The Tunisia/Morocco Scuffle at the WTO: A Missed Opportunity to Establish a Record of Regional Interstate Trade Disputes or a Chance to Contribute to Shaping WTO Jurisprudence?

By:

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April 4, 2019

On 21 February 2019, Tunisia requested consultations with Morocco with respect to the imposition of definitive anti-dumping measures by Morocco on imports of school exercise books originating in Tunisia. This is the second complain that follows a first one in July 2018 where Tunisia requested consultations with Morocco regarding the imposition of *provisional* anti-dumping measures by Morocco on imports of school exercise books.

Morocco's imposition of antidumping duties followed a complaint by three of its manufacturers in 2017. Tunisia/Morocco case is the first intra-African trade dispute at the level of the World Trade Organization (WTO) after about 25 years of existence. Per the WTO Dispute Settlement Understanding, consultations are expected to last not more than 60 days after which the complainant is entitled to request the establishment of a panel. Initiated in July 2018, the first complaint has not proceeded to the panel stage yet. Once can thus speculate that the filing of the second dispute is a strategy to allow the two countries to come up with a mutually satisfactory solution, since it is not the habit of African countries to litigate trade matters.

One could also foresee that Tunisia would likely request the establishment of a joint panel should the second consultations not yield any satisfactory results. If that second scenario were to happen, the WTO dispute settlement would adjudicate the first ever intra-African dispute, thereby contributing to the extremely rich and complex body of WTO case law, which is central in guaranteeing security and predictability in trade relations.

A Chance of setting a WTO "Precedent"

One of the achievements of the Uruguay Round that led to the creation of WTO was the legalization of its dispute settlement. Colloquially known as the "Jewel in the Crown" of the multilateral trading system, the WTO dispute settlement is rightly considered as a one of its central pillars. Indeed, the innovation that the new systems brought was the departure from power-based system, which offered almost to place to developing countries, to one based on high adherence to the rules and compliance to the ruling (including by amending domestic laws) regardless of the Members' (and disputants') size.

The US – Gambling case is the oft-cited example of that shift symbolized by the persistence of right over might. Yet, despite guaranteeing the rule of law to all participants, African countries continue to find it hard to engage with the system. While the contribution of African countries in the shaping of international investment disputes and of the use of the international court of justice is well documented, their non-participation in the WTO dispute settlement is all the more so. A number of reasons have been cited for this shortfall, including by the WTO African Group itself. Apart from the human

resources and financial constraints associated with the procedures as complainants, literature have also pointed at the low level of trade, which shield them from being the target.

This necessarily does not imply they have never had the chance to want to litigate, particularly with regard to industrialized countries' (agricultural) subsidies and other non-tariff barriers their products face when trying to enter these markets. What's more, the celebrated US–Gambling case has also demonstrated that, unlike the European Union or the US for instance, developing countries do not have adequate retaliatory power after the triumph of the law. Hence the proposition of collective countermeasures, which, for obvious reasons, did not go far.

A Missed Opportunity to Establish an intra-REC Trade Dispute Record

The Tunisia/Morocco dispute poses another problem in international adjudication, namely that of jurisdictional overlap and forum shopping. Indeed, Morocco and Tunisia are parties to: (1) the Arab Mediterranean Free Trade Agreement (AMFTA) – the Agadir Agreement– a free trade agreement between Egypt, Jordan, Morocco and Tunisia covering agricultural, processed agricultural and industrial products (including school exercise books); (2) the Pan-Arab Free Trade Area (PAFTA); and the Arab Maghreb Union. Yet, Tunisia chose not to use any of these forums for the case at hand. While AMFTA and PAFTA are cross regional, as they involve countries of the Middle East, AMU is regional.

The Agadir Agreement provides for arbitral proceedings after a failed consultations phase. PAFTA on its part guarantees diplomatic procedures for the settlement of disputes and refers to the dispute settlement mechanisms of the Arab Investment Agreement when a matter relates to an investment. More importantly, the AMU, which is intra-African, also states that disputes related to the interpretation and application of the AMU treaty and related agreements shall be solved by a "judicial authority" composed of eight judges. One may of course argue that no courts have been established in the AMU to hear trade matters, which Tunisia could have resorted to. At the same time, no procedures as mandated by the treaty were ever engaged prior to filing the WTO complaint.

Studies explain why countries prefer the WTO forum to litigate their trade disagreements even when their RTAs provide for dispute settlement mechanisms. The experience of the WTO in the subject matter of the disputes and its strong enforcement mechanism are the prime reasons for this tendency. However, these findings only partially, if at all, apply to African countries. Although one should not overlook African regional courts' role in settling disputes beyond what their mandate originally commanded, especially in human rights, the contention that these courts have not adjudicated trade matters because intra-African trade is so low that cases of abuses are seldom reported and litigated is probably not farfetched. But more importantly, African interstate trade disputes are not legion because Governments seem to have a strong preference for informal mechanisms to deal with disagreements. Yet, despite their preference for "African solutions to African problems", including through dialogue (which is found in consultations procedures both at the level of the WTO and RECs), it is argued that economic concerns seem not to be as important to African states as are their border demarcations – as testified by their active involvement at the ICJ. Some authors even go on to suggest having a World Trade Court which will function as a court of appeal for the decisions emanating from all regional trade courts so as to ensure unity in interpretation of trade law.

Although practically difficult to achieve, a World Trade Court or this sort may also remove the feeling of guilt from African officials when dragging their fellows to a regional trade dispute settlement forum. Understandably, the political tensions among the AMU states concerning the Western Sahara, which has paralyzed the organization for decades now, may have prevented them from attempting to solve the matter intra-regionally.

While one can hope to actually see a first panel where not only the complainant is an African country Member, but also because the respondent is African, hence contributing to the WTO jurisprudence, one can also regret that the record of trade disputes in African RECs continues to be blank, and likely will remain so for quite some time. This status quo is definitely to the detriment of African regional trade rules which need clarifications and predictability too.

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