with Article 2.1 will necessarily be consequential.<sup>222</sup>

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<sup>220</sup> Appellate Body Report, *US - Softwood Lumber V (Article 21.5 – Canada)*, para. 142.

<sup>221</sup> Panel Report, *US – Orange Juice (Brazil)*, para. 7.156.

<sup>222</sup> Tunisia's response to Panel question No. 2.18, paras. 113 and 114.

7.182. We noted above<sup>223</sup> that other panels and the Appellate Body have regarded Article 2.1 of the Anti-Dumping Agreement as a purely definitional provision, i.e. as not itself imposing obligations.<sup>224</sup> Furthermore, we consider that establishing a violation of Article 2.1, even a consequential one, requires the requesting party to explain how the measure at issue specifically violates that provision of the Anti-Dumping Agreement.

7.183. In the present case, we consider that Tunisia's arguments in support of its claim under Article 2.1 are the same as those developed in support of its claim under Article 2.4 of the Anti-Dumping Agreement. In our view, they are not sufficient to establish what Morocco's obligations are under Article 2.1, or how these obligations were violated on account of the error made by MIICEN in the choice of mathematical formula for calculating the margin of dumping.

#### **7.2.2.2.3 Conclusion on the mathematical formula**

7.184. In view of the foregoing, we therefore conclude that Tunisia has demonstrated that Morocco violated Article 2.4 of the Anti-Dumping Agreement by using an erroneous mathematical formula to calculate the margin of dumping of the Tunisian exporters. We also conclude, however, that Tunisia has failed to demonstrate any violation of Article 2.1 of the Anti-Dumping Agreement.

### **7.3 Tunisia's claims regarding the determination of injury**

7.185. In this dispute, Tunisia criticizes several aspects of the determination of injury by the Moroccan investigating authority. According to Tunisia, MIICEN acted inconsistently with:

- a. Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing to objectively analyse the volume of imports relative to the domestic production and consumption of exercise books<sup>225</sup>;
- b. Articles 3.1 and 3.2 of the Anti-Dumping Agreement by erroneously and non-objectively analysing the effects of imports on the price of domestic exercise books; and
- c. Articles 3.1 and 3.4 of the Anti-Dumping Agreement by failing to objectively analyse the economic situation of the Moroccan industry.

7.186. First, we analyse the claim concerning the effects of Tunisian imports on prices and address the other two claims in turn in the following sections.

#### **7.3.1 Whether MIICEN examined the effects of imports on the price of the domestic product in a manner inconsistent with Article 3.1 and the second sentence of Article 3.2 of the Anti-Dumping Agreement**

##### **7.3.1.1 Introduction**

7.187. As part of this claim, Tunisia challenges MIICEN's findings on the effects of Tunisian imports of exercise books on the prices of the domestic product. MIICEN's report on the definitive determination states:

The dumped imports of exercise books originating in Tunisia had a *significant* effect on the prices of the locally manufactured exercise book in terms of undercutting, *significant* price depression and price suppression of locally manufactured exercise books.<sup>226</sup>

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<sup>223</sup> Para. 7.57.

<sup>224</sup> Appellate Body Report, *US - Zeroing (Japan)*, para. 140; Panel Report, *Ukraine - Ammonium Nitrate*, para. 7.120.

<sup>225</sup> At the first hearing, Tunisia clarified that it was making two separate claims under Articles 3.1 and 3.2 of the Anti-Dumping Agreement. One of the claims relates to the analysis of the volume of imports relative to production and domestic consumption, while the other addresses certain aspects of the examination of the effects of imports on the price of the domestic product. However, Tunisia would like the Panel to address the three price effects referred to in Article 3.2 and to make findings on each of these effects. (Tunisia's response to Panel question No. 3.2 at the first meeting of the Panel)

<sup>226</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 180. (emphasis added)

7.188. Tunisia's claim is thus divided into three parts: the "erroneous" and non-objective examination of price undercutting, price depression and price suppression.

7.189. Below, we address these three grievances outlined by Tunisia.

### **7.3.1.2 Analysis**

#### **7.3.1.2.1 Applicable requirements of Article 3.1 and the second sentence of Article 3.2 of the Anti-Dumping Agreement**

7.190. Article 3.1 of the Anti-Dumping Agreement provides:

A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

7.191. Article 3.1 requires a determination of injury to be based on positive evidence and involve an objective examination. The term "positive evidence" in Article 3.1 refers to "the facts underpinning and justifying the injury determination" and relates to "the quality of the evidence that [an investigating authority] may rely upon in making a determination".<sup>227</sup> The word "positive" means that the "evidence must be of an affirmative, objective and verifiable character, and ... credible".<sup>228</sup>

7.192. The term "objective examination", on the other hand, is concerned with the investigative process itself, i.e. "the way in which the evidence is gathered, inquired into and, subsequently, evaluated".<sup>229</sup> In order to qualify as "objective", the investigative process must "conform to the dictates of the basic principles of good faith and fundamental fairness" and be conducted "in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation".<sup>230</sup> Moreover, to conduct an objective examination, the authority must take into account conflicting evidence and plausible explanations that may contradict its own hypotheses.<sup>231</sup>

7.193. The Anti-Dumping Agreement does not establish a specific period or any guidance for the selection of the period of injury data collection. However, regardless of the period selected, the investigating authority must ensure that its examination of the data from the selected period is objective and based on positive evidence.

7.194. The second sentence of Article 3.2 of the Anti-Dumping Agreement provides for an examination by the investigating authority of the effects of imports on the price of the like product:

With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

7.195. Article 3.2 refers to three types of price effects that are separated by the words "or" and "otherwise". The use of the word "or" indicates, in our view, that the investigating authority may rely on one of the three price effect inquiries to meet the requirements of this provision. Moreover,

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<sup>227</sup> Appellate Body Report, *US - Hot-Rolled Steel*, paras. 192 and 193.

<sup>228</sup> Appellate Body Report, *US - Hot-Rolled Steel*, para. 192. See also Appellate Body Report, *China - GOES*, para. 126.

<sup>229</sup> Appellate Body Report, *US - Hot-Rolled Steel*, para. 193.

<sup>230</sup> Appellate Body Report, *US - Hot-Rolled Steel*, para. 193. See also Appellate Body Report, *China - GOES*, para. 126.

<sup>231</sup> Panel Report, *Pakistan - BOPP Film (UAE)*, para. 7.258. See also Appellate Body Report, *US - Softwood Lumber VI (Article 21.5 - Canada)*, para. 97.



this Article does not impose specific methodologies for this examination, and the Appellate Body considered that the investigating authority had a measure of discretion in this regard.<sup>232</sup>

7.196. However, Article 3.1 and the second sentence of Article 3.2, read together, require the authority to conduct an objective examination based on positive evidence. Furthermore, these three types of effects describe separate economic mechanisms, which require separate evidence to be proven. Therefore, a price effect examination requires an investigating authority to take into account the differences between the three price effects, as the elements relevant to the consideration of significant price undercutting differ from those relevant to the consideration of significant price depression and suppression.<sup>233</sup> For this reason, we do not agree with Morocco's cross-cutting argument that "[p]rice undercutting, price depression and price suppression [are not] ... set in stone or immune to change" and "Article 3.2 does not identify three separate categories of price analysis, each with its own separate basket of evidence".<sup>234</sup>

7.197. Thus, the price undercutting examination provided for in the second sentence of Article 3.2 must establish a "link between the price of subject imports and that of like domestic products".<sup>235</sup> This inquiry 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)".<sup>236</sup> This means that the investigating authority cannot conduct this analysis "by 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".<sup>237</sup> At the same time, price depression and price suppression inquiries are intended to determine whether the dumped imports have "explanatory force" for the occurrence of such price effects.<sup>238</sup>

7.198. Whether a price effect qualifies as "significant" depends on the evidence before the authority, how long the observed effect has been taking place and to what extent, as well as the relative market shares of the products.<sup>239</sup> In another dispute settlement proceeding, it was found that "[i]n all cases, an investigating authority must, pursuant to Article 3.1, objectively examine all positive evidence, and may not disregard relevant evidence suggesting that prices of dumped imports have no, or only a limited, effect on domestic prices".<sup>240</sup>

7.199. Bearing these considerations in mind, we shall proceed to examine MIICEN's determination regarding the effects of imports on prices.

#### **7.3.1.2.2 Was MIICEN's consideration of price undercutting consistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement?**

7.200. Tunisia's first grievance concerns the consideration of significant price undercutting of Tunisian exercise books in relation to the price of Moroccan exercise books.

7.201. In the present case, Tunisia takes issue with the investigating authority for having:

- a. compared the price of Tunisian exercise books with a notional ("reconstructed") price of Moroccan exercise books;
- b. reconstructed this notional price on the erroneous basis of the profit margin of Tunisian exporters; and
- c. based its consideration on a single year rather than the entire period of investigation.<sup>241</sup>

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<sup>232</sup> Appellate Body Report, *Korea - Pneumatic Valves (Japan)*, para. 5.233.

<sup>233</sup> Appellate Body Report, *China - GOES*, para. 137.

<sup>234</sup> Morocco's second written submission, paras. 202 and 203; response to Panel question No. 3.17, para. 57.

<sup>235</sup> Appellate Body Report, *China - GOES*, para. 136.

<sup>236</sup> Appellate Body Reports, *China - HP-SSST (Japan) / China - HP-SSST (EU)*, para. 5.159.

<sup>237</sup> Appellate Body Reports, *China - HP-SSST (Japan) / China - HP-SSST (EU)*, para. 5.160.

<sup>238</sup> Appellate Body Report, *China - GOES*, para. 136.

<sup>239</sup> Appellate Body Reports, *China - HP-SSST (Japan) / China - HP-SSST (EU)*, para. 5.161.

<sup>240</sup> Appellate Body Reports, *China - HP-SSST (Japan) / China - HP-SSST (EU)*, para. 5.161.

<sup>241</sup> Tunisia's second written submission, para. 4.44.

7.202. We begin by recalling the facts as they appear in the record and we will consider the arguments of the parties with regard to the relevant obligations under Articles 3.1 and 3.2.

7.203. The record shows that MIICEN did not find any price undercutting when comparing the price of the imported Tunisian exercise books with the prices reported by Moroccan producers. MIICEN, however, considered that the prices reported by Moroccan producers were not profitable, because of import pressure on prices<sup>242</sup>, and therefore should be replaced, for the purposes of considering price undercutting, by a target selling price. Thus, the authority "reconstructed" the price of the domestic product by including a profit margin of 15% to 25%, based on the profit margin made by the Tunisian exporters in their domestic market.<sup>243</sup>

7.204. Tunisia's first argument concerning the price undercutting examination is that the selection of a notional price is "contrary to the very nature of the concept of 'price undercutting' under Article 3.2, which relates to a comparison between two actual prices". It specifically contests the fact that the constructed price of the domestic product was not the actual price charged in the Moroccan market by the domestic industry, but rather, a hypothetical price based on a scenario in which there were no dumped imports.<sup>244</sup> Tunisia argues that the authority "had already reached its conclusion on the effects of imports on the price of the domestic product" before conducting its price undercutting analysis.<sup>245</sup> It also recalls that, in other dispute settlement proceedings, it was found that the price undercutting inquiry required "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)".<sup>246</sup>

7.205. Morocco responds that Article 3.2 does not refer to the "actual" price.<sup>247</sup> It also asserts that, in the particular scenario where sales of the domestic product are made at a loss, Article 3.2 allows the investigating authority to reconstruct this price at the profitable level, for the purposes of the price undercutting analysis.<sup>248</sup> To support this argument, Morocco draws our attention to the distinction that Article 2.2.1 of the Anti-Dumping Agreement makes between profitable and non-profitable prices. This provision allows the investigating authority to disregard certain non-profitable transactions in the calculation of normal value.<sup>249</sup>

7.206. We do not agree with Morocco on this point.

7.207. In our view, even if Article 2.2.1 allows the investigating authority to exclude sales not being made in the ordinary course of trade from the construction of normal value because of their price, this provision applies to the determination of dumping and not to the determination of injury. As Tunisia points out, the price comparison in the price undercutting analysis is different from the price comparison in the margin of dumping calculation.<sup>250</sup> Furthermore, Article 2.2.1 sets out strict conditions for disregarding unprofitable sales in determining normal value: these sales "may be disregarded in determining normal value only if the authorities determine that such sales are made within an extended period of time in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time".<sup>251</sup> As the possibility of disregarding certain sales, because of their prices, is explicitly and conditionally established in the very specific

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<sup>242</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 134.

<sup>243</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 136.

<sup>244</sup> Tunisia relies on Canada's assertion that "an examination of significant price undercutting should be based on actual prices, and not on hypothetical prices based on a scenario in which there are no dumped imports." (Tunisia's second written submission, para. 4.49 (quoting Canada's third-party written submission, para.10)) See also Tunisia's first written submission, para. 6.39 ("the purpose of adjustments cannot be to completely replace actual prices") and para 6.42.

<sup>245</sup> Tunisia second written submission, para. 4.51. Canada agrees and considers that "while the analysis under Article 3.2 is aimed at determining whether the dumped imports are causing injury through their price effects, the method of constructing a target price presupposes that imports have such effects." (Canada's third-party written submission, para. 11 (emphasis original))

<sup>246</sup> Tunisia's first written submission, para. 6.35 (quoting Appellate Body Reports, *China - HP-SSST (Japan) / China - HP-SSST (EU)*, para. 5.159). See also Tunisia's second written submission, para. 4.47.

<sup>247</sup> Morocco's first written submission, paras. 127 and 131; second written submission, para. 199.

<sup>248</sup> Morocco's first written submission, para. 130; opening statement at the first meeting of the Panel, paras. 89 and 92; and second written submission, paras. 199, 200 and 208.

<sup>249</sup> Morocco's second written submission, para. 200.

<sup>250</sup> Tunisia's opening statement at the second meeting of the Panel, para. 5.4.

<sup>251</sup> Fns omitted.

context of constructing normal value, we do not think that such discretion may be presumed in the context of the price undercutting examination.

7.208. However, although Article 3.2 does not refer to "actual" prices, the context of this article provides useful guidance as to the nature of the prices to be used for the undercutting examination. First, Article 3.1 of the Anti-Dumping Agreement provides that a determination of injury shall be based on an objective examination of "the effect of the dumped imports on *prices in the domestic market* for like products".<sup>252</sup> As price undercutting is one of these effects, this provision indicates that, in its Article 3.2 analysis, the investigating authority must examine prices that are related to the *domestic market* conditions of the importing Member, i.e. the actual prices charged and not hypothetical prices. Second, with regard to the prevention of price increases, the investigating authority must consider whether the effect of the dumped imports is "otherwise to prevent *price increases, which otherwise would have occurred*, to a significant degree".<sup>253</sup> The use of the conditional in this passage (in italics) suggests that the authority may have recourse to a counterfactual analysis of the domestic prices that would have been charged in the absence of dumped imports. Therefore, the possibility of recourse to a counterfactual analysis is *expressly* provided for in the text of the Agreement. But, as noted by Canada, such terms are not used in relation to the undercutting examination<sup>254</sup>, and thus the wording of Article 3.2 regarding the price undercutting analysis does not permit the construction of a target price for the domestic product.<sup>255</sup>

7.209. Lastly, we recall that Articles 3.1 and 3.2 require the investigating authority to examine the "effects" of imports on the price of the domestic product in order to be able to subsequently determine whether such imports are causing injury to the domestic industry by means of these effects. In the light of this objective, we agree with Tunisia's argument that "if the investigating authority constructs the price of the domestic product, it will no longer be possible to identify the 'effect' that imports actually [*sic*] have on the price of the domestic product using the resulting ratio".<sup>256</sup> This confirms the interpretation that the investigating authority must examine the prices of the domestic product that are actually charged in the market and not hypothetical prices.<sup>257</sup>

7.210. We therefore find that MIICEN's price undercutting analysis, based on the comparison of the price of Tunisian imports and the constructed price of the domestic product, does not meet the requirements of Article 3.2 of the Anti-Dumping Agreement.

7.211. We recall that Tunisia raises a second argument regarding the construction of this target selling price: it considers that MIICEN "improperly" used the Tunisian exporters' profit margin to attribute it to Moroccan producers, on the grounds that it was "legitimate for Moroccan producers to be able to aspire to the same level of profit [as] their Tunisian counterparts in their domestic market".<sup>258</sup> In the light of our finding that MIICEN's price undercutting analysis, based on the comparison of the price of Tunisian imports and the hypothetical price of the like product, was not consistent with Article 3.2 of the Anti-Dumping Agreement, we consider that it is not necessary for us to address this argument from Tunisia separately.<sup>259</sup>

7.212. The third argument raised by Tunisia concerning the price undercutting examination refers to the period of time during which the examination was conducted. The record indicates that this examination only concerned the period from 1 May 2016 to 31 April 2017, while the injury investigation period was spread over four years and four months.<sup>260</sup> Tunisia's first grievance is that this examination over a year is not sufficient to make a "dynamic assessment of price developments

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<sup>252</sup> Emphasis added.

<sup>253</sup> Emphasis added.

<sup>254</sup> Canada's third-party written submission, para. 10.

<sup>255</sup> See also European Union's third-party written submission, para. 105.

<sup>256</sup> Tunisia's first written submission, para. 6.40.

<sup>257</sup> We note that Canada and the European Union agree with Tunisia that the practice of reconstructing the price of domestic producers is not consistent with the notion of price undercutting. (Canada's third-party written submission, paras. 9-11; European Union's third-party written submission, paras. 103-105)

<sup>258</sup> Tunisia's first written submission, paras. 6.48 and 6.49 (quoting the report on the definitive determination (Exhibit TUN-7), para. 140).

<sup>259</sup> Tunisia's first written submission, paras. 6.48-6.54; second written submission, paras. 4.64-4.72. Tunisia admits that a finding regarding the construction of the price of the domestic product in its favour would render unnecessary a finding regarding the selection of the profit margin for the purposes of constructing the price of the domestic product. (Tunisia's response to Panel question No. 3.18, paras. 139 and 140)

<sup>260</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), paras. 29 and 145.

and trends".<sup>261</sup> It recalls that in another dispute settlement proceeding, the Appellate Body found that an inquiry into price undercutting could not be limited to 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".<sup>262</sup>

7.213. Morocco argues that the investigating authority "conducted a more deeply dynamic analysis by examining all the evidence before it and recognizing that price effects over a long period are necessarily **fluid**".<sup>263</sup> Morocco also explains that MIICEN did not try to link the price effects observed in the market to the "immutable categories" in the second sentence of Article 3.2.<sup>264</sup>

7.214. We note that MIICEN's undercutting examination was in fact limited to finding an undercutting margin of 11.24%, by comparing the constructed price of the domestic product (index 100) to the price of the imported Tunisian exercise book (index 89.89) for the period from 1 May 2016 to 30 April 2017. This comparison formed the basis of its conclusion that "the dumped imports of exercise books originating in Tunisia had a significant effect on the prices of the locally manufactured exercise book in terms of undercutting".<sup>265</sup> MIICEN's reasoning therefore does not demonstrate any analysis of price "trends in the relationship between the prices of the dumped imports and those of domestic like products", including whether import and domestic prices are moving in the same or contrary directions. It is well established that finding a "mathematical difference" between import prices and domestic prices does not meet the requirements of Article 3.2 regarding the price undercutting examination.<sup>266</sup> We agree with this interpretation. Therefore, we find that MIICEN did not examine price undercutting in a manner consistent with Article 3.2 of the Anti-Dumping Agreement, by disregarding price trends and focusing only on a comparison between a single constructed price of the domestic product and the price of the imported product.

7.215. Tunisia further considers that the inconsistency between the injury investigation period and the period used for the price undercutting examination does not satisfy the requirements of Articles 3.1 and 3.2.<sup>267</sup> Tunisia emphasizes that MIICEN selected the investigation period from 1 January 2013 to 30 April 2017 for the injury investigation.<sup>268</sup> However, when analysing price undercutting, MIICEN took only the last 12 months of the investigation period into consideration without explaining this inconsistency.<sup>269</sup>

7.216. We note that the title of Article 3 "Determination of *Injury*" and the wording of Article 3.5 ("[i]t must be demonstrated that the dumped imports are, *through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement*")<sup>270</sup> confirm that consideration of price effects is one of the steps in the determination of injury. As Tunisia recalls<sup>271</sup>, this inquiry is part of a "logical progression ... leading to an investigating authority's ultimate injury and causation determination".<sup>272</sup> Therefore, in order to determine whether imports cause, through the effects of dumping (including price effects) injury, the effects analysed must, in principle, relate to the period selected for the examination of the economic situation of the domestic industry.

7.217. The record shows that MIICEN indicated that the period from 1 January 2013 to 30 April 2017 was the period of data collection for the purposes of the injury assessment<sup>273</sup>; however, it made the price comparison for the purposes of the price undercutting analysis only on the basis of the last 12 months of that period. For the reasons outlined above, we consider that MIICEN failed to conduct an objective examination, as it selected a different period of price

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<sup>261</sup> Tunisia's first written submission, para. 6.44.

<sup>262</sup> Tunisia's first written submission, para. 6.44 (quoting Appellate Body Reports, *China - HP-SSST (Japan) / China - HP-SSST (EU)*, para. 5.160).

<sup>263</sup> Morocco's opening statement at the first meeting of the Panel, para. 84. (emphasis original)

<sup>264</sup> Morocco's opening statement at the first meeting of the Panel, paras. 86 and 91-96.

<sup>265</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 180.

<sup>266</sup> Appellate Body Reports, *China - HP-SSST (Japan) / China - HP-SSST (EU)*, para. 5.160.

<sup>267</sup> Tunisia's response to Panel question No. 3.14, paras. 134 and 138. See also Tunisia's response to Panel question No. 3.19, paras. 146-148.

<sup>268</sup> Tunisia's response to Panel question No. 3.14, paras. 135-136.

<sup>269</sup> Tunisia's responses to Panel questions No. 3.14, paras. 136-137; No. 3.20, para. 151.

<sup>270</sup> Emphasis added.

<sup>271</sup> Tunisia's response to Panel question No. 3.14, paras. 134 and 137 (referring to Appellate Body Report, *China - GOES*, para. 128).

<sup>272</sup> Appellate Body Report, *China - GOES*, para. 128.

<sup>273</sup> Report on the definitive determination, para. 29 (Exhibits TUN-7, MAR-1). MIICEN examined several injury indicia, as well as price depression and price suppression over a period of four years and four months.

undercutting analysis from the one used for the rest of the injury analysis and did not show good cause in its report for selecting a different period.<sup>274</sup>

7.218. We note that, according to Morocco, when the price effects analysis period is the same as the dumping analysis period, there is a presumption of conformity with the requirements of Article 3.1.<sup>275</sup> In this regard, MIICEN noted that "[w]ith regard to the undercutting assessment, the Ministry made a comparison, for the period from May 2016 to April 2017, *corresponding to the margin of dumping determination period*".<sup>276</sup>

7.219. In order to assess whether a presumption of conformity is created when the periods of price undercutting analysis coincides with the period of dumping analysis, we find *Mexico - Anti-Dumping Measures on Rice* to be relevant, as the respondent in that case raised a similar argument to justify the selection of the period of injury analysis. We recall that the Appellate Body rejected this argument, noting that the determinations of dumping and injury are not "integrated" and that "these determinations are two separate operations relying on distinct data seeking to determine different things".<sup>277</sup> Another panel also expressed the view that the Anti-Dumping Agreement does not contain any rule as to the relationship between or overlap of the period of dumping analysis and the period of injury analysis.<sup>278</sup> We share this view. Nothing in the text of the Anti-Dumping Agreement requires the period of undercutting and the period of dumping analysis to coincide. Moreover, the Anti-Dumping Agreement does not establish a presumption of conformity should the two periods overlap.

7.220. We note that, because it limited itself to a one-year period, MIICEN did not consider the evidence of the interaction between domestic and import prices over the period of four years and four months that had been placed on the record.<sup>279</sup> Moreover, those data indicated that the price of imports was higher than the price of the domestic product between 2014 and 2016. In the light of these facts, we agree with Tunisia<sup>280</sup> that, because of the inconsistent selection of the price undercutting examination period, MIICEN disregarded certain evidence that did not support its conclusion.

7.221. Morocco also draws the Panel's attention to the fact that "in practice, the authority systematically takes a period of more than three years to assess injury indicators and factors, except for undercutting"<sup>281</sup> and that "the period selected is defined in a pre-existing rule" (Decree No. 2-12-645).<sup>282</sup> Even if the selection of the undercutting examination period was not arbitrary, this selection creates a doubt as to whether the undercutting analysis conducted over the 12-month period can serve as a valid basis for the final determination of injury, for which most of the factors were examined over a period of four years and four months. The fact that MIICEN's actions are based on a pre-existing rule therefore does not address the lack of objectivity resulting from the inconsistency between the periods selected for the purposes of investigating injury.<sup>283</sup>

7.222. For the reasons set out above, we find that MIICEN's analysis fails to reflect an objective examination of price undercutting under Article 3.1 and the second sentence of Article 3.2 of the Anti-Dumping Agreement.

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<sup>274</sup> We note that a panel has ruled on a similar topic:

[T]here is a *prima facie* case that an investigating authority fails to conduct an "objective" examination if it examines different injury factors using different periods. Such a *prima facie* case may be rebutted if the investigating authority demonstrates that the use of different periods is justifiable on the basis of objective grounds (because, for example, data for more recent periods was not available for certain injury factors).

(Panel Report, *Argentina - Poultry Anti-Dumping Duties*, para. 7.283)

<sup>275</sup> Morocco's response to Panel question No. 3.15(b), para. 40.

<sup>276</sup> Emphasis added.

<sup>277</sup> Appellate Body Report, *Mexico - Anti-Dumping Measures on Rice*, para. 183.

<sup>278</sup> Panel Report, *EC - Tube or Pipe Fittings*, para. 7.320.

<sup>279</sup> Report on the definitive determination (Exhibit MAR-CONF-3 (BCI)), paras. 148 and 191.

<sup>280</sup> Tunisia's comments on Morocco's response to Panel question No. 3.15(b), paras. 76 and 77.

<sup>281</sup> Morocco's response to Panel question No. 3.16, paras. 46 and 47.

<sup>282</sup> Morocco's response to Panel question No. 3.15(b), para. 41.

<sup>283</sup> We note that the provisions of Decree No. 2-12-645 have not been challenged before us and are therefore not ruling on their conformity with the Anti-Dumping Agreement. Our findings are limited to MIICEN's decision to examine the existence of price undercutting during the period from May 2016 to April 2017 in the anti-dumping investigation in this case.

### 7.3.1.2.3 Was MIICEN's examination of price depression objective and based on positive evidence?

7.223. The second aspect of the examination of the effect of import prices on the price of domestic exercise books criticized by Tunisia concerns MIICEN's consideration of price depression.

7.224. First, we note that Morocco requests that we exercise judicial economy for Tunisia's grievances regarding significant price suppression and price depression should we find that the authority conducted a *proper* price undercutting analysis.<sup>284</sup> In the previous section, we concluded that MIICEN's price undercutting examination did not meet the requirements of Article 3.2. As the condition for Morocco's request has not been met, we shall proceed to assess MIICEN's determination regarding the other price effects.

7.225. In the present case, Tunisia takes issue with MIICEN for having:

- a. used a distorted factual basis when considering whether price depression existed to a significant degree<sup>285</sup>; and
- b. failed to sufficiently explain how imports had the effect of decreasing the price of Moroccan exercise books, when the price of imports increased.<sup>286</sup>

7.226. For Tunisia, MIICEN's conclusion that "significant" price depression exists is therefore not based on an objective examination and positive evidence within the meaning of Articles 3.1 and 3.2 of the Anti-Dumping Agreement.<sup>287</sup>

7.227. The record shows that MIICEN conducted its price depression examination on the basis of the data presented in the table below<sup>288</sup>:

**Table 1**

(Index 2013 = 100)

	2013	2014	2015	2016	2016 (Jan-April)	2017 (Jan-April)
Average unit selling price of the domestic industry (Dhs/tonne)	100	99.11	98.53	98.31	93	94

Source: Report on the definitive determination (Exhibits TUN-7, MAR-1), para.148.

7.228. The report on the definitive determination thus concludes that:

The average selling price charged by the domestic industry remained at a very low level without being able to rise to satisfactory levels. In index terms, this price was 100 in 2013 and then decreased to 94 during the first four months of 2017.<sup>289</sup>

7.229. The report attributes this decline in prices to pressure from imports, because "domestic producers of exercise books are forced to constantly match the low prices on the market offered by the competition, who are primarily importers of Tunisian exercise books".<sup>290</sup> The record also shows that, starting from a comparable level in 2013, the price of exercise books, respectively, decreased (for Moroccan exercise books) and increased (for exercise books imported from Tunisia) between 2014 and 2016.<sup>291</sup>

7.230. Tunisia argues, first, that MIICEN used a distorted factual basis to consider whether price depression existed to a *significant* degree. According to Tunisia, this analysis is inconsistent with

<sup>284</sup> Morocco's first written submission, paras. 147, 148 and 167; second written submission, para. 188.

<sup>285</sup> Tunisia's first written submission, paras. 6.58-6.63 and 6.69; second written submission, paras. 4.75-4.87.

<sup>286</sup> Tunisia's first written submission, paras. 6.64-6.69; second written submission, paras. 4.88-4.92.

<sup>287</sup> Tunisia's first written submission, para 6.63.

<sup>288</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 148.

<sup>289</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 146.

<sup>290</sup> Report on the definitive determination (Exhibit MAR-CONF-3 (BCI)), para. 147.

<sup>291</sup> Report on the definitive determination (Exhibit MAR-CONF-3 (BCI)), paras. 148 and 191.

Articles 3.1 and 3.2 of the Anti-Dumping Agreement, insofar as MIICEN simply "compare[d] the selling price of the domestic product from 2013 to its price from the first four months of 2017"<sup>292</sup>, which "accentuate[d] the fall in the price" by finding a 6% drop, when the price decrease observed between 2013 and 2016 was only 1.69%.<sup>293</sup> Tunisia notes that, although the price for the whole of 2016 is significantly higher than the price for the period January-April 2016, MIICEN disregarded what appears to be a seasonal fluctuation in prices during the first months of the year and failed to ensure that the data for the four-month period could be compared with those for the full year.<sup>294</sup> Lastly, Tunisia argues that MIICEN should have examined the price trends for the four full years to conclude whether the price depression could be characterized as "significant".<sup>295</sup>

7.231. Morocco responds that MIICEN found, in a "holistic" manner, that the impact of the three price effects under Article 3.2 was significant.<sup>296</sup> We note, however, that contrary to Morocco's assertions, it is clear from the report on the definitive determination that MIICEN did not examine the three price effects in a holistic manner, but rather, addressed these three effects in *separate* sections.<sup>297</sup> Moreover, even if the authority did not describe the price depression as "*notable*" ("significant"), it used the French synonym "*importante*"<sup>298</sup>, confirming that MIICEN implicitly examined whether price depression existed "to a significant degree", as stated by Tunisia.<sup>299</sup>

7.232. With regard to the factual basis for this examination, like Tunisia<sup>300</sup>, we observe that, to find a decline in the price of the domestic product, the investigating authority relied on a comparison between an index of "100 in 2013 [that] decreased to 94 during the first four months of 2017".<sup>301</sup> As MIICEN'S only finding regarding movements in domestic prices during the period 2013-2017, we agree with Tunisia that this finding served as a basis for MIICEN's conclusion of "*importante*" ("significant") price depression.<sup>302</sup> However, the data for an entire year usually provide a more accurate picture of the situation than the data for part of the year.<sup>303</sup> In this case, the data available to MIICEN showed a significant difference between the price index for the whole of 2016 and the price index for the first four months of 2016 (98.31 compared to 93). We therefore consider that an objective and unbiased authority should at least have explained why, notwithstanding the price difference between the full year and the first four months of the year, the data for four months (in 2017) compared with the data for entire years could be decisive in judging the magnitude of price depression. Yet, we do not find any discussion on this point in MIICEN's report on the definitive determination.

7.233. We recall that Tunisia also considers that instead of focusing on an end-point-to-end-point analysis (2013 and the first four months of 2017), MIICEN should have examined the price trends during the four full years in order to conclude whether the price depression could be characterized as "significant".<sup>304</sup> Morocco responds that the authority observed a downward trend in prices throughout the period of data collection and was not limited to an end-point-to-end point analysis.<sup>305</sup> We understand that Tunisia specifically criticizes the fact that the authority failed to examine the magnitude of the price decline during the period of investigation. The record indicates that MIICEN found a gradual decline in the prices of Moroccan exercise books throughout the period of investigation<sup>306</sup>, without addressing the magnitude of this decline. However, it also shows that the price decline was, at most, only 1.69% during the four full years between 2013 and 2016. MIICEN nevertheless disregarded those data and instead chose, without explaining why, to substantiate its

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<sup>292</sup> Tunisia's second written submission, para. 4.86; response to Panel question No. 3.12, para. 126.

<sup>293</sup> Tunisia's first written submission, paras. 6.59 and 6.61; second written submission, para. 4.86.

<sup>294</sup> Tunisia's first written submission, para. 6.60; response to Panel question No. 3.12, para. 126.

<sup>295</sup> Tunisia's first written submission, paras. 6.61 and 6.62; second written submission, paras. 4.82 and 4.83; and response to Panel question No. 3.10, paras. 113 and 114.

<sup>296</sup> Morocco's first written submission, paras. 154 and 155.

<sup>297</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), paras. 128-150.

<sup>298</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 180.

<sup>299</sup> Tunisia's second written submission, paras. 4.77 and 4.78.

<sup>300</sup> Tunisia's second written submission, paras. 4.78 and 4.86.

<sup>301</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 146.

<sup>302</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 180.

<sup>303</sup> <sup>02</sup> The Appellate Body noted, in a slightly different context, that "examining data relating to the whole year would result in a more accurate picture of the 'state of the domestic industry' than an examination limited to a six-month period". (Appellate Body Report, *Mexico - Anti-Dumping Measures on Rice*, para. 183)

<sup>304</sup> Tunisia's first written submission, paras. 6.61 and 6.62; second written submission, paras. 4.82 and 4.83; and response to Panel question No. 3.10, paras. 113 and 114.

<sup>305</sup> Morocco's first written submission, paras. 156 and 157.

<sup>306</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), paras. 146 and 147.

conclusion of "*importante*" price depression on the basis of an end-point-to-end-point comparison of the period of investigation. In our view, this approach undermines the objectivity of MIICEN's analysis of whether price depression existed *to a significant degree*.

7.234. We now turn to Tunisia's second argument concerning the price depression examination. In view of the "opposite" trend in the respective prices of Moroccan exercise books and exercise books imported during the period, Tunisia considers that "Tunisian imports" had no "explanatory force" for the fall in the price of the domestic product and that, therefore, MIICEN was not in a position to find that price depression was the result of "*the effect' of Tunisian imports*".<sup>307</sup>

7.235. The investigation record confirms that the prices of Tunisian exercises books were higher than those of the exercise books produced by the Moroccan industry between 2014 and the first four months of 2017.<sup>308</sup> While the price of imports increased (in comparison to 2013) in 2014, 2015 and 2016, the price of the domestic product decreased during the same period.<sup>309</sup> Thus, not only were the prices of the Tunisian product higher than the price of the domestic like product, but they also followed an opposite trajectory.<sup>310</sup> Although this evidence was available to the authority, the price depression section of the report does not contain any analysis of these data. We recall that MIICEN found that "domestic producers of exercise books [were] forced to *constantly match the low prices* on the market offered by the competition, who [were] primarily importers of Tunisian exercise books"<sup>311</sup>, but did not explain how this conclusion was consistent with the data on the pricing of Tunisian exercise books. Moreover, MIICEN failed to explain how imports would have had the effect of depressing prices when import prices were higher than the price of the domestic like product. On this point, we agree with two previous panels, which considered that such a situation could create a doubt as to the impact of imports on domestic prices and therefore required an explanation from the authority.<sup>312</sup> We therefore consider that by disregarding this evidence that could contradict its conclusions, MIICEN failed to conduct an objective examination of whether the dumped imports of Tunisian exercise books had the effect of depressing the prices of domestically produced exercise books.

7.236. We therefore consider that by disregarding certain evidence on the magnitude of the decline in the prices of the domestic product and the interaction between the prices of the domestic and the Tunisian product, MIICEN failed to consider objectively whether price depression existed to a significant degree, as required by Article 3.1 and the second sentence of Article 3.2 of the Anti-Dumping Agreement.

#### **7.3.1.2.4 Was MIICEN's consideration of price suppression objective and based on positive evidence?**

7.237. The third and final aspect of the examination of the effect of import prices on the price of domestic exercise books criticized by Tunisia concerns the objectivity of the examination of price suppression within the meaning of Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

7.238. In the present case, Tunisia takes issue with MIICEN for both:

- a. having used a distorted factual basis when considering whether there had been significant price suppression<sup>313</sup>; and
- b. not having analysed in an objective manner whether the price suppression observed was due to imports.<sup>314</sup>

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<sup>307</sup> Tunisia's first written submission, para 6.68. (original emphasis)

<sup>308</sup> Report on the definitive determination (Exhibit MAR-CONF-3 (BCI)), paras. 148, 149 and 191.

<sup>309</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), paras. 148 and 191.

<sup>310</sup> Report on the definitive determination (Exhibit MAR-CONF-3 (BCI)), paras. 148, 149 and 191.

<sup>311</sup> Emphasis added.

<sup>312</sup> Two previous panels considered that the investigating authority should have provided an explanation of how it had concluded that there was price depression in a situation where the prices of the dumped imports were higher than the price of the domestic like product. (Panel Reports, *China - Cellulose Pulp*, para. 7.86; *China - Autos (US)*, para. 7.272)

<sup>313</sup> Tunisia's first written submission, paras. 6.74, 6.77 and 6.78; second written submission, paras. 4.96-4.103.

<sup>314</sup> Tunisia's first written submission, paras. 6.80-6.84; second written submission, paras. 4.104-4.108.



7.239. We address these two arguments in turn below.

7.240. In its first line of argumentation, Tunisia claims that MIICEN chose a distorted factual basis for assessing whether the observed increase in the ratio between the cost of production and the selling price of the domestic product was "to a significant degree".<sup>315</sup>

7.241. In Morocco's view, this argument by Tunisia falls outside the scope of the claim made in paragraph B.7.c. of the panel request.<sup>316</sup> We recall that this paragraph reads as follows:

[T]he analysis regarding the depression of sales prices and the prevention of price increases *is not based on positive evidence and does not involve an objective examination*.<sup>317</sup>

7.242. In this regard, Morocco notes that Tunisia's arguments concerning the characterization of 10% and 3% values as "significant" raise a question of interpretation of the word "significant", whereas Tunisia's claim in the panel request is limited to the issues of an objective examination and positive evidence.<sup>318</sup>

7.243. We disagree with Morocco in this respect. As in its price depression arguments, Tunisia challenges the investigating authority's *choice of factual basis* for finding a "significant" increase in the ratio between the cost of production and the selling price of Moroccan exercise books.<sup>319</sup> This means that we should examine the objectivity of MIICEN's analysis of price suppression data. This argument is therefore not outside the scope of the claim made in the panel request.

7.244. The investigation record shows that in its price suppression analysis, MIICEN relied on the data in the table below. It found that the cost of production of the domestic product had increased "from 100 in 2013 to 101 in 2016 and 103 in 2017", while the selling price of exercise books gradually decreased from 2013 onwards. The authority thus noted that the ratio between the cost of production and the selling price of exercise books produced by the domestic industry increased "from 100 in 2013 to 110 in 2017". This confirmed, in its view, "the presence in the domestic market of pressure preventing the domestic industry from increasing its prices".<sup>320</sup>

**Table 2**

(Index 2013 = 100)

	2013	2014	2015	2016	2016 (Jan-April)	2017 (Jan-April)
Average cost of production of the domestic industry (Dhs/tonne)	100	102.26	98.76	101.24	103	102.81
Average selling price of the domestic industry (Dhs/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: Report on the definitive determination (Exhibits TUN-7, MAR-1), para.149.

7.245. We note that the comparison of the index for the full year 2013 (100) with the index for the first four months of 2017 (110) was MIICEN's only finding concerning the ratio between the cost of production and the selling price of domestic exercise books. On this basis, MIICEN concluded that

<sup>315</sup> Tunisia's first written submission, paras. 6.78 and 6.79; second written submission, paras. 4.95-4.103.

<sup>316</sup> Morocco's first written submission, paras. 163 and 164.

<sup>317</sup> Tunisia's panel request, para. B.7.c. (emphasis added)

<sup>318</sup> Morocco's first written submission, paras. 163 and 164.

<sup>319</sup> Tunisia's first written submission, para. 6.78.

<sup>320</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 149.

"dumped imports of Tunisian exercise books have had ... the effect of ... preventing [price] increase[s] to a significant degree".<sup>321</sup>

7.246. The above table shows that there were considerable variations in the ratio between the cost of production and the selling price of Moroccan exercise books in 2016 (index 103 for the whole year as opposed to index 111 during the January-April period). In Tunisia's view, this indicates that the data for the four months of the year were unreliable as a basis for the definitive finding of significant price suppression.<sup>322</sup> Indeed, in our opinion, an objective and unbiased authority should have at least addressed this difference between the full year and the first four months of the year and explained why, notwithstanding this difference, the data for the four-month period could be compared with the data for full years when examining the increase in the ratio between the cost of production and the selling price of the exercise books. MIICEN's report on the definitive determination does not, however, contain any discussion of this matter.

7.247. In this regard, Tunisia also considers that MIICEN failed to objectively analyse the trends in the ratio between the cost of production and the selling price during the investigation period in order to be able to assess whether prices were suppressed to a "significant" degree.<sup>323</sup> As we have already noted, Article 3.2 of the Anti-Dumping Agreement requires the investigating authority to consider whether the effect of the dumped imports is to "prevent price increases, which otherwise would have occurred, to a significant degree".<sup>324</sup> This means that the magnitude of the price suppression can have consequences for the finding of this effect. We note, however, that MIICEN failed to examine the evolution of the ratio between the cost of production and the selling price of exercise books throughout the entire investigation period, and focused exclusively on comparing the data for 2013 and the first four months of 2017. The record shows that between 2013 and 2016 the annual increase in the ratio between the cost of production and the selling price of exercise books was up to 4% (in 2014), while comparing the 2013 data with the data for the first four months of 2017 showed an increase of 10%. MIICEN therefore chose to rely on the comparison of the 2013 data with the data for the first four months of 2017, without explaining why this limited comparison was more relevant than the trend over the four full years.<sup>325</sup> This failure to examine the evolution of the ratio between the cost of production and the selling price of exercise books throughout the entire investigation period, together with the absence of any explanation as to the choice of factual basis for finding price suppression to a significant degree, reflects, in our view, a lack of objectivity.

7.248. We recall that Tunisia raises a second argument according to which the facts gathered by the investigating authority contradicted its assertion that the Tunisian imports were exercising "pressure preventing the domestic industry from increasing its prices to a level that [would] enable it to cover its production and selling costs".<sup>326</sup> In particular, Tunisia highlights the analysis of trends in the prices of the imports and the domestic product and the cost of production, which shows that in three of the four years and four months of the investigation period "the price of the imports was above the cost of production of the [domestic industry] which, in turn, was above the price of the domestic product".<sup>327</sup>

7.249. We recall that consideration of price suppression requires the investigating authority to consider whether this price effect is a *consequence* of subject imports.<sup>328</sup> In another dispute settlement proceeding, it was found that "an investigating authority may not disregard evidence regarding elements that call into question the explanatory force of dumped imports for significant price suppression".<sup>329</sup> We note that the only paragraph in MIICEN's report dedicated to the analysis

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<sup>321</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 150. (emphasis added)

<sup>322</sup> Tunisia's response to Panel question No. 3.11, paras. 120 and 124.

<sup>323</sup> Tunisia's first written submission, paras. 6.73-6.79 and 6.84; second written submission, paras. 4.94-4.103.

<sup>324</sup> Emphasis added.

<sup>325</sup> Morocco contends that "[w]hen an industry is not only unable to recover the increase in production costs, but also **sells at a loss over a long period of time**, any price suppression is by definition significant". According to Morocco, an increase of 3% is "clearly 'significant'". (Morocco's first written submission, paras. 165 and 166 (bold type and underlining original)) We note that this reasoning is not reflected in MIICEN's report. Given our standard of review, we are unable to rely on this explanation.

<sup>326</sup> Tunisia's second written submission, para. 4.108 (quoting the report on the definitive determination (Exhibit MAR-CONF-3 (BCI)), para. 149).

<sup>327</sup> Tunisia's second written submission, para. 4.107.

<sup>328</sup> Appellate Body Report, *China - GOES*, para. 136. See also Appellate Body Report, *Russia - Commercial Vehicles*, para. 5.53.

<sup>329</sup> Appellate Body Report, *Russia - Commercial Vehicles*, para. 5.96.

of price suppression does not mention Tunisian imports.<sup>330</sup> Having concluded that the cost of production and the ratio between the cost of production and the selling price of the domestic product had increased, MIICEN asserted that this "indicate[d] the presence in the domestic market of pressure preventing the domestic industry from increasing its prices to a level that [would] enable it to cover its production and selling costs".<sup>331</sup> Beyond that, MIICEN failed to examine whether this price pressure stemmed from the Tunisian imports. At the same time, in the following paragraph, the investigating authority found that the dumped imports of Tunisian exercise books had had the "effect of ...preventing [price] increase[s] to a significant degree".<sup>332</sup> This conclusion is therefore not based on an objective analysis of the Tunisian imports' explanatory force for the price effect observed by MIICEN.

7.250. The record shows that between 2014 and 2016 (i.e. for three years of a data collection period of four years and four months), the price of the imports was above the domestic industry's cost of production, which, in turn, was above the price of the domestic product.<sup>333</sup> Nevertheless, MIICEN did not examine the interaction among the price of the domestic product, the cost of production and the price of the Tunisian imports, and did not explain why the domestic producers could not increase their prices between 2014 and 2016, when the prices of Tunisian exercise books were higher than the price of the domestic product and the cost of production of the domestic product.

7.251. In these circumstances, we believe that an objective and unbiased authority should not have ignored the evidence that called into question the Tunisian imports' explanatory force for the price suppression. We therefore conclude that MIICEN's analysis was inconsistent with Article 3.1 and the second sentence of Article 3.2 of the Anti-Dumping Agreement.

#### **7.3.1.3 Conclusion on the examination of the effects of imports on prices**

7.252. On the basis of these elements, we find that MIICEN considered price undercutting, price depression and price suppression in a manner that was inconsistent with Article 3.1 and the second sentence of Article 3.2 of the Anti-Dumping Agreement.

#### **7.3.2 Whether MIICEN objectively considered the volume of Tunisian imports in relation to domestic production and consumption of exercise books**

7.253. Tunisia claims that MIICEN failed to consider objectively the volume of imports in relative terms compared to production or consumption in Morocco.<sup>334</sup> Morocco, for its part, requests the Panel to either reject this claim<sup>335</sup> or resort to the principle of judicial economy.<sup>336</sup>

7.254. In what follows, we consider whether resorting to the principle of judicial economy in relation to this claim would be justified.

7.255. We recall that the investigating authority's consideration of the volume of the imports and their price effects pursuant to Article 3.2 "is also subject to the overarching principles, under Article[ ] 3.1 ..., that it be based on positive evidence and involve an objective examination".<sup>337</sup> The detailed requirements applicable to the investigating authority's consideration of the volume of the imports are set out in the first sentence of Article 3.2 of the Anti-Dumping Agreement:

With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member.

7.256. Morocco contends, first of all, that since the examination under Article 3.1 and the first sentence of Article 3.2 is disjunctive, after having considered the volume of imports in absolute

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<sup>330</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 149.

<sup>331</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 149.

<sup>332</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 150.

<sup>333</sup> Report on the definitive determination (Exhibit MAR-CONF-3 (BCI)), paras. 148, 149 and 191 (tables).

<sup>334</sup> Tunisia's first written submission, paras. 6.16-6.33; second written submission, paras. 4.29-4.42.

<sup>335</sup> Morocco's first written submission, para. 14; second written submission, para. 179.

<sup>336</sup> Morocco's second written submission, para. 175.

<sup>337</sup> Appellate Body Report, *China - GOES*, para. 130.

terms, the authority was not required to consider an increase in volume in relative terms.<sup>338</sup> Morocco therefore requests the Panel to resort to judicial economy with respect to this claim.<sup>339</sup> Tunisia responds that if a discretionary analysis serves as the basis for a conclusion of injury, it must meet the requirements of Article 3.1 of the Anti-Dumping Agreement.<sup>340</sup>

7.257. We note that Article 3.2 does indeed provide for three alternative examinations of the increase in imports (which can be assessed "either in absolute terms or relative to production or consumption in the importing Member") and does not require the authority to conduct more than one of these examinations.<sup>341</sup> However, Article 3.1 requires that "[a] determination of injury ... be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products". On its face, the obligation in Article 3.1 applies to the analysis of the volume of dumped imports and does not distinguish between mandatory analyses and discretionary analyses that an authority may undertake under Article 3.2. On the basis of this text, we agree with Tunisia's argument<sup>342</sup> that, if the authority chose to undertake an analysis of the evolution of the volume of imports not only in absolute terms but also in relative terms and to base its conclusions on that analysis, the analysis must comply with the requirements of Article 3.1 in its entirety.<sup>343</sup>

7.258. In the present case, MIICEN considered the volume of imports in three ways (in absolute terms, relative to consumption and relative to production)<sup>344</sup> and reached its definitive conclusion of material injury on the basis of, *inter alia*, its consideration of the volume of Tunisian imports in relative terms.<sup>345</sup> Thus, having chosen to undertake this consideration and having relied in part thereon in its definitive injury determination, MIICEN was required to comply with the requirements of Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

7.259. Morocco also contends that the Panel's findings regarding this claim would not be needed "to resolve the dispute and [would be] of no relevance for the implementation of any DSB recommendations".<sup>346</sup> It should be recalled that Tunisia only contests the two considerations in relative terms and does not advance any argument regarding the consideration of the volume of Tunisian imports in absolute terms<sup>347</sup> that also served as the basis for the investigating authority's definitive conclusion of injury.<sup>348</sup> Nevertheless, Tunisia explains that the finding regarding the increase in imports in relative terms forms an integral part of the injury determination and that, therefore, the Panel's finding on this issue "would have practical effects for resolving this dispute".<sup>349</sup>

7.260. We do not agree with Tunisia. Even if we upheld this claim by Tunisia, Morocco could, in principle, rely, at the implementation stage, on the consideration of the volume of imports in absolute

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<sup>338</sup> Morocco's preliminary ruling request, paras. 50-53; second written submission, para. 173.

<sup>339</sup> Morocco's second written submission, paras. 173, 175 and 176.

<sup>340</sup> Tunisia's response to Morocco's preliminary ruling request, para. 8.5.

<sup>341</sup> Emphasis added. The parties agree that Article 3.2 does not require consideration of the increase in imports in absolute terms *and* in relative terms. (Morocco's first written submission, para. 14; preliminary ruling request, para. 52 (referring to Panel Report, *China - Cellulose Pulp*, paras. 7.34-7.38); and Tunisia's response to Morocco's preliminary ruling request, para. 8.5)

<sup>342</sup> Tunisia's response to Morocco's preliminary ruling request, paras. 8.6-8.10; second written submission, paras. 4.37 and 4.38.

<sup>343</sup> We recall in this regard another panel's findings that the investigating authority was not required to consider the volume of imports in relative terms, but by undertaking such an examination and relying thereon for its injury determination, it was indeed subject to the requirements of Articles 3.1 and 3.2 of the Anti-Dumping Agreement. (Panel Report, *Pakistan - BOPP Film (UAE)*, para. 7.281)

<sup>344</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), paras. 110-125.

<sup>345</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), paras. 180 and 181. We note that the indexed data on the volume of Tunisian exports compared to domestic production and consumption are given in paragraph 123 of the non-confidential version of MIICEN's report. (Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 123) However, MIICEN's analysis in paragraphs 122-125 of the report (in the confidential and non-confidential versions) is based on unindexed data from the confidential version of MIICEN's report. (Report on the definitive determination (Exhibit MAR-CONF-3 (BCI)), para. 123)

<sup>346</sup> Morocco's second written submission, para. 175.

<sup>347</sup> Tunisia's response to Morocco's preliminary ruling request, fn 1.

<sup>348</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), paras. 180 and 181.

<sup>349</sup> Tunisia's opening statement at the second meeting of the Panel, para. 4.4.

terms, which has not been contested by Tunisia. From this perspective, our finding would not contribute to resolving this dispute.

7.261. We recall that "[t]he practice of judicial economy ... allows a panel to refrain from making multiple findings that the same measure is inconsistent with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute".<sup>350</sup>

7.262. In these proceedings, Tunisia contests both MIICEN's examination of the volume of imports and the examination of the effects of imports on the prices of the domestic product. In an injury determination, these two examinations are closely linked. Thus, Article 3.1 requires "an objective examination of ... (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products".<sup>351</sup> Furthermore, Article 3.2, which concerns the examination of the effects of the imports on prices and the examination of the volume of imports, explicitly states that "[n]o one or several of these factors can necessarily give decisive guidance". In view of this close relationship between the two examinations and the inconsistencies we have found in the examination of the effects of imports on the prices of the domestic product, it is not necessary for us to rule on this claim in order to resolve this dispute.

### 7.3.3 Whether MIICEN examined objectively the state of the domestic industry

#### 7.3.3.1 Introduction

7.263. Tunisia claims that the investigating authority violated Articles 3.1 and 3.4 of the Anti-Dumping Agreement by failing to conduct an objective analysis of the factors listed in Article 3.4.<sup>352</sup>

- a. First, Tunisia contends that MIICEN ignored the fact that several factors had evolved positively.<sup>353</sup>
- b. Second, Tunisia criticizes the authority's decision to rely on the data from January-April 2017 to find negative trends in the sales, market share and output of the domestic industry, despite the positive trends in these factors between 2013 and 2016.<sup>354</sup>
- c. Third, Tunisia argues that MIICEN failed to objectively examine the negative profitability of the domestic industry.<sup>355</sup>

7.264. Morocco rejects this claim in its entirety.<sup>356</sup>

#### 7.3.3.2 Analysis

7.265. We begin by briefly recalling the requirements of Articles 3.1 and 3.4 of the Anti-Dumping Agreement before turning to the consideration of Tunisia's three arguments.

##### 7.3.3.2.1 Applicable requirements of Articles 3.1 and 3.4 of the Anti-Dumping Agreement

7.266. Article 3.4 of the Anti-Dumping Agreement provides as follows:

The examination of the impact of the 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, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping;

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<sup>350</sup> Appellate Body Report, *Canada - Wheat Exports and Grain Imports*, para. 133. (emphasis added)

<sup>351</sup> Emphasis added.

<sup>352</sup> Tunisia's first written submission, paras. 6.85-6.134; second written submission, paras. 4.110-4.154.

<sup>353</sup> Tunisia's first written submission, paras. 6.99-6.106; second written submission, paras. 4.112-4.120.

<sup>354</sup> Tunisia's first written submission, paras. 6.107-6.120; second written submission, paras. 4.121-

4.139.

<sup>355</sup> Tunisia's first written submission, paras 6.121-6.132; second written submission, paras. 4.140-4.152.

<sup>356</sup> Morocco's first written submission, paras. 168-196; second written submission, paras. 213-241.

actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

7.267. This provision focuses on the state of the domestic industry<sup>357</sup> and lists 15 factors that are to be evaluated by the investigating authority. It is apparent from the text of Article 3.4 that this provision does not prescribe a particular methodology for the evaluation of, or weight to be attributed to, the various factors.<sup>358</sup> As stated in the last sentence of Article 3.4, the list of 15 factors is not exhaustive, nor can one or several of these factors necessarily give decisive guidance. In the light of this last sentence, several panels have held that Article 3.4 does not require all relevant factors, or even a majority of them, to show negative developments in order for injury to be found.<sup>359</sup>

7.268. Since the first sentence of Article 3.4 requires an examination of the *impact* of dumped imports on the domestic industry, the Appellate Body noted that Article 3.4 is concerned with "the relationship between subject imports and the state of the domestic industry".<sup>360</sup> In other words, the investigating authority is required to examine "the 'explanatory force' of subject imports for the state of the domestic industry".<sup>361</sup> However, under this provision, the investigating authority is *not* required to demonstrate that dumped imports are causing injury to the domestic industry, which is an analysis specifically mandated by Article 3.5".<sup>362</sup>

7.269. The obligation set out in Article 3.4 must be read in the light of Article 3.1, which requires that a determination of injury be based on positive evidence and involve an objective examination. The Appellate Body has stated that these two provisions read together "instruct[ ] investigating authorities to evaluate, objectively and on the basis of positive evidence, the importance and the weight to be attached to all the relevant factors".<sup>363</sup>

#### **7.3.3.2.2 Was the analysis of the domestic industry's sales and market share objective?**

7.270. Regarding the analysis of the domestic industry's sales and market share, Tunisia criticizes MIICEN's decision to give determinative weight to the data for the period January-April 2017, without taking into account the seasonal nature of exercise book sales.<sup>364</sup> According to Tunisia, the investigating authority should have attributed more importance to the fact that sales and market share increased between 2013 and 2016.<sup>365</sup>

7.271. In order to address this argument, we review in detail the analysis conducted by MIICEN. In this case, MIICEN noted that "[s]ales of exercise-books ... [had] increased slightly as of 2014 and then [fallen] by 9 points in January-April 2017 compared to the same period in 2016".<sup>366</sup> Similarly, MIICEN considered that the increase in market share had been "slight and insufficient, followed, however, by a decline in the first four months of 2017".<sup>367</sup> In its conclusion of material injury, MIICEN explained that "[t]he state of the domestic exercise book industry [was] of material injury indicated

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<sup>357</sup> Appellate Body Reports, *Korea - Pneumatic Valves (Japan)*, para. 5.167; *China - HP-SSST (Japan) / China - HP-SSST (EU)*, para. 5.204.

<sup>358</sup> Appellate Body Reports, *Korea - Pneumatic Valves (Japan)*, para. 5.168; *China - HP-SSST (Japan) / China - HP-SSST (EU)*, para. 5.204.

<sup>359</sup> Panel Reports, *China - Cellulose Pulp*, para. 7.117; *EU - Footwear (China)*, para. 7.413; *EC - Tube or Pipe Fittings*, para. 7.329; and *EC - Bed Linen (Article 21.5 - India)*, para. 6.163.

<sup>360</sup> Appellate Body Report, *Korea - Pneumatic Valves (Japan)*, para. 5.166 (quoting Appellate Body Report, *China - GOES*, para. 149).

<sup>361</sup> Appellate Body Report, *Korea - Pneumatic Valves (Japan)*, para. 5.166 (quoting Appellate Body Reports, *China - HP-SSST (Japan) / China - HP-SSST (EU)*, para. 5.205, in turn quoting Appellate Body Report, *China - GOES*, para. 149).

<sup>362</sup> Appellate Body Report, *Korea - Pneumatic Valves (Japan)*, para. 5.166 (quoting Appellate Body Reports, *China - HP-SSST (Japan) / China - HP-SSST (EU)*, para. 5.205, in turn referring to Appellate Body Report, *China - GOES*, para. 150 (emphasis original)).

<sup>363</sup> Appellate Body Report, *Korea - Pneumatic Valves (Japan)*, para. 5.168 (quoting Appellate Body Reports, *China - HP-SSST (Japan) / China - HP-SSST (EU)*, para. 5.207).

<sup>364</sup> Tunisia's first written submission, paras. 6.117 and 6.119; second written submission, paras. 4.133 and 4.135.

<sup>365</sup> Tunisia's first written submission, para. 6.120.

<sup>366</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 160.

<sup>367</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 160.

by ... the decline ... in sales [and] market share recorded in the first four months of 2017 despite their positive development during the period 2013-2016".<sup>368</sup>

7.272. MIICEN relied on the data presented below<sup>369</sup>:

**Table 3**

(Index 2013 = 100)

	2013	2014	2015	2016	2016 (Jan-April)	2017 (Jan-April)
Sales of exercise books in Morocco (tonnes)	100	114	117	122	27	18
Domestic industry's market share	100	103	100	103	68	35

Source: Report on the definitive determination (Exhibits TUN-7, MAR-1), para.161.

7.273. It is therefore our understanding that the investigating authority found a decline in sales and market share *solely* on the basis of the fall in these indices in January-April 2017 compared to the same period in 2016 and despite the upward trend between 2013 and 2016.

7.274. The question before us is whether, by giving determinative weight to the comparison of the data for four-month periods from 2016 and 2017 in its analysis of sales of exercise books and market share, MIICEN examined these two injury factors in an objective manner.

7.275. We note that, according to MIICEN's findings, deliveries of exercise books do not occur regularly throughout the year, but are concentrated in the months of April and May:

[S]ales of exercise books are, by nature, seasonal. Indeed, the sector is driven by the start of the school year. Wholesalers or large-scale retailers place orders with exercise book manufacturers around December. Production begins then and *orders are delivered during April and May*, in anticipation of back-to-school purchases.<sup>370</sup>

7.276. Tunisia contends that "MIICEN had sufficient data not to rule out the possibility that the decline in sales and market share in January-April 2017, compared to January-April 2016, had been largely offset during the rest of the year".<sup>371</sup> Indeed, since the January-April period ends in the middle of the period when deliveries take place, this four-month period does not take into account, by definition, deliveries that take place in May, which can create an incomplete picture of the evolution of sales and market share. Thus, the confidential data for the year 2016 showed that the domestic industry's market share was lower in the period January-April [[\*\*\*]] % when compared to its market share for the entire year [[\*\*\*]] %.<sup>372</sup> For these reasons, we agree with Tunisia that an objective and unbiased authority should have taken into account the seasonality of sales in its assessment of the importance of the data for the periods January-April 2016 and 2017, and examined the possibility that the decline in these indices in the first four months of 2017 was not sufficiently representative. However, the paragraphs presenting MIICEN's analysis of sales and market share contain no remarks on either the seasonal nature of exercise book sales or the reliability of the data for the January-April period. For this reason, we consider that giving determinative weight to the data for the four-month periods without addressing whether these data present a representative picture of the evolution of these factors affects the objectivity of the analysis.

7.277. In response, Morocco stresses that the authority compared the *same* seasons (the first four months of 2016 with the first four months of 2017) and that the industry's seasonal nature was therefore not a relevant consideration.<sup>373</sup> Regarding this argument, we agree with Tunisia that the

<sup>368</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 180.

<sup>369</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 161.

<sup>370</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 63. See also the initiation report (Exhibits TUN-2, MAR-10), para. 11. (emphasis added)

<sup>371</sup> Tunisia's first written submission, para. 6.119; and second written submission, para. 4.135.

<sup>372</sup> Report on the definitive determination (Exhibit MAR-CONF-3 (BCI)), para. 161. See also Tunisia's second written submission, para. 4.11.

<sup>373</sup> Morocco's first written submission, para. 189; and response to Panel question No. 4.2, para. 78.

comparison between the first four months of 2016 and the first four months of 2017 is problematic "because the period selected, while the same for 2016 and 2017, ends in the middle of the period during which sales occur"<sup>374</sup> and therefore does not take into account subsequent deliveries. We consider that an objective and unbiased authority should have explained how it took into account the possibility that the decline in sales and market share during the first four months was offset later in the year, and why this consideration does not affect the comparability of the two four-month periods. Thus, the fact that the same months were compared does not change our reasoning above.

7.278. Morocco also draws our attention to a panel's finding that "nothing in Article 3.1 prohibits an investigating authority from focusing on a part of the period of investigation for a more detailed analysis of developments during that part of the period of investigation".<sup>375</sup> We agree that nothing in Article 3.1 prohibits an authority from examining part of the investigation period in more detail. In this case, however, we consider that MIICEN failed to conduct an objective examination of the sales and market share of the domestic industry, since it gave *determinative weight* to the data for the four-month periods, without reconciling this approach with its finding regarding the seasonality of exercise book sales.

7.279. Lastly, according to Morocco, since the date of the initiation of the investigation was 11 May 2017, MIICEN did not have a full set of data for 2017 and therefore took into account the available data for the first four months of 2017. Morocco asserts that taking into account the available data for the most recent period is not inconsistent with Articles 3.1 and 3.4.<sup>376</sup> Indeed, taking into account recent data is generally desirable, as such data may reveal current injury.<sup>377</sup> However, we note that Tunisia is not contesting the choice of investigation period or the taking into account of data for the first four months of 2017, but rather the fact that MIICEN decided to draw definitive conclusions from these data without taking into consideration the seasonality of the product at issue.<sup>378</sup> We consider that, while taking into account the data for the first four months of 2017, MIICEN could have examined what weight to give to these data in the context of its own findings regarding the seasonal nature of sales and in the light of the data for the four-month period of 2016 and for that year as a whole.

7.280. Based on the foregoing, we find that MIICEN failed to conduct an objective examination of the evolution of the sales and market share of the domestic industry, as required by Articles 3.

### **7.3.3.2.3 Was the analysis of the domestic industry's production objective?**

7.281. Tunisia criticizes the examination of the domestic industry's production because "it was not objective for MIICEN to give decisive weight to the data for January-April 2017".<sup>379</sup> According to Tunisia, production is affected by the seasonality of the product at issue, and the data for the four-month period are not necessarily representative and reliable as a basis for a definitive judgement.<sup>380</sup> Tunisia highlights that production "increased over the four full years of the investigation period, and that MIICEN erroneously concluded that production performed negatively based on the data for January-April 2017."<sup>381</sup>

7.282. We recall that, according to MIICEN, the domestic industry's production "increased by 33 points between 2013 and 2016, to then decrease over the first four months of 2017".<sup>382</sup> MIICEN also noted that one of the domestic producers had been forced to stop production in 2017 because of the pressure from Tunisian imports of exercise books.<sup>383</sup> MIICEN pointed out that "the positive developments in production between 2013 and 2016, examined in the light of the non-profitable sales made [during] this entire period, give rise to the conclusion that the increase in production is not an indication of the performance of the [domestic industry], which explains the [domestic

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<sup>374</sup> Tunisia's second written submission, para. 4.17.

<sup>375</sup> Morocco's second written submission, para. 222 (quoting Panel Report, *Russia - Commercial Vehicles*, para. 7.42).

<sup>376</sup> Morocco's first written submission, para. 191; second written submission, para. 225.

<sup>377</sup> Appellate Body Report, *Mexico - Anti-Dumping Measures on Rice*, paras. 166 and 167.

<sup>378</sup> Tunisia's second written submission, para. 4.10.

<sup>379</sup> Tunisia's second written submission, para. 4.130.

<sup>380</sup> Tunisia's first written submission, para. 6.111; second written submission, paras. 4.128 and 4.129.

<sup>381</sup> Tunisia's second written submission, para. 4.128. See also Tunisia's response to Panel question No. 4.5, para. 158.

<sup>382</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 153.

<sup>383</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 153.



industry's] inability to maintain this pace and led it to decrease its production in January-April 2017".<sup>384</sup> Lastly, MIICEN relied upon this decrease in production (and three other factors) in its finding of injury.<sup>385</sup>

7.283. In its analysis, MIICEN relied upon the data set forth in the table below<sup>386</sup>:

**Table 2**

(Index 2013 = 100)

	2013	2014	2015	2016	2016 (Jan-April)	2017 (Jan-April)
Domestic exercise book production (tonnes)	100	117	118	133	42	34

Source: Report on the definitive determination (Exhibits TUN-7, MAR-1), paragraph 123.

7.284. Thus, the question before us is whether, by giving determinative weight to the first four months of 2017 in its analysis of domestic production, MIICEN examined this injury factor in an objective manner.

7.285. We begin our analysis with Tunisia's main argument that the seasonality of the product means that the data relating to exercise book production for the four-month period are unreliable. To support its position, Tunisia refers to MIICEN's finding concerning the seasonality of the product.<sup>387</sup> We have already examined this finding, but we recall it below:

It should be noted that sales of exercise books are, by nature, seasonal. Indeed, the sector is driven by the start of the school year. Wholesalers or large-scale retailers place orders with exercise book manufacturers around December. *Production begins then* and orders are delivered during April and May, in anticipation of back-to-school purchases.<sup>388</sup>

7.286. According to Tunisia, this finding demonstrates that "[p]roduction does not therefore take place regularly throughout the year but is dictated by the orders, which are placed around December."<sup>389</sup> Tunisia asserts that "the central question linked to seasonality is *to what extent this proportion [in January-April] varies from one year to the next*".<sup>390</sup> MIICEN's finding does not provide any indication of what fraction of production takes place between January and April of each year and whether the proportion of production for this period varies depending on the year. The production data set forth in the table also fail to provide indications in this regard because 2016 is the only year for which we find data for the January-April period, as well as for the full year. The record does not therefore show to what extent the proportion of production that takes place between January and April varies from one year to the next. For this reason, we are not convinced that the information before the authority clearly indicated what impact the seasonality of the sales of exercise books had on production in the January-April period.

7.287. Tunisia criticizes two further aspects of MIICEN's analysis of production.

7.288. First, Tunisia draws our attention to the fact that MIICEN used a limited set of data for the four months of 2017, without putting them in the context of the data for the entirety of 2017. In

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<sup>384</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 153.

<sup>385</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 180.

<sup>386</sup> We note that the table in paragraph 153 of MIICEN's report on the definitive determination contains a transposition error in the data for January-April 2017. Table 4 therefore uses the correct data taken from paragraph 123 of MIICEN's report. (Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 123; Morocco's first written submission, paras. 185 and 186; and Tunisia's second written submission, paras. 4.3-4.9, 4.11, 4.127 and 4.128)

<sup>387</sup> Tunisia's second written submission, para. 4.6; response to Panel question No. 4.5, paras. 154-156.

<sup>388</sup> Initiation report (Exhibits TUN-2, MAR-10), para. 11; report on the preliminary determination (Exhibits TUN-5, MAR-17), para. 32; and report on the definitive determination (Exhibits TUN-7, MAR-1), para. 63. (emphasis added)

<sup>389</sup> Tunisia's second written submission, para. 4.11.

<sup>390</sup> Tunisia's response to Panel question No. 4.5, para. 158. (emphasis original)

this respect, Tunisia compares MIICEN's approach to that of the Mexican investigating authority in *Mexico - Anti-Dumping Measures on Rice* and *Mexico - Steel Pipes and Tubes*, in which the authority examined an incomplete set of data, which did not allow it to make an objective examination of injury.<sup>391</sup>

7.289. We consider that the requirements of Article 3.1 mean that an investigating authority is obliged to ensure that the data on which it bases its injury determination accurately and credibly reflect the state of the domestic industry. As we have already noted, the data for the whole year typically provide a more accurate picture of the state of the domestic industry than the data for part of the year.<sup>392</sup> In a similar vein, we agree with the panel in *Mexico - Steel Pipes and Tubes*, which cautioned against the use of "temporal subsets within a period, without a sufficient explanation and without a consideration as to whether the developments within that temporal subset are reflective of developments throughout the period or whether and why these subsets are justified and not anomalous."<sup>393</sup>

7.290. It is apparent from MIICEN's explanation that the decrease in production observed during the period January-April 2017 was a *key element* of the conclusions of injury. In this regard, we note that MIICEN failed to explain how it had ensured that the four-month period provided a reliable picture of the production trends and was not anomalous. In these circumstances, focusing definitively on a *very limited subset of data* within the investigation period in order to draw a definitive conclusion on the production trends demonstrates, in our view, a lack of objectivity.

7.291. Second, Tunisia criticizes the fact that MIICEN based its conclusions on the decrease in production in January-April 2017, while the rest of the investigation period (the four full years from 2013 to 2016) showed a positive trend.<sup>394</sup> The record shows that MIICEN did indeed describe this four-year positive trend in its examination, but chose to focus on the decrease in production in January-April 2017.<sup>395</sup>

7.292. We consider that, in the light of the 33-point increase in production over four years, an objective and unbiased authority should have outlined why it considered the data for the four-month period of 2017 to be determinative. However, the only explanation that we find in the report on the definitive determination is that "the positive developments in production between 2013 and 2016, examined in the light of the non-profitable sales made [during] this entire period, give rise to the conclusion that the increase in production is not an indication of the performance of the [domestic industry], which explains the [domestic industry's] inability to maintain this pace and led it to decrease its production in January-April 2017".<sup>396, 397</sup> In our view, this sentence does not explain why the data for the first four months of 2017 more accurately reflected the state of the domestic industry than the data over four years.

7.293. We recall that Morocco refers to the findings of the panel in *Russia - Commercial Vehicles* to support its position that an investigating authority may "compare the data for part of an investigation period to the data for the corresponding period of the previous year".<sup>398</sup> Although the Russian investigating authority did compare two half-year periods in its injury analysis, the question before us in the present case is different. Indeed, in that other case, the European Union was not claiming

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<sup>391</sup> Tunisia's opening statement at the first meeting of the Panel, para. 8.6 (referring to Panel Reports, *Mexico - Anti-Dumping Measures on Rice*, paras. 7.85 and 7.86; and *Mexico - Steel Pipes and Tubes*, para. 7.254).

<sup>392</sup> The Appellate Body noted that "examining data relating to the whole year would result in a more accurate picture of the 'state of the domestic industry' than an examination limited to a six-month period". (Appellate Body Report, *Mexico - Anti-Dumping Measures on Rice*, para. 183) See also Panel Report, *Mexico - Steel Pipes and Tubes*, para. 7.255.

<sup>393</sup> Panel Report, *Mexico - Steel Pipes and Tubes*, para. 7.252.

<sup>394</sup> Tunisia's response to Panel question No. 4.5, para. 158.

<sup>395</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 153.

<sup>396</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 153.

<sup>397</sup> In the same paragraph of the report, MIICEN noted that "one of the largest domestic producers of exercise books was forced to stop production in 2017 owing to the market situation characterized by an increased presence of dumped imports of Tunisian exercise books". (Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 153) However, neither MIICEN during the investigation, nor Morocco in the context of this dispute, argued that the period January-April 2017 was determinative because of to this production shutdown.

<sup>398</sup> Morocco's second written submission, para. 223 (referring to Panel Report, *Russia - Commercial Vehicles*, para. 7.39).

that the Russian authority had based its determination on half-year data, thereby ignoring the trend over several years.<sup>399</sup> However, what is at issue before us is precisely the fact that MIICEN relied exclusively upon the data for the first four months of 2017 in its finding of a decline in the domestic industry's production.

7.294. In summary, we recall that, under Article 3.1 of the Anti-Dumping Agreement, the investigating authority is required to conduct an objective examination of the evidence before it. More specifically, it must ensure that the data substantiating its determination credibly and accurately reflect the state of the domestic industry. In our view, an objective authority should have explained why a decrease in the first four months of 2017 was more relevant than a trend over four years and should have addressed how the data for the four months were representative of the state of the domestic industry. The absence of an explanation of these points affects, in our view, the objectivity of the examination conducted by MIICEN.

7.295. Based on these elements, we find that MIICEN failed to conduct an objective examination of the developments in the Moroccan industry's production, as required by Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

#### **7.3.3.2.4 Was the analysis of the profitability of the domestic industry objective?**

7.296. Tunisia argues that MIICEN failed to conduct an objective and unbiased examination of the profitability of the domestic industry.<sup>400</sup> Specifically, according to Tunisia, MIICEN ignored evidence concerning profitability.<sup>401</sup> Therefore, Tunisia argues that the price of the domestic product has always been lower than the price of Tunisian exercise books, and that the domestic industry thus had some margin to convert its losses into profit by increasing its prices.<sup>402</sup> Tunisia asserts that MIICEN had before it all the elements to conclude that the negative profitability was not a sign of injury, but rather a business strategy.<sup>403</sup> MIICEN therefore possessed evidence enabling it to question the impact of the imports on the negative profitability of the domestic industry.<sup>404</sup>

7.297. Morocco defends MIICEN's decision to base its finding of injury on the negative profitability. In this connection, Morocco contends that "profitability is the *primus inter pares* of indicators".<sup>405</sup> According to Morocco, the data demonstrate that the purported margin for manoeuvre in terms of price was "barely perceptible" or "non-existent".<sup>406</sup> Furthermore, Morocco emphasizes the fact that MIICEN did not have before it any evidence pointing to a business strategy whereby the domestic industry decided to sell at a loss.<sup>407</sup>

7.298. In the light of the parties' arguments, the question before us is whether MIICEN assessed the negative profitability of the domestic industry in an objective manner.

7.299. We recall that MIICEN found negative profitability in the domestic industry during the entire period of investigation, which is supported by the record data.<sup>408</sup> MIICEN expressly linked the negative profitability to the impact of the Tunisian imports on prices. The authority thus found that "[i]n order to maintain production and sales volumes, the domestic industry was forced to offer prices lower than the prices of the dumped imports from Tunisia, thereby sacrificing its profit margins and accepting to sell at a loss".<sup>409</sup> MIICEN also stressed the importance of profitability as a key

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<sup>399</sup> Panel Report, *Russia - Commercial Vehicles*, paras. 7.28, 7.32-7.52.

<sup>400</sup> Tunisia's first written submission, para. 6.121; response to Panel question No. 4.3, para. 135.

<sup>401</sup> Tunisia's second written submission, paras. 4.146 and 4.151.

<sup>402</sup> Tunisia's second written submission, paras. 4.144 and 4.145; response to Panel question No. 4.3, paras. 135, 138 and 139.

<sup>403</sup> Tunisia's first written submission, para. 6.130; second written submission, para. 4.146.

<sup>404</sup> Tunisia's second written submission, paras. 4.148 and 4.151; response to Panel question No. 4.3, paras. 135 and 140.

<sup>405</sup> Morocco's first written submission, para. 194. (emphasis original)

<sup>406</sup> Morocco's second written submission, paras. 232 and 233.

<sup>407</sup> Morocco's second written submission, para. 237.

<sup>408</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 174; Morocco's first written submission, p. 64. We note that, in its first written submission, Tunisia challenged the data underlying the calculation of profitability. However, after having consulted the confidential data presented by Morocco, Tunisia abandoned this argument. (Tunisia's second written submission, para. 4.143; response to Panel question No. 4.1, para. 127)

<sup>409</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 173.

indicator of injury and explained the relationship between the prices and profitability levels as follows:

Moreover, if the establishment of material injury is not necessarily dependent on the negative development of all the economic indicators of a domestic industry, then surely these economic indicators do not and cannot all have equal weight. The Ministry thus considers profitability to be one of the key indicators, since it represents the ultimate objective of any company. Price level is another important indicator of material injury because of its major and direct impact on profitability. In the present case, negative levels of profitability were found throughout the period considered and *the pressure on prices, particularly from the dumped imports of Tunisian exercise books, prevented the [domestic industry] from reaching non-injurious price levels, as has been mentioned above.* The pressure exerted by the dumped imports of Tunisian exercise books was so significant over the first months of 2017 that the [domestic industry] was no longer able to maintain its production and sales volumes, demonstrating that, at the end of the investigation period, the [domestic industry] was in a situation that had become untenable.<sup>410</sup>

7.300. We begin by assessing Tunisia's main argument that MIICEN should have examined whether the negative profitability of the domestic industry was the result of a domestic industry strategy. In response to our request to explain why MIICEN should have conducted such an examination *under Articles 3.1 and 3.4* of the Anti-Dumping Agreement, Tunisia clarified that it "[was] not claiming that an investigating authority [was] required to systematically analyse whether negative profitability may be the result of something other than imports, such as a business strategy of the [domestic industry], under Articles 3.1 and 3.4".<sup>411</sup> Instead, Tunisia asserts that, in the light of the evidence before it, MIICEN should have called into question the explanation offered by the applicants (in particular, that the negative profitability was due to the need to maintain a low price level in the face of the Tunisian imports).<sup>412</sup>

7.301. It should be recalled that Article 3.4 of the Anti-Dumping Agreement requires an examination of "the impact of the dumped imports on the domestic industry" and an evaluation of all relevant economic factors and indices "having a bearing on the state of the industry". Nothing in the text of this provision requires the investigating authority to examine all the possible causes of the indices showing negative developments.<sup>413</sup> In this regard, we agree with the Appellate Body's view that Article 3.5 of the Anti-Dumping Agreement covers a broader scope than the examination under Article 3.4 and requires a non-attribution analysis.<sup>414</sup> The investigating authority must examine other known injury factors as part of this analysis. Therefore, we are not convinced that the investigating authority was required to examine under Articles 3.1 and 3.4 of the Anti-Dumping Agreement whether the negative profitability was attributable to reasons other than the imports. According to our assessment, Tunisia's argument falls within the scope of Article 3.5 rather than that of Article 3.4.<sup>415</sup> We thus agree with Morocco's view that MIICEN was not required to examine this particular issue, albeit for different reasons.

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<sup>410</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 178. (emphasis added)

<sup>411</sup> Tunisia's response to Panel question No. 4.3, para. 137.

<sup>412</sup> Tunisia's response to Panel question No. 4.3, paras. 135, 137, 139 and 140.

<sup>413</sup> Two third parties expressly support this view. (Canada's third-party response to Panel question No. 3.1, para. 1; European Union's third-party response to Panel question No. 3.1, para. 23) The European Union adds that "Article 3.4 of the Anti-Dumping Agreement could thus require the examination of the question of whether the negative profitability is due to reasons other than the dumped imports - only if this examination is *necessary* for considering 'the impact' of these imports on the domestic industry". (European Union's third-party response to Panel question No. 3.1, para. 22 (emphasis original)) The United States, meanwhile, notes that "[t]he reasons underlying observed trends [in the state of the domestic industry], however, [are] generally more relevant to an analysis of causation under Article 3.5 of the [Anti-Dumping] Agreement". (United States' third-party response to Panel question No. 3.1, para. 5)

<sup>414</sup> Appellate Body Report, *China - GOES*, para. 150.

<sup>415</sup> We note that the panel in *China - X-Ray Equipment* was confronted with a very similar claim and commented that:

In the Panel's view, Nucotech's alleged start-up situation, business expansion and aggressive pricing strategy are best considered as potential causes of an industry's condition, rather than factors indicative of the state of the industry akin to those listed in Article 3.4 of the Anti-Dumping Agreement.

(Panel Report, *China - X-Ray Equipment*, para. 7.255)

7.302. We now turn to the assessment of Tunisia's argument that MIICEN failed to objectively examine the evidence casting doubt on the explanatory force of the imports for the negative profitability. In particular, Tunisia states that, in 2014, 2015 and 2016, the price of the imports was above the domestic industry's cost of production, which, in turn, was above the price of the domestic product.<sup>416</sup> According to Tunisia, the domestic industry thus had some margin to increase its prices while keeping them below the price of the Tunisian imports.<sup>417</sup> Tunisia asserts that, by ignoring those data that contradicted the applicant's explanation regarding the impact of the imports on profitability, MIICEN failed to conduct an objective examination of this evidence.<sup>418</sup>

7.303. Given that the first sentence of Article 3.4 requires an examination of the *impact* of dumped imports on the domestic industry, this Article is concerned with "the relationship between subject imports and the state of the domestic industry".<sup>419</sup> Accordingly, the investigating authority is required to examine "the 'explanatory force' of subject imports for the state of the domestic industry".<sup>420</sup>

7.304. We note that, according to the questionnaire responses from two producers, the price level of Tunisian imports was a factor in the setting of prices for the domestic industry.<sup>421</sup>

7.305. The data taken from the record by Tunisia demonstrate that the price of the Tunisian imports exceeded the domestic industry's cost of production between 2014 and 2016 (for three years of a data collection period of four years and four months) which, in turn, exceeded the price of the domestic product.<sup>422</sup> However, the analysis of the domestic industry's profitability conducted by MIICEN makes no reference to the interaction among the prices of the domestic product, the Tunisian product and the cost of production of the domestic product. MIICEN simply asserted that "the dumped imports of Tunisian exercise books prevented the [domestic industry] from reaching non-injurious price levels"<sup>423</sup> and that "[i]n order to maintain production and sales volumes, the domestic industry was forced to offer prices lower than the prices of the dumped imports from Tunisia, thereby sacrificing its profit margins and accepting to sell at a loss."<sup>424</sup>

7.306. Morocco contends that the domestic industry was seeking to maintain its market share by reducing its prices to remain competitive.<sup>425</sup> In this regard, MIICEN clarified that the domestic industry had chosen to continue "selling at prices as competitive as those of Tunisian exporters in order to limit market share losses, thereby directly affecting profitability margins".<sup>426</sup> We have found above that MIICEN's conclusions concerning the developments in the domestic industry's market shares and sales were not based on an objective examination of the data. We also note that MIICEN's explanation fails to consider the specific interaction among the prices of the domestic product, the Tunisian product and the cost of production of the domestic product. The record shows that not only were the prices of the Tunisian product higher than the price of the domestic like product, but they also followed *an opposite trajectory* between 2014 and 2016.<sup>427</sup> However, MIICEN failed to explain why, in view of the upward trend in the prices of the Tunisian product, the domestic industry was forced to continue lowering its prices, thereby sacrificing its profits. MIICEN thus failed to examine in an objective manner whether the subject imports had "explanatory force" for the negative profitability of the domestic producers.

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<sup>416</sup> Tunisia's second written submission, para. 4.145; response to Panel question No. 4.3, para. 139.

<sup>417</sup> Tunisia's second written submission, para. 4.145; response to Panel question No. 4.3, para. 135.

<sup>418</sup> Tunisia's second written submission, para. 4.148; response to Panel question No. 4.3, para. 135.

<sup>419</sup> Appellate Body Report, *Korea - Pneumatic Valves (Japan)*, para. 5.166 (quoting Appellate Body Report, *China - GOES*, para. 149).

<sup>420</sup> Appellate Body Report, *Korea - Pneumatic Valves (Japan)*, para. 5.166 (quoting Appellate Body Reports, *China - HP-SSST (Japan)/China - HP-SSST (EU)*, para. 5.205, which quotes Appellate Body Report, *China - GOES*, para. 149).

<sup>421</sup> MAPAF's responses to the questionnaire (Exhibit TUN-66), p. 16, section F.2 ("Fixation des prix "); and Promograph's responses to the questionnaire (Exhibit TUN-67), p. 16, section F.2 ("Fixation des prix ").

<sup>422</sup> Report on the definitive determination (Exhibit MAR-CONF-3 (BCI)), paras. 148, 149 and 191 (tables); Tunisia's response to Panel question No. 4.3, para. 138; and second written submission, para. 4.144.

<sup>423</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 178.

<sup>424</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 173.

<sup>425</sup> Morocco's first written submission, para. 194; second written submission, para. 216.

<sup>426</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 176.

<sup>427</sup> Report on the definitive determination (Exhibit MAR-CONF-3 (BCI)), paras. 148, 149 and 191.

7.307. For the reasons set out above, we conclude that MIICEN failed to examine the negative profitability of the domestic industry in an objective manner and therefore violated Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

7.308. We note that Tunisia also argues that MIICEN did not take into account the fact that many factors showed positive developments in its finding of injury.<sup>428</sup> On the basis of another panel decision, Tunisia asserts that the authority must explain in a "thorough and persuasive" manner why the positive performances were "outweighed by any other factors".<sup>429</sup> Tunisia considers that MIICEN has not provided such an explanation.<sup>430</sup>

7.309. We note that MIICEN's definitive conclusion regarding the state of the domestic industry was based on the negative development of four factors: the domestic industry's production, sales, market share and profitability.<sup>431</sup> The fact that we have concluded that MIICEN's examination of these four factors was not objective means that entire conclusion regarding the state of the domestic industry is inconsistent with the requirements of Articles 3.1 and 3.4 of the Anti-Dumping Agreement. Accordingly, we consider that there is no need to address this additional argument made by Tunisia in order to resolve this dispute.

### **7.3.3.3 Conclusion on the examination of the state of the domestic industry**

7.310. In view of the foregoing, we find that MIICEN violated Articles 3.1 and 3.4 of the Anti-Dumping Agreement by failing to conduct an objective examination of the developments in the domestic industry's sales, market share and production, and by failing to examine in an objective manner, on the basis of the evidence before it, whether the negative profitability of the domestic industry was due to the Tunisian imports.

## **7.4 Tunisia's claims regarding the causation determination**

### **7.4.1 Introduction**

7.311. Tunisia claims that MIICEN violated Articles 3.1 and 3.5 of the Anti-Dumping Agreement for two reasons: (a) because it found a causal relationship between the injury observed and the Tunisian imports on the basis of its flawed analysis of the volume of imports in relative terms, of the effects of the imports on prices, and of the state of the domestic industry<sup>432</sup>; and (b) because it failed to properly examine competition from domestic producers (specifically Imprimerie Moderne) as part of its analysis of non-attribution factors.<sup>433</sup>

7.312. With regard to Tunisia's first argument, Morocco recalls that it is contesting Tunisia's claims under Articles 3.2 and 3.4 and, on this basis, requests that we also reject the related claim concerning the causation examination.<sup>434</sup> With regard to Imprimerie Moderne, Morocco explains that the exporters did not submit evidence of competition from this company in the Moroccan market and that the company did not cooperate with the investigation.<sup>435</sup> Therefore, MIICEN was not required to examine the effects of the presence of this company on the market.<sup>436</sup>

7.313. In the next section, we recall the requirements of Articles 3.1 and 3.5 of the Anti-Dumping Agreement concerning the causation examination. We then examine Tunisia's two grievances.

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<sup>428</sup> Tunisia's first written submission, paras. 6.99-6.106; second written submission, paras. 4.112-4.120.

<sup>429</sup> Tunisia's first written submission, para. 6.105 (quoting Panel Report, *Thailand - H-Beams*, para. 7.249).

<sup>430</sup> Tunisia's first written submission, para. 6.106.

<sup>431</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 180.

<sup>432</sup> Tunisia's first written submission, paras. 7.10-7.15; second written submission, paras. 5.3-5.6.

<sup>433</sup> Tunisia's first written submission, paras. 7.16-7.29; second written submission, paras. 5.7-5.24.

<sup>434</sup> Morocco's first written submission, para. 205.

<sup>435</sup> Morocco's opening statement at the first meeting of the Panel, paras. 108 and 109; opening statement at the second meeting of the Panel, para. 104; and response to Panel question No. 5.6, para. 83.

<sup>436</sup> Morocco's second written submission, para. 246.

## 7.4.2 Analysis

### 7.4.2.1 Applicable requirements of Articles 3.1 and 3.5 of the Anti-Dumping Agreement

7.314. We have set out the requirements of Article 3.1 above and shall not repeat them here.

7.315. The relevant provisions of Article 3.5 of the Anti-Dumping Agreement provide that:

It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. 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.

7.316. Article 3.5, together with Article 3.1, thus establishes a number of obligations. First, it "must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury". This demonstration "shall be based on an examination of all relevant evidence before the authorities".

7.317. By virtue of the phrase "through the effects of dumping, as set forth in paragraphs 2 and 4", the causation analysis is the culmination of a logical progression in the injury analysis. The Appellate Body noted that "to the extent that a panel f[ound] that an investigating authority's volume, price effects, and impact analyses [were] inconsistent with its obligations under Articles 3.2 and 3.4, such inconsistencies would likely undermine an investigating authority's overall causation determination and *consequently* lead to an inconsistency with Article 3.5".<sup>437</sup> Similarly, other panels have found violations of Article 3.5 based on the inconsistencies of the investigating authorities' analyses with Articles 3.2 and 3.4.<sup>438</sup>

7.318. Under the third sentence of Article 3.5, the investigating authority is required to examine any known factors other than the dumped imports which at the same time are injuring the domestic industry. The Appellate Body noted that the obligation to conduct this non-attribution analysis is triggered when the factor at issue (a) is "known" to the investigating authority; (b) is a factor "other than dumped imports"; and (c) is injuring the domestic industry at the same time as the dumped imports.<sup>439</sup>

7.319. Lastly, we note that the Anti-Dumping Agreement "does not expressly state how such factors should become 'known' to the investigating authority, or if and in what manner they must be raised by interested parties, in order to qualify as 'known'".<sup>440</sup>

### 7.4.2.2 Was the causation examination, based on the flawed analyses of the imports' price effects and of the injury indicia, inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement?

7.320. Tunisia considers that MIICEN's conclusion that Tunisian imports had contributed to the injury to the domestic industry was based on: (a) the effects of the volume of Tunisian imports, (b) the effects of the imports on the prices of the domestic product, and (c) the analysis of the economic situation of the domestic industry.<sup>441</sup> According to Tunisia, the inconsistency of the injury examination with Articles 3.1, 3.2 and 3.4 of the Anti-Dumping Agreement means that MIICEN had no grounds to conclude that there was a causal relationship between the dumped imports and the injury found and it therefore violated Articles 3.1 and 3.5.<sup>442</sup>

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<sup>437</sup> Appellate Body Report, *Korea - Pneumatic Valves (Japan)*, para. 5.196. (emphasis original)

<sup>438</sup> Appellate Body Reports, *China - X-Ray Equipment*, para. 7.239; *China - Autos (US)*, paras. 7.327 and 7.328; *Russia - Commercial Vehicles*, para. 7.182; and *China - Broiler Products (Article 21.5 - US)*, para. 7.186.

<sup>439</sup> Appellate Body Report, *EC - Tube or Pipe Fittings*, para. 175.

<sup>440</sup> Appellate Body Report, *EC - Tube or Pipe Fittings*, para. 176.

<sup>441</sup> Tunisia's first written submission, para. 7.10; second written submission, para. 5.5.

<sup>442</sup> Tunisia's first written submission, paras. 7.10-7.15; second written submission, paras. 5.3 and 5.4.

7.321. In the report on the definitive determination, MIICEN concluded that "the increase in dumped imports of exercise books originating in Tunisia, because it coincides with the deterioration of the domestic industry, and in view of the volume and prices of these imports, is a cause of the material injury suffered by the [domestic industry]".<sup>443</sup> This finding suggests that MIICEN based its causation determination on the increase in the volume of imports, the effects of the imports on prices and the injury to the domestic industry.

7.322. We recall that, under Article 3.5 of the Anti-Dumping Agreement, the investigating authority is required to demonstrate that the dumped imports are, *through the effects of dumping, as set forth in paragraphs 2 and 4*, causing injury. This means that the flawed analyses under Articles 3.2 and 3.4 may consequentially lead to an inconsistency with Article 3.5.<sup>444</sup>

7.323. We have found several inconsistencies with Articles 3.2 and 3.4 in MIICEN's analysis of the effects of the imports on the prices of the domestic product, as well as in the analysis of the indicia of the domestic industry underlying the determination of material injury. These inconsistencies lead us to conclude that the causation examination was also inconsistent with Article 3.5. We consider in this regard that relying, in the causation examination, upon analyses under Articles 3.2 and 3.4 that were not objective within the meaning of Article 3.1 of the Anti-Dumping Agreement taints the causation analysis, meaning that it too cannot be objective.

7.324. Accordingly, we conclude that the analysis of the causal relationship between the injury found and the Tunisian imports was inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

#### **7.4.2.3 Did MIICEN act inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement by failing to examine the effects of competition from Imprimerie Moderne on the domestic industry?**

7.325. We note that, in the present case, MIICEN defined the domestic industry as comprising three of the five domestic producers of exercise books (MAPAF, PROMOGRAPH and Med Paper).<sup>445</sup> As part of its non-attribution analysis, MIICEN examined competition among these producers.<sup>446</sup> While MIICEN noted the existence of two other domestic producers - Imprimerie Moderne and Sopalemb - which accounted for 30-40% of domestic exercise book production in 2016<sup>447</sup>, it did not examine competition from these two other producers as a non-attribution factor.

7.326. Tunisia contends that MIICEN was aware of the significant presence of Imprimerie Moderne in the Moroccan market and that competition from Imprimerie Moderne was a "known factor" that "injur[ed] the domestic industry" within the meaning of the third sentence of Article 3.5.<sup>448</sup> Tunisia specifically challenges the fact that MIICEN failed to examine the effects of competition from Imprimerie Moderne on the state of the domestic industry and, thus, violated Articles 3.1 and 3.5 of the Anti-Dumping Agreement.<sup>449</sup>

7.327. We recall that, under the requirements of Article 3.5, the investigating authority is required to conduct a non-attribution analysis when the factor at issue (a) is "known" to the investigating authority, (b) is a factor "other than dumped imports", and (c) is injuring the domestic industry at the same time as the dumped imports.<sup>450</sup>

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<sup>443</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 219.

<sup>444</sup> Appellate Body Report, *Korea - Pneumatic Valves (Japan)*, para. 5.196.

<sup>445</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), paras. 14 and 73.

<sup>446</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), paras. 198-200.

<sup>447</sup> Initiation report (Exhibits TUN-2, MAR-10), para. 6; report on the definitive determination (Exhibits TUN-7, MAR-1), paras. 14, 16 and 77.

<sup>448</sup> Tunisia's response to Panel question No. 5.2, para. 144.

<sup>449</sup> Tunisia's response to Panel question No. 5.1, para. 143; second written submission, para. 5.24. Tunisia clarifies that, "according to the data before MIICEN, Imprimerie Moderne was the only producer other than the applicants with the ability to adversely affect the state of the [domestic industry]" (Tunisia's second written submission, para. 5.15) In the light of these explanations, we understand that Tunisia is not claiming a violation of Article 3.5 on the grounds that MIICEN failed to examine competition from Sopalemb as a known factor *injuring* the domestic industry.

<sup>450</sup> Appellate Body Report, *EC - Tube or Pipe Fittings*, para. 175.



7.328. With regard to the requirements of Article 3.5, we do not share Tunisia's position that mere knowledge of the existence of a potential injury factor is sufficient to trigger the obligation to investigate this factor.<sup>451</sup> We recall that Article 3.5 requires the examination of "any known factors other than the dumped imports which at the same time are injuring the domestic industry." Other panels have considered that if there is no evidence before an investigating authority to indicate that a factor is injuring the domestic industry, the investigating authority is not required to examine this factor as part of the non-attribution analysis.<sup>452</sup> We agree with this interpretation and adopt it for the purposes of our examination.

7.329. Morocco does not contest the fact that the exporters drew MIICEN's attention to competition from Imprimerie Moderne.<sup>453</sup> It is therefore clear that the presence of Imprimerie Moderne was "known" to the authority. It is also undisputed that competition from Imprimerie Moderne was a factor "other than the dumped imports".

7.330. However, the parties disagree as to whether there was evidence before MIICEN to indicate that competition from Imprimerie Moderne caused injury to the domestic industry.<sup>454</sup> The question before us is therefore whether MIICEN had evidence before it concerning the negative effects of the presence of Imprimerie Moderne on the state of the domestic industry.

7.331. On this point, Tunisia provided us with the following elements: the data reflecting Imprimerie Moderne's production, the estimation of Imprimerie Moderne's market share and certain submissions made by exporters to MIICEN. We shall examine these elements in turn.

7.332. According to MIICEN, Imprimerie Moderne began operations in 2015.<sup>455</sup> We note that the main argument put forward by Tunisia is that the presence of Imprimerie Moderne in the Moroccan market was very significant, as indicated by its share of domestic production.<sup>456</sup> MIICEN found that Sopalemb and Imprimerie Moderne accounted for 30-40% of the domestic production of exercise books in 2016.<sup>457</sup> Given that Sopalemb "produced only extremely limited volumes of exercise books"<sup>458</sup>, Tunisia, on the basis of the record data, estimates that Imprimerie Moderne's share of production must have been [[\*\*\*]] % in 2015 and [[\*\*\*]] % in 2016.<sup>459</sup> According to Tunisia, "this producer can be expected to have had a significant share of the market" and could have had an impact on the domestic industry's market share.<sup>460</sup>

7.333. In our view, the data on this company's share of production do not provide specific indications as to the effect of competition from Imprimerie Moderne on the domestic industry, because the record does not demonstrate what proportion of this producer's sales were made in the Moroccan market and in export markets, and how its sales affected the domestic industry. Thus, we agree with Morocco that "[i]t is unclear, on the basis of the facts before the authority, what fraction of Imprimerie Moderne's production was exported during the final year of the investigation period, what competition existed with the products at issue, and what actual competition existed in the market".<sup>461</sup>

7.334. Both parties confirm that MIICEN did not establish Imprimerie Moderne's market share.<sup>462</sup> However, Tunisia insists that the market share of this producer was significant. According to the estimate made by Tunisia on the basis of the data contained in the initiation report, its market share

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<sup>451</sup> Tunisia's first written submission, para. 7.20 (referring to Panel Report, *China - GOES*, para. 7.636).

<sup>452</sup> Panel Reports, *EU - Fatty Alcohols (Indonesia)*, para. 7.196; *China - X-Ray Equipment*, para. 7.267.

<sup>453</sup> Morocco's comments on Tunisia's response to Panel question No. 5.9, para. 245 a).

<sup>454</sup> Tunisia's first written submission, paras. 7.21-7.28; second written submission, paras. 5.14-5.24; Morocco's opening statement at the first meeting of the Panel, paras. 108 and 109; opening statement at the second meeting of the Panel, para. 104; response to Panel question No. 5.6, para. 83; and comments on Tunisia's response to Panel question No. 5.9, paras. 245-247.

<sup>455</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 77.

<sup>456</sup> Tunisia's response to Panel question No. 5.9, para. 166.

<sup>457</sup> Initiation report (Exhibits TUN-2, MAR-10), para. 6.

<sup>458</sup> Report on the definitive determination (Exhibits TUN-7, MAR-1), para. 77.

<sup>459</sup> Tunisia's second written submission, para. 5.15 (referring to the Excel file on the applicants (Exhibit TUN-30 (BCI), "Représentativité" sheet); report on the definitive determination (Exhibit MAR-CONF-3 (BCI)), paras. 210 and 211.

<sup>460</sup> Tunisia's second written submission, para. 5.15.

<sup>461</sup> Morocco's response to Panel question No. 5.11, para. 60 d).

<sup>462</sup> Tunisia's response to Panel question No. 5.9, paras. 160-165; Morocco's comments on Tunisia's response to Panel question No. 5.9, paras. 241, 242 and 245 b).

would have been around 13%.<sup>463</sup> Tunisia obtained this figure by multiplying the domestic industry's market share taken from the initiation report (45-50%) by Imprimerie Moderne's share of domestic production (30%).<sup>464</sup> This calculation presumes that this company sold all its exercise books in the Moroccan market and does not take into account the possibility that it may be export-oriented. As we have already noted, the investigation record does not indicate what fraction of Imprimerie Moderne's sales were made in the Moroccan market. For this reason, we cannot rely upon this estimate by Tunisia, which is not substantiated by evidence.

7.335. Tunisia also asserts that the entry into the market of a producer that rapidly gained a large share of domestic production would certainly have influenced the domestic industry's pricing decisions.<sup>465</sup> However, the investigation record does not provide information on the price levels of the exercise books offered by Imprimerie Moderne<sup>466</sup> allowing for an assessment of whether this producer could have exerted pressure on domestic industry prices. This assertion by Tunisia thus remains speculation that is unsubstantiated by evidence in the investigation record.

7.336. Lastly, Tunisia refers to the exporters' submissions to MIICEN. The exporters drew MIICEN's attention to the fact that Imprimerie Moderne had opened a new factory in 2014 (citing the company's website).<sup>467</sup> They also asserted that "new producers, such as the company Imprimerie Moderne, [were] successfully develop[ing] new brands (e.g. Bleu Marine) and [had] expanded their production and sales".<sup>468</sup> Although these assertions confirm the emergence of a new Moroccan producer of exercise books, they did not provide other elements as to the effects of competition from Imprimerie Moderne on the state of the domestic industry.

7.337. In summary, we are not convinced that an objective authority would have concluded, on the basis of the elements contained in the record, that competition from Imprimerie Moderne was injuring the domestic industry. For this reason, we find that MIICEN was not obliged to examine competition from Imprimerie Moderne as part of its analysis of non-attribution factors.

7.338. We note that Tunisia does not raise any independent arguments in support of its claim under Article 3.1. Thus, Tunisia has failed to establish that Morocco violated Article 3.1 of the Anti-Dumping Agreement by failing to examine the effects of competition from Imprimerie Moderne.

#### **7.4.3 Conclusion on the causation examination**

7.339. In view of the foregoing, we conclude that MIICEN's analysis of the causal relationship between the injury found and the Tunisian imports was inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

7.340. With regard to the non-attribution examination of the injury caused by other known factors, Tunisia has failed to establish that Morocco violated Articles 3.1 and 3.5 of the Anti-Dumping Agreement by failing to examine the effects of competition from Imprimerie Moderne.

### **7.5 Claims by Tunisia concerning the initiation of the investigation**

#### **7.5.1 Introduction**

7.341. Tunisia questions whether the complaint filed with MIICEN by the domestic industry contained sufficient evidence of dumping.<sup>469</sup> Tunisia submits that MIICEN should not have initiated

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<sup>463</sup> Tunisia's first written submission, para. 7.24 (referring to the initiation report (Exhibit TUN-2), table 11).

<sup>464</sup> Tunisia's first written submission, para. 7.24 and fn 346.

<sup>465</sup> Tunisia's response to Panel question No. 5.9 at the second hearing; comments on Morocco's response to Panel question No. 5.11, para. 98.

<sup>466</sup> Tunisia's first written submission, para. 7.27. Exhibit TUN-30 reflects the value of Imprimerie Moderne's production for 2015 and 2016. (Excel file listing the applicants (Exhibit TUN-30 (BCI))) However, those data do not indicate whether Imprimerie Moderne exerted pressure on domestic industry prices.

<sup>467</sup> Tunisian exporters' comments on the investigation (27 February 2018) (Exhibit TUN-29), p. 11.

<sup>468</sup> Tunisia's response to Panel question No. 5.9, para. 166; Tunisian exporters' comments on the investigation (27 February 2018) (Exhibit TUN-29), p. 10.

<sup>469</sup> Although Tunisia's panel request stated that "the petition ... does not contain sufficient evidence of dumping, injury or causation", Tunisia confirmed that its claims under Article 5 are based solely on there being insufficient evidence of dumping. (Tunisia's response to Panel question No. 6.2, para. 153)

the investigation because of a lack of evidence of dumping or, at least, it should have explained in its notice of initiation how the evidence was sufficient to justify initiating an investigation.<sup>470</sup> Tunisia requests the Panel to find that:

MIICEN failed to sufficiently examine the accuracy and adequacy of the evidence provided in the application to justify the initiation of an anti-dumping investigation in accordance with Article 5.3 of the Anti-Dumping Agreement. Contrary to the provisions of Article 5.2 of the Agreement, the petition filed by the three petitioning firms does not contain sufficient evidence of dumping, in particular a demonstrable normal value in Tunisia. However, despite that deficiency, MIICEN failed to terminate the investigation, as required by the first sentence of Article 5.8 of the Anti-Dumping Agreement.<sup>471</sup>

7.342. Tunisia therefore considers that several pieces of evidence included in the domestic industry's complaint were insufficient to meet the criteria set out in Article 5.2 of the Anti-Dumping Agreement:

- a. **The export price evidence** was based on just one invoice from the period from December 2015 to November 2016, and the notice of initiation did not include any explanation as to why "export prices on that day should be considered representative of the whole dumping investigation period".<sup>472</sup>
- b. The export price information was limited to just a few models of the product under investigation, even though the investigation covered a wide range of products with very different prices.<sup>473</sup>
- c. The domestic transport adjustment made by the applicant to convert the FOB price into an ex-factory price did not reflect the various domestic means of transport used in Tunisia to move the product concerned, because of the differences in the weight of the exercise books and the variable distances between the factories and ports of export<sup>474</sup> (for the same reason, Tunisia criticizes the adjustment for the same value made to the sales prices in Tunisia to determine the normal value).<sup>475</sup> Tunisia also notes that the adjustment corresponds to a return journey between the factory and the port of export, without justification.<sup>476</sup>
- d. **The normal value evidence** was based on the online catalogues of a retail supermarket chain and retail bookshops, but without demonstrating that the prices shown in those catalogues were those of the Tunisian product.<sup>477</sup> Moreover, those catalogues only show the price of certain models of the product, but the complaint fails to explain how these prices were representative.<sup>478</sup>
- e. The distribution margins used for the normal value were adjusted on the basis of information concerning the business practices of a Moroccan wholesaler, but the applicant fails to explain why these margins were representative of practices in Tunisia.<sup>479</sup> Meanwhile, the margins were adjusted on the basis of wholesale prices even though the references used for the normal value in Tunisia corresponded to retail prices.<sup>480</sup>
- f. Lastly, the adjustment for royalties for certain licensed exercise books was not based on evidence of such payments in the Tunisian market.<sup>481</sup>

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<sup>470</sup> Tunisia's first written submission, para. 8.8.

<sup>471</sup> Tunisia's first written submission, para. 8.1. See also Tunisia's second written submission, para. 6.65.

<sup>472</sup> Tunisia's first written submission, para. 8.22.

<sup>473</sup> Tunisia's first written submission, para. 8.23.

<sup>474</sup> Tunisia's first written submission, para. 8.26.

<sup>475</sup> Tunisia's first written submission, para. 8.37.

<sup>476</sup> Tunisia's first written submission, para. 8.27.

<sup>477</sup> Tunisia's first written submission, para. 8.31.

<sup>478</sup> Tunisia's first written submission, paras. 8.33 and 8.34.

<sup>479</sup> Tunisia's first written submission, para. 8.35.

<sup>480</sup> Tunisia's first written submission, para. 8.36.

<sup>481</sup> Tunisia's first written submission, para. 8.38.

7.343. We note that Tunisia does not contend that the complaint is devoid of elements cited in paragraph (iii) of Article 5.2 of the Anti-Dumping Agreement. When examining the record, it appears that the complaint did include information on export prices of the product under investigation, and on the normal value of the like product on the Tunisian market. What is at issue is therefore the sufficiency and relevance<sup>482</sup> of that evidence, taking into account what could reasonably be expected from the applicants.

7.344. With regard to the alleged violation of Article 5.3, Tunisia asserts that MIICEN did not act as an unbiased and objective authority, as it failed to examine sufficiently the accuracy and adequacy of the evidence relating to the export price and the normal value contained in the petition to initiate an investigation.<sup>483</sup> In particular, according to Tunisia, MIICEN should have assessed:

- a. whether the prices in the export documents and the domestic sales in Tunisia, limited to certain models from the range of models of the product under investigation, were representative of the export prices and normal values of the product under consideration as a whole;
- b. whether the export prices set on one day were representative of export prices for the whole investigation period;
- c. whether the information contained in the catalogues submitted as evidence of the normal value was accurate in relation to the producers in question or those who made the product at issue; and
- d. whether the adjustments applied to the export price and to the normal value were based on correct assumptions.<sup>484</sup>

7.345. Although these four arguments concerning the examination conducted by the authority are advanced in support of its claim under Article 5.3, Tunisia clarified, in response to the Panel's questions, that they are "closely linked to evidentiary shortfalls identified by Tunisia within the meaning of Article 5.2".<sup>485</sup> Tunisia argues that "by failing to conduct such an examination, MIICEN acted inconsistently with Articles 5.3 and 5.8 of the Anti-Dumping Agreement".<sup>486</sup>

7.346. In this regard, Tunisia explains that it is requesting "a finding of inconsistency with each of these provisions (5.2, 5.3 and 5.8)"<sup>487</sup>, but that "if the Panel considers that, based on the standard of review applicable to Articles 5.2 and 5.3, it could resolve Tunisia's claim by finding a violation of one of these two provisions (and Article 5.8), Tunisia will not object to the Panel exercising judicial economy in respect of the other provision in question".<sup>488</sup>

7.347. Meanwhile, Morocco asks us to find "that there is no independent obligation *for the authority* under Article 5.2"<sup>489</sup> and that MIICEN did not act inconsistently with Articles 5.3 and 5.8 of the Anti-Dumping Agreement by agreeing to initiate an investigation.<sup>490</sup>

## 7.5.2 Analysis

7.348. We recall that Article 5 of the Anti-Dumping Agreement concerns "initiation and subsequent investigation". It specifies the conditions under which an investigating authority may accept a complaint and initiate or terminate an investigation.

7.349. The arguments advanced by Tunisia in this dispute question both the sufficiency of the evidence provided by the domestic industry and the examination of the evidence by the investigating

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<sup>482</sup> Tunisia's second written submission, para. 6.65.

<sup>483</sup> Tunisia's first written submission, para. 8.41.

<sup>484</sup> Tunisia's first written submission, para. 8.43.

<sup>485</sup> Tunisia's response to Panel question No. 6.23, para. 176.

<sup>486</sup> Tunisia's first written submission, para. 8.44.

<sup>487</sup> Tunisia's response to Panel question No. 6.22, para. 175.

<sup>488</sup> Tunisia's response to Panel question No. 6.22, para. 174.

<sup>489</sup> Morocco's comments on Tunisia's response to Panel question No. 6.22, para. 250. (emphasis original)

<sup>490</sup> Morocco's second written submission, para. 306.

authority. We shall therefore begin by analysing Morocco's obligations under Articles 5.2, 5.3 and 5.8 of the Anti-Dumping Agreement. We will then examine the parties' arguments under these provisions and the facts on the investigation record.

### 7.5.2.1 Applicable requirements of Article 5.2 of the Anti-Dumping Agreement

7.350. Article 5.2 of the Anti-Dumping Agreement consists of a "chapeau" and four subparagraphs that describe the "information" that must be included in the written application submitted by the domestic industry or on its behalf to initiate an investigation (the complaint). The chapeau states that a complaint:

[S]hall 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. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following[.]

7.351. The "information" on dumping (subparagraph (iii) of Article 5.2) relates to the normal value and the export price as established by the applicant.<sup>491</sup> Other panels have been of the opinion that Article 5.2 (iii) should be read in the light of Article 2 of the Anti-Dumping Agreement, which defines dumping and methodologies for establishing a margin of dumping.<sup>492</sup> This information covers the various components of the dumping margin calculation, i.e. elements for determining a normal value (on the basis of either the sales price or a reconstructed normal value), an export price, as well as any adjustments as may be necessary for a fair comparison.

7.352. Meanwhile, the chapeau provides that "evidence of dumping" must "substantiate" the normal value, export price and adjustments submitted by the applicant. The definition of the word "étayer" ("substantiate") states that this verb means "[s]outenir quelque chose par des arguments, des preuves, le fonder, l'établir ou en être la base, la preuve"<sup>493</sup> ("to support something with arguments, evidence, to determine it, to establish it or to be grounds for, proof of it"), while the word "preuve" ("evidence") is defined as an "[é]lément matériel ... qui démontre, établit, prouve la vérité ou la réalité d'une situation de fait ou de droit"<sup>494</sup> (a "material element ... that demonstrates, establishes, proves the truth or reality of a *de facto* or *de jure* situation"). This word choice indicates that the information provided in support of the complaint must have some probative value. With regard to dumping, the applicant must provide evidence that permits the actual normal value, export price and value of any adjustments to be established for the period identified in the complaint. A normal value and export price not substantiated "by relevant evidence" would be "insufficient" to meet the requirements of Article 5.2.<sup>495</sup>

7.353. Article 5.2 nevertheless accepts that the applicant can only be required to provide such evidence as is "reasonably available to [it]". The standard of evidence required in a complaint may therefore not go beyond what information may be reasonably available to a firm that is part of the domestic industry, which excludes, in particular, confidential information. This stipulation has been interpreted in other dispute settlement procedures as seeking "to avoid putting an undue burden on the applicant to submit information which is not reasonably available to it".<sup>496</sup> Meanwhile, a number

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<sup>491</sup> Article 5.2(iii) provides that the complaint shall include "information on the prices at which the product is sold from the country or countries of origin or export ... and information on export prices or, where appropriate, on the prices at which the product is first resold to an independent buyer in the territory of the importing Member".

<sup>492</sup> Panel Report, *Guatemala - Cement II*, para. 8.35. See also Panel Report, *Pakistan - BOPP Film (UAE)*, para. 7.22.

<sup>493</sup> Dictionnaire Larousse, definition of "étayer"  
<https://www.larousse.fr/dictionnaires/francais/%c3%a9tayer/31335> (accessed 14 April 2021).

<sup>494</sup> Dictionnaire Larousse, definition of "preuve"  
<https://www.larousse.fr/dictionnaires/francais/preuve/63855> (accessed 14 April 2021).

<sup>495</sup> As stated in Panel Report, *Pakistan - BOPP Film (UAE)*, "inherent in the very meaning of evidence is its relationship to the facts that it tends to establish, i.e. its relevance. Information that does not tend to establish the facts called for does not fit this definition". (*Ibid.*, para. 7.19 (fn omitted))

<sup>496</sup> Panel Report, *US - Softwood Lumber V*, para. 7.54.

of panels have recognized that the quantity and quality of evidence provided at the complaint stage would necessarily be lower than the evidence required to impose anti-dumping measures.<sup>497</sup>

7.354. Lastly, we note that the parties differ over whether Article 5.2 of the Anti-Dumping Agreement lays down obligations, the violation of which may be found by a panel. In that respect, Tunisia maintains that by "setting forth, in a prescriptive manner, the basic content of an application for initiating an anti-dumping investigation, Article 5.2 *imposes an obligation* that the authorities must comply with when assessing such an application".<sup>498</sup> On the other hand, Morocco considers that "nothing in Article 5.2 imposes any legal obligation to do or not do something on" the investigating authority.<sup>499</sup> To the extent that Tunisia makes claims based on Article 5.2 in this dispute, Morocco considers it "essential that the Panel find that Article 5.2 does not contain an independent obligation *for the authority*".<sup>500</sup>

7.355. In this regard, we find that Article 5.2 determines the content of the complaint submitted by the domestic industry and does not therefore create directly an obligation for the investigating authority. It is Article 5.3 that, as we will see in the next section, sets the criteria for the review that the authority must undertake to determine **whether the evidence contained in the complaint is sufficient** to justify the initiation of an investigation. We therefore agree with Morocco that Article 5.2 describes the evidence and information that an applicant must include in its complaint, but that the relevant obligations that apply to the investigating authority are set out in Article 5.3.

#### 7.5.2.2 Applicable requirements of Article 5.3 of the Anti-Dumping Agreement

7.356. The text of Article 5.3 is composed of just one sentence, which requires the investigating authority 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". This provision covers explicitly the investigating authority and requires it to examine the complaint filed by the domestic industry, with a view to determining *whether there is* "sufficient" evidence to initiate an investigation.

7.357. The authority's examination must focus on the "accuracy" and "adequacy" of the evidence provided in the complaint. The word "exactitude" ("accuracy") means something "[q]ui est rigoureusement conforme à la réalité"<sup>501</sup> ("which is strictly in line with reality") and "adéquation" (adequacy) refers to the "[c]onformité à l'objet, au but qu'on se propose"<sup>502</sup> ("conformity with the purpose, with the objective that one has in mind"). Thus, the authority must examine whether the evidence provided in the complaint is (a) in line with reality, and (b) in line with the objective of the complaint, which, in this case, is to "prove" the existence of dumping, injury and a causal link.<sup>503</sup> As other panels before us, we note however that "Article 5.3 says nothing regarding the nature of the examination to be carried out. Nor does it say anything requiring an explanation of how that examination was carried out".<sup>504</sup> To know what evidence an authority must examine for accuracy

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<sup>497</sup> Panel Report, *Argentina - Poultry Anti-Dumping Duties*, para. 7.62. On this subject, another panel report states that:

the difference between the evidence that must sustain a determination and the evidence needed for initiation is not one of subject matter but of degree, or, as other panels have described it, of "quantity and [of] quality". The "*quantity and [the] quality*" of the evidence needed to initiate an investigation are lesser than required to impose anti-dumping measures. However, it is still evidence of those *same elements* that is necessary to justify initiation of an investigation.

(Panel Report, *Pakistan - BOPP Film (UAE)*, para. 7.23 (fn omitted; emphasis original))

<sup>498</sup> Tunisia's response to Panel question No. 6.3, para. 154 (emphasis added). See also the European Union's third-party response to Panel question Nos. 4.1 and 4.2, para. 33.

<sup>499</sup> Morocco's response to Panel question No. 6.3, para. 84.

<sup>500</sup> Morocco's comments on Tunisia's response to Panel question No. 6.22, para. 250. (emphasis original)

<sup>501</sup> Dictionnaire Larousse, definition of "exactitude"

<https://www.larousse.fr/dictionnaires/francais/exactitude/31922> (accessed 22 June 2021).

<sup>502</sup> Dictionnaire Larousse, definition of "adéquation"

<https://www.larousse.fr/dictionnaires/francais/ad%C3%A9quation/1060> (accessed 14 April 2021).

<sup>503</sup> Panel Report, *Pakistan - BOPP Film (UAE)*, paras. 7.21 and 7.22.

<sup>504</sup> Panel Report, *EC - Bed Linen*, para. 6.198.

and adequacy, reference must be made to the context of this provision and, in particular, to paragraph 2 of Article 5, which determines what the material content of a complaint must be.<sup>505</sup>

7.358. At the end of its examination, the authority must "determine" whether the evidence before it is sufficient to initiate an inquiry.<sup>506</sup> The Larousse dictionary defines the word "suffisant" ("sufficient") as "[q]ui correspond juste à ce qui est nécessaire"<sup>507</sup> ("corresponding exactly to what is necessary"). The investigating authority must therefore determine whether it has before it the evidence necessary to initiate an investigation, i.e. whether an investigation appears to be justified, but also whether it has the information it needs to initiate its investigation. In that regard, the standard of review applied by other panels to a claim under Article 5.3 has been to verify "whether or not an objective and unbiased investigating authority, looking at the facts before it, could properly have determined that there was sufficient evidence of dumping, injury and causal link to justify the initiation of an anti-dumping investigation".<sup>508</sup> We agree with this standard of review and have adopted it for this dispute.

### 7.5.2.3 Applicable requirements of Article 5.8 of the Anti-Dumping Agreement

7.359. Article 5.8 provides that an "application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case". Other panels have taken the view that Article 5.8 does not require an additional examination in relation to Article 5.3.<sup>509</sup> We share this view. Article 5.8 regulates the situation in which an authority, following the examination required under Article 5.3, determines that there is not sufficient evidence to initiate an investigation. If that is the case, the complaint must be rejected by the authority.

7.360. Nevertheless, we note that Article 5.8 obliges the authority to terminate an investigation when it is "satisfied" that the evidence is not sufficient. Thus, reading Article 5.8 in its entirety shows that the obligation to reject the complaint (or to terminate an investigation already initiated) follows a determination by the authority that there is no basis (or no longer a basis) for an investigation. Article 5.8 says nothing, however, about an authority that has determined that the evidence is sufficient, as is the case in this dispute. For this reason, we do not believe that a panel that finds a violation of Article 5.3 - because some evidence was not sufficient to initiate an investigation - should automatically find a consequential violation of Article 5.8.

### 7.5.2.4 Conclusion on the standard of review applicable in this dispute

7.361. Despite their differences as to the precise nature of the obligations contained in Articles 5.2 and 5.3, the parties agree on the fact that, in order to understand the standard of proof required of the applicant, the Panel must examine Tunisia's claim under Article 5.3 by making reference to Article 5.2.

7.362. Thus, according to Tunisia, the standard of review "is the same for Articles 5.2 and 5.3 (i.e., the sufficiency, or not, of evidence)".<sup>510</sup> It adds that "[p]rovided that the Panel finds that there was insufficient evidence to initiate the investigation, according to the common standard of review of the provisions in question, the Panel will have grounds to find a violation of either Article 5.2, or Article 5.3, or of both provisions together".<sup>511</sup>

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<sup>505</sup> Other panels considered that Article 5.2 provides context for understanding the requirements of Article 5.3. See, for example, Panel Reports, *Guatemala - Cement II*, paras. 8.35 and 8.72; and *Pakistan - BOPP Film (UAE)*, para. 7.22.

<sup>506</sup> As Canada notes in its third-party submission, the standard of "sufficiency" in Article 5.3 is not related to the examination to be carried out, but to the sufficiency of the evidence provided in the application. (Canada's third-party submission, para. 16)

<sup>507</sup> Dictionnaire Larousse, definition of "suffisant"  
<https://www.larousse.fr/dictionnaires/francais/suffisant/75259> (accessed 14 April 2021).

<sup>508</sup> Panel Report, *Argentina - Poultry Anti-Dumping Duties*, para. 7.60; see also Panel Report, *Mexico - Steel Pipes and Tubes*, paras. 7.26 and 7.32 (which is cited in Tunisia's first written submission, fn 361).

<sup>509</sup> Panel Report, *Mexico - Steel Pipes and Tubes*, para. 7.25. (fn omitted)

<sup>510</sup> Tunisia's response to Panel question No. 6.22, para. 170.

<sup>511</sup> Tunisia's response to Panel question No. 6.22, para. 172.

7.363. Meanwhile, Morocco "propose[s] a comprehensive approach to the interpretation and application of Article 5".<sup>512</sup> Thus:

The **content** of the necessary application is set forth in Article 5.2, even if the provision does not impose, in and of itself, a particular obligation on an authority; the authority's responsibility for verifying the accuracy of and grounds for that content is to be found in Article 5.3, but that obligation is linked to the purpose of the exercise (as set out in Article 5.1) and the provisions of Article 5.2 (concerning reasonable availability, for example).<sup>513</sup>

7.364. The parties also agree on the standard of review that we must apply to Tunisia's claims. Thus, for Tunisia, the Panel should determine "whether an unbiased and objective 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".<sup>514</sup> Morocco, on the other hand, considers that "[w]hat is at issue is the reasonableness of the authority's *examination* of the *accuracy* and *adequacy* of the evidence before it to *initiate* an investigation. That examination by the authority involves both quantitative and qualitative elements, as does a panel's review of the reasonableness of the authority's examination".<sup>515</sup>

7.365. With regard to the arguments developed before us by the parties, we will therefore consider in the next section whether it is apparent from the record that MIICEN properly examined the accuracy and adequacy of the evidence of dumping contained in the domestic industry's complaint and determined in an unbiased and objective manner that there was sufficient evidence of dumping to justify the initiation of the investigation

#### **7.5.2.5 Application of the standard of review to the facts raised by the parties**

7.366. We recall that Tunisia criticizes of the following aspects of MIICEN's examination:

- a. whether the prices in the export documents and the domestic sales in Tunisia, limited to certain models in relation to the range of models of the product under investigation, were representative of the export prices and normal values of the product under consideration as a whole;
- b. whether the export prices set on one day were representative of export prices for the whole investigation period;
- c. whether the information contained in the catalogues submitted as evidence of the normal value was accurate in relation to the producers in question or those who made the product at issue; and
- d. whether the adjustments to be applied to the export price and to the normal value were based on correct assumptions.<sup>516</sup>

7.367. We will begin by analysing Tunisia's argument regarding the "representativeness" of the evidence put forward by the applicants to substantiate the export price (points (a) and (b)), before turning to the manner in which the authority treated the normal value evidence and the adjustments proposed by the applicants (points (c) and (d)).

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<sup>512</sup> Morocco's response to Panel question No. 6.3, para. 85.

<sup>513</sup> Morocco's response to Panel question No. 6.3, para. 87. (emphasis original) See also Morocco's response to Panel question No. 6.9, para. 100.

<sup>514</sup> Tunisia's first written submission, paras. 8.11 and 8.12 (quoting Panel Report, *Mexico - Steel Pipes and Tubes*, para. 7.32). See also Tunisia's response to Panel question No. 6.23, para. 177 (fn omitted). See, in the same sense, the European Union's third-party submission, para. 122.

<sup>515</sup> Morocco's response to Panel question No. 6.19, paras. 73 and 75. (emphasis original)

<sup>516</sup> Tunisia's first written submission, para. 8.43.



#### 7.5.2.5.1 Did MIICEN's examination of the export price evidence comply with the provisions of Article 5.3?

7.368. With regard to the evidence substantiating the export price, the record shows that the applicants relied on one invoice issued by one of the Tunisian producers/exporters for exports of exercise books to Morocco.<sup>517</sup>

7.369. Tunisia criticizes the fact that proof of the export price was based on only one invoice and on certain types of exercise books.<sup>518</sup> Thus:

The invoice only covered exercise books of one particular grammage (60 g/m<sup>2</sup>) (despite the wide range of exercise books of grammage between 55 g/m<sup>2</sup> and 120 g/m<sup>2</sup>); was limited to three formats 21x29.7 cm, 9x14 cm and 11x17 cm; and to three forms of presentation: stapled, register and cloth bound.<sup>519</sup>

7.370. Tunisia considers that the prices found on a single invoice (thus relating to a single transaction) cannot be "representative" of export prices for the entire period covered by the complaint.<sup>520</sup> In support of this argument, Tunisia cites the conclusions of another panel that found that:

[I]t is indeed 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.<sup>521</sup>

7.371. With regard to the models of exercise books, Tunisia considers the sample presented by the applicants was not representative of the product as a whole. Tunisia cites in this regard the same panel report, according to which:

Where the evidence pertains to only a thin sliver of a broad overall product range, the authority should not assume without some corroboration that this evidence represents pricing for the full product range.<sup>522</sup>

7.372. Nevertheless, according to Tunisia, there is nothing on the record that allows the "representativeness" or not of the invoice to be adjudicated.<sup>523</sup>

7.373. Morocco recalls that at the moment of initiating an investigation, the investigating authority is not required to have before it the quantity and quality of evidence that would be necessary to substantiate a preliminary or final determination. It finds support in this regard in the Panel Report in *Mexico - Steel Pipes and Tubes*, which considered that:

[I]t is not necessary for an investigating authority to have irrefutable proof of dumping or injury prior to initiating an anti-dumping investigation.<sup>524</sup>

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<sup>517</sup> Tunisia's first written submission, para. 8.5; Morocco's response to Panel question No. 6.17, para. 61. See also the submission by SITPEC and SOTEFI (Exhibit MAR-11), p. 5; and the initiation report (Exhibits TUN-2, MAR-10), para. 24.

<sup>518</sup> Tunisia's first written submission, para. 8.23. See also Tunisia's response to Panel question No. 6.23, para. 178 i).

<sup>519</sup> Tunisia's first written submission, para. 8.5 (referring to the initiation report (Exhibits TUN-2, MAR-10), para. 26).

<sup>520</sup> Tunisia's first written submission, paras. 8.21 and 8.22. See also Tunisia's response to Panel question No. 6.23, para. 178 ii).

<sup>521</sup> Tunisia's first written submission, para. 8.19 (quoting Panel Report, *Mexico - Steel Pipes and Tubes*, para. 7.37).

<sup>522</sup> Tunisia's first written submission, para. 8.19 (quoting Panel Report, *Mexico - Steel Pipes and Tubes*, paras. 7.38 and 7.39).

<sup>523</sup> Tunisia's first written submission, para. 8.8; comments on Morocco's response to Panel question No. 6.17, paras. 112 and 113.

<sup>524</sup> Morocco's first written submission, para. 237 (quoting Panel Report, *Mexico - Steel Pipes and Tubes*, para. 7.22).

7.374. Morocco also notes that Article 5.2 concerns only information that may be "reasonably available to the applicant".<sup>525</sup> In that regard, Morocco asserts that an invoice is a very compelling piece of information, which is difficult<sup>526</sup> for an applicant composed of small and medium-sized enterprises to obtain.<sup>527</sup> It also points out that this invoice was particularly relevant to the extent that:

- a. it is an invoice issued by one of the two exporters<sup>528</sup>;
- b. it is a wholesale invoice<sup>529</sup>;
- c. it covers the nine best-selling models of exercise books for export<sup>530</sup>; and
- d. it corresponds to transactions that occurred in the middle of the data-collection period.<sup>531</sup>

7.375. Lastly, Morocco asserts that the investigation record contained "other elements that substantiate how that one invoice was representative of the export price over the period selected by the applicants, notably official statistical data from the Foreign Exchange Board" showing the trend over the period 2013-2016 of the average import price of exercise books from Tunisia.<sup>532</sup>

7.376. However, we do not find, in the record, confirmation that those statistics formed the basis - in addition to the contested invoice - for the examination, by MIICEN, of the domestic industry's complaint. Like Tunisia, we note that the initiation report does not refer to those statistics as evidence substantiating the export price.<sup>533</sup> The section on the export price in the initiation report refers only to data taken from a single invoice.<sup>534</sup>

7.377. We further note that the investigation record contains only a few undisputed pieces of information concerning this invoice and that the parties did not submit the invoice to the Panel. We only know that it is an invoice issued by one of the Tunisian exporters that cooperated with the investigation, that the invoice covers several models of exercise books and that it was issued during the period selected for the complaint.<sup>535</sup>

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<sup>525</sup> Morocco's first written submission, para. 252.

<sup>526</sup> Morocco's first written submission, para. 257; response to Panel question No. 6.17, para. 62 b) 1); and comments on Tunisia's response to Panel question No. 6.23, para. 259.

<sup>527</sup> Morocco's first written submission, para. 254.

<sup>528</sup> Morocco's comments on Tunisia's response to Panel question No. 6.23, para. 259. However, neither the issuer of the invoice nor the Moroccan client feature in the elements on file.

<sup>529</sup> Morocco's comments on Tunisia's response to Panel question No. 6.23, paras. 257 and 258. The level of trade of the invoice in question is contested by Tunisia. (Tunisia's comments on Morocco's response to Panel question No. 6.17, para. 112)

<sup>530</sup> Morocco's first written submission, para. 257. See also Morocco's response to Panel question No. 6.17, para. 62 b) 6). This point is contested by Tunisia, which notes that the popularity of these models is not substantiated by any objective evidence. (Tunisia's second written submission, para. 6.63 h); response to Panel question No. 6.23, para. 178 i))

<sup>531</sup> Morocco's first written submission, para. 257. However, Tunisia contests the date provided by Morocco. (Tunisia's second written submission, para. 6.63 e))

<sup>532</sup> Morocco's response to Panel question No. 6.17, para. 61 (quoting the initiation report, para. 82 (Exhibit TUN-2)). These import price statistics are included in the section of the initiation report on "the analysis of factors other than imports", and not in the section on the margin of dumping.

<sup>533</sup> Tunisia's comments on Morocco's response to Panel question No. 6.17, para. 105.

<sup>534</sup> "The export price is calculated by the applicant on the basis of the FOB/Tunisia price contained in *an invoice* for Tunisian exports of exercise books to Morocco in 2016." (Initiation report, (Exhibits TUN-2, MAR-10), para. 24 (emphasis added))

<sup>535</sup> Exhibit TUN-48 (Annex 17, export invoice) contains only a non-confidential description of the invoice in question. In its oral statement at the first substantive meeting of the Panel, Tunisia asserted: "we know very little about the content of this invoice, because it was submitted as confidential without a non-confidential summary being provided. We only know that it would have been issued by a Tunisian exporter on a date in 2016. We do not know the type, quantity or price of the exercise books concerned". (Tunisia's opening statement at the first meeting of the panel, para. 10.1) We also note that Morocco submitted the invoice as evidence before this Panel after the period allowed for the submission of its comments on Tunisia's responses to the Panel. Tunisia objected to that late submission of evidence request and asked the Panel to disregard it in its analysis. Having recalled that paragraph 5 (1) of our working procedures requires a showing of "good cause" to allow a party to place new evidence on the record outside the dates or steps established for that

7.378. We recall that Tunisia was critical of the insufficient "representativeness" of the prices put forward by the applicants to substantiate the export price and the normal value.<sup>536</sup> We understand that by "representativeness" Tunisia means the capacity of the evidence provided to substantiate the price of the product "in its entirety" and for the whole period covered by the complaint.<sup>537</sup> However, we do not consider that the examination of the accuracy and adequacy of the evidence requires the investigating authority to ensure that the information provided is "representative" of the *whole* period and of *all* types of the product under investigation. We note in this regard the view of Canada in its third-party submission, which we share:

Article 5.3 does not require the authority to explain or expound in the initiation report "the resolution of all issues of fact underpinning the determination that there is sufficient evidence to justify the initiation of an investigation". Accordingly, Tunisia's claim that the Moroccan authority failed to fulfil its obligation under Article 5.3, as it did not provide "any explanation in the initiation report as to how evidence concerning the export price and normal value - which was limited to certain product models - was representative of the entire range of products under investigation", is based on a questionable legal foundation.<sup>538</sup>

7.379. Similarly, we note the European Union's view that:

[I]t would certainly be an exaggeration to require evidence for all the products covered and producers concerned, or even concrete (irrefutable) arguments on representativeness. On the other hand, at the other end of the spectrum, a single piece of evidence concerning an insignificant subset of the product concerned or prices would be insufficient without the investigating authority making any effort to establish its representativeness.<sup>539</sup>

7.380. Our review seeks to determine whether MIICEN properly examined the accuracy and adequacy of the export price evidence and, notably, whether the complaint contained the elements needed to initiate an investigation. In that regard, we consider that invoices for sales of the product concerned during the relevant period normally have a high probative value<sup>540</sup>, and that it cannot be reasonably expected that an applicant has at its disposal multiple invoices for a large sample of transactions and models of the product concerned over the period covered by the complaint. As another panel before us<sup>541</sup>, we consider, however, that a single invoice cannot, without some corroboration, be sufficient to substantiate the export price of the product concerned. In particular, we believe that an authority cannot ensure the accuracy and adequacy of such information without cross-checking it against other "information on export prices". However, although the initiation report indicates that MIICEN did "examine and verify" the "petition data and supporting documents"<sup>542</sup>, we find no reference to other information substantiating the export price. Neither the investigation record, nor the arguments presented by Morocco before us, allow us to conclude in this case that the invoice submitted by the applicants was both relevant and sufficiently probative, or that the investigating authority sought to verify the relevance of that evidence by cross-checking it against other export price information for Tunisian exercise books.

7.381. From that point of view, and in the light of the information available to us, we consider that Tunisia has established that the investigating authority failed to examine the accuracy and adequacy of the export price evidence when determining whether that evidence was sufficient to justify the initiation of an investigation.

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purpose in the timetable, we decided to decline Morocco's request. We considered that Morocco's request to place Exhibit MAR-22 on record did not cite a "good cause", to the extent that the parties had already been long aware of the existence of the exhibit in question and that its nature and content had already been discussed at each stage of the proceedings.

<sup>536</sup> Tunisia's response to Panel question No. 6.23, para. 178 i) and ii). See also Tunisia's first written submission, para. 8.8; and comments on Morocco's response to Panel question No. 6.17, paras. 112 and 113.

<sup>537</sup> Tunisia's response to Panel question No. 6.23, para. 176.

<sup>538</sup> Canada's third-party submission, para. 17. (fn omitted)

<sup>539</sup> European Union's third-party submission, para. 124. (fns omitted)

<sup>540</sup> Morocco's response to Panel question No. 6.13, para. 118; comments on Tunisia's response to Panel question No. 6.23, para. 259.

<sup>541</sup> Panel Report, *Mexico - Steel Pipes and Tubes*, para. 7.37.

<sup>542</sup> Initiation report (Exhibits TUN-2, MAR-10), para. 38.

#### **7.5.2.5.2 Did MIICEN's examination of the normal value evidence comply with the provisions of Article 5.3?**

7.382. With regard to the normal value, the initiation report indicates that the retail sales prices of certain models were "taken from sales catalogues published by [a supermarket chain] and [specialist bookshops]".<sup>543</sup> Tunisia criticizes of the fact that those catalogues only showed the price of certain exercise book models, without the complaint explaining how those prices were representative.<sup>544</sup> Tunisia argues, inter alia, that "MIICEN has done nothing more than accept the prices proposed by the applicant and the explanation that around 85% of exercise books imported into Morocco from Tunisia were the models for which the prices were provided".<sup>545</sup> It also considers that there is no evidence that the prices in the catalogues were those of the Tunisian product.<sup>546</sup>

7.383. At the same time, the normal value was the subject of certain adjustments in the petition to make allowances for VAT, the distributor's profit margin, domestic transportation and royalties (for exercise books with a protected trademark).<sup>547</sup> Tunisia contests those adjustments for the following reasons:

- a. The distribution margins used for the normal value were adjusted on the basis of information concerning the business practices of a Moroccan wholesaler, without the applicant justifying why those margins were representative of the practice in Tunisia.<sup>548</sup> Meanwhile, the margins were adjusted on the basis of wholesalers even though the references used for the normal value in Tunisia corresponded to retail prices.<sup>549</sup>
- b. The adjustment for royalty payments for certain exercise books was not based on evidence of such payments in the Tunisian market, but on "a contract between a Moroccan exercise book producer and a French company for a licence to use a trademark".<sup>550</sup>
- c. The adjustment for domestic transportation was fixed and based on transportation costs per tonne in Tunisia<sup>551</sup>, whereas "the weight of each exercise book varies considerably depending on the format and the grammage of the paper used".<sup>552</sup>
- d. The average distance selected by MIICEN did not reflect the situation of different factories and corresponds to a return journey between one of the factories and the port of Tunis.<sup>553</sup>

7.384. We will begin by examining Tunisia's criticisms regarding the origin of the exercise books in the catalogues, used to substantiate the normal value proposed by the applicants. We note first of all that, in response to the Panel's questions following the second substantive meeting with the parties, a disagreement arose between the parties over the exact nature of the evidence that the authority used as the basis for establishing the normal value. Morocco stated that those catalogues were "objective information sources published on the exporters' website, covering different types of exercise books sold on the Tunisian market similar to the exercise books sold for export [, and that

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<sup>543</sup> Initiation report (Exhibits TUN-2, MAR-10), para. 28; Tunisia's first written submission, para. 8.31. In its opening statement at the first meeting of the Panel, Tunisia specified that "the evidence presented to demonstrate normal value consisted of a series of screen shots of certain models sold at retail". Tunisia submitted Exhibit TUN-49, entitled "Annexe 11b à la requête pour l'ouverture de l'enquête - Preuves valeur normale" (Annex 11b to the petition for the initiation of the investigation - Normal value evidence), which contains those screen shots.

<sup>544</sup> Tunisia's first written submission contains a table showing that the catalogues provided in support of the normal value cover only three models of the exercise books under investigation. (Tunisia's first written submission, paras. 8.33 and 8.34. See also Tunisia's response to Panel question No. 6.23, para. 178 i))

<sup>545</sup> Tunisia's response to Panel question No. 6.23, para. 178 i).

<sup>546</sup> Tunisia's first written submission, para. 8.31. See also Tunisia's response to Panel question No. 6.23, para. 178 iii).

<sup>547</sup> Initiation report (Exhibits TUN-2, MAR-10), paras. 29 and 30.

<sup>548</sup> Tunisia's first written submission, para. 8.35. See also the initiation report (Exhibits TUN-2, MAR-10), paras. 25 and 29.

<sup>549</sup> Tunisia's first written submission, para. 8.36.

<sup>550</sup> Tunisia's first written submission, para. 8.38; initiation report (Exhibits TUN-2, MAR-10), para. 29.

<sup>551</sup> Tunisia's first written submission, para. 8.37. See also the initiation report (Exhibits TUN-2, MAR-10), para. 29.

<sup>552</sup> Tunisia's first written submission, para. 8.25.

<sup>553</sup> Tunisia's first written submission, paras. 8.26 and 8.27.

they] were therefore an appropriate source for comparison".<sup>554</sup> Tunisia, on the other hand, contests Morocco's assertion that the catalogues in question came from the Tunisian exporters' website: instead, it indicates that the catalogues were published on the website of distributors in Tunisia.<sup>555</sup> The initiation report seems to confirm Tunisia's assertions, since it states that the retail sales prices of certain models were "extracted from sales catalogues published by [a supermarket chain] and [specialist bookshops]".<sup>556</sup> In any case, it appears that the catalogues in question were properly appended to the complaint.<sup>557</sup>

7.385. Consultation of that annex confirms that the pages of the websites provided by the applicants do include the retail price of exercise books produced by SOTEFI<sup>558</sup>, and it is not contested that this is one of the producers/exporters that cooperated with MIICEN's investigation. We therefore reject Tunisia's argument that the applicant "failed to submit documentation to show that the prices indicated in the catalogues reflected the prices of products manufactured by the identified producers (SITPEC, SOTEFI-Selecta, Yamama, Imprimerie Le Livre), or to demonstrate that the product sold by [a chain of supermarkets] and certain bookshops was in fact of Tunisian origin".<sup>559</sup>

7.386. We will now examine Tunisia's argument concerning the lack of alleged "representativeness" of the catalogues provided by the applicants. We recalled above that we did not consider that the examination of the accuracy and adequacy of the evidence requires the investigating authority to ensure that the information provided is "representative" of the *whole* period and of *all* types of the product under investigation. In this case, the record shows that:

- a. the online catalogues provided in support of the petition do contain the retail prices in August and November 2016, on the Tunisian market, of nine exercise books of 60 and 64 g/m<sup>2</sup>, including those manufactured by one of the Tunisian producers/exporters that cooperated with the investigation, as we noted above; and
- b. the prices reflected in those catalogues correspond to a grammage of 60 and 64 g/m<sup>2</sup>, which in turn corresponds to the exercise book prices used as evidence of the export price.<sup>560</sup>

7.387. Nevertheless, as another panel before us<sup>561</sup>, we consider that such a limited sample of retail prices cannot, without some corroboration, be sufficient to substantiate the normal value of the product concerned. In particular, we believe that an authority cannot ensure the accuracy and adequacy of such information without cross-checking it against other "information on the normal value". However, in this case, we find that the initiation report does not refer to other information substantiating the normal value: the section on the normal value in the initiation report only mentions data taken from those website pages.<sup>562</sup> Neither the investigation record, nor the arguments presented by Morocco before us, allow us to conclude in this case that the website excerpts submitted by the applicants were both relevant and sufficiently probative, or that the investigating authority sought to verify the relevance of that evidence by cross-checking it against other information on the normal value of Tunisian exercise books.

7.388. From that point of view, we therefore consider that Tunisia has established that the investigating authority failed to examine the accuracy and adequacy of the normal value evidence in accordance with the provisions of Article 5.3 of the Anti-Dumping Agreement when determining whether that evidence was sufficient to justify initiating an investigation.

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<sup>554</sup> Morocco's response to Panel question No. 6.20, para. 77 a). See also Morocco's response to Panel question No. 6.14, para. 120; SOTEFI, Catalogue 2017-2018 (Exhibit MAR-21); and SITPEC, Catalogue 2016 (Exhibit MAR-22).

<sup>555</sup> Tunisia's comments on Morocco's response to Panel question No. 6.20, para. 117.

<sup>556</sup> Initiation report (Exhibits TUN-2, MAR-10), para. 28.

<sup>557</sup> Petition (Exhibits TUN-3, MAR-9), para. 46.

<sup>558</sup> Seven of the nine web pages contained in Exhibit TUN-49 bear the logo "SELECTA", which refers to SOTEFI, as the initiation report demonstrates. (Initiation report (Exhibits TUN-2, MAR-10), para. 18; Annexe 11b à la requête pour l'ouverture de l'enquête - Preuves valeur normale (Exhibit TUN-49))

<sup>559</sup> Tunisia's first written submission, para. 8.31. (fn omitted)

<sup>560</sup> Initiation report (Exhibits TUN-2, MAR-10), para. 23.

<sup>561</sup> Panel Report, *Mexico - Steel Pipes and Tubes*, paras. 7.38 and 7.39.

<sup>562</sup> Initiation report (Exhibits TUN-2, MAR-10), para. 28.

7.389. We now turn to the examination of Tunisia's arguments concerning the adjustments to the normal value. In that regard, we recall that an applicant must provide, in support of its petition, "information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export ... and information on export prices".<sup>563</sup> We consider that any adjustments made to the normal value and to the export price to allow a fair comparison are part of that "information", and must be both probative and relevant, within the meaning of Article 5.2 of the Anti-Dumping Agreement. We also recall the stipulation that such information must be "reasonably available to the applicant".

- a. With regard to the level of trade adjustment, the record indicates that the applicant proposed an adjustment that sought to reduce the retail price of the exercise books (as reflected in the catalogues appended to the complaint) to the ex-factory level. To that end, the applicant subtracted a distributor mark-up, corresponding to the amount charged for the same transactions in Morocco, from the retail price found in the catalogues.
- b. With regard to the royalties adjustment, the record indicates that the applicant proposed an adjustment for the royalties paid by the Tunisian exercise books producer to use trademarks on the cover of its exercise books.<sup>564</sup> According to the initiation report, the proposed adjustment is based on "a contract between a Moroccan exercise book producer and a French company for a licence to use a trademark".<sup>565</sup>

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 particulier, "why the market conditions in Morocco with respect to that profit margin could have been representative or a reasonable indicator of distribution margins in Tunisia".<sup>566</sup> Morocco, on the other hand, insists that the margins made and royalties paid by the Tunisian producers are confidential data, which cannot be reasonably available to the applicants.<sup>567</sup>

7.391. In the light of these record elements, we do not share Tunisia's opinion that the initiation report or the complaint should have contained additional explanations "as to why these margins 'are similar' to those which could be obtained in Tunisia".<sup>568</sup> In fact, it seems to us that MIICEN could not reasonably require the applicants to provide evidence of the exact amount of royalties or margins paid in Tunisia: with respect to an applicant's difficulty in obtaining such evidence, relying on comparable data for the same business operations in the same region is relevant evidence in this case. We therefore reject Tunisia's argument on this point.

7.392. Tunisia also contests the adjustment made for domestic freight, in particular, the fact that the amount deducted is a fixed amount that fails to take into account the different weights of the different models of exercise books. Likewise, Tunisia criticizes the fact that the adjustment applied corresponds to a return journey between the factory and the port, instead of a one-way trip.<sup>569</sup> Morocco responds that the fixed price is based on an independent study<sup>570</sup> and was calculated using an average weight per exercise book.<sup>571</sup> It also states that "the FOB price of the invoice [used as evidence of the export price] included transportation costs, by using a return rate to calculate an ex-factory export price".<sup>572</sup> Morocco adds that the same fixed amount was deducted from the export

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<sup>563</sup> Article 5.2(iii) of the Anti-Dumping Agreement.

<sup>564</sup> The initiation report states that the applicant made "[a]n adjustment for the distributor's mark-up, estimated at [35-50] % on the basis of the difference between the price at which a Moroccan manufacturer sells an exercise book to a larger retailer in Morocco and the resale price of that product to the end consumer". (Initiation report (Exhibits TUN-2, MAR-10), para. 29)

<sup>565</sup> Initiation report (Exhibits TUN-2, MAR-10), para. 29.

<sup>566</sup> Tunisia's first written submission, para. 8.35.

<sup>567</sup> Morocco's response to Panel question No. 6.20, para. 77.

<sup>568</sup> Tunisia's first written submission, para. 8.35.

<sup>569</sup> Tunisia's first written submission, paras. 8.25-8.28.

<sup>570</sup> Morocco's response to Panel question No. 6.19, para. 66. See also Annex 14b, input costs in Tunisia (Exhibit TUN-51 (BCI)).

<sup>571</sup> Morocco's response to Panel question No. 6.19, para. 69. See also Annex 14a, domestic transportation in Tunisia (Exhibit TUN-50 (BCI)).

<sup>572</sup> Morocco's response to Panel question No. 6.19, para. 70.

price (which is reflected in the initiation report)<sup>573</sup> and that the impact on the margin of dumping calculated by the applicant was, in any case, inconsequential.<sup>574</sup>

7.393. Further reading of the evidence of the transportation cost provided in support of the complaint, we find that the applicant provided the data needed to make a proper assessment of the transportation price in Tunisia.<sup>575</sup> Notwithstanding this, MIICEN accepted the adjustment proposed by the applicants, based on a return journey between one factory and one port. In its response to the Panel's questions, Morocco actually admits that "nothing on the record justifies the use of a return rate to determine either the ex-factory export price or the normal value. A correct application would have used a one-way rate for both...".<sup>576</sup> We find no indication in the record that the investigating authority sought to explain or correct that error in the freight adjustment.

7.394. From that point of view, we therefore consider that Tunisia has established that the investigating authority failed to examine the accuracy and adequacy of the evidence concerning the domestic transportation adjustment<sup>577</sup> in accordance with the provisions of Article 5.3 of the Anti-Dumping Agreement.

### **7.5.3 Conclusion**

7.395. In the light of the foregoing, we therefore conclude that Tunisia has demonstrated that MIICEN failed to examine the accuracy and adequacy of the evidence of the export price, the normal value and the adjustment for transportation costs, in accordance with the provisions of Article 5.3 of the Anti-Dumping Agreement.

7.396. We recall that Tunisia is requesting "a finding of inconsistency with each of these provisions (5.2, 5.3 and 5.8)"<sup>578</sup>, but that "if the Panel considers that, based on the standard of review applicable to Articles 5.2 and 5.3, it could resolve Tunisia's allegation by finding a violation of one of these two provisions (and Article 5.8), Tunisia will not object to the Panel exercising judicial economy in respect of the other provision in question".<sup>579</sup>

7.397. In this case, we recall our findings that:

- a. Article 5.2 determines the content of the complaint submitted by the domestic industry and does not therefore create directly an obligation for the investigating authority; and
- b. a panel that finds a violation of Article 5.3 - because some evidence was not sufficient to initiate an investigation - should not automatically find a consequential violation of Article 5.8.

7.398. We therefore conclude that Tunisia has failed to demonstrate that Morocco violated Articles 5.2 and 5.8 of the Anti-Dumping Agreement by initiating its investigation.

## **8 CONCLUSIONS AND RECOMMENDATIONS**

8.1. For the reasons set out in this Report, we conclude that:

- a. Morocco has failed to demonstrate that paragraphs B.5 and B.6 of the panel request did not respect the provisions of Article 6.2 of the DSU.
- b. Tunisia has established that the definitive anti-dumping measure applied by Morocco to exercise books originating in Tunisia was inconsistent with:

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<sup>573</sup> Initiation report (Exhibits TUN-2, MAR-10), paras. 26 and 31.

<sup>574</sup> Morocco's response to Panel question No. 6.19, para. 71.

<sup>575</sup> See in particular Annex 14a, domestic transportation in Tunisia (Exhibit TUN-50 (BCI)) and Annex 14b, input costs in Tunisia (Exhibit-51 (BCI)).

<sup>576</sup> Morocco's response to Panel question No. 6.19, para. 74.

<sup>577</sup> As the same adjustment was made to the export price, our conclusion extends to the transportation adjustment applied to the export price.

<sup>578</sup> Tunisia's response to Panel question No. 6.22, para. 175.

<sup>579</sup> Tunisia's response to Panel question No. 6.22, para. 174.

- i. Articles 2.2 and 2.2.2 of the Anti-Dumping Agreement, because the amount for profits used by the investigating authority to construct the normal value of certain exercise books sold by SOTEFI and SITPEC was not based "on actual data pertaining to the production and sales, in the ordinary course of trade, of the like product by the exporter or producer under investigation" and was therefore not a "reasonable amount" for profits within the meaning of Article 2.2;
  - ii. Article 2.2 of the Anti-Dumping Agreement, because the investigating authority, by including a distribution cost in the constructed normal value of certain models of SOTEFI exercise books, did not construct the normal value on the basis of the cost of production in the country of origin, plus a reasonable amount for administrative, selling and general costs and for profits, within the meaning of this provision;
  - iii. Article 2.4 of the Anti-Dumping Agreement, because, by using an erroneous mathematical formula to establish the margin of dumping of two Tunisian exporters, the investigating authority failed to make a "fair comparison" between the export price and the normal value, within the meaning of this provision;
  - iv. Articles 3.1 and 3.2 of the Anti-Dumping Agreement, because the investigating authority failed to conduct an "objective examination" of price undercutting, price depression and price suppression;
  - v. Article 3.2 of the Anti-Dumping Agreement, because the investigating authority failed to conduct a proper examination of price undercutting;
  - vi. Articles 3.1 and 3.4 of the Anti-Dumping Agreement, because the investigating authority failed to conduct an "objective examination" of the trend in sales, market shares, and the domestic industry's production and profitability;
  - vii. Articles 3.1 and 3.5 of the Anti-Dumping Agreement, because the investigating authority based its causation determination on an injury analysis that was inconsistent with Articles 3.1, 3.2 and 3.4 of the Anti-Dumping Agreement;
  - viii. Article 12.2.2 of the Anti-Dumping Agreement, because the report on the definitive determination does not give "the reasons for the ... rejection of relevant arguments or claims made by the exporters" concerning the impact of licences on price comparability; and
  - ix. Article 5.3 of the Anti-Dumping Agreement, because MIICEN failed to review the accuracy and adequacy of the evidence submitted by the Moroccan applicants to determine whether the evidence was sufficient to justify the initiation of an investigation.
- c. Tunisia has failed to establish that the measure was inconsistent with:
- i. Article 2.4 of the Anti-Dumping Agreement, because MIICEN did not accept to make allowance for licences as a difference affecting price comparability;
  - ii. Articles 3.1 and 3.5 of the Anti-Dumping Agreement, because MIICEN failed to examine competition from Imprimerie Moderne as a "known factor" injuring the domestic industry; and
  - iii. Articles 2.1, 5.2 and 5.8 of the Anti-Dumping Agreement.

8.2. We have applied the principle of judicial economy to Tunisia's claim under Articles 3.1 and 3.2 of the Anti-Dumping Agreement concerning the investigating authority's consideration of the volume of Tunisian imports in relation to domestic production and consumption.

8.3. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measure at issue is inconsistent



with the Anti-Dumping Agreement, it has nullified or impaired benefits accruing to Tunisia under that Agreement.

8.4. Pursuant to Article 19.1 of the DSU, we recommend that Morocco bring its measure into conformity with its obligations under the Anti-Dumping Agreement.

8.5. We recall that Tunisia further requests, as is permitted under Article 19.1, that, in addition to our recommendation, we suggest to Morocco how to implement this recommendation. Tunisia specifically requests that we suggest that Morocco fulfil its obligations by revoking the anti-dumping measure at issue.<sup>580</sup> Article 19.1 of the DSU allows, but does not require, us to suggest ways in which the Member concerned could implement the Panel's recommendations. Furthermore, under Article 21.3 of the DSU, the implementation of DSB recommendations and rulings is left, in the first instance, to the discretion of the implementing Member.<sup>581</sup> We therefore decline Tunisia's request.

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<sup>580</sup> Tunisia's first written submission, para. 9.3; second written submission, para. 7.3.

<sup>581</sup> Panel Reports, *US - Shrimp II (Viet Nam)*, para. 8.6; *EU - Footwear (China)*, para. 8.12; *EC - Fasteners (China)*, para. 8.8; and *US - Hot-Rolled Steel*, para. 8.11.