THE INTERNATIONAL TRADE LAW REVIEW

Fifth Edition

Editors
Folkert Graafsma and Joris Cornelis

THE LAWREVIEWS

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PREFACE

We vividly remember that when we were young(er), we were told that time would go faster as we got older. With the impetuousness of youth, we dismissed this as nonsense, but – like many things told when young – it has proven to be true. We say this because the five years during which we have been editors has really flown. Yet, in this short period, the dynamics of trade have fundamentally changed in a disturbing manner. By means of illustration, we look at three trade-shattering events, starting with a regional one and moving on to two more fundamental problems.

First, as also noted last year, the spectre of Brexit is looming ever closer. With the EU stepping up its preparations to confront a 'hard' Brexit, the United Kingdom appears to refuse to face that possibility and continues to sleepwalk into the abyss, at least that is, respectfully, our modest continental view.

Second, the dynamics of the interwoven jumbo economy of 'Chimerica' continue to be rewritten and deteriorate as we speak, with trade policies being abused as instruments to meet political goals.[1] And even if a 'good, fair and "largest ever" deal' were clinched, the painful repercussions of all unnecessary rhetoric and bellicose escalations may take years to normalise.

Third, and arguably even more fundamental, the asphyxiation of the Appellate Body slowly continues, despite multiple attempts by over 20 members to rewrite the Appellate Review process and find creative solutions. Unfortunately, the deadline of 10 December 2019 is, at the time of going to press, only three months away. After that day, members can no longer claim their 'ticket' for a proper traditional Appellate Review, thereby putting the continued existence of one of the best international dispute settlement systems in doubt. As Professor Van den Bossche rightly pointed out: '[H]istory will not judge kindly those responsible for the collapse of the WTO dispute settlement system.'[2]

In this regard we underline the desire that some have rightfully expressed: if only we could press a reset button so that 1995 could start again! The trade world at the time was full of desire to move from its power-oriented regime into a rules-based system. Hence, the leap from the GATT to the WTO was made, along with, most notably, the creation of the

1 As one example, we recall record duties being unilaterally imposed, with no plausible *prima facie* legal justification – also setting a bad example to other members.

2 Farewell speech by Professor Peter Van den Bossche, former Presiding Member of the Appellate Body. See www.wto.org/english/tratop_e/dispu_e/farwellspeech_peter_van_den_bossche_e.htm.

Appellate Body. Now, with that priceless institution on the brink, we continue to hope for a last-minute solution.[3]

In short and simplistic terms, trade law, born and grown after the Second World War, appears to be aging. While some might say that this is part of adolescence, others would argue that we are in the midst of a full-blown mid-life crisis. Whichever it is, we find ourselves in an undefined status, with increased decision-making, increased pressures and a search for a new self.

Returning to the specifics of this fifth edition, we wish to warmly thank our ever-faithful contributors. Once again, they have very nicely described, summarised and analysed all the main events in their respective key jurisdictions. Notably we wish to thank two new guest contributors, Michael-James Clifton and Pekka Pohjankoski, both from the bench, for opening up whole new perspectives and dynamics for *The International Trade Law Review*. And, on a closing note, as before, we wish to thank our publishers and, especially, our ever-growing and active audience who have supported us throughout this first lustrum.

Having said all that, we remain deeply committed to this publication in these challenging times and we wish you all happy reading.

Folkert Graafsma and Joris Cornelis
VVGB Advocaten
Brussels
August 2019

3 The irony being that the people who are currently shutting down the system have an open nostalgia as well, except that they wish to time-travel back further, to the pre-1995 power-based system, convert the WTO into the GATT, and eliminate the Appellate Body.

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 seventh in terms of the number of anti-dumping measures imposed, which mostly concerned plastics and rubber, textiles, and base metals.[2] Indeed, Turkey has to this date conducted 232 trade defence investigations (including anti-dumping, anti-subsidy, anti-circumvention and safeguard investigations).[3]

The Directorate General for Imports (Directorate General) within the Ministry of Trade (the Ministry) is competent for the conduct of 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 upon 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 Turkish Official Gazette.

The Board is empowered to make proposals in the course of an investigation, evaluate the findings made during investigations and submit for the Minister's approval its decisions on the imposition of provisional or definitive measures. Eventually, the Board 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 are violated.

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

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: 117 measures are in force; 45 measures have expired; 11 measures have been repealed as a result of expiry investigations; 30 safeguard measures expired or were terminated; 21 investigations have ended without the adoption of any measures; and eight investigations are still ongoing. Those numbers have been calculated by considering the number of initiation notices and not the number of subject countries.

and the Ministry approves this resolution, a Communiqué proposing the adoption of a measure to the President 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 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 therefore been accompanied by the suppression of barriers aiming to substitute imports with domestically produced inputs.

While liberalising its economy, 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 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 EU in 1995, which meant adopting the EU's common external tariff and compulsory alignment with the EU's Common Trade Policy.[4]

Turkey is also a member of the WTO and is therefore bound by the Agreement Establishing the World Trade Organization, as well as the annexed 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[5] (the Anti-Dumping Agreement) and the Agreement on Safeguards.

i Anti-dumping and anti-subsidy legislation

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 legislation

The Turkish legislation on safeguards is:

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

4 The Customs Union Agreement came into force on 31 December 1995.

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

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 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 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 constitutes one of Turkey's long-standing problems. 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: the prohibition of zeroing; the application of the lesser duty rule; the obligation of the investigating authority to request the exporter or producer in the territory of the other party for missing information or clarification concerning the answers to the questionnaire, if necessary; and 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.

In light of these, Turkey first entered into an FTA with the European Free Trade Association countries in 1991,[6] and then formed a customs union with the EU. Indeed,

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

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 to 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 the EU and Turkey 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 FTAs' main objective 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 Commission underlined in its 2019 Country Report for Turkey that although Turkey is generally aligned with the terms of the EU with regard to free trade agreements it has entered with third countries, it has continued to implement its free trade agreement with Malaysia even though the EU has not yet concluded a similar agreement with this country.[7]

IV RECENT CHANGES TO THE REGIME

The Turkish regime has not undergone any salient amendment recently. Nevertheless, some changes in the Ministry's practice may be mentioned (see details in Section V, below).

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 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 was concretely 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.

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 imports from China. Accordingly, the Decree of the Council of Ministers on the same subject was also repealed on 18 March 2017.

7 See Turkey 2019 Report, COM(2019) 260 final, 29 May 2019, p. 98.

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

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

V SIGNIFICANT LEGAL AND PRACTICAL DEVELOPMENTS

i Market economy status

The expiration of the 15-year period prescribed for the application of the 'surrogate country approach' to China, which was set out in China's Accession Protocol to the WTO, has been brought to attention by the Chinese government and Chinese associations to confirm that an automatic switch to market economy status has occurred. However, Chinese exporters, which are seeking to have their cost and price data taken into consideration by the Ministry, claim that they satisfy the conditions for market economy treatment (MET) laid down by Turkish legislation.

In the *Solar panels* anti-dumping case,[10] despite the request by the Chinese Ministry of Trade that the MET be applied, the Ministry implicitly rejected the 'automatic switch' argument regarding the expiry of the Accession Protocol by only referring to the proper implementation of the WTO and Turkish legislation. Additionally, one of the cooperating exporters requested that the Ministry consider that the company's activities are conducted under market economy conditions. 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 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,[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 Turkish law recognises China as a market economy. Nevertheless, Additional Article 1 of the 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 the determination of the normal value in their case; to this end,

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

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

they have to demonstrate that they produce and sell under market economy conditions. The Ministry indicates in initiation notices that those claiming market economy treatment must comply with requirements mentioned in the legislation.

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 also 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 re-conducted 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 other than the withdrawing company does not satisfy the representativeness criterion.

On the other hand, the anti-dumping investigation[12] carried out concerning imports of terephthalic acid originating in Korea, Spain and Belgium, and the anti-dumping and anti-subsidy investigations[13] 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 Non-cooperation versus cooperation

Turkish law provides that the investigation's outcome 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 *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;

b in the final disclosure regarding the *Terephthalic acid* case, a company that duly submitted its responses was considered non-cooperating on the grounds that it attempted to obstruct the investigation to affect its outcome;

c in the *Articulated link chain and parts* anti-circumvention case, the Ministry exempted most of the cooperating companies;[14]

d in the *Woven fabrics of synthetic and artificial stable fibres* expiry review case, the applicable anti-dumping measure has been reduced from 87 per cent of the CIF price to 44 per cent;[15] and

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

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

14 See Communiqué No. 2019/10 on the Prevention of Unfair Competition in Imports, published on 9 March 2019.

15 See Communiqué No. 2019/4 on the Prevention of Unfair Competition in Imports, published on 31 December 2018.

e in the *Wall clocks* expiry review case,[16] where no exporting or producing company cooperated, the Ministry calculated a dumping margin likely to recur in case of the expiry on the basis of the prices offered on global shopping platforms; and imposed a measure at an amended rate of 23 per cent of the CIF price, which cannot be applied in a way exceeding the absolute dumping margin determined in the original investigation.[17]

These recent cases reveal that proper cooperation can bring about important advantages (i.e., lower duties or exemption from duties), and exporting companies may be placed in a better position, so that cooperating companies may stand out in the competition thanks to their new position in the market.

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 defence 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 expiry 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* expiry review case[18] had not been subject to such visits.

The *Hinges* anti-circumvention case raises a discussion point regarding verification.[19] While the Ministry considered the data provided by the exporters and producers located in Germany and indicated that the conduct of verification visits at the premises of those companies is not necessary, it carried out verification visits at the premises of the cooperating companies located in the other countries. Even though the conduct of verification visits is not compulsory, the question could be asked whether conducting verification visits in a subject country but not in others during the same investigation would be consistent with the investigating authorities' obligation to carry out an objective examination.

v 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 to what extent

16 See Communiqué No. 2019/17 on the Prevention of Unfair Competition in Imports, published on 23 May 2019.

17 See Communiqué No. 2001/5 on the Prevention of Unfair Competition in Imports, published on 7 November 2001. In this decision, while the Ministry established an absolute dumping margin of 4.84 US$/piece and a dumping margin of 180 per cent (in relative terms), it imposed an anti-dumping measure of 2.10 US$/piece.

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

19 See Communiqué No. 2019/16 on the Prevention of Unfair Competition in Imports, published on 4 May 2019.

import prices are below the domestic selling price of the domestic industry, whereas price depression gives the percentage at 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 in cases where the majority of the exports to Turkey are made by a single company or where there is a large number of cooperating exporters or producers in the subject country.

Accordingly, in the *Dioctyl phthalate* anti-dumping case where the cooperating exporter claimed that its own data be used,[20] the Ministry underlined that an important part of the imports of the concerned product from South 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 depression. A similar approach has been adopted in the *Sodium percarbonates* anti-dumping case where 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.[21]

The following cases are worth mentioning in this respect:

a In the *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 In the *Wall clocks* expiry review case, it seems that 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 in case of the concerned measure's expiry on the prices offered on global shopping platforms.

The 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.

The *Sodium percarbonates* case is also worth mentioning, as the Ministry linked the absence of price undercutting to the domestic producer's waiver from its turnover and profit

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

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

by not raising its prices to be able to compete with the imports. Besides, one of cooperating parties' claim regarding the currency used in the determination of price undercutting and depression has been accepted by the Ministry and 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 price undercutting and price depression. However, the Ministry rejected this request on the basis of its like product analysis.

Transparency issues in the reasonable profit margin calculations

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,[22] unlike its common 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.

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 depression 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 importers' actual data.

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.

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, 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

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.

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

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 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 such requests in the future, provided that sufficient supporting documents are submitted. It is not clear at this stage what kind 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.

viii 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 and putting through texturing machines does not constitute a substantial transformation.[23] In the *Woven fabrics of synthetic and artificial stable fibers* 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.[24]

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.

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

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

As regards Turkey's situation at the WTO, it has been involved in five cases as complainant, 12 cases as respondent and 94 cases as third country. However, only three cases in which Turkey was complainant led to the establishment of a panel.

In *United States – Countervailing Measures on Certain Pipe and Tube Products* (DS523), 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 purposes of its injury determination.

The US appealed against the Panel's report before the Appellate Body.

In *Morocco – Hot-Rolled Steel* (DS513), Turkey had 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. In this case the Panel also upheld most of Turkey's claims. Accordingly, Moroccan authorities failed to:

a conclude the investigation within the 18-month maximum time limit;

b reject the reported information and establish the dumping margins for the two investigated Turkish producers on the basis of facts available;

c inform all interested parties of essential facts; and

d improperly conduct the injury analysis.

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).

A Panel was also established (DS573) on 11 April 2019 on 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.

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.

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 implement trade defence measures in the past few years 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 defence investigations.

Turkey's safeguard investigation into imports of certain iron and steel products (initiated as a response to the ongoing worldwide protectionist approach in the international trade regime as regards steel imports, more particularly, right after the US 232 Section tariffs and the EU's initiation of a safeguard investigation concerning imports of certain iron and steel products) was concluded on 7 May 2019 without imposition of a measure. This case is of significance particularly because (1) Turkey implied at the beginning of the investigation that the EU could be exempted from potential measures but was subjected to provisional measures (in the form of a system of tariff rate quotas in excess of which an additional duty of 25 per cent); and (2) Turkey's attachment to its commitments under WTO rules and its determination not to undermine trade liberalisation.

On the other hand, the Ministry's evaluations and findings in recent cases suggest that Turkey will closely monitor the stance of the US and of the EU as well as other countries' trade defence policies.

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. In this context, China's recent suspension of its dispute before the Panel with regard to its market economy treatment claim appears to constitute an important development for the Ministry's approach.

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 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 in 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 especially renowned 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 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 of *Competition Board Decisions* Vols I, II, III and IV.

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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 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 Österreichisches Sankt Georgs-Kolleg (Avusturya Lisesi) 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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