

A CASE ON WTO'S COMPLAINT MECHANISM: Turkey's Request for Consultations against Morocco's Anti-Dumping Measures

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I Background

In September 2014, following an anti-dumping investigation period, Morocco has imposed an 11 % tax duty against Turkish hot-rolled steel exporters which has created fuss in Turkish hot-rolled steel market and exporters.

Upon Morocco's anti-dumping measures on hot-rolled steel, in October 2016, Turkey has filed a "Request for Consultations" against Morocco before the World Trade Organization ("WTO")¹. In its request for consultations, Turkey alleges that anti-dumping duties imposed by Morocco in September 2014 on imports of Turkish hot-rolled steel are inconsistent with a number of procedural and substantive provisions of the WTO's Anti-Dumping Agreement, the Agreement on Import Licensing Procedures as well as the General Agreement on Tariffs and Trade 1994.

II Basis of the Consultation Request

- Turkey's Allegations against Morocco's Decision

The Request for Consultations dated October 3rd, 2016 ("Request") is circulated by the delegation of Turkey to the delegation of Morocco and to the Chairperson of the Dispute Resolution Body under the WTO.

Turkey's Request is based upon following allegations:

(i) Pursuant to Article 5.10 of the Anti-Dumping Agreement, investigations shall be concluded in no case more than 18 months, after their initiation. However, Turkey alleges that the Moroccan authorities have failed to comply with the rule of 18-month deadline for concluding the investigation according to Article 5.10 of the Anti-Dumping Agreement.²

(ii) The Moroccan authorities applied facts available, alleging that the information on sales to Morocco during the investigation period provided by the Turkish exporters was incomplete and inconsistent. In return, Turkey alleges that Moroccan authorities did not provide the Turkish exporters the opportunity to explain the alleged discrepancies, disregarded evidence

¹ See at https://www.wto.org/english/news_e/news16_e/ds513rfc_05oct16_e.htm

² According to the statements of the President of the Turkish Steel Exporters Association, the investigation has been concluded on August 12th instead of July 21st. See <http://ticaretgazetesi.com.tr/fastan-celik-ihracatcilarina-anti-damping-vergisi> (latest access on November 17th, 2016)

on these discrepancies, and determined the dumping margins of the Turkish exporters without using "special circumspection". Therefore, Turkey alleges that this leads to inconsistency in light of Article 6.8 and paragraphs 1, 3, 5, 6, and 7 of Annex II to the Anti-Dumping Agreement.

Pursuant to Article 6.8 of the Anti-Dumping Agreement, determinations may be made on the basis of the facts available under limited circumstances. The application of this possibility is regulated under Annex II of the Anti-Dumping Agreement. In this regard, the investigating authorities should specify the details and the method of the information that they request from the interested parties. Besides, the authorities should also clarify that if the interested parties do not provide the information in reasonable time, the investigating authority may determine the case based on the facts available. Information that is verifiable and submitted timely and appropriately should be considered during the determinations. Furthermore, if the interested party has acted to the best of its ability and yet has provided information that is not "ideal in all respects", the authorities should still regard such information in their determinations. However, if the authorities would not accept an evidence or information, the reasons for such rejection should be given to the supplying party and the supplying party should have the opportunity to provide explanations within a reasonable period, due account being taken of the time-limits of the investigation. If the explanations are rejected as well, the reasons for considering the explanations unsatisfactory should be announced within the scope of determinations. The authorities should also base their findings with special circumspection and check independent sources, where practicable. If, however, an interested party does not cooperate, relatively less favorable results may be applicable to this party as it withheld relevant information from the authorities.

(iii) Turkey alleges that the Moroccan authorities did not disclose essential facts with respect to its decision to use facts available, in breach of Article 6.9 of the Anti-Dumping Agreement; which indicates that "*The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.*"

(iv) Moroccan authorities applied registration/licensing requirements and failed to issue import licenses following the imposition of provisional anti-dumping measures. This is considered as an additional "*specific action against dumping of exports*", which can be taken only in accordance with the provisions of the General Agreement on Tariffs and Trade ("GATT") as interpreted by the Anti-Dumping Agreement and other relevant provisions of GATT, as appropriate, as per Article 18.1 of the Anti-Dumping Agreement.

In addition, Turkey also alleges that the foregoing measure imposed by Morocco is inconsistent with Articles I:1, X:1, X:2, X:3(a) and XI:1 of the GATT and Articles 3.2 and 3.3 of the Import Licensing Agreement.

Article I of the GATT regulates the General Most-Favoured-Nation Treatment, which stipulates that any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties. Relevant paragraphs of Article X stipulate in general that relevant laws, regulations, judicial decisions and administrative rulings of general application and agreements affecting international trade policy shall be published in a manner as to enable governments and traders to become acquainted with them. Relevant measures including new or more burdensome requirements, restrictions or prohibitions on imports shall not be enforced before such measure has been officially published. Publication and administration of trade regulations shall be administered in a uniform, impartial and reasonable manner. Furthermore, the referred Article XI:1 of the GATT stipulates that no prohibitions or restrictions other than duties, taxes or other charges shall be instituted or maintained on imports and exports of the GATT contracting parties.

Article 3 of the Import Licensing Agreement regulates the “Non-Automatic Import Licensing” while Articles 3.2 and 3.3 stipulate that such licensing shall not have trade-restrictive or distortive effects on imports additional to those caused by the imposition of the restriction (*i.e. they it should not be more administratively burdensome than absolutely necessary to administer the measure*). Licensing requirements for purposes other than the implementation of quantitative restrictions shall be published with sufficient information in a manner as to enable other member countries and traders to know the basis for granting and/or allocating licenses.

(v) Turkey alleges that the Moroccan authorities did not provide a reasoned and adequate explanation regarding their findings of injury and causation. In this regard, Turkey alleges that there was inconsistency with certain paragraphs of the Article 3 of the Anti-Dumping Agreement (*Articles 3.1, 3.2, 3.4, and 3.5*).

Article 3 of the Anti-Dumping Agreement regulates the determination of injury. Accordingly, injury should be determined based on positive evidence and involve objective examination of the volume and effect of the dumped imports and their impact on domestic producers. The effect analysis should evaluate the increase in and price undercutting by the dumped imports while the impact analysis should consider all relevant economic factors and indices having a bearing on the state of the industry. In addition, the causal relationship between the dumped imports and the injury to the domestic industry should be demonstrated by the investigating authority through examination of all relevant evidence and disaffiliate factors that are injuring the domestic industry other than the dumped imports. Among these factors are “*the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry*”.

In light of the foregoing, Turkey indicates that Morocco's investigation and definitive measures cannot be reconciled with the Anti-Dumping Agreement as the measure in subject was not initiated and conducted in accordance with the provisions of the Anti-Dumping Agreement as stipulated by Article 1 of the Anti-Dumping Agreement and no action against dumping of exports from Turkey should be taken, as the investigation and relevant measures are not in accordance with the provisions of GATT as stipulated by Article 18 of the Anti-Dumping Agreement.

- Current Status of the Consultations

Currently, Turkey's request for consultations with the respondent is waiting. As published in WTO's webpage³ no dispute panel has been established yet and no withdrawal or mutual agreement been notified.

III Consultation Process under WTO

- WTO's Dispute Settlement Mechanism

The dispute settlement procedure of the WTO is governed by the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). This entered into force on January 1st, 1995 after the modifications made in the GATT, which was increasingly unable to resolve major trade conflicts between its member countries. While the DSU retains diplomatic elements – for example, the goal of the process is to secure a "mutually agreed solution" and contains provisions that may foster a negotiated outcome - it sets out a mechanism that is overall more "rule-bound" than the process developed under the GATT.⁴ Thereby, following its enforcement in 1995, the DSU has gained practical importance as members have frequently resorted to using this mechanism.

The DSU proceeds through three main stages: (i) consultation; (ii) adjudication; and, if necessary, (iii) implementation.

- Consultations Process

As the first prerequisite step to be taken before the adjudication stage, consultations process starts with filing of a "Request for Consultations". This process is set out for reaching an amicable solution between parties.

Following the receipt date of complainant's request, unless otherwise mutually agreed, the respondent should reply to the request within ten days and, in any case, collaborate in good faith within a period of maximum thirty days. Non-collaboration of the respondent in due time (*i.e. not responding to the request in ten days or not collaborating in thirty days, unless*

³ See at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds513_e.htm (latest access on November 17th, 2016)

⁴ Daniel T. Shedd, Brandon J. Murrill, Jane M. Smith, "Dispute Settlement in the World Trade Organization (WTO): An Overview" see <https://www.fas.org/sgp/crs/misc/RS20088.pdf>

otherwise agreed) would give the complainant the right to directly proceed to the adjudication stage and request establishment of a panel⁵.

If the dispute is not resolved within sixty days after the date of receipt of the request for consultations, the complainant may request the establishment of a panel. The complainant may request a panel during the sixty-day period, if the consulting parties jointly consider that consultations have failed to settle the dispute.⁶

- What Happens After the Consultations?

If the consultations fail to settle the dispute, upon the complainant's request from the Dispute Settlement Body, a panel is established within forty five days. The panel, by way of hearing written and oral arguments from both parties, issues an interim report which will be followed by the final report. In no case should the period from the establishment of the panel to the circulation of the report to the members exceed nine months.⁷

This settlement procedure, from establishment of the panel until adaptation of the report, lasts usually up to nine – twelve months, depending on parties' calling for the appeal procedure.

Following the litigation process, parties may adopt 3 positions accordingly with the panel's report; (i) compliance with the recommendations of the panel/the appellate body (*implementation*), (ii) in case of non-compliance with the recommendations in due time, affected party's request for compensation payment (*payment of compensation*), (iii) in case of non-compliance with the recommendations and non-payment of the compensation, affected party's request for authorization to introduce retaliatory measures against the offending country (*retaliatory measures*).

IV Former Turkey Specific WTO Complaints

Since the DSU' enforcement in 1995, while 513 complaint have been filed to the DSU, not all of them have resulted in panels. To date, 96 of the cases have been finalized with withdrawal or mutual agreement by parties before establishment of a panel.

Whether as the complainant or the respondent, Turkey has participated to 12 cases in total. While Turkey has made 3 applications to the DSU for consultations, there are 9 complaints filed against Turkey thus far.⁸

V Conclusion

⁵ Article 4(3) of the Understanding on Rules and Procedures Governing the Settlement of Disputes

⁶ Article 4(7) of the Understanding on Rules and Procedures Governing the Settlement of Disputes

⁷ Article 12(9) of the Understanding on Rules and Procedures Governing the Settlement of Disputes

⁸ Lists of WTO panel and Appellate Body reports are available at WTO's website at https://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm

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WTO plays a substantial role in preserving the growing international trade worldwide. Therefore, in order to assure a reliable and foreseeable international trade environment for the member countries, a developing dispute settlement mechanism has significant pertinence. In the wake of WTO's praiseworthy yet still improving settlement system, outcome of the dispute between Turkey and Morocco remains as an object of curiosity for Turkish market players.

*The content of this article is intended to provide a general guide to the subject matter.
Specialist advice should be sought about your specific circumstances.*

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