

THE INTERNATIONAL  
TRADE LAW  
REVIEW

SIXTH EDITION

**Editors**

Folkert Graafsma and Joris Cornelis

THE LAWREVIEWS

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# PREFACE

*May you live in interesting times!* This ancient curse of apocryphal origin could perhaps summarise the recent turmoil and economic disasters our planet has not seen since the Great Depression. Superficially *Jaws in Space*, we endure allegories of the Ancient Plagues. The Appellate Body has vaporised, Brexit did materialise and, to make matters worse, an invisible lethal pathogen has entered the scene. The latter, of course, also has consequences well beyond trade, exceeding the realm of this book.

Staying with trade, not only has the Appellate Body ceased to function, certain WTO Members seem to dismiss the binding nature of its rulings altogether.<sup>1</sup> There are worrying tendencies by some Members to shift from a multilateral to a regional or bilateral trading system – not to speak of unilateral measures. While such systems are usually referred to as ‘free trade agreements’, they have not always managed to live up to this expectation. Undoubtedly, Members may have some reasons for such policy shifts, but if all start to propagate these types of agreements, we could find ourselves back in the 1920s before too long.

In this light, it is imperative to strengthen the arbiter when the ‘soccer (or rugby) game of international trade’ may slowly be spinning out of control. When the game is rough, the referee must be tough. Although the Multiparty Interim Appeal Arbitration Agreement (MPIA) (the stopgap Appellate Body) is a good start (see below), some other fixes are also needed. Members *will* need to partially update the rule book, partially rectify a few selected rulings, and look for an improved implementation and enforcement mechanism.

Even the European Union (EU), with ‘multilateralism written in its DNA’,<sup>2</sup> seems to have caught some early symptoms of unilateralism by formulating responses to some perceived WTO failures outside the multilateral framework. For example, although this is not really new, a few years ago the EU revamped part of its normal value determination by modernising and neutralising its old analogue country methodology.<sup>3</sup> More recently, however, the EU has also started acting against transnational subsidies – something not traditionally understood to be included in the Marrakesh rule book. Indeed, apart from targeting transnational subsidies through its regular Anti-subsidy Regulation,<sup>4</sup> the EU is now also in the process of designing

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1 Communication from the United States in *US – Countervailing Measures on Supercalendered Paper from Canada*, WT/DS505/12. In the past such decisions were not announced *expressis verbis*.

2 Speech by EU Trade Commissioner Phil Hogan at Dublin business event, 6 December 2019, at <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2088>.

3 See Regulation 2017/2321 published in OJ L338/1 dated 19 December 2017.

4 See, for example, Commission Implementing Regulation (EU) 2020/776, published in OJ L189/1 dated 15 June 2020.

a completely new and all-encompassing legal instrument<sup>5</sup> addressing the distortive effect of foreign subsidies in the fields of competition, public procurement, takeovers, investment, etc. If enacted, this powerful and broadly scoped new tool, potentially capable of decapitating any nine-headed water serpent, is something about which we will undoubtedly hear much more in the years to come. Finally, the Chief Trade Enforcement Officer is also new and is designed to increase monitoring and enforcement of environmental and labour obligations under EU trade agreements; while laudable *in se*, it also confirms a shift away from multilateralism.

On the upside, however, some other recent developments illustrate that the EU is simultaneously attempting to uphold the banner of free trade and promote multilateralism. Under an EU initiative, an unprecedented interim appeal arrangement for WTO disputes has become effective (the MPIA), with currently some 20 plus participating Members pledging their commitment to a rules-based trading system. This agreement addresses some efficiency concerns that were raised with respect to the Appellate Body, such as only allowing arbitrators to address issues that are necessary to resolve the dispute, and limiting possibilities to extend the 90-day time limit. This innovative and interesting stopgap agreement also raises important questions for the future of international trade dispute settlement in the post-MPIA era. Importantly, what will be the relevance of MPIA decisions in a future if and when the Appellate Body were to resurrect? How will the dispute settlement system function with fractured jurisprudence? These early questions have recently been addressed in an excellent blog.<sup>6</sup>

Another promising silver lining is the continuing negotiations on fisheries subsidies. Although it has proven extremely difficult to make unanimous decisions with 164 WTO Members, fish are not known to respect national borders and therefore the only possible and effective response to the rapidly depleting global fish stocks is multilateral. These negotiations are a good opportunity, therefore, for the WTO to demonstrate its effectiveness, its capabilities as a rule-making organisation, and its ability to adapt to changing times.

Similarly, the recent announcement of the WTO Director General to step down before the end of his term should be used as an opportunity to usher in some new energy to the organisation. Let us share the hope expressed by the Director General that him stepping down does not mean that ‘the ship is . . . going down’ but that command will simply be transferred to someone else who will ‘hopefully . . . inject precisely that kind of energy and stamina that . . . is badly needed’.<sup>7</sup>

Let us, therefore, not lose all faith in the future of the multilateral trading system. *May we live in hopeful times.* With this in mind, we are deeply grateful for the continued support of our faithful contributors: Charlotte Morgan and Samuel Coldicutt at Linklaters for the Brexit chapter (A New Framework for UK Customs and Trade); Michael-James Clifton at EFTA and Pekka Pohjankoski of the University of Helsinki for the EU Courts chapter; Philippe De Baere at Van Bael & Bellis for the WTO chapter; Alfredo A Bisero Paratz at Wiener•Soto•Caparrós for the Argentina chapter; Mauro Berenholc and René Medrado at

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5 See the recent ‘White paper on levelling the playing field as regards foreign subsidies COM(2020) 253 final’, dated 17 June 2020. This latter concept-law is still in its initial ‘blueprinting stage’ and has not yet formally translated into a new law.

6 See <https://ielp.worldtradelaw.net/2020/01/guest-post-update-from-the-void-questions-for-the-new-interim-appeal-agreement-iaaa.html>.

7 Bloomberg interview with WTO Director General Roberto Azevedo, at <https://www.bloomberg.com/news/articles/2020-05-14/wto-chief-citing-chaos-says-he-s-not-the-right-man-for-the-job>.



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Finally, as ever, we wish you enjoyable reading during these challenging times.

**Folkert Graafsma and Joris Cornelis**

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# TURKEY

*M Fevzi Toksoy, Ertuğrul Canbolat and Hasan Güden<sup>1</sup>*

## I OVERVIEW OF TRADE DEFENCE INSTRUMENTS

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.<sup>2</sup> Indeed, Turkey currently applies 182 anti-dumping and anti-subsidy measures (including anti-circumvention measures), and eight safeguard measures. During the period 2019–2020, Turkey initiated three anti-dumping investigations, 15 expiry review investigations, five anti-circumvention investigations and two safeguard investigations; decided on the application 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 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.

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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.

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.<sup>3</sup>

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<sup>4</sup> (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
- b Regulation No. 25486 on Safeguard Measures in Imports (the Safeguard Regulation).

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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.

**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 are obliged to pay value added tax on 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 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.

In light of these, Turkey first entered into an FTA with the European Free Trade Association countries in 1991,<sup>5</sup> 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 2019 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.<sup>6</sup>

Additionally, subsequent to the United Kingdom’s (UK) departure from the EU, Turkey and the UK are working to establish a free trade area between the two countries. In parallel with the trade agreement negotiations between the EU and the UK, Turkey will negotiate a bilateral trade agreement with the UK. Negotiations are already under way through meetings of the Trade Working Group set up between the two countries. On 1 February 2020, Turkey issued Circular No. 2020/1 on the Transition Period Regarding the Departure of the UK from the EU, which stresses the UK’s position as a partner to the EU–Turkey Customs Union until expiry of the transition period (currently expected to end on 31 December 2020). The conclusion of a trade agreement between the UK and Turkey is of crucial importance since 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, below).

The 7th Chamber of the Council of State, with two decisions taken on 28 December 2017,<sup>7</sup> repealed the definitive anti-dumping duties imposed against imports of

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5 The agreement entered into force on 1 April 1992.

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

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

unbleached kraft liner paper originating in the United States<sup>8</sup> 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.

It should also be noted that a 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.

## 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,<sup>9</sup> 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,<sup>10</sup> 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

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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.

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). 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 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 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, 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<sup>11</sup> without providing for the refusal.

## **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<sup>12</sup> carried out concerning imports of terephthalic acid originating in Korea, Spain and Belgium, and the anti-dumping and anti-subsidy investigations<sup>13</sup> 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.

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

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

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

### 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 this regard, although the Ministry usually carries out verification visits, the domestic producers involved in the *Polyester synthetic staple fibre* expiry review case<sup>14</sup> had not been subject to any such visits.

The *Hinges* anti-circumvention case raises a discussion point regarding verification.<sup>15</sup> While the Ministry considered the data provided by the exporters and producers located in Germany and indicated that conducting verification visits at the premises of those companies is not necessary, it did carry out verification visits at the premises of the cooperating companies located in the other countries. Even though verification visits are not compulsory, the question could be asked whether conducting them 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.

### 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 *Diocetyl phthalate* anti-dumping case, in which the cooperating exporter claimed that its own data were used,<sup>16</sup> 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

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

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

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



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.<sup>17</sup> 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:<sup>18</sup> the Ministry performed its price undercutting analysis on the basis of the data provided by the only cooperating company from Italy.

### ***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* anti-dumping case<sup>19</sup> through the application of the lesser duty rule after taking into account the public interest principle.

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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.

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

### ***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,<sup>20</sup> 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.

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,<sup>21</sup> 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.

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

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

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 macro-economic circumstances, such as currency fluctuations.<sup>22</sup>

**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 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.<sup>23</sup> 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.<sup>24</sup>

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

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.

### 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 the application of the definitive anti-dumping measure on imports of unbleached kraftliner paper originating in the United States for nine months.<sup>25</sup>

### 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, with its recent decisions, the Ministry has apparently adopted a different approach.

In its *Polyester staple fibre* expiry review case,<sup>26</sup> 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,<sup>27</sup> 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,<sup>28</sup> 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*<sup>29</sup> and *Yarn of man-made or synthetic or artificial staple fibres* 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.

## 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

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

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

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

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

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

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 96 cases as third country. However, only seven cases in which Turkey was complainant led to the establishment of a panel.<sup>30</sup>

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 European Union, 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 no earlier than autumn 2020.

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. Accordingly, the 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 the facts available;

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30 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*.

- c inform all interested parties of essential facts; and
- d improperly conduct the injury analysis.

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, it is not expected to issue its final report before the second half of 2020.

On 2 April 2019, the European Union 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.

In DS596: *European Union – Safeguard Measures on Certain Steel Products*, Turkey requested consultations with the European Union 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.

Turkey also adopted measures to resume trade through an application named 'contactless trade', according to which the trucks carrying goods to be exported or imported will have to undergo an exchange of containers, trailers and drivers in buffer zones established at Turkey's borders.

Another important topic is the modernisation of the customs union between the European Union and Turkey, which came to a standstill following the freeze of the accession negotiations by the European Union. 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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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.

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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.

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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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