



MOROCCO – ANTI-DUMPING MEASURES ON CERTAIN HOT-ROLLED STEEL FROM TURKEY

AB-2018-11

Report of the Appellate Body

BCI redacted, as indicated [BCI]

WORLD TRADE ORGANIZATION
APPELLATE BODY

**Morocco – Anti-Dumping Measures on
Certain Hot-Rolled Steel from Turkey**

Morocco, *Appellant*
Turkey, *Appellee*

China, *Third Participant*
Egypt, *Third Participant*
European Union, *Third Participant*
India, *Third Participant*
Japan, *Third Participant*
Korea, *Third Participant*
Russian Federation, *Third Participant*
Singapore, *Third Participant*
United States, *Third Participant*

AB-2018-11

Appellate Body Division:

Bhatia, Presiding Member
Graham, Member
Zhao, Member

1.1. This appeal concerns the Panel Report, *Morocco – Anti-Dumping Measures on Certain Hot-Rolled Steel from Turkey*¹ (Panel Report). The Panel was established on 20 February 2017 to consider complaints by Turkey² with respect to the definitive anti-dumping measures imposed by Morocco on imports of certain hot-rolled steel products (hot-rolled steel) from Turkey.³

1.2. Morocco initiated the anti-dumping investigation at issue on 21 January 2013⁴, and imposed provisional anti-dumping duties on the imported products at issue, following the preliminary affirmative determination by the Ministère délégué auprès du Ministre de l'Industrie, du Commerce, de l'Investissement et de l'Économie Numérique chargé du Commerce Extérieur (MDCCE) of dumping, injury, and causation, dated 29 October 2013.⁵ On 12 August 2014, the MDCCE published the final affirmative determination of dumping, injury, and causation.⁶ The definitive measure came into force on 26 September 2014.⁷ The factual aspects of this dispute are set forth in greater detail in section 2 of the Panel Report.

1.3. Before the Panel, Turkey raised the following claims under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) and the General Agreement on Tariffs and Trade 1994 (GATT 1994):

- a. the MDCCE acted inconsistently with Article 5.10 of the Anti-Dumping Agreement because the duration of the investigation at issue exceeded the maximum time limit under that provision;
- b. the MDCCE acted inconsistently with Article 6.8 of, and paragraphs 1, 3, 5, 6, and 7 of Annex II to, the Anti-Dumping Agreement in its use of facts available to determine the margins of dumping for two Turkish producers of subject imports;
- c. the MDCCE acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to disclose all "essential facts" in a timely manner with respect to its decision to use facts available to determine the margins of dumping;

¹ WT/DS513/R, 31 October 2018.

² Request for the Establishment of a Panel by Turkey, WT/DS513/2.

³ Minutes of the Dispute Settlement Body (DSB) Meeting held on 20 February 2017, WT/DSB/M/392, paras. 5.1-5.5.

⁴ Panel Report, para. 2.2.

⁵ Panel Report, para. 2.3.

⁶ Panel Report, para. 2.4.

⁷ Panel Report, para. 2.4.

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- d. the MDCCE's determination that the domestic industry, composed of the sole domestic producer Maghreb Steel⁸, was "unestablished" is inconsistent with Article VI:6(a) of the GATT 1994, as well as footnote 9 to Article 3 and Articles 3.1 and 3.4 of the Anti-Dumping Agreement;
 - e. the MDCCE's determination that the domestic industry suffered injury in the form of material retardation is inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement; and
 - f. the MDCCE acted inconsistently with Articles 6.5, 6.5.1, and 6.9 of the Anti-Dumping Agreement by failing to disclose information concerning the domestic industry's break-even threshold in its analysis of whether the domestic industry was "established".⁹

1.4. Turkey requested the Panel to exercise its discretion under Article 19.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and to suggest that Morocco bring its measures into conformity with its World Trade Organization (WTO) obligations by immediately revoking the anti-dumping measure at issue.¹⁰

1.5. The Panel Report was circulated to Members of the WTO on 31 October 2018. For the reasons set out in its Report, the Panel found the following claims of Turkey to be outside the Panel's terms of reference:

- a. the claim under footnote 9 to Article 3 of the Anti-Dumping Agreement in respect of the MDCCE's finding of "establishment";
- b. the claims under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement in respect of the confidential treatment of the domestic industry's (Maghreb Steel) break-even threshold; and
- c. the claim under Article 6.9 of the Anti-Dumping Agreement in respect of the alleged failure to inform all interested parties of the domestic industry's (Maghreb Steel) break-even threshold.¹¹

1.6. For the procedural reasons set out in its Report, the Panel declined to rule on:

- a. the claim under Article VI:6(a) of the GATT 1994 in respect of the MDCCE's finding of "establishment"; and
- b. the claim under Article 6.9 of the Anti-Dumping Agreement in respect of any "essential facts" used by the MDCCE in cross-checking the facts available rate.¹²

1.7. For the reasons set out in its Report, the Panel concluded that Turkey had established that Morocco acted inconsistently with:

- a. Article 5.10 of the Anti-Dumping Agreement by failing to conclude the investigation within the 18-month maximum time limit set out in that provision;
- b. Article 6.8 of the Anti-Dumping Agreement by rejecting the reported information and establishing the margins of dumping for the two investigated Turkish producers on the basis of facts available;
- c. Article 6.9 of the Anti-Dumping Agreement by failing to inform all interested parties of: (i) any essential facts in respect of the additional, unidentified export sales that the MDCCE considered the producers to have failed to report; and (ii) the essential facts in

⁸ Panel Report, para. 7.30.

⁹ Panel Report, para. 3.1.

¹⁰ Panel Report, para. 3.2.

¹¹ Panel Report, para. 8.1.

¹² Panel Report, para. 8.2.

respect of the data for the cost and freight prices and for the adjustments used in arriving at the producers' margins of dumping using facts available;

- d. Article 3.1 of the Anti-Dumping Agreement in determining that the domestic industry was "unestablished";
- e. Articles 3.1 and 3.4 of the Anti-Dumping Agreement by improperly conducting the injury analysis in the form of "material retardation of the establishment of the domestic industry"; and
- f. Articles 3.1 and 3.4 of the Anti-Dumping Agreement by: (i) failing to evaluate 5 of the 15 injury factors listed in Article 3.4; (ii) disregarding the captive market in the injury analysis; and (iii) relying in the injury analysis on the McLellan report without properly investigating the significance of inaccuracies in that report.¹³

1.8. For the reasons set out in its Report, the Panel concluded that Turkey had not established that Morocco acted inconsistently with:

- a. Article 6.9 of the Anti-Dumping Agreement by failing to inform all interested parties of the movement certificates and commercial invoices in respect of the [BCI] tonnes of allegedly unreported export sales in sufficient time for the two investigated Turkish producers to defend their interests; and
- b. Articles 3.1 and 3.4 of the Anti-Dumping Agreement by failing to evaluate "factors affecting domestic prices".¹⁴

1.9. The Panel did not consider it necessary to address Turkey's claims under paragraphs 1, 3, 5, 6, and 7 of Annex II to the Anti-Dumping Agreement.¹⁵

1.10. Pursuant to Article 19.1 of the DSU, the Panel recommended that Morocco bring its measures into conformity with its obligations under the Anti-Dumping Agreement.¹⁶ The Panel noted Turkey's request that the Panel exercise its discretion under Article 19.1 of the DSU and suggest that Morocco bring its measures into conformity with its WTO obligations by immediately revoking the anti-dumping measure at issue.¹⁷ The Panel considered that "Article 19.1 of the DSU allows, but does not require, [the Panel] to suggest ways in which the Member concerned could implement the Panel's recommendations"¹⁸, and that "implementation of [Dispute Settlement Body (DSB)] recommendations and rulings is left, in the first instance, to the discretion of the implementing Member".¹⁹ The Panel therefore denied Turkey's request.²⁰

1.11. On 20 November 2018, Morocco notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, and filed a Notice of Appeal²¹ and an appellant's submission pursuant to Rule 20 and Rule 21, respectively, of the Working Procedures for Appellate Review²² (Working Procedures). On 10 December 2018, Turkey filed an appellee's submission.²³ On 11 December 2018, the European Union, Japan, and the United States each filed a third participant's

¹³ Panel Report, para. 8.3. The McLellan report refers to "a pre-feasibility report ... prepared for Maghreb Steel by McLellan and Partners Ltd., an independent consulting firm". (Panel Report, para. 7.223)

¹⁴ Panel Report, para. 8.4.

¹⁵ Panel Report, para. 8.5.

¹⁶ Panel Report, para. 8.7.

¹⁷ Panel Report, para. 8.8. See also para. 1.4 above.

¹⁸ Panel Report, para. 8.9 (referring to Panel Report, *US – Stainless Steel (Korea)*, para. 7.9).

¹⁹ Panel Report, para. 8.9 (referring to Panel Reports, *US – Shrimp II (Viet Nam)*, para. 8.6; *EC – Fasteners (China)*, para. 8.8; *US – Hot-Rolled Steel*, para. 8.11).

²⁰ Panel Report, para. 8.9.

²¹ WT/DS513/5 (contained in Annex A-1 of the Addendum to this Report, WT/DS513/AB/R/Add.1).

²² WT/AB/WP/6, 16 August 2010.

²³ Pursuant to Rule 22 of the Working Procedures.

submission.²⁴ China, Egypt, India, Korea, the Russian Federation, and Singapore each notified its intention to appear at the oral hearing as a third participant.²⁵

1.12. The claims and arguments of the participants, and the arguments of the third participants that filed a written submission, are reflected in the executive summaries of their written submissions provided to the Appellate Body.²⁶ The Notice of Appeal and the executive summaries of the participants' and third participants' written submissions are contained in Annexes A, B, and C of the Addendum to this Report, WT/DS513/AB/R/Add.1.

1.13. By letter dated 15 January 2019, the Chair of the Appellate Body notified the Chair of the DSB that the Appellate Body would not be able to circulate its Report within the 60-day period pursuant to Article 17.5 of the DSU, or within the 90-day period pursuant to the same provision, for the reasons mentioned therein.²⁷

1.14. On 4 December 2019, the Appellate Body received a letter from Morocco, in which Morocco stated:

My authorities have requested that I inform you of Morocco's decision to withdraw its appeal in [this] dispute. Morocco requests the Appellate Body to inform the DSB of Morocco's decision in accordance with Rule 30(1) of the Working Procedures for Appellate Review.

The anti-dumping measure underlying the dispute expired on 26 September 2019. Although Morocco continues to believe that the Panel's findings suffer from serious flaws, those findings have become moot with the expiration of the underlying measure. Consequently, and in light of the heavy workload of the Appellate Body, Morocco has decided to withdraw the appeal.

Morocco respectfully requests the Appellate Body to record the reasons for Morocco's decision as set out above in the event that the Appellate Body issues a report.

1.15. Rule 30(1) of the Working Procedures provides that:

At any time during an appeal, the appellant may withdraw its appeal by notifying the Appellate Body, which shall forthwith notify the DSB.

1.16. Upon receipt of Morocco's letter of 4 December 2019, the Appellate Body on the same day notified the Chair of the DSB, pursuant to Rule 30(1) of the Working Procedures, that Morocco had decided to withdraw the appeal in this dispute.²⁸

1.17. In response to Morocco's letter, on the same day, Turkey sent a letter to the Appellate Body, in which Turkey stated:

Turkey takes note of Morocco's decision to withdraw its appeal in [this] matter. Pursuant to Rule 30(1) of the Working Procedures for Appellate Review, Turkey joins Morocco in requesting the Appellate Body to notify the DSB of this decision.

On the previous instance in which an appeal was withdrawn, the Appellate Body proceeded to issue a short report noting the withdrawal of the appeal (*India – Autos*, WT/DS146/AB/R; WT/DS175/AB/R). This report, together with the underlying

²⁴ Pursuant to Rule 24(1) of the Working Procedures.

²⁵ Pursuant to Rule 24(2) and Rule 24(4) of the Working Procedures.

²⁶ Pursuant to the Appellate Body's communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings" (WT/AB/23, 11 March 2015).

²⁷ WT/DS513/6. The Chair of the Appellate Body referred to the size of the Panel record and the complex issues appealed, and further noted the backlog of appeals pending with the Appellate Body, the fact that all Appellate Body Divisions in the appeals filed since 1 October 2018 were composed of the same three remaining Appellate Body Members, and that it would not be possible to staff this appeal for some time. (Ibid.)

²⁸ WT/DS513/7, dated 5 December 2019.

Panel Report, was then adopted by the DSB in the normal manner. The Appellate Body may wish to follow this practice in this instance. For clarity, when it informs the DSB of Morocco's withdrawal of its appeal, the Appellate Body should indicate whether it intends to issue a report as it did in *India – Autos*.

1.18. Under Article 16.4 of the DSU, a panel report shall be adopted at a DSB meeting within 60 days after the date of its circulation, unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. Article 16.4 further provides that, if a party has notified its decision to appeal, "the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal." In addition, under Article 17.14, an Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the report within 30 days following its circulation to the Members.

1.19. In this dispute, the 60-day period pursuant to Article 16.4 of the DSU ended on 30 December 2018. In view of Morocco's withdrawal of the appeal by its letter of 4 December 2019, the Appellate Body hereby completes its work in this appeal. The 30-day period for adopting the Appellate Body Report, together with the Panel Report, thus begins from the circulation of this Report.

Signed in the original in Geneva this 6th day of December 2019 by:

Ujal Singh Bhatia
Presiding Member

Thomas R. Graham
Member

Hong Zhao
Member
