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Morocco faces its first commercial dispute before the WTO

Morocco - Hot-rolled steel case (complaint from Turkey).

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Summary

This paper examines Turkey's case against Morocco before the World Trade Organization (WTO), over anti-dumping duties on hot-rolled steel products. Turkey's complaint constitutes both a precedent and an opportunity. First, it is a precedent in that Morocco was previously never involved in a case before GATT or WTO, neither as a plaintiff nor as a defendant. Second, it is an opportunity as the evaluation of the legal process of the complaint enables an assessment of adequacy of Morocco's arguments and, consequently, the elaboration of recommendations and guidelines for the overall legal strategy.

Introduction

On October 3rd 2016, Turkey requested consultations with Morocco regarding anti-dumping measures on certain hot-rolled steel products. In November, two rounds of consultations took place between the two parties without reaching an amicable resolution. Turkey then decided to initiate the jurisdictional phase of the World Trade Organization's (WTO) dispute settlement system, requesting the establishment of a panel. Despite its opposition, Morocco was unable to indefinitely prevent the initiation of this jurisdictional phase. It should be recalled that the Uruguay Round outcome, also known as the Marrakesh Accords, established an almost automatic right for the plaintiff to form a Special Group examining conformity of measures applied by the defendant[1].

The case of anti-dumping measures between Morocco and Turkey is a significant development for at least two

1. For an analysis of the World Trade Organization's dispute settlement system, see our doctoral thesis entitled, The Status of Developing Countries in the World Trade Organization's Dispute Settlement System, defended on 17 March 2007 at the University of François Rabelais de Tours, France; JACKSON J.H., Observation on the Results of the Uruguay Round, RGDIP, N°3 1994.
JACKSON J.H., The WTO dispute settlement: understanding-misunderstandings on the nature of legal obligation, American Journal of International Law, Washington, D.C., Vol. 91, 1997.

reasons. First, the case raised by Turkey is unprecedented in the history of Morocco's trade relations. The latter was never involved, neither as a plaintiff nor as a defendant, in any case before GATT or WTO. Second, such a case provides an opportunity to assess the existence and performance of the legal strategy supposedly adopted by Morocco to support the country's trade liberalization process on multilateral and regional fronts.

This paper aims to analyze the elements and consequences of Morocco's first experience with the WTO dispute settlement system. A two-step approach will be adopted: first, a presentation of the arguments of both parties to the dispute and the conclusions of the Panel; and second, an assessment of the Moroccan legal strategy and the means of improving it.

I. Economics of Turkey's complaint and basic findings of the panel

We will examine, in turn, the content and scope of Turkey's legal arguments, the defense put forward by Morocco and the fundamental findings of the Special Panel on the dispute.

1. Economics of Turkey's complaint

On September 26th, 2014, Morocco imposed definitive anti-dumping duties on imports of certain hot-rolled steel products from Turkey. Morocco's decision followed a national investigation, initiated on 21 January 2013, to establish whether or not two Turkish exporters, Erdemir Group and Colakoglu, were found to be dumping.

Turkey's complaint alleged that the conduct of the investigation and the measures taken by Moroccan authorities were contrary to WTO law. More specifically, Turkey questioned the compatibility of Moroccan measures with the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (also known as the Anti-dumping Agreement).

A series of arguments were put forward by Turkey to corroborate its allegations. Turkey claimed that Morocco had failed to comply with the maximum duration provided for in the Anti-Dumping Agreement to complete an investigation, namely 18 months. Turkey also claimed that Morocco's use of factually available data to calculate dumping margins for Turkish exporters was incompatible with provisions of Annex II of the Anti-Dumping Agreement. In addition, and still according to Turkey, Morocco had failed to comply with its obligations under the Anti-Dumping Agreement by not disclosing to Turkish exporters accused of dumping all the essential facts allegedly justifying its use of available factual data to carry out such calculations. Similarly, Morocco, in Turkey's view, could not demonstrate, by facts and law, that its domestic industry, namely Maghreb Steel, was not established and that its creation was significantly delayed due to the alleged dumping by Turkish imports.

To refute Turkish allegations, Morocco's defense adopted a legal strategy based on three main points. First, Morocco explained that the 22-day delay in concluding its national investigation was largely imparted to a concern to grant targeted Turkish exporters enough time to defend their case. Furthermore, according to Morocco, the eighteen-month period provided for in the Anti-dumping Agreement should not be interpreted rigidly, since both Panels and the Appellate Body themselves repeatedly deviate from deadlines provided for in the Dispute Settlement Understanding. Second, Morocco argued that its use of available factual data was fully consistent with provisions of the Anti-Dumping Agreement, since it allows the investigating authority to reject data submitted by exporters accused of dumping in cases where such data is incomplete or manifestly inaccurate. This was precisely the complaint made by Morocco against Turkish exporters, who, according to Morocco, reportedly declared only 18,800 tons for the period of the investigation, while the Moroccan import services recorded a volume of 29,000 tons. Third, Morocco's defense presented evidence of material injury to its domestic production structure as a result of Turkish exporters' use of dumping practices on its domestic market. More specifically, Morocco argued that its domestic hot-rolled steel industry was not established because of unfair competition from the two Turkish producers, and that this situation resulted in substantial delay in the establishment of a domestic industry.

For all these reasons, Morocco requested that the Special Panel examining the case reject Turkey's allegations en bloc.

2. Fundamental findings of the Panel

In essence, the Panel upheld Turkey's allegations and rejected the defense presented by Morocco[2].

First, the Panel found that the delay in the conclusion of the investigation by Moroccan authorities violated relevant provisions of Article 5.10 of the Anti-dumping Agreement, which provides that "Investigations shall, except in special circumstances, be completed within one year, and in any event within a period not exceeding 18 months, after their initiation". Yet, the investigation was opened on January 21, 2013 and concluded only on August 12, 2014, resulting in a 22-day delay. Arguments put forward by Morocco, which, besides never contested the existence of such a delay, were considered unfounded. On the one hand, the Panel did not agree with the Moroccan argument that the delay was due to a desire to allow Turkish producers the time necessary to prepare their responses; and on the other hand, it dismissed Morocco's attempt to draw an analogy between the 18-month cap and timelines for the preparation of Panel and Appellate Body reports. In the Panel's view, the late submission of the reports by dispute settlement bodies does not in any way justify a member's failure to comply with the maximum eighteen-month time limit set in the Anti-Dumping Agreement.

Second, the Panel considered the question of the legality of Morocco's use of available factual data to calculate dumping margins for the two Turkish producers. On this issue as well, the Panel found the Moroccan measure to be contrary to WTO law. Above all, it reproached Morocco for rejecting the data provided by the two Turkish producers, Erdemir Group and Colakoglu, without objectively demonstrating their insufficient and/or incorrect character. Specifically, the Panel found that Morocco failed to submit documents and supporting evidence that the alleged 10,000 ton discrepancy between quantities declared and those actually exported was attributable to the two Turkish producers. Clearly, the panelists criticized Moroccan authorities for not having investigated the origin of the estimated gap and for simply pointing out that the gap was accounted for by third party traders acting on behalf of the exporters in question. Consequently, the panel concluded that Morocco did not duly establish that the Turkish producers had not declared all their export sales to its market.

Third, the panel examined Turkey's claims with regard to the failure of Morocco to disclose essential facts concerning the non-declaration of additional export transactions. On this point, the Panel agreed with two allegations made by Turkey but rejected Turkey's third. Thus, in the Panel's view, Morocco never informed Turkish exporters of the precise basis for its decision to use available factual data and failed in its duty to disclose the data used to calculate the dumping rate. On the other hand, the Panel rejected the Turkish allegation that Moroccan authorities had not disclosed certain essential facts early enough to allow Turkish producers to defend their case.

Lastly, the Panel considered Morocco's arguments regarding the non-establishment of its domestic industry and the material injury caused to it as a result of the delay in establishment of the industry. Again, the Panel broadly rejected the Moroccan defense. In essence, the Panel found that Morocco did not substantiate its allegation of non-establishment of its domestic industry, represented in this case in the sole Maghreb Steel producer, with positive evidence and that its examination of the issue was not objective.

Several considerations were put forward by the Panel to support its finding: the inability of Moroccan authorities to demonstrate that a two-year period was insufficient to produce and market a product such as hot-rolled steel sheets; the removal of Maghreb Steel's captive market from total local market share calculations; the decision to exclude Maghreb Steel's share of the free market on the grounds that the company's sales were at a loss and the fact that Maghreb Steel's break-even point was calculated solely on the basis of 2012 numbers.

In addition, the Panel found that Turkey had duly submitted prima facie evidence that Morocco failed to assess six out of fifteen factors listed in Article 3.4 of the Anti-dumping Agreement on the demonstration of injury to domestic industry.

On the basis of these and other findings, the Panel concluded that Morocco acted inconsistently with the Anti-dumping Agreement and recommended that it bring its measures into line with its obligations under that Agreement.

2. The full report of the Panel is available on the official WTO website and can be found at: file:///C:/Users/user/Downloads/513R%20(2).pdf

II. Review of the moroccan legal strategy and conclusions to be drawn

It would be somewhat premature to draw a comprehensive conclusion from this first Moroccan encounter with the WTO dispute settlement system. The reason being that Morocco has lodged an appeal against the Panel's report. This second instance, a major innovation of the Uruguay Round, allows the appellant to request the Appellate Body to overturn or amend the Panel's report. This means that the settlement process in Morocco's hot-rolled steel case is not yet completed.

However, at this stage of the procedure, it is permissible to present some preliminary remarks on the legal management of the Hot-rolled Steel case by Moroccan authorities, on the one hand, and to make a number of strategic recommendations on conditions to be met for a better utilization of the WTO dispute resolution system on the other hand.

1. Remarks on the Moroccan strategy

The scene of the 'legal battle' between Morocco and Turkey was twofold. Determination of facts, on the one hand, and interpretation of legal texts, on the other. The first concerns data. The second is the legal qualification of factual elements. This is essentially what any trade defense strategy before WTO bodies is all about. It follows that winning an anti-dumping case before the Dispute Settlement Body is largely dependent on the Member State's ability to present relevant and conclusive evidence on these two cumulative aspects. Morocco's arguments however appeared imperfect, on both aspects.

Regarding factual elements, the data presented by Morocco to support its defense was deemed neither complete, nor objective. This applies primarily to the three data sets on which Morocco's arguments were based. First, the Moroccan defense team was unable to prove a 10,000-ton discrepancy in additional undeclared exports. Neither did it substantiate by conclusive documents that the difference was attributable to the two Turkish exporters Erdemir Group and Colakoglu. Second, Morocco's defense did not corroborate, with conclusive data and documents, allegations that its domestic hot-rolled steel industry, represented by Maghreb Steel, never reached break-even. Lastly, in its calculation of dumping margins practiced by the two Turkish exporters, the Moroccan defense merely stated that an 11% rate used was based on export price calculations in which adjustments were applied to (Cost and Freight) prices to reach Ex Works prices[3]. Nevertheless, here again, the Moroccan position was not supported by figures, neither on prices (C and F), and nor on adjustments applied in this context.

With regard to legal elements, many of the legal interpretations made by the Moroccan defense were not rigorous. Three examples can be highlighted: (1) the issue of delay in completing the national survey, (2) the treatment of certain data as confidential business information, and (3) the criteria for non-establishment of the domestic industry.

Accordingly, on the issue of delay, the Moroccan defense team attempted to justify exceeding the 18-month time limit, noting that Panels and the Appellate Body itself did not systematically respect the time limits for completing the consideration of cases before them. In our view, such a position creates the risk of Morocco alienating itself from dispute settlement bodies and, clearly, should not be maintained in the appeal phase. It is more appropriate to seek precedents in the jurisprudence of the Appellate Body and Panels for flexibility of time limits based on the dual condition of the principle of good faith and the principle of special and differential treatment for developing countries.

Similarly, the Moroccan defense team based a significant part of its reasoning on elements that it deemed to be confidential commercial information without corroborating its statements with irrefutable evidence. The Panel even had the opportunity to highlight a contradiction in the attitude of Moroccan authorities in qualifying data as confidential despite having communicated it at other stages of the case. In this regard, the Panel appears to have implicitly applied the estoppel principle[4].

3. C&F and Ex works are Incoterms used in international trade to specify the obligations of importers and exporters in relation to transport and insurance costs. See Patrick Saerens and William Pissoort, Droit Commercial International, Larcier, Brussels, 2013, p 214 et seq.

4. For a similar case of implicit application of the estoppel principle, see the case United States - Tax treatment of foreign sales companies (FSCs). Case cited by RUIZ F. H., Chronique de règlement des différends de l'OMC, 1999, Journal du Droit International, 2000, p. 430.

Finally, while Morocco succeeded in demonstrating that the creation of a domestic industry does not ipso facto lead to its establishment, it was unable to prove the existence and content of specific circumstances that could have justified such a distinction in the present case. The sharpening of Morocco's arguments on these three legal issues is important to ensure a better position in ongoing appeal proceedings.

2. Strategic recommendations

Right from its inception, the dispute settlement system was described as the jewel in the WTO crown and its window to the world. Doubts were nevertheless raised about the ability of the system to guarantee de facto equality between developed and developing countries. Due to inadequate human and material resources for the use of such a system, developing countries could not take full advantage of it. Even worse, they were at risk of becoming its victims.

This classic pattern of capacity asymmetry between developed and developing countries is largely outdated by now. Several developing countries have successfully empowered themselves to make positive and profitable use of the WTO dispute settlement system. The case of the United States - underwear raised and won by Costa Rica is a good illustration of this[5].

Regardless of the outcome of the case of anti-dumping measures brought by Turkey, it is essential for Morocco to devise a comprehensive legal strategy in the field of foreign trade. The ultimate objective is to legally secure opportunities offered by Morocco's commitment to the WTO and free trade agreements. The strategy envisaged should be structured around four focal points, namely:

- Encourage public-private partnerships, including in the collection and processing of trade data;
- Establish a body to monitor WTO jurisprudence[6] in order to be abreast of major trends in the dispute settlement system;
- Promote the training of national legal experts through sustained participation in the dispute settlement system as a third party. And finally,
- Initiate the process of rapid accession to the Advisory Center on WTO Law. This Center, established on the sidelines of the 1999 Seattle Ministerial Conference[7], provides developing country Members with free legal advice and training on WTO law, as well as assistance in dispute settlement procedures at rates significantly lower than those charged by private law firms.

5. Available on the WTO website: www.wto.org, WT/DS24, "Disputes in Alphabetical Order" section.

6. For an analysis of the effect of the precedent of WTO panel reports and the WTO Appellate Body, see PAUWELYN J., The limits of litigation: americanization and negotiation in the settlement of WTO disputes, Ohio State Journal On Dispute Resolution[Vol. 19:1 2003].

7. See the Centre's official website: http://www.acwl.ch

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