

# AFRICAN JOURNAL OF INTERNATIONAL ECONOMIC LAW

*Volume 2 | Fall 2021*

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# AFRICAN JOURNAL OF INTERNATIONAL ECONOMIC LAW

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# **Case Note: Panel Report in Morocco** – Definitive Anti-Dumping Measures on School Exercise Books from Tunisia (DS578)

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***Oluyori Ehimony\* & Maryanne Kamau\****

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## **ABSTRACT**

After nearly 25 years, a trade dispute on imports of school exercise books from Tunisia to Morocco has set a new statistical record at the World Trade Organization (WTO) as the first intra-African trade dispute to be heard by a WTO Panel. The case concerns anti-dumping duties by Morocco on imported exercise books from Tunisia and raises issues surrounding the initiation of anti-dumping investigations, construction of normal value and determination of injury. This case commentary gives a bird's eye view of the Panel's findings on the (in) consistency of Morocco's measure with its WTO obligations and the emerging legal issues. It also briefly discusses the likely implications of the case and the signals it sends concerning the participation of African countries in the WTO.

## **1 Introduction**

The limited participation of developing countries, particularly African countries, in the dispute settlement system of the World Trade Organization (WTO) is well documented since the inception of the WTO. Several reasons have been advanced for the diminutive participation including, low trade volumes, structural difficulties and expensive nature of the WTO dispute settlement system and the lack of legal expertise at the desired level.<sup>1</sup> One recent WTO dispute involving two African countries (as complainant and respondent), indicates a positive change in African participation in the WTO dispute settlement system.<sup>2</sup> This dispute appears to deviate from the notion that African states have a culture of non-litigation of economic disputes between and among themselves.<sup>3</sup>

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1 See Victor Mosoti, *Africa In The First Decade Of WTO Dispute Settlement*, 9 J. INT'L ECON. L. 427, 428-427 (2006); see also Proposal by the African Group, *Negotiations on the Dispute Settlement Understanding*, WTO Doc. TN/DS/W/15 (Sep. 25, 2002).

By way of background, the dispute arose as a result of the definitive anti-dumping (AD) measure imposed by Morocco on imports of schoolbooks from Tunisia.<sup>4</sup> The measure was imposed following a complaint from three Moroccan producers of school exercise books, regarding alleged dumping by Tunisian exercise book manufacturers which allegedly caused significant injury to producers in Morocco.<sup>5</sup> The complaint led to an AD investigation by the Moroccan Ministry of Industry, Investment, Trade and the Digital Economy (MIICEN) and the introduction of definitive AD duties on exporters of school exercise books from Tunisia at a rate ranging between 15.69% and 27.71%. Consequently, on 21 February 2019, Tunisia requested consultations with Morocco on the AD measure. The consultations between the parties failed to resolve the issues, prompting Tunisia to request the establishment of a panel to hear the dispute.<sup>6</sup>

To recall, a product is considered to be dumped if its export price to another country is *less than* its normal value. Normal value refers to the price of the product on the domestic market of the exporting country.<sup>7</sup> WTO law only condemns dumping if it *causes or threatens material injury* to the domestic industry of the importing country.<sup>8</sup> In response to injurious dumping, WTO Members may unilaterally impose AD measures which typically take the form of AD duties or price undertakings, and remain in force for five years.<sup>9</sup> These measures are imposed after a thorough investigation has established the existence of (1) dumping, (2) material injury suffered by the domestic industry in the importing country (or threat thereof) and (3) a causal link between the dumping and injury.<sup>10</sup>

In this dispute, Tunisia challenged the consistency of the AD measure with Articles 2, 3, 5 and 12 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement or ADA). In particular, Tunisia challenged the definitive findings by MIICEN concerning (1) dumping; (2) injury to the domestic industry; (3) a causal link between dumping and injury; and (4) the initiation of the AD investigation and requested that the Panel recommend that Morocco bring its measure into conformity with its WTO obligations.

This case commentary examines the Panel's findings on the (in) consistency of Morocco's AD measure with its WTO obligations. It also briefly discusses the

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2 African countries, and in particular, Egypt and South Africa, have often played limited roles historically, either as Respondents or third party participants.

3 See Olabisi D. Akinkugbe, *Dispute Settlement Under the African Continental Free Trade Area Agreement: A Preliminary Assessment*, 28 AFR. J. INT'L COMP. L. 138 (2020).

4 This is the second consultations request submitted by Tunisia against Morocco on a similar matter. See Request for Consultations by Tunisia, *Morocco – Provisional Anti-Dumping Measures on School Exercise Books from Tunisia*, WTO Doc. WT/DS555/1 (July 10, 2018).

5 See Soufiane Chahid, *Dumping sur les cahiers scolaires : la Tunisie recourt à l'arbitrage de l'OMC*, TELQUEL (July 11, 2018), [https://telquel.ma/2018/07/11/dumping-sur-les-cahiers-scolaires-la-tunisie-recourt-a-larbitrage-de-lomc\\_1602735](https://telquel.ma/2018/07/11/dumping-sur-les-cahiers-scolaires-la-tunisie-recourt-a-larbitrage-de-lomc_1602735) (last visited Nov. 30, 2021).

6 The Panel was established on October 28, 2019. For a procedural history of the dispute, see *DS578: Morocco – Definitive Anti-Dumping Measures on School Exercise Books from Tunisia*, WTO (last visited Nov. 30, 2021), [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/DS578\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/DS578_e.htm).



likely implications of the case and the signals it sends concerning the participation of African countries in the WTO. The commentary examines some of the pertinent issues addressed by the Panel and proceeds as follows. Section 2 examines first, some of the Panel's findings on procedural and preliminary issues raised by Morocco, and then addresses notable substantive findings made by the Panel on the issues raised by the parties. It also reviews, where appropriate, the reasoning adopted by the Panel and discusses emerging issues. Section 3 considers the likely implication of the dispute on African participation in the international trade dispute space.

## 2 Key Panel Findings

### 2.1 Procedural issues

On 19 June 2020, Morocco challenged the jurisdiction of the Panel to hear certain claims made by Tunisia, because they were either not contained in the request for the establishment of a panel (panel request) or were too vague. The challenge was hinged on Article 6.2 of the Dispute Settlement Understanding (DSU) of the WTO which set out the standards for a Panel request, namely, (1) identification of the specific measures at issue, and (2) provision of a brief summary of the legal basis of the claims. The Appellate Body has clarified that a panel request must be sufficiently precise because it forms the basis for the panel's terms of reference and informs the respondent aware of the legal basis of the claims made.<sup>11</sup>

Morocco argued that Tunisia's claims relating to the distribution cost, exclusion of certain costs and expenses from the calculation of the profit margin and questions around the mathematical formulas used in calculating the margin of dumping were not contained in the panel request. Instead, these claims were raised in the first written submission and therefore fell outside the Panel's terms of reference.<sup>12</sup> The Panel issued a preliminary ruling and held that Morocco had failed to demonstrate that these claims were not included in the panel request.<sup>13</sup>

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7 See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 art. 2.1, Apr. 12, 1979, 1868 U.N.T.S. 201 [hereinafter ADA]; General Agreement on Tariffs and Trade 1994 art. VI, Apr. 15, 1994, 1867 U.N.T.S. 187 [hereinafter GATT].

8 See GATT art. IV(1); ADA art. 1.

9 See ADA art. 11.3. See also Appellate Body Report, *United States – Anti-Dumping Act of 1916*, ¶ 137, WTO Doc. WT/DS136/AB/R (Aug. 28, 2000).

10 See Chad P. Bown, *The World Trade Organization and Antidumping in Developing Countries* (World Bank Policy Research Working Paper, Paper No. 4014, 2006), <https://openknowledge.worldbank.org/bitstream/handle/10986/9305/wps40140BOX031113B01tell0JS0when0done1.pdf?sequence=1&isAllowed=y>.

11 See Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, ¶ 126, WTO Doc. WT/DS436/AB/R (Dec. 8, 2014). See also Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, ¶ 142, WTO Doc. WT/DS27/AB/R (Sep. 9, 1997).

12 See Panel Report, *Morocco – Definitive Anti-Dumping Measures on School Exercise Books from Tunisia*, ¶¶ 1.12, 7.14, WTO Doc. WT/DS578/R (July 27, 2021) [hereinafter Panel Report (Exercise Books)].

Subsequently, Morocco raised new objections on the Panel's jurisdiction in its second written submission, arguing that in two instances, the panel request made reference to multiple obligations in the ADA and was thus imprecise, contrary to Article 6.2 DSU.<sup>14</sup> In response, Tunisia argued that the objections were time-barred and thus, should not be addressed.<sup>15</sup> The Panel found that although Morocco's objections were late, it was necessary to address the objections and clear all doubts concerning its jurisdiction before turning to substantive issues.

The Panel rejected Morocco's objections and found that for the claims in question, the panel request indicated the specific aspects of the measure at issue and the provisions alleged to have been violated. Further, Tunisia had connected the measure at issue with the provisions it alleged had been violated. In the Panel's view, the demonstration of the precise manner in which the ADA provisions had been violated did not need to be included in the panel request.<sup>16</sup>

While the procedural issues considered in this case and the ensuing Panel findings are not groundbreaking, they reaffirm the applicable legal standard on the sufficiency of a panel request which WTO Members, as users of the WTO dispute settlement system, should be familiar with.

## 2.2 Determination of Dumping

Tunisia raised two sets of claims concerning errors in the determination of dumping regarding (1) construction of normal value contrary to Article 2.2 and 2.2.2 ADA; and (2) comparison between normal value and the export price, contrary to Article 2.4. Tunisia also argued that in all these instances, there was a consequential violation of Article 2.1. The Panel rejected these claims because Tunisia failed to demonstrate the violation.<sup>17</sup>

For context, Article 2.1 provides that dumping exists where the export price of a product is less than its normal value. Typically, normal value is based on the price of the like product in the exporting country. In some circumstances, such domestic sales cannot be relied on.<sup>18</sup> Article 2.2 identifies these circumstances where normal value may be on (1) a representative export price to an appropriate third-country; or (2) *cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and profits* (constructed normal value).<sup>19</sup>

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13 See *id.*, Annex A-3.

14 See *id.*, ¶¶ 3.4, 7.16, 7.24, 7.26, 7.32 (referencing Request for the Establishment of a Panel by Tunisia, *Morocco – Definitive Anti-Dumping Measures on School Exercise Books from Tunisia*, ¶¶ B.5, B.6, WTO Doc. WT/DS578/2 (Sep. 20, 2019)).

15 See *id.*, ¶¶ 7.17-7.22.

16 See *id.*, ¶¶ 7.29-7.31, 7.33.

17 See *id.*, ¶¶ 7.59, 7.86, 7.107, 7.144, 7.184. These claims are not covered in this comment.

18 See ADA art. 2.2 (examples include: (1) no sales of the like product in the domestic market of the exporting country; or (2) low volume of sales in that market; or (3) because of a particular market situation, such sales do not permit a proper comparison).

19 See *id.*

Article 2.2.2 provides some insights on how to calculate administrative, selling and general costs by relying on actual data. Article 2.4 requires that a fair comparison of the export price and the normal value be made in calculating the margin of dumping.

Before turning to the substantive claims on the dumping determination, the Panel addressed Morocco's objection to these claims based on arguments that the issues before the Panel were not first raised before the investigating authority. Morocco argued that addressing such claims would amount to a *de novo* review contrary to the standard of review in Article 17.6(i) of the ADA. This provision precludes a panel from assuming the role of an investigating authority and engaging in an independent fact-finding exercise. However, if the disputing parties request, a panel can determine whether the facts are properly established and whether the investigating authorities' evaluation of the facts was unbiased and objective. The Panel found that Tunisia had only invited the Panel to apply the law to the existing facts before the Panel and not to re-evaluate the facts and thus, rejected Morocco's objections.

### 2.2.1 Construction of normal value

In this dispute, MIICEN constructed normal value for certain exercise book models using data provided by the two exporting producers participating in the AD investigation.<sup>20</sup> Tunisia claimed that in doing so, *first* MIICEN acted inconsistently with Article 2.2 and 2.2.2 by failing to calculate and use a reasonable amount for profits, and identified two errors (1) including expenses that were unrelated to profits and (2) excluding sales of certain exercise book models. *Second*, MIICEN acted inconsistently with Article 2.2 by including costs that were not part of the normal value components.

Exporting producer	Cost and pricing data declared
SITPEC	<ul style="list-style-type: none"> <li>• Non-adjusted unit price (as charged to the customer)</li> <li>• An adjusted unit price (excluding certain selling expenses charged to the customer)</li> <li>• Cost of production including fixed and variable manufacturing costs</li> </ul>
SOTEFI	<ul style="list-style-type: none"> <li>• Value and quantity sold for each transaction</li> <li>• An adjusted unit price (excluding certain selling expenses charged to the customer)</li> <li>• Cost of production including administrative and financing costs</li> <li>• Distribution and marketing costs (separately)</li> </ul>

The first error in the profit margin calculation relates to the inclusion of expenses that do not count as profit. MIICEN calculated the general profit by subtracting the cost of production from the unit selling price of each sale and then added up the results. For SITPEC, it used the declared *non-adjusted* unit price and the cost of production. For SOTEFI, it used a *non-adjusted* unit price and cost of production comprised of fixed and variable manufacturing costs, along with *distribution* and marketing costs. This resulted in profit margins that included the profit itself and expenses that were not linked to profit such as taxes, duties, transport and credit costs.<sup>21</sup>

The ADA does not provide a methodology to determine a ‘reasonable amount’ for profits. However, Article 2.2.2 provides that these amounts should be based on “*actual data* pertaining to production and sale in the ordinary course of the like product by the exporter or producer under investigation”.<sup>22</sup> Interestingly, Morocco did not contest Tunisia’s claim but instead asserted that it used actual data provided by the producers which did not meet MIICEN’s required format. This created confusion on the composition of the normal value components.

The Panel recognized that an investigating authority may have difficulties interpreting responses by companies in AD investigations. However, any errors or ambiguity in these responses does not exempt an authority from the obligation in Article 6.6 of ensuring the “accuracy of the information supplied by interested parties upon which their findings are based.”<sup>23</sup> The Panel found that while MIICEN had gathered the relevant data, it had failed to establish “actual profit”. The Panel found that amounts used by MIICEN were not based on “actual data” and therefore inconsistent with Article 2.2.2. As a result, the profits were not a “reasonable amount” for profits within the meaning of Article 2.2.

This reasoning begs the question of whether Article 2.2.2 includes a separate test on the reasonability of the results arrived at through the use of “actual data” provided by the exporting producer. In *EC – Bed Linen*, the Panel found that testing the results obtained against some arbitrary or subjective standard of reasonability serves no purpose.<sup>24</sup>

With respect to the second error, MIICEN excluded sales prices and the cost of production of certain state-subsidized exercise books from Tunisia, because they were subject to an export ban.<sup>25</sup> The profit margins did not include profits from sales of these books, which inflated the profit margin because the profits from the excluded sales were lower. Tunisia argued that these sales met all the conditions in Article 2.2.2

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20 See Panel Report (Exercise Books), *supra* note **Error! Bookmark not defined.**, nn.60, 96, 131 (normal value was constructed for models of exercise books that: (1) were not sold in the Tunisian market; (2) did not exceed the standing threshold; and (3) were not sold in the ordinary course of trade).

21 See *id.*, ¶¶ 7.49, 7.51.

22 See Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, ¶ 7.263, WTO Doc. WT/DS264/R (Apr. 13, 2004) [hereinafter Panel Report (Softwood Lumber V)].

23 See Panel Report (Exercise Books), *supra* note 12, ¶ 7.54.

24 See Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, ¶ 6.99, WTO Doc. WT/DS141/R (Oct. 30, 2000).

25 See Panel Report (Exercise Books), *supra* note 12, ¶¶ 7.70, 7.75.

and thus, there was no valid justification for their exclusion. As a result, Morocco did not use a “reasonable amount” for profits as required by Article 2.2.

Notably, Morocco did not argue that the excluded sales of state-subsidized books, subject to an export ban were not in the ordinary course of trade. In its analysis of this claim, the Panel seems to imply that had MIICEN done so, the exclusion may have been justified.<sup>26</sup> Instead, Morocco argued that the exclusion was justified because “actual data” under Article 2.2.2 does not relate to all sales, but to those likely to provide a fair comparison between the normal value and the export price under Article 2.4. This argument found support from the European Union.<sup>27</sup> By excluding these sales, Morocco avoided including products that are subject to an export ban and thus unable to be dumped in the dumping calculation.

The Panel considered that there was no evidence offered showing that including sales from these books in the determination of profits would not result in a normal value that permits a fair comparison with the export price. Rather, excluding these costs led to profits that were not based on “actual data” contrary to Article 2.2.2. As a result, Morocco did not use a “reasonable amount” for profits as required by Article 2.2.

Tunisia also claimed that in calculating SOTEFI’s normal values, MIICEN incorrectly included expenses related to the distribution cost (domestic transportation and port fees) in the “cost price”, based on the data provided (table 1 above). In Tunisia’s view, these costs are not included in the “cost of production” or “administrative, selling and general costs” in Article 2.2. Further, where an investigating authority decides to construct normal value at the ex-factory level, it ought to consider only the administrative, selling and general costs and expenses that form part of an ex-factory price. Tunisia argued that distribution costs (transportation costs from the factory door to the point of delivery) are not part of the ex-factory price.

The ADA does not include a definition or methodology of determining the amount of each normal value component or make an explicit reference to distribution costs. Curiously, Morocco responded that MIICEN accepted data presented by the producer and that any resulting errors were not brought to its attention. Thus, MIICEN is not accountable for any error that is based on data provided by the exporting producer. As noted above, the Panel found Morocco’s contention to defy the spirit of Article 6.6 which requires the investigating authority to verify data used during the investigation.

The Panel found that there was no ambiguity in the costs declared by SOTEFI because it presented the distribution costs separately and broke down their contents. Further, domestic transportation and port fees are not part of the ex-factory level price and thus should not form part of the normal value constructed at the ex-factory level. The Panel concluded that Tunisia sufficiently demonstrated that MIICEN’s inclusion of these costs was inconsistent with Article 2.2.<sup>28</sup>

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26 See *id.*, ¶¶ 7.74-7.76.

27 See *id.*, ¶ 7.78.

28 See *id.*, ¶¶ 7.103, 7.107.

### 2.2.2 Fair price comparison

Article 2.4 requires investigating authorities to ensure a fair comparison between the normal value and export price for the dumping margin determination. Due allowance should be made for differences that affect the price comparability. The provision does not provide a definitive methodology for making allowances and instead grants discretion to the authorities. However, it specifies that while an authority carries the burden of making a fair comparison, parties seeking allowances must substantiate their requests constructively.

In this case, Tunisia claimed that MIICEN failed to make a fair comparison contrary to Article 2.4 by (1) excluding the use of licenses as a relevant factor affecting price comparability; and (2) using an erroneous mathematical formula. The first claim was rejected because the Panel found that the parties had failed to demonstrate that the use of licenses affected comparability. For the second claim, Tunisia argued that the numerator and the denominator of the mathematical formula used by MIICEN to calculate dumping margin were expressed in units of volume and not in monetary terms, which distorted the comparison between normal value and export price. Morocco did not dispute the factual description of the formula used and instead argued that errors in the dumping margin calculation are not covered by the first sentence of Article 2.4.

The Panel established that the formula used was erroneous because the numerator and the denominator represented irrelevant export volumes instead of the amount of dumping. Further, the fair comparison principle in Article 2.4 applies to the formula used to calculate the dumping margin. As a result, the use of an erroneous formula violated the fair comparison obligation in Article 2.4.<sup>29</sup>

### 2.2.3 Comments on the Panel's findings

The Panel's findings place the duty of an investigating authority to rely on accurate data in proper perspective. For instance, it is observed that in calculating SOTEFI's profit margin, MIICEN used a non-adjusted unit price, which includes not only the cost of production declared by SOTEFI but also certain selling expenses charged to the customer. 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." Subtracting these two figures, therefore, resulted in an inaccurate 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).<sup>30</sup>

In responding to this inconsistency, Morocco provided a technical defence by stating that "*the cost of production and profits data submitted by one of the two Tunisian exporting producers (SOTEFI) were not presented in the format required by MIICEN, which created a certain amount of "confusion" regarding the exact composition of the cost*

<sup>29</sup> See *id.*, ¶¶ 7.168, 7.179.

<sup>30</sup> See *id.*, ¶ 7.51.



*of production, the administrative costs, the cost price and the profits.*<sup>31</sup> This is a clear case of admission of miscalculation of the profit margin of the exporting producer and an apparent derogation from the obligations of the investigating authority as created by Articles 2.2 and 2.2.2 of the ADA.

On this point, the Panel's finding was spot-on where it noted that while errors may slip into responses to the investigation questionnaires and while it may be difficult for the investigating authority to interpret the responses provided by the interested parties, any error or ambiguity in the data provided 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" and to establish the facts "proper[ly]." 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.

### 2.3 Determination of Injury

Under Article 3.1, an injury determination (material injury or threat thereof) must be based on positive evidence and involve an objective examination of (i) the *volume* of the dumped imports and the corresponding impact on prices in the domestic market for similar products, and (ii) the consequent impact of the dumped products on domestic producers.<sup>32</sup> With respect to volume, Article 3.2 mandates an investigating authority to examine whether there has been a significant increase in dumped imports in absolute terms or relative to production or consumption. For the effects on prices, an authority should examine whether there has been significant price undercutting, depression, or suppression.

Article 3.4 identifies a non-exhaustive list of economic factors and indices to guide an investigating authority in the examination of the impact of dumped imports on the domestic industry.<sup>33</sup> Article 3.5 is instructive on the requirement for a causal link between dumping and injury. It requires investigating authorities to ensure that injury to the domestic industry caused by any known factors other than dumped imports is not attributed to the imports. By necessary implication, an inconsistency with Articles 3.2 and 3.4 would likely undermine an investigating authority's overall causation determination and consequentially lead to inconsistency with Article 3.5.<sup>34</sup> Tunisia challenged MIICEN's findings flowing from its injury and causation analysis and claimed that MIICEN acted inconsistently with Articles 3.1 and 3.2 of the ADA. In particular, MIICEN had (1) failed to objectively analyze the volume of imports in relation to the domestic production and consumption of exercise books, (2) erroneously and non-objectively analyzed the effects of imports on the price of domestic exercise books (3) failed to objectively analyze the state of the domestic industry and (4) erred

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31 *See id.*, ¶ 7.53.

32 *See* ADA art. 3.1.

in finding a causal link between the imports and injury on the domestic industry. Claims on (1) were not examined because the Panel applied judicial economy.<sup>35</sup>

The analysis of price effects of dumped imports essentially requires investigating authorities to examine whether the dumped imports have caused significant price undercutting, price depression or price suppression. As concerns price undercutting, Tunisia challenged the use of a constructed domestic price (notional target selling price) in Morocco when compared with the actual import price. The Panel found that Article 3.2 does not permit the construction of a notional target selling price in a price undercutting analysis, and instead, in its context, requires the use of *actual* prices. Further, Tunisia claimed that MIICEN indicated that the injury analysis covered the period from 1 January 2013 to 30 April 2017. However, the examination of price effects was limited to the period between 1 May 2016 to 30 April 2017. The Panel noted that “to determine whether imports cause, through the effects of dumping (including price effects) injury, the effects analyzed must, in principle, relate to the period selected for the examination of the economic situation of the domestic industry.”<sup>36</sup> Moreover, Morocco failed to justify its approach.

As concerns price depression, Tunisia claimed that MIICEN (1) compared prices from 2013 to prices in the first four months of 2017 (end-point to end-point) instead of examining the price trends over the entire period of investigation (POI); and (2) failed to consider whether the decline in domestic prices was due to imports. On the argument concerning the POI, the Panel found that data for a whole year provides a more accurate picture of the situation than data for part of the year. In this case, MIICEN should have explained why the data for the last four months was more decisive in assessing the extent of the depression.<sup>37</sup> The Panel also found that while MIICEN found a gradual decline in the prices throughout the POI, it did not address the magnitude of this decline. The price decline was, at most, 1.69% which did not meet the “*significant*” threshold. Further, the Panel found that MIICEN failed to sufficiently explain how imports depressed prices of Moroccan exercise books when import prices were higher than domestic prices of like products.

On price suppression, Tunisia claimed that MIICEN (1) focused on a limited comparison of prices from the first year in the POI with prices from the last four months in the last year of the POI; and (2) failed to analyze whether the suppression observed was due to imports. The Panel agreed and found that there was no explanation

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33 Examples include actual or potential decline in sales, profits, output, market share, productivity, return on investments and the magnitude of the margin of dumping, actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments.

34 Other panels have come to similar determinations. *See, e.g.*, Appellate Body Report, *Korea – Anti-Dumping Duties on Pneumatic Valves from Japan*, ¶ 5.196, WTO Doc. WT/DS504/AB/R (Sep. 10, 2019); Panel Report, *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, ¶ 7.239, WTO Doc. WT/DS425/R (Feb. 26, 2013); Panel Report, *China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States*, ¶ 7.327, WTO Doc. WT/DS440/R (May 23, 2014); Appellate Body Report, *Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy*, ¶ 7.182, WTO Doc. WT/DS479/AB/R (Mar. 22, 2018); Panel Report, *China – 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)*, ¶ 7.186, WTO Doc. WT/DS427/RW (Jan. 18, 2018).



on why a limited comparison was more relevant than an evaluation of the price trends over the entire POI. Further, MIICEN did not examine whether price pressure was caused by imports or explain why domestic prices could not be increased between 2014 and 2016, despite the import price being higher than domestic prices and the cost of domestic production. Based on this, the Panel found that the examination of price effects was inconsistent with Article 3.1 and the first sentence of Article 3.2.

On the examination of the state of the domestic industry, Tunisia claimed that the analysis of the factors listed in Article 3.4 was not objective. In this regard, the Panel noted that “to conduct an objective examination, the authority must take into account conflicting evidence and plausible explanations that may contradict its own hypotheses”.<sup>38</sup> Recalling that Article 3.4 requires an examination of the impact of dumped imports on the domestic industry, the Panel noted that “an investigating authority is required to examine the explanatory force of subject imports for the state of the domestic case”.<sup>39</sup> The Panel found that MIICEN failed to conduct an objective assessment of the trends in sales, market shares and the domestic industry’s production and profitability because there was either (1) no examination of whether the imports had an explanatory force for the state of the domestic industry or (2) MIICEN failed to examine how conflicting evidence could affect its conclusions.<sup>40</sup>

Finally, Tunisia claimed that MIICEN violated Articles 3.1 and 3.5 by failing to properly examine (1) the causal relationship between the injury observed and Tunisian imports and (2) the impact of competition from one domestic producer (Imprimerie Moderne) in the non-attribution analysis. On the first claim, the inconsistencies with Articles 3.2 and 3.4 in MIICEN’s determination of injury (described above) led the Panel to conclude that the causation examination was also inconsistent with Article 3.5. By relying on analyses for its injury determination that was not objective, MIICEN tainted the causation analysis.

The Panel rejected Tunisia’s second claim because there was no evidence on the effect of competition from Imprimerie Moderne on the domestic industry. The Panel found that an objective authority would not have concluded, based on the record, that competition from domestic producers was injuring the domestic industry.

### 2.3.1 *Comments on the Panel’s findings*

It is interesting to note that the price comparison between Tunisian books and Moroccan books did not reveal the existence of price undercutting. However, the Authority reconstructed the price of the domestic industry by including a high profit

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35 See Panel Report (Exercise Books), *supra* note 12, ¶¶ 7.262, 8.2.

36 See *id.*, ¶ 7.216.

37 See *id.*, ¶ 7.232.

38 See *id.*, ¶ 7.192.

39 See *id.*, ¶¶ 7.268, 7.303.

40 See *id.*, ¶¶ 7.263-7.310.

41 See *id.*, ¶ 7.203.

margin of 15% to 25%, based on the profit margin made by the Tunisian exporting producers in their domestic market.<sup>41</sup> In a bid to justify this aberration, Morocco argued that Article 3.2 did not use the word ‘*actual price*’ and given that sales by the local marketers were made at a loss, the authority had the discretion to reconstruct a profitable price for the examination. The logical inference that may be drawn from the price reconstruction is that MIICEN’s examination was orchestrated to achieve the desired outcome and this outcome could not be achieved if MIICEN had relied on the actual data or domestic price.

While the price of Tunisian imports increased from 2014 to 2016, the price of the domestic product decreased during the same period. By implication, not only were the prices of the Tunisian books higher than that of Moroccan books, but they also followed an opposite trajectory. Despite having this evidence at hand, MIICEN failed to act on it or explain how imports would have depressed domestic prices when import prices were higher than the domestic price of the like product. The Panel was therefore right in stating that by disregarding evidence that could contradict its conclusions, MIICEN failed to conduct an objective examination as required by Article 3.2.<sup>42</sup>

Another pointer that is indicative of MIICEN’s failure to meet the standard set out in Article 3.2 is Tunisia’s challenge on the period the price suppression was conducted. The record shows that the assessment considered the period from 1 May 2016 to 31 April 2017 (11 months) whereas the POI was 1 January 2013 to 31 April 2017 (4 years and 4 months). No compelling justification was provided by MIICEN to explain why it selected a different period of price undercutting analysis from the one used for the rest of the injury analysis, and this impugned the credibility of the assessment for injury determination.

## 2.4 Propriety of Initiating the Investigation

Article 5.2 sets the legal standard on the evidence required in an application for initiation of an AD investigation by exporting producers. Evidence of the existence of dumping, injury and a causal link must accompany the application. Investigating authorities should examine the accuracy and adequacy of the evidence provided in a complaint to determine whether there is sufficient evidence to justify the initiation of an AD investigation. When authorities are satisfied that there is no sufficient evidence of dumping or injury, the application should be rejected, and investigations terminated promptly.<sup>43</sup>

Admittedly, an investigating authority does not need to possess *irrefutable proof of dumping or injury* before initiating an AD investigation.<sup>44</sup> However, it must have *prima facie* evidence that is at the very least, compelling enough to invite a reasonable, objective, and fair authority to initiate an investigation to ascertain the existence of dumping.<sup>45</sup>

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42 See *id.*, ¶ 7.235.

43 See ADA arts. 5.2, 5.3, 5.8.

44 See *id.* arts. 2.4, 5.1, 5.2; Panel Report (Softwood Lumber V), *supra* note 22, ¶ 7.164.

45 *Id.*

In this case, Tunisia claimed that the application filed by domestic producers did not contain sufficient evidence of the required elements, thus, there was no basis for an investigation. Consequently, the measures introduced by Morocco were inconsistent with its obligations under Articles 5.2, 5.3 and 5.8.

Tunisia challenged the sufficiency and relevance of the evidence that formed the basis of the investigation and asserted that MIICEN did not act as an unbiased and objective authority would, in determining whether there was sufficient evidence to justify initiating an investigation. For instance, the export price evidence provided by the domestic industry was based on one invoice without an explanation on why export prices from that day were representative of the entire POI. The normal value evidence was based on the online catalogues of a retail supermarket and chain store without demonstrating that the prices were domestic prices for Tunisian producers or if at least representative.<sup>46</sup> Thus, the evidence included in the domestic industry's application was insufficient to initiate an investigation within the meaning of Article 5.3.

The Panel noted that Article 5.2 does not impose a direct obligation on investigating authorities but is a useful reference when examining the obligations in Article 5.3 which fall squarely on the investigating authority. Further, a violation of Article 5.8 can only be found where following a determination that there is no basis for an investigation, the authority nonetheless fails to terminate the investigation. A violation of Article 5.3. does not result in a consequential violation of Article 5.8. Based on this, the Panel only examined claims relating to Article 5.3. The Panel found that MIICEN failed to examine the accuracy and sufficiency of the export price and normal value evidence when determining whether that evidence was sufficient to justify the initiation of an investigation.<sup>47</sup>

### 3 Concluding remarks: potential implications of the dispute

The dispute between Morocco and Tunisia marks the first time, in 25 years of the WTO's existence, for a Panel to hear an intra-African trade dispute. Prior to this, no African country had ever been a complainant in any WTO dispute. African countries have been involved as respondents in nine disputes, out of which two were heard by a Panel and the rest were either resolved through a Mutually Agreed Solution or stuck at the consultations stage.<sup>48</sup> While the significance of this dispute has been noted, it is not clear that this dispute marks the beginning of active participation in the WTO dispute settlement system by African countries. This single decision may not, on its own, be a sign of things to come.

Away from the WTO, the culture of limited participation of African countries in litigating intra-African trade disputes is also observed in the dispute settlement regimes set up under African regional economic organizations such as the Common Market

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<sup>46</sup> For Tunisia's first written submission, see Panel Report (Exercise Books), *supra* note 12, ¶¶ 8.22-8.38.

<sup>47</sup> See *id.*, ¶¶ 7.381-7.395; see also Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, ¶ 7.19, WTO Doc. WT/DS331/R (June 8, 2007).

for Eastern and Southern Africa (COMESA), the East African Community (EAC), the Southern African Development Community (SADC) and trade agreements such as the Tripartite Free Trade Area Agreement. In the regional context, the East African Court of Justice stands out for having adjudicated, in 2019, the first case that was based purely on an international trade question.<sup>49</sup>

The participation of African countries in formal economic dispute resolution is particularly relevant now, following the extensive and growing ratification of the African Continental Free Trade Area Agreement (AfCFTA) by 38 African Countries.<sup>50</sup> The AfCFTA has an inbuilt dispute settlement mechanism (DSM) which provides rules and procedures for the settlement of trade disputes between member states. The AfCFTA DSM is largely modelled after the '*functioning aspects of the WTO Dispute Settlement Body*' but departs from the WTO DSM in two (in)significant regards (tenure and appointment of the Appellate Body).<sup>51</sup>

This wholesale adoption of the WTO-like DSM suggests that the AfCFTA may not fill the gaps in the WTO DSM including weak enforcement mechanism, lack of political will, lack of technical expertise, cost of dispute resolution proceedings, questionable quality of some decisions and the undue delay of the appellate process. These are political and institutional challenges that may not be easily cured by ratification of treaties, as history has demonstrated. Admittedly, these are early days for AfCFTA DSM, and the mechanism is still untested. It will be interesting to see whether the mechanism can provide a pro-African solution to intra-continental trade disputes.

While the dearth of intra-African trade litigation matters at the WTO and regional level is not explored in any detail in this commentary, it is important to point out that the non-participation is not caused by an absence of intra-African trade disputes. The question of why non-participation in formal trade disputes systems persists among African countries may need to be re-examined, to offer tangible solutions.

Turning to the legal and jurisprudential value of the dispute, we observed from the findings and rulings of the Panel that, the Panel Report does not particularly set new legal standards or reasoning. This may be explained away by the factual circumstances and legal issues that the Panel had to address, being somewhat familiar in the world of WTO AD case law. We observed that in several instances, the Panel adopted the reasoning advanced by other Panels and the Appellate Body, without going to great lengths of developing new legal arguments.

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48 See *Dispute settlement*, WTO (last visited Dec. 17, 2021), [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm).

49 See Harrison Otieno Mbori, *Case Commentary on the British American Tobacco v Attorney General of Uganda (EACJ) and GETMA International v The Republic of Guinea (OHADA CCJA)*, 1 AFR. J. INT'L ECON. L. 339, 344 (2020).

50 See *Status of AfCFTA Ratification*, TRALAC (Oct. 4, 2021), <https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html>.

51 See *Inaugural Meeting of the Dispute Settlement Body of the African Continental Free Trade Area (AfCFTA)*, AfCFTA SECRETARIAT (Apr. 26, 2021), <https://afcfta.au.int/en/events/2021-04-26/dispute-settlement-body-aims-settle-trade-disputes-between-member-states>.

In any case, the Panel Report emphasizes the duty of an investigating authority in dumping investigations and the need for careful consideration of evidence during the examination. There is a notion that states tend to adopt a protectionist approach to trade by restricting imports into their domestic market, it then behaves an investigating authority to maintain a fair and objective examination to allay these fears. Morocco came short of the standards created by the ADA for the most part and this was exemplified by the Panel's findings, both on preliminary and substantive issues.

More significantly, the Panel Report in this dispute has not yet been adopted by the WTO Dispute Settlement Body (DSB). In addition, soon after the Panel Report was published and circulated to WTO Members, Morocco notified the DSB of its decision to appeal certain findings and rulings in the Panel Report.<sup>52</sup> Given the ongoing impasse concerning the filling of Appellate Body vacancies, this effectively suspends the proceedings until such a time when the Appellate Body resumes operation.

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52 See Communication, *Morocco—Definitive Anti-Dumping Measures on School Exercise Books from Tunisia* (Notification of an Appeal by Morocco under Article 16.4 and Article 17.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and under Rule 20(1) of the Working Procedures for Appellate Review), WTO Doc. WT/DS578/5 (Aug. 4, 2021).