THE INTERNATIONAL TRADE LAW REVIEW

Fourth Edition

Editors
Folkert Graafsma, Joris Cornelis and Drew Sundberg

THE LAWREVIEWS

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PREFACE

It has been said that 'smooth seas don't produce skilful sailors'.[1] And indeed, stakeholders tasked with navigating the treacherous waters of international trade have, over the past year, certainly needed to find their sea legs like at few other times in recent memory.

The escalating trade war between the United States, China and other trading partners continues apace with no end in sight. The latest in a string of US trade measures over the past year includes the announcement by the United States Trade Representative (USTR) in July 2018 that the United States intends to impose a 10 per cent additional tariff on US$200 billion of Chinese imports, covering over 6,000 lines of products and product categories. In addition to the ever-increasing volume and scope of trade affected by United States measures – and retaliatory countermeasures by trading partners – a striking feature of several of the US tariff and quota actions has been the reliance on rarely-invoked executive authorities outside the familiar paradigm of anti-dumping, countervailing or safeguard investigations. For example, in imposing steel and aluminium tariffs in March 2018, the legal rationale relied upon by the United States was 'national security' pursuant to Section 232 of the Trade Expansion Act of 1962 – a provision that had not been invoked since the mid-1970s. In May 2018, the Department of Commerce launched a second investigation based on Section 232 – this time on imported autos and parts. By contrast, the United States instead relied on Section 301 of the Trade Act of 1974 to justify the imposition of a 25 per cent tariff on US$50 billion of Chinese imports. The tariff, which went into effect in July 2018, follows an investigation by the USTR pursuant to Section 301, which concluded that certain Chinese policies relating to intellectual property and technology transfer unreasonably 'burden or restrict US commerce'. The United States' move to impose a 10 per cent tariff on a further US$200 billion of Chinese goods is likewise based on Section 301.

At the same time, Brexit negotiations are proceeding in a furious race against time as the United Kingdom's withdrawal date of 30 March 2019 looms closer. At the time of writing, there is no guarantee that a final Withdrawal Agreement will be finalised and ratified before the deadline, with the result that the EU is urging stakeholders to prepare for both a 'deal and no-deal scenario'. Assuming that the Agreement is ratified by the Brexit date, EU law will continue to apply to and within the United Kingdom for a transition period ending on 1 January 2021. In a joint statement in June 2018, EU and UK negotiators identified key outstanding issues to include:

a agreeing on a 'backstop' to prevent a 'hard border' between Northern Ireland and Ireland;

1 Franklin D Roosevelt.

b the United Kingdom's continued protection of geographical indications;
c data protection;
d settling EU judicial and administrative procedures post-Brexit;
e the consistent application and interpretation of the Withdrawal Agreement; and
f dispute settlement.

At this critical juncture, no scenario is entirely beyond the realm of possibility, including the spectre of the United Kingdom 'crashing out' of the EU without a deal or even calling for a second Brexit referendum.

And, again in the EU, the year was also marked by a substantive overhaul of the Union's trade defence instruments with the adoption of two Regulations amending existing anti-dumping and anti-subsidy law. First, Regulation 2017/2321 introduces a new methodology for calculating normal value in dumping cases for imports from WTO members whose domestic prices and costs are significantly distorted as a result of state intervention. Normal value is usually calculated by using the costs and prices of exporters in their home market. However, where significant distortions are found to exist, the new rules require the Commission to construct normal value on the basis of non-distorted costs and prices. The Commission may use either:

a corresponding costs of production and sale in an appropriate representative country with a similar level of economic development;
b undistorted international prices, costs or benchmarks; or
c domestic costs to the extent that they are shown not to be distorted.

The Commission bears the burden of proof to show the existence of distortions justifying the use of the new methodology. An important feature of the Regulation is that it provides that the Commission may produce reports detailing distortions in a specific country or sector and such reports may be relied upon by complainants in anti-dumping cases. To date, the Commission has produced one country report on China (arguably the main intended target of the new rules) and a second report is underway for Russia. As further discussed in this edition's WTO chapter, it is noted that China has attempted to include the new methodology in Regulation 2017/2321 within the terms of reference of China's ongoing dispute before the WTO Panel in EU – Price Comparison Methodologies.[2]

Moreover, Regulation 2018/825, adopted in June of 2018, introduces a 'modernisation package' overhauling the way the Commission carries out anti-dumping and anti-subsidy investigations. Some of the key changes include the shortening of the investigation period wherein the Commission must now impose any provisional measures within seven to eight months as opposed to nine months previously. In addition, the Commission will provide an 'early warning' on the imposition of provisional anti-dumping measures during which time provisional duties will not be applied to allow affected parties to adjust to the new situation. The Regulation also provides that the 'lesser duty rule' will no longer be applied in anti-subsidy investigations and will be suspended in certain circumstances in anti-dumping cases. Other reforms include changes to the injury margin calculation method, the taking into account of social and environmental standards in certain investigations and the establishment

2 DS516, document WT/DS516/1.

of a 'help desk' to assist small and medium-sized enterprises in understanding and making use of trade defence instruments.

These are but a sample of the dozens of trade developments and issues analysed in this fourth edition by our esteemed contributing authors from key jurisdictions around the world – including that of the WTO. We are in this context deeply grateful for the continued participation and support from the following authors: Philippe De Baere at Van Bael & Bellis for the WTO chapter, Alfredo A Bisero Paratz at Wiener-Soto-Caparrós for the Argentina chapter, Ignacio García and Andrés Sotomayor at Porzio Ríos Garcia for the Chile chapter, Yuko Nihonmatsu and Fumiko Oikawa at Atsumi & Sakai for the Japan chapter, Lim Koon Huan and Manshan Singh at Skrine for the Malaysia chapter, Fernando Benjamin Bueno and Milena da Fonseca Azevedo at Demarest Advogados for the Brazil chapter, David Tang, Yong Zhou and Jin Wang at JunHe LLP for the China chapter, Dongwon Jung and Sungbum Lee at Yoon & Yang LLC for the Korea chapter, Anzhela Makhinova at Sayenko Kharenko for the Ukraine chapter, Alexander H Schaefer at Crowell & Moring LLP for the US chapter, Nicolaj Kuplewatzky at the Legal Service of the EU Commission and Kiliane Huyghebaert at VVGB Advocaten for the European Union chapter.

We are moreover delighted and honoured to welcome on board the following new and acclaimed contributors: Sergey Lakhno at Integrites for the Eurasian Economic Union chapter, M Fevzi Toksoy, Ertuğrul Canbolat and Hasan Güden at ACTECON for the Turkey chapter, Saurabh Tiwari, Ashish Chandra and Stuti Toshi at L&L Partners for the India chapter and Prudence Smith, Eva Monard, Byron Maniatis, Matthew Whitaker, Patrick Mason Begg Clark, Bowen Fox, Jacqueline C Smith, Lachlan Green, Timothy King Atkins Jr and William Maher at Jones Day for the Australia chapter.

We are, as always, indebted to each of these outstanding practitioners, who have generously taken time from their demanding schedules to share and pass on their insights gleaned from years of practice in the field of international trade. With the pace of developments over the past year, the analyses of these contributors – taking a step back from the stream of daily events – is particularly timely and valuable.

Last but not least we wish to thank our guest editor, Drew Sundberg, for his invaluable assistance in getting this year's manuscript ready for publication. Our former colleague and skilful sailor was kind enough to spend a number of months in Brussels when the perfect trade storm was raging over the old continent. We are therefore immensely grateful for his full dedication and intellectual acumen.

Folkert Graafsma, Joris Cornelis and Drew Sundberg
August 2018

Chapter 13

TURKEY

M Fevzi Toksoy, Ertuğrul Canbolat and Hasan Güden[1]

I OVERVIEW OF TRADE DEFENCE INSTRUMENTS

Turkey ranks among the World Trade Organization's (WTO's) top 10 users of anti-dumping measures. Between 1995 and 2014, Turkey was ranked 10th among WTO members in terms of the number of anti-dumping investigations initiated and 7th in terms of the number of anti-dumping measures imposed. The anti-dumping measures imposed by Turkey mostly concerned plastics and rubber, textiles, and base metals.[2] Indeed, the total number of anti-dumping and anti-subsidy investigations that Turkey has initiated at the time of writing is 200.[3]

From the beginning of 2017 to the beginning of July 2018, Turkey has initiated 33 investigations in relation to trade remedies:

a 18 anti-dumping investigations (of which 11 are expiry review investigations);
b one anti-subsidy investigation;
c eight safeguard investigations; and
d six anti-circumvention investigations.

Anti-dumping, countervailing, and safeguard measures are reviewed by different departments within the Turkish Ministry of Trade (the Ministry).

As regards anti-dumping, countervailing, and anti-circumvention measures, the Directorate General for Imports of the Ministry of Trade (the Directorate General) is empowered to conduct a preliminary examination upon complaint or *ex officio*. If the Directorate General considers that there are reasons warranting the initiation of an investigation, it will issue a recommendation to the Board of Evaluation for Unfair Competition in Imports. The Board of Evaluation for Unfair Competition in Imports will then decide whether to authorise the Directorate General to conduct an investigation. If so, the Board of Evaluation for Unfair Competition in Imports publishes an initiation communique in the Official Gazette. As a result of its investigation, the Directorate General can make proposals to the Board as regards measures to be taken.

1 M Fevzi Toksoy is a managing partner, Ertuğrul Canbolat is a senior associate and Hasan Güden is an associate at ACTECON.

2 World Trade Organization, Trade Policy Review, S/331/Rev. 1, p. 68.

3 The following breakdown may be made: 108 measures are in force; 41 measures have expired; 11 measures have been repealed as a result of expiry investigations; 27 investigations have ended without the adoption of any measures; and 13 investigations are still ongoing. Those numbers have been calculated by considering the number of initiation notices and not the number of subject countries.

The Board of Evaluation for Unfair Competition in Imports is empowered to make proposals in the course of an investigation, to evaluate the results of investigations and to submit for the Ministry's approval draft decisions on the imposition of provisional or definitive measures. Eventually, the Board of Evaluation for Unfair Competition in Imports can also propose undertakings in the course of an investigation, decide whether or not to accept a proposed undertaking and take relevant measures where undertakings have been violated.

The Ministry is also competent to propose, apply and monitor safeguard measures. More precisely, the Department of Safeguards (within the Directorate General) is authorised to carry out safeguard investigations either on its own initiative or upon complaint. The Board for the Evaluation of Safeguard Measures for Imports decides, among other things, whether to initiate an investigation; to adopt, review, extend, modify or abolish any provisional or definitive safeguard measure; and to determine the form, extent and duration of such measures.

Eventually, the Directorate General for Imports may decide to conduct surveillance upon a written application or *ex officio*.

II LEGAL FRAMEWORK

Owing to the economic contraction and foreign exchange bottleneck of the 1970s, Turkey decided in 1980 to liberalise its economy and adopted an economic policy based on growth through exports. Indeed, from the 1960s until 1980, Turkey pursued an import-substitution industrialisation policy. To accomplish that shift, Turkey had to open its economy and gradually abandon its restricting policies (authorisation to import, foreign exchange control, etc.). The liberalisation of the Turkish economy has thus been accompanied by the suppression of barriers aiming to substitute imports with domestically-produced inputs.

While liberalising its economy and thus facilitating imports, Turkey felt the need to somehow protect its domestic producers. In that context, the first legislation providing for trade defence instruments was adopted in 1989. Since then, Turkey has been one of the developing countries that intensively used trade remedies (particularly anti-dumping measures) both to protect its domestic industries and to respond to measures taken by other states affecting Turkish exports.

In terms of liberalisation, Turkey went further by taking part in the European Union Customs Union in 1995, which meant adopting the EU's common external tariff and the compulsory alignment with the EU's Common Trade Policy.[4]

Turkey is also a member of the WTO and is therefore bound by WTO agreements. These include the General Agreement on Tariffs and Trade (GATT 1994) and the annexed agreements such as the Agreement on Subsidies and Countervailing Measures and the Agreement on Trade-Related Investment Measures that include provisions on investment incentives. In brief, these provide that Turkey cannot:

a discriminate between foreign and domestic companies while giving subsidies;
b give subsidies that directly promote exports; or
c give subsidies that are contingent upon the use of local content.

4 The Customs Union Agreement came into force on 31 December1995.

The GATT 1994 and the Agreement on Implementation of Article VI of GATT 1994[5] constitute the grounds in Turkish law for every legislation on trade remedies, and are directly applicable regarding all issues that are not addressed in the Turkish law.

i Anti-dumping and anti-subsidy legislation

The relevant legislation mainly consists of:

a Law No. 3577 on the Prevention of Unfair Competition in Imports;
b Regulation No. 23861 on the Prevention of Unfair Competition in Imports;
c Decree No. 99/13482 on the Prevention of Unfair Competition in Imports;
d Communique No. 2008/6 on the Prevention of Unfair Competition in Imports; and
e the Rules and Principles on the Implementation of Communique No. 2008/6 on the Prevention of Unfair Competition in Imports.

Dumping in the context of international trade refers to the export of products at a price that is lower than the domestic selling price or lower than the price at which the exporter should sell its products. Although dumping may benefit consumers or users in the importing country, the producers in the same country may well be harmed.

Another trade defence instrument that may lead to the same result and that is much less used by Turkey is anti-subsidy measures (the countervailing duties), whereby the exporter receives financial or fiscal advantages conferring a benefit or any form of income or price support with a view to helping the production or the export of a given product. The measures imposed in that regard aim to 'countervail' the injury that is caused or could be caused by subsidies to the domestic industry of the country taking the measures.

In brief, dumping or subsidisation are unfair competition practices that cause or threaten to cause material injury to the domestic industry, or cause material retardation of an industry. Through an objective examination of the facts, the Ministry has to determine whether there has been a significant increase in such imports, either in absolute terms or relative to production or consumption in Turkey.

Once the Ministry determines that imports are dumped, it has further to assess the effect of those imports on prices and on the domestic industry. Concerning the effect on prices, consideration should be given to whether there has been a significant price undercutting by the dumped imports as compared with the prices of the like product in Turkey, or whether the effect of such imports is to depress prices to a significant degree or prevent price increases. As regards the impact on the domestic industry, it has to be determined if the economic indicators of the domestic industry have deteriorated because of the dumped imports.[6]

ii Safeguard legislation

The Turkish legislation regulating the main aspects of safeguard measures is as follows:

a Decree No. 2004/7305 on Safeguard Measures in Imports; and
b Regulation No. 25486 on Safeguard Measures in Imports (the Safeguard Regulation).

5 Approved by Law No. 4067 dated 26 January 1995. Ratified by the Decision No. 95/6525 of the Council of Ministers dated 3 February1995.

6 For example, the actual and potential decline in sales, profits, output, market share, productivity, return on investment and utilisation rate of capacity. Factors affecting domestic prices may also be taken into account, such as the magnitude of the dumping margin, actual or potential negative effects on cash flow, inventories, employment, wages, growth and ability to raise capital or investments.

If a given product is imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry producing like or competing products, the Ministry may remedy this serious injury or threat of serious injury provided that the adoption of safeguard measures is not against Turkey's interests (which requires the Ministry to take into account the welfare of all the sectors that may be affected by the contemplated safeguard measure). The remedy taken by the Ministry may take the form of customs duties, additional financial charges, restrictions on the quantity or value of imports, tariff quotas or a combination thereof.

Provisional safeguard measures may also be taken by the Council of Ministers upon the Ministry's proposal if critical circumstances existed where delay would cause damage that would be difficult to repair, thereby making immediate action necessary. Moreover, a preliminary determination providing clear evidence that increased imports have caused or are threatening to cause serious injury is also necessary.

iii Anti-circumvention

Anti-circumvention is regulated by the following provisions:

a Article 11 of Decree No. 99/13482 on the Prevention of Unfair Competition in Imports; and

b Articles 4(4)(j) and 38 of Regulation No. 23861 on the Prevention of Unfair Competition in Imports.

To avoid the payment of additional duties, exporters or producers may be tempted, by putting themselves outside this framework, to move a part of their manufacturing (or assembly) operations to another country. Likewise, they may also be tempted to slightly change the product subject to an anti-dumping or anti-subsidy measure. In brief, they may attempt to circumvent the additional customs duties imposed. The Ministry handles this problem to a certain extent by subjecting the 'new' product to the existing anti-dumping duties.

While the purpose of anti-dumping or anti-subsidy measures is to prevent the domestic market being jeopardised by an unfair price competition, anti-circumvention measures aim to prevent the circumvention of measures already taken. In short, the sole purpose of a regulation extending the implementation of additional duties is to ensure the effectiveness of those duties and to prevent its circumvention.

As anti-dumping or anti-subsidy duties are imposed on a specific product of a specific exporter or producer from a specific country, the circumvention may concern both the defined product and the origin scope, and may be carried out in several ways:

a by shipping goods subject to anti-dumping or anti-subsidy duties through a less restrictive country (transshipment or third-country circumvention);

b by assembling the goods subject to anti-dumping or anti-subsidy duties in a country not subject to the anti-dumping duties (assembling); and

c by slightly modifying the product 'slight modification).

iv Surveillance

The main principles for the surveillance carried out by the Ministry are established in the following legislation:

a Decree No. 25476 on Safeguard Measures for Imports; and

b Regulation No. 25486 on Safeguard Measures for Imports.

Surveillance is an instrument by which import trends, import conditions and the imports' effect on the domestic industry may be observed. If the Ministry decides to implement a surveillance, every country will be subject to such a measure. This measure allows the Ministry to monitor and have a better outlook on future imports from the subject countries. In other words, surveillance provides advance warning on the type of product and the number of products that a company plans to export to Turkey from those countries. The companies that do not have the 'surveillance documents' are obliged to pay the value added tax for the difference between their actual product price and the reference price.

III TREATY FRAMEWORK

The conclusion of free trade agreements (FTAs) is part of Turkey's willingness to conduct a growth policy based on exports in order to conquer new markets and to diversify the products it exports. Those FTAs are generally characterised by the elimination of tariff and non-tariff barriers between the concerned countries, by the prevention mechanisms that could be used to offset the adverse effects of duty reductions, by the establishment of a joint committee responsible for the proper implementation of the FTA, and by regulations on issues such as origin rules or the cooperation between administrations. Moreover, the conclusion of FTAs and the establishment of customs unions is often considered to be a potential solution to the foreign trade deficit, which constitutes one of Turkey's long-standing problems.

In light of the foregoing objectives, Turkey first entered into an FTA with the European Free Trade Association countries in 1991,[7] and then participated in the customs union of the European Union (EU). Indeed, on 22 December 1995, the EC–Turkey Association Council, adopted Decision No. 1/95 on implementing the final phase of the Customs Union, which entered into force on 1 January 1996. Decision No. 1/95 abolishes the imposition of customs duties and charges having equivalent effect on imports of industrial goods between the EU and Turkey. Decision No. 1/95 further provides that Turkey must conclude FTAs only with countries with which the EU has concluded preferential trade agreements and must align its policies with the EU's Common Trade Policy. The latter requirement means that Turkey must, among other things, implement trade measures substantially similar to those contained in the EU's legislation on trade remedies to countries other than the Member States of the EU.

FTAs entered into by Turkey recall parties' interest in reinforcing the implementation of the multilateral trading system established by the WTO, and in that respect, provide that the instruments of the GATT 1994 and of the WTO constitute a basis for parties' trade policy. In that sense, although FTAs' main objective is to facilitate trade between signatory parties, the need to address distortions in trade flows through trade law instruments is recognised. The FTAs concluded by Turkey thus do not contain any different provisions as regards the substantial or procedural rules already applicable to trade remedy cases.

IV RECENT CHANGES TO THE REGIME

The Turkish trade remedies law did not recently undergo any salient amendment. Nevertheless, some changes in the Ministry's practice may be mentioned (see details in Section V, below).

7 The entry into force of the concerned agreement being 1 April 1992.

The 7th Chamber of the Council of State, with two decisions taken on 28 December 2017,[8] repealed the definitive anti-dumping duties imposed against the imports of unbleached kraft liner paper originating in the United States[9] on the grounds that neither the occurrence of the injury nor the causal link between the dumped imports and the injury has been concretely established and that adverse effects have been attributed to the dumped imports without carrying out a proper examination of other reasons that could have had a bearing on the injury. Nevertheless, one of the dissenting opinions attached to those decisions stressed that the Ministry's examination of the case has been properly performed. The Ministry, however, challenged those decisions in appeal before the General Assembly of the Council of State.

Although of negligible importance, it should also be noted that the Regulation published on 21 February 2017, repealed the Regulation on Safeguards Measures Concerning the Imports of Goods Originating in China, thereby making the general rules applicable to the concerned imports. Accordingly, the Decree of the Council of Ministers on the same subject was also repealed on 18 March 2017.

Eventually, changes regarding the status of China are expected to occur in the near future.

V SIGNIFICANT LEGAL AND PRACTICAL DEVELOPMENTS

The recent trade remedy investigations launched by the Ministry, particularly those against the EU and Korea, contributed to the development of the case law in that regard. Moreover, the expiry of the 15-year period foreseen by China's Accession Protocol to the WTO (the Protocol) and the market economy treatment (MET) requests made both by China-based companies and by the Chinese government have been the focus of attention. Other issues worth mentioning pertain to the increasing importance attached by the Ministry to assessments based on injury and to the application of the lesser duty rule by the very same authority.

i Market economy status

The expiry of the 15-year period prescribed for the application of the 'surrogate country approach' to China has been put forward by the Chinese government and by Chinese associations in order to affirm that an automatic switch to market economy status has occurred. On the other hand, Chinese exporters, who are seeking to have their cost and price data taken into consideration by the Ministry, claim for their part that they satisfy the conditions for MET laid down by the Turkish legislation.

In the anti-dumping *Solar Panels* case (2017),[10] despite the request by the Chinese Ministry of Trade that the MET be applied to the case at hand, the Ministry implicitly rejected the 'automatic switch' argument regarding the expiry of the above-mentioned Protocol by only referring to the proper implementation of the WTO and Turkish legislations. Additionally,

8 See Decision No. E. 2015/6923 K. 2017/6615 and Decision No. E. 2015/6922 K. 2017/6614.

9 See Communique No. 2015/28 on the Prevention of Unfair Competition in Imports, published on 14 July 2015.

10 See Communique No. 2017/6 on the Prevention of Unfair Competition in Imports, published on 1 April 2017.

one of the cooperating exporters requested the Ministry to consider that the company's activities are conducted under market economy conditions. Indeed, although the Ministry acknowledged the improvements made by China concerning the compulsory household registration (*hukou* system), it has been outlined that the system still restricts the free movement of workers and prevents wage formation under market conditions. Furthermore, owing to the collective ownership of land and the prohibition of private ownership, Chinese companies are granted the right to use land by the government; however, the conditions under which prices and depreciations are calculated are not transparent.

In the *Porcelain* case (2018),[11] the China Ceramics Industrial Association put forward the argument that the normal value must be calculated on the basis of actual costs and sales data of each exporter. The Ministry, however, indicated that the exporters included in the sampling applied for the non-market economy (NME) treatment and provided their data accordingly (i.e., without any costs and domestic sales information). The following questions arose in this case:

a Does the acknowledgment of the alleged 'automatic switch' of China to market economy status make the choice for cooperating companies between MET and NME treatment irrelevant, and if so, should the Ministry have requested the cooperating companies that asked for NME treatment to provide their costs and domestic sales data?

b Should the Ministry make an individual determination for a cooperating company that was not included in the sampling but submitted complete information on costs and domestic prices along with the documents supporting MET?

Eventually, the Ministry stipulated that no provision in the Turkish legislation recognises China as a market economy.

ii Implications of the withdrawal of the complaint

According to Turkish law, the Ministry may well decide to terminate an investigation upon the withdrawal of the complaint. Indeed, the Ministry developed a consistent practice of closing investigations upon withdrawal of the complaint and pursued this practice in a considerable number of cases. The Ministry, however, reversed this practice in its recent *Porcelain* case, in which it decided not to close the investigation and to also use the data submitted by the complainant company, which withdrew its complaint.

This practice raises the questions of whether the representativeness test should be re-conducted concerning the other complainant company or companies, rather than the withdrawing company, and whether the data of the withdrawing company may still be used by the Ministry for the injury determinations following the withdrawal as happened in the *Porcelain* case. Those questions are of importance regarding the latter case, in which the Ministry considered that the complainant company, rather than the withdrawing company, does not satisfy the representativeness criterion.

11 See Communique No. 2018/6 on the Prevention of Unfair Competition in Imports, published on 3 March 2018.

iii Non-cooperation versus cooperation

Turkish law provides that the outcome of the investigation may be less favourable to the non-cooperating companies. Accordingly, the Ministry generally determines more favourable duties for the companies duly cooperating. In this regard, the following cases are relevant:

a in the *Copper Wire Rod* case (2017),[12] in which no exporter cooperated, the Ministry decided to terminate the anti-dumping measure because of the fact that the expiry of the duty would not lead to a continuation or recurrence of the injury;

b in the *Plywood* sunset review case (2018),[13] the Ministry resolved to decrease the amount of the previously applied duties despite the absence of cooperating Chinese companies;

c in the final disclosure regarding the pending *Terephthalic Acid* case (2018),[14] a company that duly submitted its responses has been considered as non-cooperating on the ground that it attempted to obstruct the investigation in order to affect its outcome; and

d in the *Porcelain* case, the Ministry applied the same duty rate for all the companies regardless of the fact that some of them cooperated and had been selected for the sampling.

iv Absence of on-the-spot verification

The Ministry may conduct verification visits at the premises of the domestic producers and exporters. Such verification visits enable the Ministry to examine the records, to verify the information provided, and to comprehensively analyse the interested parties' accurate economic indicators. It is undisputed that on-spot verifications are critical in trade remedy investigations and are necessary for the Ministry to base its determinations on positive evidence and to conduct an objective examination of the facts. Those visits are particularly crucial in the context of sunset reviews, as the Ministry may confine its assessment only to the injury analysis (i.e., based on domestic industry data).

In this regard, although the Ministry usually carries out verification visits, the domestic producers involved in the *Polyester Synthetic Staple Fiber* sunset review case (2018),[15] have not been subject to such visits.

v Injury analysis: the importance of price undercutting and suppression

The Ministry evaluates, in the context of the injury determination, whether the prices at which products enter Turkey have been decreasing and then analyses the effect of the import prices on the domestic industry's prices.

Price undercutting demonstrates to what extent import prices are below the domestic selling price of the domestic industry, whereas price suppression gives the percentage at which the import prices are lower than the target price of the domestic industry. Therefore, the

12 See Communique No. 2017/36 on the Prevention of Unfair Competition in Imports, published on 29 December 2017.

13 See Communique No. 2018/18 on the Prevention of Unfair Competition in Imports, published on 22 May 2018.

14 The Turkish version of the final disclosure is accessible through the following link: https://www.ticaret.gov.tr/portal/content/conn/UCM/uuid/dDocName:EK-260290 (last accessed on 17 July 2018).

15 See Communique No. 2018/13 on the Prevention of Unfair Competition in Imports, published on 20 April 2018.

setting of a reasonable profit margin (required for the calculation of price suppression) is of utmost importance in the establishment of the injury. The Ministry's assessments are based on country-specific rather than company-specific data.

As regards the cooperating exporter's claim for the use of its own data in the *Dioctyl Phthalate* anti-dumping case (2017),[16] the Ministry underlined that an important part of the imports of the concerned product from Korea has been made by the cooperating company and that the concerned claim has not had any effect on the final evaluations of price undercutting and suppression.

In this regard, the importance attached by the Ministry to the outcome of the above-mentioned assessments is dependent on the characteristics of each case. In some cases in which price undercutting or suppression were absent, the Ministry did not impose any measure by way of implementing the lesser duty rule. Nevertheless, in recent cases, the Ministry decided to impose measures even in the absence of price undercutting or suppression.

In the *Polyester Synthetic Staple Fiber* sunset review case, in which neither price undercutting nor price suppression has been established for the imports originating in Korea, the Ministry still extended the period of application of the existing measures on the following basis:

> *In the framework of the evaluations, it has been considered that there has not been price undercutting or price suppression under the implementation of the anti-dumping measures due to the facts that (i) the composition of the imports from the subject countries could have changed following the effectiveness of the anti-dumping measure, (ii) the imports from Indonesia in 2015 and 2016 were very low and thus its price is far from constituting an indicator, and (iii) although the domestic prices in TRY did not increase, the decrease of the USD value of the sales prices in TRY caused by the currency increase in 2015 and 2016 had an effect. In light of the foregoing, it has been determined that the expiry of the measure would be likely to lead to a continuation or recurrence of the injury.*

Furthermore, the *Sodium Percarbonates* anti-dumping case (2018)[17] is worth mentioning as the Ministry linked the absence of price undercutting to the domestic producer's waiver from its turnover and profit by not raising its prices in order to be able to compete with the imports. Besides, one of cooperating parties' claim regarding the currency used in the scope of the determination of the price undercutting and suppression has been accepted by the Ministry, so that the calculations have been made accordingly. Eventually, the concerned company also requested from the Ministry that the differences in the production processes (i.e., energy efficiencies) be taken into account in the calculation of the price undercutting and price suppression. However, the Ministry rejected this request on the basis of its like product analysis.

Another issue that should be tackled regarding the determination of price suppression pertains to the setting of a reasonable profit margin. Indeed, in the *Tubes and Pipes of Refined Copper* case (2017),[18] unlike its common practice, the Ministry set, as regards the price

16 See Communique No. 2017/23 on the Prevention of Unfair Competition in Imports, published on 20 October 2017.

17 See Communique No. 2018/7 on the Prevention of Unfair Competition in Imports, published on 2 March 2018.

18 See Communique No. 2017/25 on the Prevention of Unfair Competition in Imports, published on 17 October 2017.

suppression calculation, a lower reasonable profit margin in its decision as compared to the margin established in the final disclosure. This change from 10 per cent to 8 per cent may be explained by the comments submitted by the cooperating exporter and importers against the findings contained in the final disclosure.

On the contrary, in the *Porcelain* case, the Ministry maintained the reasonable profit margin (10 per cent) set in the final disclosure, although the China Ceramics Industrial Association claimed that the profit rate used in the price suppression calculation is very high and that a profit rate of between 3 per cent and 5 per cent would be more accurate as regards the producers operating in the concerned industry. In that respect, the Ministry emphasised that the resellers' average profit rate is 22 per cent based on the actual data of importers.

Regarding the value on which a reasonable profit margin should be implemented, it has been claimed, in the *Tubes and Pipes of Refined Copper* case, that the purchase value of copper, which is determined on the London Metal Exchange (and is therefore publicly available to all parties), constitutes the main cost item as well as the price of the subject product, and that any genuine negotiation would be made on the remainder of the price. The Ministry nevertheless rejected this argument.

Finally, it should also be noted that the Ministry refrained from disclosing the non-confidential version of its injury calculations; in cases in which there is a single domestic producer, the Ministry has even been reluctant to reveal the exact injury margin. On the one hand, such an approach may contribute to protecting the confidentiality of the domestic industry. On the other hand, this protective approach must not lead to the restriction of the rights of the defence.

vi Currency fluctuation: is it an acceptable argument?

In the *Tubes and Pipes of Refined Copper* case, in which the operations of the exporting company and of the domestic industry have respectively been conducted in euros and US dollars, the claim has been made that the injury of the domestic industry resulted from the appreciation of the US dollar against the euro during the investigation period. The Ministry nevertheless controversially dismissed this argument on the grounds that the copper stock exchange prices constitute the main portion of both production costs and prices of copper tubes and pipes, and that the currency of the concerned prices is the same for both exporting companies and the domestic industry.

vii Single economic entity

Under Turkish law, the Ministry is obliged to ensure a fair comparison between the export price and the normal value that shall be made at the same level of trade. For this purpose, due account should be taken of differences that can affect price comparability, including paid commissions. In that respect, it is of significance whether the exporter and the company to which commissions have been paid operate as a single economic entity and, consequently, whether such commissions will be deducted from the export sales. In other jurisdictions, the single economic entity doctrine is consistently recognised and the costs incurred by the company to which the commissions have been paid are thus deemed part of the export price.

In the *Tubes and Pipes of Refined Copper* case, the Ministry rejected a request to be considered within a single economic entity because of the lack of supportive documents. Accordingly, this case shows that the Ministry may well accept such requests in the future provided that sufficient supportive documents are submitted. It is not clear at this stage what kind of documents would be deemed supportive, considering the fact that in order to be

recognised as cooperating, respondent companies must already provide the Ministry with, among other things, documents on the capital structure of both the company paying and the company receiving commissions, and on the nature and scope of the involvement of the company receiving commissions.

VI TRADE DISPUTES

Although the relevant parties may appeal for the annulment or suspension of the execution of the Ministry's decision, the Ministry's decisions are seldom challenged in court. In the rare cases where the Ministry's decision is called into question, the competent court regularly acknowledges that the Ministry may exercise considerable discretion in its assessments. The length of the appeal process is another reason that interested parties generally prefer not to lodge an action against the Ministry. Therefore, case law in that area has not been developed yet.

As regards Turkey's situation at the WTO, Turkey has been involved in four cases as complainant, in nine cases as respondent, and in 77 cases as third country. However, only two cases, in which Turkey is complainant, led to the establishment of a panel.

In the *United States – Countervailing Measures on Certain Pipe and Tube Products* (DS523) case, Turkey complained about the method used by the US authorities to determine which entities are public bodies, which sales have been made for less than adequate remuneration, and which aid is specific to certain enterprises. The use of facts available and the application of adverse inferences have also been contested in this case.

In *Morocco – Hot-Rolled Steel* (DS513), Turkey contested the Moroccan authorities' exceeding the investigation duration, their use of facts available (and their failure to disclose essential facts in that regard), their failure to issue import licences following the imposition of provisional measures, which are alleged to have amounted to import restrictions, and their failure to provide a reasoned and adequate explanation of their finding of injury and causation.

The outcome of the panel's examination regarding those two cases is expected to be released in the second half of 2018.

Also, the United States filed a complaint challenging retaliatory duties brought by Turkey in response to the US duties on steel and aluminium. Indeed, the Decree on the Implementation of Additional Duty for the Imports of Certain Products Originating in the United States was announced on 25 June 2018 (valid retroactively as from 21 June 2018).

VII OUTLOOK

Current events related to trade have been marked by an increasing protectionism triggered by the tension that exists between the United States and China. Accordingly, Turkey has frequently had to recourse to trade remedy measures in the past few years in order to support its domestic industries. In this context, the trade flows diverted from the United States to the EU and Turkey owing to additional duties are likely to cause an increase in the number of trade remedy investigations.

Right after the EU's newly initiated safeguard investigation concerning iron and steel products, on 27 April 2018 the Ministry launched, a safeguard measure investigation of iron and steel. The Ministry, in its initiation notice, stressed that it will decide whether products originating in the EU will be exempted from potential measures. Although no provision states

that the products originating in the EU are exempt from potential measures, the concerned notice raises doubts about whether all exporters will be treated equally, as required by the WTO rules. This step is construed as Turkey keeping the door open for negotiations with the EU where the safeguard investigation concerning iron and steel is pending.

Another example showing that Turkey will closely monitor the stance of the United States and of the EU may be found in the *Polyester Synthetic Staple Fiber* sunset review case, in which the Ministry considered that the US measure against the imports of the subject products from Korea and the ongoing investigations in the United States against Korea are of importance to show the import tendencies.

As regards the status of China, although the Ministry in no case applied the market economy status to Chinese producers after the expiry of Article 15 of China's WTO Accession Protocol (i.e., since December 2016), the developments in the EU and in the United States may be taken into consideration by the Turkish authorities. In any case, the MET may be granted to Chinese exporters provided that requests to that effect are accompanied by documents or evidence supporting the conditions set out by the Turkish legislation on the MET status of China, such as the non-interference of the state in the decision-making process of the company or the existence of an accounting system in line with international accounting standards.

Eventually, the result of the negotiations between the United States, the EU and China to minimise the industrial concerns may thus have a great impact upon the Turkish Ministry's assessments. Further, the outcome of the pending cases initiated by China at the WTO against the EU and the United States related to their price comparison methodologies will serve as a reference for the Ministry's approach towards China.

Appendix 1

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Dr M Fevzi Toksoy is an EU Law specialist and an economist with master's degrees from Istanbul and Brussels (ULB) on European Union law and economics and a PhD in EU Competition Law. Dr Toksoy focuses on EU and Turkish competition law and international trade remedies. He is the founding partner of ACTECON and offers solutions to customers in competition investigations, merger clearances and preventive competition compliance programmes.

After 1997, when the Turkish Competition Authority became active, he focused on EU and Turkish competition law and advised clients in the majority of the investigations conducted by the same authority. He also prepared many successful merger notifications, negative clearance and exemption applications in a variety of industries.

Dr Toksoy has a broad experience in customs union-related issues such as parallel trade, customs duties and anti-dumping. He has contributed in a variety of anti-dumping investigations conducted in different industries by various investigating authorities. He has combined his competition law knowledge with its broad experience of economic aspects of antitrust matters across a wide range of industries, particularly in M&A transactions, restrictive practices, distribution systems, and abuse of dominance.

Dr Toksoy has advised multinational companies regarding the Turkish part of their M&A transactions and is especially renowned with his experience in complicated merger control cases. He has successfully negotiated remedies with the Turkish Competition Authority in many complex merger cases. He has a practical experience in public and private sector competition law related commercial problems in Turkey. He also conducts competition compliance programmes in different industries and leads and designs workshops and training sessions for major companies.

He serves as an expert member of the Competition Law and WTO Committees of the Turkish Businessmen and Industrialists' Association. He is an Associate Member of ABA and a member of the Antitrust and M&A Committees and national reporter of the International Antitrust Committee. He is a non-governmental agent of the Turkish Competition Authority to the International Competition Network.

He is the co-author of *Competition Law and Policy in Automotive Industry,* was chief editor of *Competition Bulletin* (2000–2002) and editor o*f Competition Board Decisions* Vols. I, II, III and IV.

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Ertuğrul provides legal consultancy services regarding day-to-day competition and regulatory compliance, investigations initiated by the Turkish Competition Authority and merger control issues related to both domestic and cross-border mergers. He also represents clients in judicial review proceedings.

He leads the trade remedies practice of ACTECON and has an extensive experience in defending local and international clients in anti-dumping investigations initiated by the Turkish Ministry of Trade. Ertuğrul's experience includes constructing successful defence strategies, preparing strong counterarguments against injury claims, and advising clients in presenting their case to the Ministry. He has attended many verification visits, public and private hearings and represented Korean, Chinese and European clients in anti-dumping, anti-subsidy and safeguard investigations. He has a hands-on experience on the procedural and practical issues implemented by the Ministry. Ertuğrul also defends Turkish exporters in dumping investigations initiated by foreign authorities.

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