

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.