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SEVENTH EDITION

Editors

Folkert Graafsma and Joris Cornelis

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PREFACE

I TRADE IN THE TIME OF COVID-19

Covid-19 has become the defining event of our time. For many years to come, this invisible but virulent pestilence will remain branded on our memories; and when we look back to the first decades of the twenty-first century, perhaps no other event would be found to have caused such turmoil and misery. The long-term and structural ramifications emanating from the pandemic are hard to predict, but some significant short-term effects have already surfaced: international travel has virtually halted, working from home has become the new normal and social distancing has emerged.

Changes brought about by the pandemic have also had an immense impact on the world of international trade and novel trade issues are being discussed – from covid passports to personal protective equipment to the global and equitable roll-out of vaccines, to name just a few. In order to go deeply into these issues, we have dedicated special attention in this edition to cover a number of relevant topics related to the pandemic.

In this endeavour, we are delighted to have received special contributions from a number of prominent authors in the field for this seventh edition: Simon Lester and Huan Zhu from China Trade Monitor, Virginia; Simon J Evenett from the University of St Gallen, Switzerland; and Hosuk Lee-Makiyama from the European Centre for International Political Economy, Brussels. These authors, drawing upon their experiences in both practice and academia, provide us with much needed legal, political and economic considerations, which may help to develop the debates at hand. For this, we thank these authors wholeheartedly.

II CAN WE BE CAUTIOUSLY OPTIMISTIC ABOUT THE WTO?

Several issues continue to fester within the multilateral trading system – particularly concerning the World Trade Organization (WTO). However, there is cause for cautious optimism.[1] WTO Members have recently elected a charismatic new Director-General – Dr. Ngozi Okonjo-Iweala, a Nigerian economist, who is the first woman and first African national to occupy the position. Her appointment is seen by some as particularly crucial at a time of immense health-related suffering, given that her most recent engagement was chair of the board of Gavi, the Vaccine Alliance. Now, all eyes are fixed on the Twelfth WTO Ministerial Conference (MC12), currently scheduled to take place in late 2021.

1 The expression 'cautiously optimistic' was popularised by Ronald Reagan in 1982.

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In this regard, proposals from Members have focused on three important issues: an agreement to curb harmful fisheries subsidies; outcomes on agriculture, with a particular focus on food security; and a framework to better equip WTO Members in responding to the covid-19 pandemic. Discussions are also ongoing with a view to achieve results regarding trade and environmental sustainability, the 'joint-statement initiatives' (particularly relating to investment facilitation, e-commerce and micro, small and medium-sized enterprises) and dispute settlement, in particular, to resolve the impasse over the Appellate Body.[2]

At this point, WTO reform is crucial, particularly given the rise of promising regional endeavours such as the Regional Comprehensive Economic Partnership[3] and the African Continental Free Trade Agreement.[4] That being said, activity at the WTO has not ceased: dispute settlement, for example, despite being particularly challenging in this period, has produced important panel reports, which have in turn developed jurisprudence on a number of significant issues. These reports are analysed in detail in the WTO chapter.[5]

III DEVELOPMENTS IN THE EUROPEAN UNION

As one of the most important players in the field of international trade, the European Union (EU) has recently undertaken a flurry of initiatives[6] as part of what it calls 'open strategic autonomy'.[7] The initiatives are varied in nature, as demonstrated below.

2 With the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) in operation since last year, five disputes, as at July 2021, have submitted to deploying their appeal procedures should the need or desire arise after the panel stage: *Canada – Measures Governing the Sale of Wine* (DS537); *Costa Rica – Measures Concerning the Importation of Fresh Avocados from Mexico* (DS524); *Canada – Measures Concerning Trade in Commercial Aircraft* (DS522); *Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands* (DS591); and *Australia – Anti-Dumping Measures on A4 Copy Paper* (DS529). However, a panel report has not yet been released in three of these disputes (DS524, DS591, DS522), while one dispute has been resolved through a mutually agreed solution (DS537) and one panel report has been adopted without appeal (DS529). The MPIA is therefore still waiting for its first real test.

3 The largest multilateral trading pact in terms of combined output (US$26.2 trillion).

4 The largest free trade agreement, measured by number of participating countries (54 signatories).

5 See further: Chapter 1 on the WTO by Philippe De Baere.

6 See further: Chapter 13 on the EU by Nicolaj Kuplewatzky and Nia Bagaturiya.

7 European Commission, 'Commission sets course for an open, sustainable and assertive EU trade policy', Press Release, 18 February 2021, available at: <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_644>.

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i Transnational subsidies

By creatively using the WTO Agreement on Subsidies and Countervailing Measures (the SCM Agreement), the EU has started to countervail subsidies that are indirect or 'transnational' in nature – in other words, where more than one country was involved in providing the financial contribution.[8] Unsurprisingly, this has led to much debate over the proper understanding of legal issues, most notably attribution.[9]

ii Enforcement officer and enforcement regulation

Faced with an increase in non-compliance with international trade rules, the EU has created the position of Chief Trade Enforcement Officer, a role that appears to emulate that of the United States Trade Representative. The position is currently held by Mr Denis Redonnet.[10] Almost simultaneously, the EU armed itself with a new Enforcement Regulation, which allows it to take countermeasures if it wins a dispute at the WTO and the losing party fails to cooperate in the resolution of the matter.[11]

iii Foreign investment screening mechanism

In October 2020, the EU's foreign investment screening mechanism came into force,[12] and as at 14 July 2021, 18 Member States have notified the details of their national screening mechanisms to the European Commission.[13]

8 See: Commission implementing Regulation (EU) 2020/776 of 12 June 2020 imposing definitive countervailing duties on imports of certain woven and/or stitched glass fibre fabrics originating in the People's Republic of China and Egypt and amending Commission Implementing Regulation (EU) 2020/492 imposing definitive anti-dumping duties on imports of certain woven and/or stitched glass fibre fabrics originating in the People's Republic of China and Egypt; and Commission implementing Regulation (EU) 2020/870 of 25 June 2020 imposing a definitive countervailing duty and definitively collecting the provisional countervailing duty imposed on imports of continuous filament glass fibre products originating in Egypt, and levying the definitive countervailing duty on the registered imports of continuous filament glass fibre products originating in Egypt.

9 See: Victor Crochet and Vineet Hegde, 'China's 'Going Global' Policy: Transnational Production Subsidies Under the WTO SCM Agreement' (2020), *Journal of International Economic Law*, Volume 23, Issue 4, at 10–11, 19–20.

10 https://ec.europa.eu/trade/trade-policy-and-you/contacts/chief-trade-enforcement-officer/.

11 Regulation (EU) 2021/167 of the European Parliament and of the Council of 10 February 2021 amending Regulation (EU) No 654/2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules. See: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32021R0167.

12 Regulation 2019/452 establishing a framework for screening of foreign direct investments into the European Union.

13 List of screening mechanisms notified by Member States, available at: <https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf> (last updated: 28 May 2021).

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iv Comprehensive Investment Agreement with China

In January 2021, amid much fanfare, the EU finalised an 'in principle' agreement with China called the Comprehensive Investment Agreement, which contained some unique obligations on notification of (services) subsidies. However, in May 2021, the European Parliament froze efforts to ratify the agreement.[14]

v Anti-coercion instrument

The EU is designing an anti-coercion instrument, in response to attempts by 'foreign countries seeking to influence the decisions or behaviour of the EU or EU Member States in the area of trade and investment policy'.[15] This would allow the EU to take countermeasures against such actions,[16] which could include import tariffs and restrictions in the areas of investment, services, public procurement access and intellectual property rights.

vi Other ongoing initiatives

A number of other projects exist, such as the EU and its Member States being actively involved in the process of modernising the Energy Charter Treaty.

vii Carbon border adjustment mechanism

On 14 July 2021, the European Commission's proposal for a carbon border adjustment mechanism (CBAM) was finally published. It reflects the EU's desire to prevent carbon leakage, inter alia, by requiring the purchase of carbon-emission certificates. The prices of these certificates will be based on the average closing prices of all Emissions Trading System permits in the previous week. The CBAM will apply to imports of cement, electricity, fertilisers, iron, steel and aluminium. The intention is to have the system up and running, in a simplified form, by 2023, with full implementation in 2026.

viii United Kingdom

For its part, the newly 'independent' United Kingdom (UK), breaking away from the EU fold, is making moves of its own. It has signed several free trade agreements, most recently concluding substantial negotiations with Iceland, Liechtenstein and Norway (part of the European Economic Area and European Free Trade Association), and Australia. Further, the country now has an official and operational Trade Remedies Authority, which made its first determination in an anti-dumping transitional review investigation in July 2021.[17] It has also extended EU safeguard measures on certain steel products for a period of three years to protect the UK industry.

14 European Parliament resolution of 20 May 2021 on Chinese countersanctions on EU entities and MEPs and MPs, available at: <https://www.europarl.europa.eu/doceo/document/TA-9-2021-0255_EN.html>.

15 European Commission, 'Strengthening the EU's autonomy – Commission seeks input on a new anti-coercion instrument', 23 March 2021, available at: <https://ec.europa.eu/commission/presscorner/detail/en/IP_21_1325>.

16 See: Joint Declaration of the Commission, the Council and the European Parliament on an instrument to deter and counteract coercive actions by third countries, 2021/C 49/01, 12 February 2021.

17 TD0001: *Welded Tubes and Pipes from Belarus, China and Russia*.

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IV HOW ABOUT THE UNITED STATES?

The EU position – and its eventual impact on international trade governance – is best understood when juxtaposed with its geo-economic and geo-strategic ally and competitor, the United States (US). The new US administration has shed some of its predecessor's proclivity towards generating trade turbulence – under President Biden, the US seems to be returning to its leadership role in trade governance and, with the help of a congressional majority, the US is seeking to reaffirm its commitment to, and deepen its engagement with, the multilateral agenda.

i The good

Among recent developments, of particular note is the (largely unexpected) push by the US in support of a proposal by India and South Africa to waive the protections for covid-19 vaccines under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[18]

Prior to this, the US and the EU announced a suspension of tariffs in the long-standing *Boeing-Airbus* dispute for a period of four months to allow for negotiations. On 15 June 2021, following a visit by President Biden to Brussels, the two sides announced the 'Understanding on a cooperative framework for Large Civil Aircraft'.[19] They agreed to suspend tariffs for five years,[20] increase transparency of research and development funding[21] and cooperate on competition coming from non-market economies.[22] A complete resolution of the *Boeing-Airbus* dispute would no doubt help both sides rid themselves of an albatross – notably, one that has stalled (the much needed) renegotiation of the SCM Agreement, as far back as in the Doha Round of trade negotiations among WTO Members.[23]

18 United States Trade Representative (USTR), 'Statement from Ambassador Katherine Tai on the Covid-19 Trips Waiver', available at: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/may/statement-ambassador-katherine-tai-covid-19-trips-waiver>. More recently, however, the EU has failed to get on board with the idea of a 'broad TRIPS waiver'. See: <https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_2802>. Instead, it has put forward an alternative proposal at the WTO, based largely on existing flexibilities in the WTO framework. See: WTO General Council 'Urgent Trade Policy Responses to the COVID-19 Crisis: Communication from the European Union to the WTO General Council', WT/GC/231, 4 June 2021. At the time of writing, WTO Members have agreed to move to 'text-based' negotiations with an aim to reach an agreement in the second half of 2021. See: Borderlex, 'TRIPS Waiver: WTO Members move to text-based negotiations', 9 June 2021. For in-depth legal analysis, see: Chapter 3 on the TRIPS waiver and covid-19 vaccine production (Lester and Zhu).

19 'Understanding on a cooperative framework for Large Civil Aircraft', available at: <https://trade.ec.europa.eu/doclib/docs/2021/june/tradoc_159645.pdf>.

20 ibid., Para. 7.

21 ibid., Para 4. The two sides also intend to ensure that 'R&D funding or other support . . . is [not] specific, to its LCA producer in a way that would cause negative effects to the other side'. This language is reminiscent of the US–Japan semiconductor agreement of 1986.

22 ibid., Para. 6 and also attached Annex, the latter of which foresees information sharing, investment screening and joint analysis on non-market economy practices.

23 See comments of Pascal Lamy in: Bruegel, 'China and the WTO: (How) can they live together?', 28 April 2021, recording available at: <https://www.bruegel.org/events/china-and-the-wto-how-can-they-live-together/>.

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ii The bad

Relations are not entirely good between the two partners: in June 2021, the US announced that it would take (unilateral) action, under Section 301 of its Trade Act, against Austria, Italy and Spain, among others, for their digital services taxes (DST) within six months if a multilateral agreement on the issue was not finalised by then.[24] And given that the EU is considering an EU-wide DST, trade friction between the US and EU could deepen over the issue in the future.

Further, the Biden administration has chosen to retain the unilateral tariffs on steel and aluminium inherited from the previous administration, and has designed a 'buy American' policy, which seeks to leverage government purchasing power to counter the economic influence of rivals. Both these actions, while perhaps of strategic importance to the US, contravene both the letter and the spirit of the WTO agreements.

iii The ugly?

In May 2021, the US Department of Commerce (USDOC) drew inspiration from new regulations,[25] and in an investigation into imports of tyres from Vietnam found that currency devaluation by the Vietnamese government constituted a countervailable subsidy.[26] Further, in December 2020, the US Treasury (the body entrusted to make determinations about the existence of currency undervaluation) branded Vietnam and Switzerland currency manipulators, and has placed China, Japan, Korea, Germany, Italy, Singapore, Malaysia, Taiwan, Thailand and India on a 'monitoring list'.[27]

The US has also insisted upon the inclusion of currency provisions in the United States–Mexico–Canada Agreement and the US–China Phase One deal. Thus, it is likely that the USDOC will expand its new practice of countervailing goods from a range of WTO Members in the future. However, in light of issues such as specificity and financial contribution, the consistency of the USDOC's approach with the WTO is not a given, and opening this Pandora's box may well lead to other WTO Members developing their own versions of this trade tool.

V 'EAST' AND 'WEST': FUNDAMENTALLY INCOMPATIBLE?

And what about the elephant in the room? Today, one cannot talk about trade without talking about China. Take fisheries subsidies, for example. Fairly recently, China overtook the US and Japan, and is now at the helm of the largest fishing fleet in the world. As a

24 USTR, 'USTR Announces, and Immediately Suspends, Tariffs in Section 301 Digital Services Taxes Investigations', 2 June 2021, available at: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/june/ustr-announces-and-immediately-suspends-tariffs-section-301-digital-services-taxes-investigations>.

25 Modification of Regulations Regarding Benefit and Specificity in Countervailing Duty Proceedings, 85 Fed. Reg. 6031 (Department of Commerce Feb. 4, 2020).

26 *Passenger Vehicle and Light Truck Tires from the Socialist Republic of Vietnam: Final Affirmative Countervailing Duty Determination*, 86 Fed. Reg. 28566 (Department of Commerce May 27, 2021), and accompanying Issues and Decision Memorandum.

27 See https://home.treasury.gov/system/files/206/December-2020-FX-Report-FINAL.pdf, page 67.

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result, an argument has broken out over which rules should apply to China: should it still be granted 'special and differential treatment' (S&DT) or should it be forced to acknowledge its economic weight and be made to play on equal terms with developed nations?

As such, the growing fissure between economic liberalisation and state capitalism is becoming increasingly apparent, particularly in the field of trade remedies. This has led the US – and, increasingly, Belgium – to stretch existing trade remedies agreements, arguably beyond their initial purpose. The examples and initiatives mentioned in Sections III and IV in the US and the EU bear witness to this observation. Accordingly, the debate over the purpose, effectiveness and continued relevance of S&DT continues, and will also form an important part of MC12 discussions.

VI TRADE REMEDIES

This brings us, finally, to our 'beloved' trade defence instruments (TDI). Even though the possibility of travel for persons is non-existent, the same is not true for the movement of goods, let alone for the number of trade remedy investigations trying to restrict this movement. Both new cases, as well as reviews, have continued unfettered, with authorities worldwide requesting questionnaire responses to be supplied as if everything was business as usual. Yet, some noticeable differences with pre-pandemic times have emerged worldwide. For one, using EU terminology as a shorthand, remote cross-checks (RCCs) have replaced on-site inspection visits. RCCs have exponentially increased the workload for respondents (at least in the EU), with massive homework assignments being imposed for every next day of the RCC. This workload is then compounded with the fact that inspections are, on average, taking twice as long as traditional on-site inspection visits.

In the TDI context, court cases in various jurisdictions and WTO panel reports have continued unabated. At the WTO level, one of the more eye-catching reports was that of the panel in *European Union – Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia – (Second complaint)* (DS494). While, in a sense, the case was a simple continuation in the line of *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, *Ukraine – Anti-Dumping Measures on Ammonium Nitrate* and *Australia – Anti-Dumping Measures on A4 Copy Paper*,[28] the panel nonetheless took an important step and established the existence of the EU's Cost Adjustment Methodology as a 'measure of general and prospective application attributable to the European Union'.[29] Accordingly, the panel found a number of the EU's anti-dumping measures to be inconsistent with several provisions of the WTO Anti-Dumping Agreement – for example, its measures on Russian ammonium nitrate and Russian welded pipes and tubes.[30] In the wake of this report, despite the EU's repeated offers to litigate the case on appeal, Russia refused to participate in the Multi-Party Interim Appeal Arbitration Arrangement, even on an ad hoc basis. The EU has serious qualms about the panel report, as evidenced by its lengthy and detailed notice of appeal.[31] Other noteworthy panel reports in the TDI context have been those in *Pakistan –*

28 For further details see: chapter on the WTO in the sixth edition of *The International Trade Law Review*.

29 Panel Report, *European Union – Cost Adjustment Methodologies II (Russia)* (DS494), Para. 8.1 (a) (i).

30 ibid., Para. 8.1 (a) (f) and (g).

31 WTO, *European Union – Cost Adjustment Methodologies II (Russia)* – Notification of an Appeal by the EU under Articles 16.4 and 17.1 of the DSU and Rule 20(1) of the Working Procedures for Appellate Review, WT/DS494/7, 1 September 2020.

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Anti-Dumping Measures on Biaxially Oriented Polypropylene Film from the United Arab Emirates (DS538), *Korea – Sunset Review of Anti-Dumping Duties on Stainless Steel Bars* (DS553) and *United States – Anti-Dumping and Countervailing Duties on Certain Products and the Use of Facts Available* (DS539).

These significant TDI developments, at the national level and the multilateral level, are described in the country chapters and the WTO chapter, respectively.

VII IN SUM

So much has happened over the past year (and still is happening) that we had to cut this preface in half from its original draft to avoid it being too lengthy. Thankfully, however, our faithful contributors make up for our omissions and oversights; their comprehensive overviews are precisely what makes this volume of *The International Trade Law Review* a particularly valuable and fascinating read. Therefore, as always, we extend our sincere thanks to our ever-expanding group of faithful contributors: Philippe De Baere at Van Bael & Bellis for the WTO chapter; Matthew Weiniger QC and Alex Fawke at Linklaters for the chapter on UK customs and trade; Simon Lester and Huan Zhu at China Trade Monitor for the chapter on the TRIPS waiver and covid-19 vaccine production; Simon J Evenett at the University of St Gallen for the chapter on whether an effective activist state must harm trading partners; Hosuk Lee-Makiyama at the European Centre for International Political Economy for the chapter on laws of vaccine nationalism; Alfredo A Bisero Paratz at Wiener Soto Caparrós for the Argentina chapter; Mauro Berenholc, Renê Medrado, Carol Sayeg and Cora Mendes at Pinheiro Neto Advogados for the Brazil chapter; Peter Jarosz and Chris Scheitterlein at McMillan LLP for the Canada chapter; Ignacio García at Porzio Ríos García for the Chile chapter; David Tang, Jessica Cai, Yong Zhou and Jin Wang at JunHe LLP for the China chapter; Juan David López at Baker McKenzie SAS for the Colombia chapter; Sergey Lakhno at International Law Firm Integrites for the Eurasian Economic Union chapter; Nicolaj Kuplewatzky at the Court of Justice of the European Union and Nia Bagaturiya at V V G B for the EU chapter; Shiraz Rajiv Patodia and Mayank Singhal at Dua Associates for the India chapter; Lim Koon Huan and Manshan Singh at Skrine for the Malaysia chapter; Saifullah Khan at S.U.Khan Associates, Corporate & Legal Consultants for the Pakistan chapter; Apisith John Sutham and Chalermwut Nilratsirikulat at Weerawong, Chinnavat & Partners Ltd for the Thailand chapter; M Fevzi Toksoy, Ertuğrul Canbolat and E Kutay Çelebi at Actecon for the Turkey chapter; and Matthew R Nicely, Devin S Sikes, Julia K Eppard and Brandon J Custard at Akin Gump Strauss Hauer & Feld LLP for the US chapter. Finally, we also wish to thank Oscar Beghin and Akhil Raina at V V G B for their most kind and invaluable assistance.

We wish you, as ever, an enjoyable reading experience. We hope that you are keeping safe and healthy, and that you share our cautious optimism about the future of international trade.

Folkert Graafsma and Joris Cornelis
V V G B
Brussels
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Chapter 18

TURKEY

M Fevzi Toksoy, Ertuğrul Canbolat and E Kutay Çelebi[1]

I OVERVIEW OF TRADE REMEDIES

Turkey ranks among the World Trade Organization's (WTO) top 10 users of anti-dumping measures. Between 1995 and 2014, Turkey was ranked 10th of all WTO Members in terms of the number of anti-dumping investigations initiated and seventh in terms of the number of anti-dumping measures imposed, which mostly concerned plastics and rubber, textiles and base metals.[2] Indeed, Turkey currently applies 192 anti-dumping and anti-subsidy measures (including anti-circumvention measures), and seven safeguard measures. During 2020 and first seven months of 2021, Turkey initiated nine anti-dumping investigations, 19 expiry review investigations, three anti-circumvention investigations and three safeguard investigations; decided on the application of two anti-dumping measures and the continuation of 11 anti-dumping measures as a result of the expiry of review investigations; and imposed four anti-circumvention measures.

The Directorate General for Imports (Directorate General) within the Ministry of Trade (the Ministry) is the competent authority for conducting trade defence investigations.

As regards anti-dumping, anti-subsidy, review and anti-circumvention investigations, the Directorate General (Department of Dumping and Subsidy; Department for Monitoring and Assessment of Import Policies) is empowered to conduct a preliminary examination in response to a complaint or *ex officio*. If the Directorate General considers that there are reasons warranting the initiation of an investigation, it issues a recommendation to the Board of Evaluation for Unfair Competition in Imports (the Board), which then submits its decision to initiate an investigation to the Minister of Trade (the Minister) for approval. If it is approved, an initiation Communiqué is published in the national Official Gazette.

The Board is empowered to make proposals in the course of an investigation, evaluate the findings made and submit for the Minister's approval its decisions on the imposition of provisional or definitive measures. The Board can also propose undertakings in the course of an investigation, decide whether or not to accept a proposed undertaking and take appropriate action when undertakings are violated.

As to safeguard investigations, a similar process applies, but the competent department and board are different (i.e., the Department of Safeguards and the Board for the Evaluation of Safeguard Measures for Imports). If the concerned board resolves that a safeguard measure is

1 M Fevzi Toksoy is a managing partner, Ertuğrul Canbolat is a senior associate and E Kutay Çelebi is an associate at Actecon.

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

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justified and the Ministry approves this resolution, a Communiqué to the President proposing the adoption of a measure is published. If the President decides that a measure should be taken, a Presidential Decree announcing the measure is published in the Official Gazette.

The Directorate General may decide to conduct surveillance on receipt of 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, among other things). The liberalisation of the Turkish economy has therefore been accompanied by the suppression of barriers, with the aim of substituting imports with domestically produced inputs.

While liberalising its economy and facilitating imports, Turkey felt it needed to find a way to 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 has intensively used trade defence instruments 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 forming a customs union with the European Union (EU) in 1995, which meant adopting the EU's common external tariff and compulsory alignment with the EU's Common Trade Policy.[3]

As a Member of the WTO, Turkey is bound by the Agreement Establishing the World Trade Organization and the annexed multilateral agreements, including the General Agreement on Tariffs and Trade (GATT 1994), the Agreement on Subsidies and Countervailing Measures, the Agreement on Implementation of Article VI of GATT 1994[4] (the Anti-Dumping Agreement) and the Agreement on Safeguards.

i Anti-dumping and anti-subsidy

The main relevant legislation is:

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 Communiqué No. 2008/6 on the Prevention of Unfair Competition in Imports; and
e Rules and Principles on the Implementation of Communiqué No. 2008/6 on the Prevention of Unfair Competition in Imports.

ii Safeguard

The Turkish legislation on safeguards is:

a Decree No. 2004/7305 on Safeguard Measures in Imports; and

3 The Customs Union Agreement came into force on 31 December 1995.
4 Approved by Law No. 4067 dated 26 January 1995, and ratified by Decision No. 95/6525 of the Council of Ministers dated 3 February 1995.

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b Regulation No. 25486 on Safeguard Measures in Imports (the Safeguard Regulation).

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.

iv Surveillance

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

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 effect of imports on the domestic industry may be observed. If the Ministry decides to implement a surveillance, every country will be subject to the measure. This allows the Ministry to monitor and have a better outlook on future imports from the subject countries. In other words, surveillance provides advance warning of the types of products and the number of products that a company plans to export to Turkey from those countries. The companies that do not have the required surveillance documents may be obliged to pay the relevant duties and taxes by considering the respective 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 so as to conquer new markets and diversify the products it exports. Turkey's 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 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 is a long-standing problem for Turkey. As regards trade defence instruments specifically, those FTAs generally contain a provision stating that parties may resort to trade measures in accordance with the WTO agreements and sometimes provide rules not included in the WTO agreements or domestic law.

The FTA concluded with Korea differs from the others because it provides for substantive rules:

a the prohibition of zeroing;

b the application of the lesser duty rule;

c the obligation of the investigating authority to request from the exporter or producer in the territory of the other party any missing information or clarification concerning the responses to the questionnaire, if necessary; and

d the obligation to terminate a review investigation if the dumping margin calculated is less than the *de minimis* threshold set out in Article 5.8 of the Anti-Dumping Agreement.

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In light of these, Turkey first entered into an FTA with the European Free Trade Association countries in 1991,[5] and then formed a customs union with the 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 defence on countries other than EU Member States. Moreover, although Decision No. 1/95 does not prevent the imposition of trade defence measures between the EU and Turkey, it provides that both shall endeavour, through exchange of information and consultation, to seek possibilities for coordinating their action in that regard.

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 WTO's instruments constitute a basis for parties' trade policies. In that sense, although the main objective of FTAs is to facilitate trade between signatory parties, the need to address distortions in trade flows through trade law instruments is also recognised. The FTAs concluded by Turkey, therefore, do not contain any different provisions with regard to the substantial or procedural rules already applicable to trade defence cases.

The European Commission underlined in its 2020 Country Report for Turkey that although Turkey is generally aligned with the terms of the EU with regard to FTAs it has entered into with third countries, it has continued to implement its FTA with Malaysia even though the EU has not yet concluded a similar agreement with Malaysia. It also continued the process of concluding an agreement with Venezuela.[6]

Subsequent to the United Kingdom's (UK) departure from the EU, the UK also left the Customs Union established between the EU and Turkey and thus a new preferential trade agreement between the two countries was needed to regulate and maintain the previous trade regime established with the Customs Union. As a result of the Customs Union between the EU and Turkey, Turkey was able to enter into an FTA with the UK only after the EU–UK Trade and Cooperation Agreement had been reached. The FTA between the UK and Turkey includes provisions on: trade in goods (including provisions on preferential tariffs, tariff-rate quotas, rules of origin, and sanitary and phytosanitary measures); customs and trade facilitation; intellectual property; government procurement; technical barriers to trade; competition; trade remedies; and dispute settlement. The conclusion of the trade agreement between the UK and Turkey is of crucial importance as the UK is one of the few countries with which Turkey has a trade surplus.

IV RECENT CHANGES TO THE REGIME

The Turkish regime has not undergone any salient amendment recently. Nevertheless, some changes in the Ministry's practice are discussed in Section V.

5 The agreement entered into force on 1 April 1992.

6 See Turkey 2020 Report, SWD (2020) 355 final, 6 October 2020, p. 106.

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The 7th Chamber of the Council of State, with two decisions taken on 28 December 2017,[7] repealed the definitive anti-dumping duties imposed against imports of unbleached kraft liner paper originating in the United States[8] on the grounds that neither the occurrence of the injury nor the causal link between the dumped imports and the injury was firmly established and that adverse effects were attributed to the dumped imports without carrying out a proper examination of other reasons that could have had a bearing on the injury. The Ministry then appealed those decisions before the Plenary Session of the Tax Law Chambers, which overturned those decisions on 3 October 2018.

V SIGNIFICANT LEGAL AND PRACTICAL DEVELOPMENTS

i Market economy status

In 2016, the Chinese government and Chinese associations brought attention to the expiry of the 15-year period prescribed for application of the 'surrogate country approach' to China (set out in China's Accession Protocol to the WTO) with a view to confirming that an automatic switch to market economy status had occurred. Consequently, Chinese exporters seeking to have their cost and price data taken into consideration by the Ministry have claimed that they satisfy the conditions for market economy treatment (MET) laid down by Turkish law.

In the *Solar panels* anti-dumping case,[9] despite the request by the Chinese Ministry of Trade that MET be applied, the Ministry implicitly rejected the 'automatic switch' argument regarding the expiry of the Accession Protocol by referring only to the proper implementation of WTO rules and Turkish legislation. Additionally, one of the cooperating exporters requested that the Ministry consider that the company's activities be conducted under market economy conditions. Although the Ministry acknowledged the improvements made by China concerning compulsory household registration (*hukou* system), it has been outlined that the system still restricts 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* anti-dumping case,[10] 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 or domestic sales information). In this regard, the Ministry stipulated that no provision in Turkish law recognises China as a market economy. Nevertheless, Additional Article 1 of Regulation No. 23861 on the Prevention of Unfair Competition in Imports provides that exporters and producers located in non-market economies can request that the provision applicable as regards market economies be applied to

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

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

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

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

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the determination of the normal value in their case; to this end, they have to demonstrate that they produce and sell under market economy conditions. In this regard, the Ministry refused MET to cooperating exporters from Vietnam in the *Yarn of man-made or synthetic or artificial staple fibres* expiry review case[11] without providing grounds for the refusal. However, in the *Welded stainless-steel tubes, pipes and profiles* case, the Ministry found that Vietnamese laws on land, price formation and energy prices, and the state's intervention in steel production, prevented the market economy conditions from prevailing.[12]

ii Implications of withdrawal of a 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 *Porcelain* case, in which it decided not to close the investigation and to use the data submitted by the complainant company, which withdrew its complaint.

This practice raises the questions of whether the representativeness test should be conducted again concerning the other (remaining) complainant company or companies, and whether the data of the withdrawing company may still be used by the Ministry for the injury determinations following the withdrawal. These questions are of importance with regard to the *Porcelain* case, in which the Ministry considered that the complainant company rather than the withdrawing company does not satisfy the representativeness criterion.

On the other hand, the anti-dumping investigation[13] carried out concerning imports of terephthalic acid originating in Korea, Spain and Belgium, the anti-dumping investigation initiated into the imports of uncoloured float glass originating in Israel, and the anti-dumping and anti-subsidy investigations[14] conducted into imports of acrylic and modacrylic products originating in China, South Korea, Thailand and Germany, were all terminated following the withdrawal of the complaints.

iii Absence of on-the-spot verification

The Ministry may conduct verification visits at the premises of the domestic producers and exporters. These 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-the-spot verifications are critical in trade defence investigations and are necessary for the Ministry to base its determinations on positive evidence and to conduct an objective examination of the facts. These visits are particularly crucial in the context of expiry reviews, as the Ministry may confine its assessment to the injury analysis (i.e., based on domestic industry data). In light of covid-19 measures, since the beginning of March 2020, the Ministry has been conducting verification visits and holding public hearings online. Indeed, in *Yarn of man-made or synthetic or artificial staple fibres* anti-circumvention case, in

11 See Communiqué No. 2020/8 on the Prevention of Unfair Competition in Imports, published on 15 May 2020.

12 See the Final Disclosure of the *Welded stainless-steel tubes, pipes and profiles* case, published on 26 May 2021.

13 See Communiqué No. 2018/27 on the Prevention of Unfair Competition in Imports, published on 15 August 2018.

14 See Communiqués No. 2019/6 and No. 2019/7 on the Prevention of Unfair Competition in Imports, published on 12 January 2019.

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response to an interested party's criticism regarding the absence of on-the-spot verifications, the Ministry stated that covid-19 measures has prevented it from conducting on-the-spot verification, and in any event, it is not under any obligation to conduct such visits.[15]

iv Injury analysis

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 the extent to which import prices are below the domestic selling price of the domestic industry, whereas price depression gives the percentage by which the import prices are lower than the target price of the domestic industry.

Country-specific data versus company-specific data

The Ministry's assessments are mostly based on country-specific rather than company-specific data, especially when the majority of the exports to Turkey are made by a single company or there is a large number of cooperating exporters or producers in the subject country.

Accordingly, in the *Dioctyl phthalate* anti-dumping case, in which the cooperating exporter claimed that its own data were used,[16] the Ministry underlined that a significant part of the imports of the concerned product from South Korea had been made by the cooperating company and that the concerned claim has not had any effect on the final evaluations of price undercutting and depression. A similar approach has been adopted in the *Sodium percarbonates* anti-dumping case, in which the Ministry found that the exports of the cooperating company located in Germany made up a significant part of the exports from Germany to Turkey, and therefore considered the Turkish Statistical Institute's country-specific data.[17] The following cases are worth mentioning in this respect:

a *Kraft liner* anti-dumping case: the Ministry conducted its analysis regarding the effect of subject imports on the domestic industry's prices considering both the cooperating exporters' and country-specific data.

b *Wall clocks* expiry review case: the Ministry found that the subject imports were only composed of high-segment products because of the effect of the measure imposed on a piece-rate basis, and therefore that the actual prices used revealed a lack of price undercutting and depression. Additionally, the Ministry based its calculations of potential price effects of the concerned measure's expiry on the prices offered on global shopping platforms.

c *Water heater* expiry review case:[18] the Ministry performed its price undercutting analysis on the basis of the data provided by the only cooperating company from Italy.

15 See Communiqué No. 2021/12 on the Prevention of Unfair Competition in Imports, published on 24 March 2021.

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

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

18 See Communiqué No. 2019/11 on the Prevention of Unfair Competition in Imports, published on 19 April 2019.

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Implementation of the lesser duty rule

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 depression were absent, the Ministry did not impose any measure by way of implementing the lesser duty rule. Nevertheless, in recent cases, the Ministry has decided to impose measures even in the absence of price undercutting or depression.

In the *Polyester synthetic staple fibre* expiry review case, in which neither price undercutting nor price suppression was established for the imports from Korea, the Ministry still extended the period of application of the existing measures and evaluated that the prices of imports from Indonesia in 2015 and 2016 were far from being representative because of their very low quantity. The Ministry also took into consideration the effect of the currency fluctuation during the same period.

In the *Sodium percarbonates* case, the Ministry linked the absence of price undercutting to the domestic producer's waiver from its turnover and profit by not raising its prices to be able to compete with imports. Furthermore, the claim by one of the cooperating parties regarding the currency used in the determination of price undercutting and depression was accepted by the Ministry and the calculations were 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 price undercutting and price depression. However, the Ministry rejected this request on the basis of its like product analysis.

The Ministry eventually imposed reduced anti-dumping duties in its *Yarn of man-made or synthetic or artificial staple fibres*[19] and *Plastic baby products*[20] anti-dumping cases through the application of the lesser duty rule after taking into account the public interest principle.

Transparency issues in calculating reasonable profit margins

The setting of a reasonable profit margin is of utmost importance in the establishment of the price effect.

In the *Tubes and pipes of refined copper* case,[21] in contrast to its usual practice, the Ministry set, as regards the price depression 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.

By contrast, 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 depression calculation was 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 was 22 per cent based on the importers' actual data.

19 See Communiqué No. 2020/9 on the Prevention of Unfair Competition in Imports, published on 22 May 2020.

20 See Communiqué No. 2020/20 on the Prevention of Unfair Competition in Imports, published on 18 August 2020.

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

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Regarding the value on which a reasonable profit margin should be implemented, it was 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.

In the aforementioned *Yarn of man-made or synthetic or artificial staple fibres* anti-dumping case,[22] the Ministry also refused to use the profit margins provided by the two cooperating companies on the grounds that they were not reasonable in view of factors such as the market conditions, interest rates and market structure. The Ministry stated that it had established net profit margins for each company by making adjustments on the basis of the data provided by those companies.

It should also be noted that the Ministry refrained from disclosing the non-confidential version of its injury calculations; even in cases with a single domestic producer, the Ministry has been reluctant to reveal the exact injury margin. On the one hand, this 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.

v Currency fluctuation

In the *Tubes and pipes of refined copper case*, in which the operations of the exporting company and the domestic industry were conducted in euros and US dollars, respectively, the claim was made that the injury to the domestic industry resulted from the appreciation of the US dollar against the euro during the investigation period. The Ministry 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.

In the *Blankets* case, in which the domestic industry has been found to have suffered injury, the Ministry concluded that the deterioration of the domestic industry's situation was not caused by imports from China, but rather was linked to macroeconomic circumstances, such as currency fluctuations.[23] On the other hand, in the *Polyester FDY*[24]and *Synthetic filament yarns*[25] expiry review cases, the Ministry found that currency fluctuations would not break the causal link between the dumped imports and the likelihood of continuation or recurrence of dumping in the absence of measures.

vi 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

22 See Communiqué No. 2020/9 on the Prevention of Unfair Competition in Imports, published on 22 May 2020.

23 See Communiqué No. 2019/25 on the Prevention of Unfair Competition in Imports, published on 4 August 2019.

24 See Communiqué No. 2021/1 on the Prevention of Unfair Competition in Imports, published on 9 January 2021.

25 See Communiqué No. 2021/3 on the Prevention of Unfair Competition in Imports, published on 28 January 2021.

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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 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 supporting documents. Accordingly, this case shows that the Ministry may well accept this type of request in the future, provided that sufficient supporting documents are submitted. It is not clear what kinds of documents would be deemed supporting, considering the fact that 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.

vii Substantial transformation in anti-circumvention cases

Anti-circumvention investigations revolve around whether or not the imported goods originate in the subject (exporting) country. In practice, the Ministry seeks to determine whether the subject product underwent substantial transformation in the subject country, thereby acquiring the origin of the exporting country.

In the *Polyester partially oriented yarn* case, the Ministry found that the processing of the subject product, partially oriented yarn, into partially texturised yarn through operations such as twisting it and running it through texturing machines does not constitute a substantial transformation.[26] In the *Woven fabrics of synthetic and artificial staple fibres* case, the Ministry held that the purchased raw fabric made up a significant portion of the final product's costs and that the value added created through the workings of the subject company did not exceed 15 per cent.[27] Furthermore, in the *Staple fibres*[28] and *Chopped strands*[29] anti-circumvention cases the Ministry observed that the created added values through certain processes did not exceed 30 per cent and thus decided that the substantial transformation requirement was not satisfied.

viii Suspension of definitive anti-dumping measures

Article 9 of Decree No. 99/13482 on the Prevention of Unfair Competition in Imports provides that the Ministry may decide to suspend a definitive anti-dumping measure when (1) temporary changes occur in the market, (2) the injury to the domestic industry is unlikely to continue or occur as a result of suspension, (3) related parties are informed with respect to suspension and (4) at least one year has elapsed since the imposition of the definitive measure. In this regard in the *Kraftliner paper* case, the Ministry evaluated the import trends and effects thereof and other financial liabilities imposed on imports and decided to suspend

26 See Communiqué No. 2018/23 on the Prevention of Unfair Competition in Imports, published on 21 June 2018.

27 See Communiqué No. 2019/15 on the Prevention of Unfair Competition in Imports, published on 7 May 2019.

28 See Communiqué No. 2021/12 on the Prevention of Unfair Competition in Imports, published on 24 March 2021.

29 See Communiqué No. 2021/13 on the Prevention of Unfair Competition in Imports, published on 24 March 2021.

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the application of the definitive anti-dumping measure on imports of unbleached kraftliner paper originating in the United States for nine months.[30] On 6 March 2020, the suspension was extended for one year. Subsequently, on 22 October 2020, Article 9 of Decree No. 99/13482 on the Prevention of Unfair Competition in Imports was amended to provide that, in cases where anti-dumping measures are applied on the importation of a product that is also subject to safeguard measures, the Ministry may decide to partially or fully suspend the concerned anti-dumping measure or modify its type for the duration of the application of the safeguard measure.

ix Calculation of dumping margins in expiry reviews

The Ministry has discretion as to whether to recalculate the dumping margins in expiry review investigations. However, based on certain cases it conducted in 2020, the Ministry adopted a different approach.

In its *Polyester staple fibre* expiry review case,[31] the Ministry calculated a new dumping margin regarding one of the cooperating companies on the basis of the data provided by that company.

In the *Laminated flooring* expiry review case,[32] the Ministry calculated a new dumping margin on the basis of the prices on the website 'Obi.de' as no exporter or producer from Germany cooperated. Regarding the imports from China, the Ministry calculated a new likely dumping margin on the basis of the prices on the website 'Alibaba.com'.

In the *Instantaneous gas water heaters* expiry review case,[33] the normal value in the calculation of a new dumping margin has been established on the basis of Turkey's average unit export price to the world.

In its *Pocket lighters*,[34] *Food grinders and mixers*,[35] *Padlocks*[36] *Finished/semi-finished artificial leathers*,[37] *Welding machines*[38] and *Vulcanised rubber thread and cord*[39] expiry review cases, the Ministry also calculated a new dumping margin in the absence of any cooperating company on the basis of data relating to Turkish domestic costs. It should be noted, however,

30 See Communique No. 2019/19 on the Prevention of Unfair Competition in Imports, published on 7 June 2019.

31 See Communiqué No. 2019/26 on the Prevention of Unfair Competition in Imports, published on 4 August 2019.

32 See Communiqué No. 2019/36 on the Prevention of Unfair Competition in Imports, published on 4 January 2020.

33 See Communiqué No. 2019/33 on the Prevention of Unfair Competition in Imports, published on 4 January 2020.

34 See Communiqué No. 2019/35 on the Prevention of Unfair Competition in Imports, published on 7 January 2020.

35 See Communiqué No. 2021/8 on the Prevention of Unfair Competition in Imports, published on 24 March 2021.

36 See Communiqué No. 2021/9 on the Prevention of Unfair Competition in Imports, published on 27 March 2021.

37 See Communiqué No. 2021/18 on the Prevention of Unfair Competition in Imports, published on 28 May 2021.

38 See Communiqué No. 2021/19 on the Prevention of Unfair Competition in Imports, published on 22 May 2021.

39 See Communiqué No. 2021/25 on the Prevention of Unfair Competition in Imports, published on 12 May 2021.

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that the Ministry has abandoned this approach and decided to consider dumping margins calculated in original investigations as the indicator of exporters' and producers' behaviour in the absence of anti-dumping measures.

VI TRADE DISPUTES

Although the relevant parties may appeal to request the annulment or the suspension of the execution of the Ministry's decisions, these 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 for interested parties 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, it has been involved in six cases as complainant, 12 cases as respondent and 105 cases as third party. However, only seven cases in which Turkey was complainant led to the establishment of a panel.[40]

In DS523: *United States – Countervailing Measures on Certain Pipe and Tube Products*, Turkey complained about the method used by the US authorities to determine which entities are public bodies, which sales were 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 had also been contested. The panel in this case ruled in Turkey's favour in most regards and determined that the Department of Commerce failed, inter alia, to:

a apply the correct legal standard and provide a reasoned and adequate explanation for its public body determinations;

b engage in a process of reasoning and evaluation in selecting facts available for missing price information and in selecting the subsidy rate as a 'reasonable replacement' for the missing necessary information or for the use of certain subsidies; and

c distinguish the effects of subsidised imports with those of dumped, non-subsidised imports for the purposes of its injury determination.

The United States appealed against the panel's report before the Appellate Body.

In DS564: *United States – Certain Measures on Steel and Aluminium Products*, published on 25 January 2019, a panel was composed at Turkey's request concerning the imposition of an additional import duty of 25 per cent on certain steel products and an additional import duty of 10 per cent on certain aluminium products from all countries, with the exception of Australia, Argentina, Brazil, Canada, the EU, Korea and Mexico. The main legal basis for the measures at issue was Section 232 of the United States Trade Expansion Act of 1962 and two investigations on steel and aluminium products, conducted by the US Department of Commerce (USDOC). USDOC determined that present quantities and circumstances of steel and aluminium imports were weakening the US's internal economy and threatened to impair national security as defined in Section 232. The panel expects to issue its final report in the second half of 2021.

40 Panels are currently active in the following disputes: DS583: *Turkey – Certain Measures concerning the Production, Importation and Marketing of Pharmaceutical Products*, DS573: *Turkey – Additional Duties on Imports of Air Conditioning Machines from Thailand* and DS561: *Turkey – Additional Duties on Certain Products from the United States*.

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In DS513: *Morocco – Hot-Rolled Steel*, Turkey had contested the Moroccan authorities' exceeding the investigation duration, their use of the fact 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. In this case, the panel also upheld most of Turkey's claims. On 20 November 2018, Morocco appealed certain aspects of the panel report before the Appellate Body. However, on 4 December 2019, Morocco withdrew its appeal as the measure at issue expired on 26 September 2019.

Furthermore, 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 Imports of Certain Products Originating in the United States was announced on 25 June 2018 (valid retroactively as from 21 June 2018).

A panel was also established (DS573) on 11 April 2019 at Thailand's request against Turkey's additional duties of 9.27 per cent on imports of Thai air conditioners imposed in response to Thailand's earlier decision to extend safeguard duties on imports of non-alloy hot-rolled steel flat products for an additional three years. Although a panel was established on 28 June 2019, the panel has not yet issued its report.

On 2 April 2019, the EU requested consultations concerning certain of Turkey's requirements on the production, import and approval for reimbursement, pricing and licensing of pharmaceutical products. On 17 March 2020 a panel was composed (DS583) to adjudicate the case. Due to the delays caused by the covid-19 pandemic, the panel expects to issue its final report in the second half of 2021.

In DS595: *European Union – Safeguard Measures on Certain Steel Products*, Turkey requested consultations with the EU with respect to the imposition of provisional and definitive safeguard measures and the review determination that had been made thereafter. Within the consultation process, Turkey asserted that, inter alia, the EU failed to make reasoned and adequate findings and conclusions with respect to its determinations on the following matters: (1) the scope of the subject products, domestic like products and domestic industry; (2) the unforeseen developments and how those resulted in increased imports threatening to cause serious injury to domestic producers; and (3) the existence of a threat of serious injury to the domestic industry.

VII OUTLOOK

Besides the weakening of the multilateral trade system and the increased use of protectionist measures triggered by the tensions between the United States and China, the covid-19 pandemic has also significantly adversely affected international trade. In addition to its traditional use of trade defence measures, Turkey has established additional customs tariffs against imports of more than 1,000 products (heavy machinery, iron and steel, construction materials, power installation products, car spare parts, glass products, water heaters, jewellery, white appliances, sanitary products, game consoles, ceramics, chemicals, plastics, furniture, textiles, shoes, personal protective equipment, etc.) with the acknowledged aim of reducing the negative effects of covid-19 on Turkey's economy and of protecting Turkish producers against the pressure of imports.

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Another important topic is the modernisation of the customs union between the EU and Turkey, which came to a standstill following the freeze of the accession negotiations by the EU. Meetings between officials are being held in that context to resume the talks while the qualitative gap between the agreement establishing the customs union and the EU's 'new generation' trade agreements continues to grow.

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Appendix 1

ABOUT THE AUTHORS

M FEVZI TOKSOY

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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 EU 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 that authority. He also prepared many successful merger notifications, negative clearance and exemption applications in a variety of industries.

Dr Toksoy has broad experience in customs union-related issues such as parallel trade, customs duties and anti-dumping. He has contributed to a variety of anti-dumping investigations conducted in different industries by various investigating authorities. He has combined his competition law knowledge with his 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 renowned in particular for his experience in complicated merger control cases. He has successfully negotiated remedies with the Turkish Competition Authority in many complex merger cases. He has practical experience in commercial problems arising in public and private sector competition law. 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 the American Bar Association and a member of the antitrust and M&A committees and national reporter of the International Antitrust Committee. He is a non-government agent of the Turkish Competition Authority to the International Competition Network.

He is a co-author of *Competition Law and Policy in Automotive Industry*, was chief editor of *Competition Bulletin* (2000–2002) and editor of *Competition Board Decisions*, Volumes I to IV.

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Dr Toksoy has been the guest of round tables on the legislative amendments of the Turkish Competition Law hosted by the Competition Authority. He lectures EU and Turkish competition law at Marmara University EU Institute.

ERTUĞRUL CANBOLAT

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Ertuğrul Canbolat is a senior associate at Actecon, and has extensive knowledge and experience of all aspects of competition law, antitrust and international trade remedies.

Ertuğrul provides legal consultancy services regarding day-to-day competition and regulatory compliance, investigations initiated by the Turkish Competition Authority and merger control issues relating 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 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 cases to the Ministry. He has attended many verification visits, public and private hearings, and has represented South Korean, Chinese and European clients in anti-dumping, anti-subsidy and safeguard investigations. He has hands-on experience of the procedural and practical issues implemented by the Ministry. Ertuğrul also defends Turkish exporters in dumping investigations initiated by foreign authorities.

He obtained his LLM degree in international commercial law from the University of Exeter, UK (with distinction) and his LLB degree from Bilkent University in 2011. He graduated from St Georg's Austrian High School and Commercial School in Istanbul in 2006. He wrote a dissertation on the intersection between competition law and intellectual property law and earned the Dean's Commendation for academic excellence.

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E Kutay Çelebi is an associate at Actecon and focuses on competition law, regulatory issues and trade remedy cases. Kutay holds a bachelor's degree from Istanbul Bilgi University.

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