THE INTERNATIONAL TRADE LAW REVIEW

EIGHTH EDITION

Editors
Folkert Graafsma and Joris Cornelis

THE LAWREVIEWS

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Eighth Edition

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This article was first published in August 2022
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Published in the United Kingdom
by Law Business Research Ltd, London
Holborn Gate, 330 High Holborn, London, WC1V 7QT, UK

www.TheLawReviews.co.uk

ISBN 978-1-80449-102-7

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ACTECON

AKIN GUMP STRAUSS HAUER & FELD LLP

BAKER MCKENZIE SAS

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PREFACE

I LIVING IN A POST-PANDEMIC TRADE WORLD

We had just got used to face masks and started travelling again. Nevertheless, 'it ain't over till it's over'. Thus, while many of us had expected, or at least hoped, that the disruptions caused by the pandemic would this year be a thing of the past, the war in Ukraine, some continuing lockdowns in Asia, as well as new Omicron subvariants, are evidence that difficult times are not entirely behind us.

Moreover, even if the pandemic has now by and large subsided, the illegal invasion of Ukraine has replaced it for prime-time attention. The most immediate trade impact of Russia's unprovoked and naked aggression against its one-time brother people has been a sharp rise in commodity prices, as both countries are key suppliers of essential goods such as food, energy, and fertilisers.[1] Grain shipments through Black Sea ports have also frozen, with poorer countries dependent on essential commodities bearing the most serious consequences.[2] To support Ukraine's economy, the European Union adopted a regulation allowing for the temporary trade liberalisation and other trade concessions with regard to some Ukrainian products.[3] Likewise, the United Kingdom and the United States announced that they will suspend tariffs on certain Ukrainian products for a year. Meanwhile, a large number of countries, including the EU, the UK, the US, Canada, Japan and Australia, imposed sanctions against Russia. As demonstrated by Russia's large and growing export surplus, these sanctions are slowly starting to work and are having an impact on the Russian economy.[4] Furthermore, the discussions concerning Russia leaving – or being expelled from – the World

1 United Nations News, 'Ukraine conflict putting global trade recovery at risk: WTO' (2022), available at <https://news.un.org/en/story/2022/04/1116052>, last accessed on 13 June 2022. While a 'grain corridor' deal has been recently reached, the security and robustness of this corridor is not guaranteed. See: BBC, 'Food crisis: Ukraine grain export deal reached with Russia, says Turkey' (22 July 2022), available at: https://www.bbc.com/news/world-europe-62254597 (last accessed 2 August 2022).

2 In fact, in trying to avert the worst, India banned exports of wheat, Turkey banned the exports of beans, lentils and seed and olive oil, Serbia banned exports of vegetables oil, maize and wheat, Indonesia banned exports of Cooking oil and its raw materials – to name a few.

3 Regulation (EU) 2022/870 of the European Parliament and of the Council of 30 May 2022 on temporary trade-liberalisation measures supplementing trade concessions applicable to Ukrainian products under the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part [2022] OJ L152/103.

4 The reason for Russia's growing export surplus is that Western sanctions imports are working either directly (i.e., by cutting Russia's imports) or indirectly (i.e., by causing capital flight). According to Mark Harrison, history teaches that, in wartime, export surplus is an indicator of a weaker, not stronger,

Trade Organization (WTO) are prone to resulting in medium to long-term consequences,[5] including a risk of fragmentation in terms of Member-blocs based on geopolitics (i.e., possibly, a US-centric and a China-centric bloc, or variations thereof).[6]

The pace of such dire events makes it difficult to step back from the stream of daily trade happenings. Mercifully, the latest news regarding the remarkable (and, in the words of many, 'unprecedented')[7] outcomes achieved through the 12th Ministerial Conference (MC12) of the WTO show (once again) that, in times of crisis, 'the story is not one of trade as a source of vulnerability; it is one of trade as a source of resilience'.[8]

II REBUILDING TRUST AT THE WTO

The twice-delayed MC12 finally took place in June 2022, and it was a success. A joint statement by over 50 WTO Members expressing solidarity for Ukraine set the scene for five days of intense and prolonged negotiations,[9] which ultimately led to a historical package of trade agreements. Some of the noteworthy outcomes of the MC12 are briefly summarised below.

i Covid-19 vaccines

Nearly two years after the development of covid-19 vaccines, WTO Members gave the green light to a waiver of certain procedural obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). This agreement has been referred to as a major win for the developing countries, which had to wait several months longer than rich countries to receive their vaccines. This wait was accompanied by pain and misery, which could have been entirely avoided. One may wonder whether it took too long to agree on something so critical. Groups advocating for vaccine access were also disappointed that the deal does not cover diagnostic materials and therapeutics – although the decision provides for the WTO Members to consider whether to extend the waiver to those issues at the end of this year.

economy. For further details, see: 'Western sanctions on Russia are working, an energy embargo now is a costly distraction' (13 June 2022), available at <https://voxeu.org/article/western-sanctions-russia-are-working-energy-embargo-now-costly-distraction>, last accessed on 14 June 2022.

5 World Trade Organization, 'The crisis in Ukraine: implications of the war for global trade and development' (2022), available at <www.wto.org/english/res_e/booksp_e/imparctukraine422_e.pdf>, last accessed on 13 June 2022.

6 Eddy Bekkers and Carlos Goes, 'The impact of geopolitical conflicts on trade, growth and innovation: an illustrative simulation study' (29 March 2022), available at <https://voxeu.org/article/impact-geopolitical-conflicts-trade-growth-and-innovation>, last accessed on 14 June 2022.

7 Director General Ngozi Okonjo-Iweala, 12MC Closing Speech, available at <www.wto.org/english/news_e/spno_e/spno27_e.htm>, last accessed on 17 June 2022.

8 Deputy Director-General Anabel Gonzalez, speech of 29 October 2021, transcript available at <www.wto.org/english/news_e/news21_e/ddgag_29oct21_e.htm>, last accessed on 14 July 2022.

9 The MC12 was originally scheduled to last for four days, but it was prolonged by one day, and the negotiations lasted until 5 am local time on Friday, 17 June 2022.

ii Food security and agriculture

Faced by one of the worst food security crisis since World War II, WTO Members committed to: (1) avoiding unjustified export restrictions on food; (2) improving transparency on export restrictions; and (3) exempting humanitarian purchases for the World Food Programme (WFP) from export restrictions completely.[10] WTO Members, however, could not overcome their differences on a work programme for agriculture.[11] Nonetheless, the decision in support of the WFP clearly shows that the WTO can and will react promptly to exceptional challenges if there is enough negotiating capital to do so.

iii Fisheries

After two decades of talking, delegates reached a partial deal to stop harmful fishing subsidies.[12] The deal prohibits subsidies contributing to illegal, unregulated and unreported (IUU) fishing as well as subsidies for fishing activities on the unregulated high seas. It also restricts the subsidisation of fleets that fish in 'overfished' stocks. Developing countries are not exempted from these provisions. Nevertheless, they are afforded more flexibility and are eligible for technical assistance and financial support. According to Director-General Ngozi Okonio-Iweala, the deal takes 'a first but significant step forward to curb subsidies for overcapacity and overfishing.' Yet, in fact, the commitment to ban subsidies that contribute to overcapacity and overfishing as well as the promise to prohibit fuel and ship construction subsidies were dropped. For these reasons, some referred to the deal as 'pretty meager'.[13] On the other hand, this remains the first WTO Agreement 'with environmental sustainability at its heart'.[14] While the deal broadly operates as a standard WTO agreement – by prohibiting the worst, restricting the bad and developing transparency around the rest – it departs from the standard in so far as it does have the potential to form the basis for trade, environmental and development wins.[15] The deal will require attention and maintenance, however, since it is bound to expire within four years unless 'comprehensive disciplines' are adopted or otherwise

10 WTO, Draft Ministerial Declaration on the Emergency Response to Food Insecurity of 16 June 2022, WT/MIN(22)/W/17/Rev.1, available at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/W17R1.pdf&Open=True>, last accessed on 17 June 2022; and WTO, Draft Ministerial Declaration on World Food Programme Food Purchases Exemption from Export Prohibitions of Restrictions of 10 June 2022, WT/MIN(22)/W/18, available at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/W18.pdf&Open=True>, last accessed on 17 June 2022.

11 The debate around India's demand to seek a permanent exemption on public stockholdings of food grains from the WTO subsidy rules meant that no consensus could be reached on reforming the agricultural trade policy.

12 WTO, Draft Ministerial Decision on the Fisheries Subsidies of 17 June 2022, WT/MIN(22)/W/22, available at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/W22.pdf&Open=True>, last accessed on 17 June 2022.

13 Statement by Philip Chou, senior director of global policy with the Washington-based conservation group Oceana. Reported by Paul Withers in 'WTO agreement to curb fishing subsidies is "meagre," says expert Social Sharing' (17 June 2022), available at <www.cbc.ca/news/canada/nova-scotia/wto-agreement-curb-subsidies-prevent-overfishing-1.6492624>, last accessed on 17 June 2022.

14 Director General Ngozi Okonjo-Iweala, 12MC Closing Speech, available at <www.wto.org/english/news_e/spno_e/spno27_e.htm>, last accessed on 17 June 2022.

15 Amar Breckenridge, 'Miraculous catch or struggling to stay afloat? Early thoughts on the WTO's 12th Ministerial Conference' (17 June 2022), available at <www.trade-knowledge.net/commentary/

agreed,[16] meaning that further substantial action will be required of the WTO Members for the 12MC negotiations not to be in vain. In this latter regard it has been noted[17] that this clause is a double-edged sword: the last few times such expiry clause was used, it was: (1) either designed to make the Agreement on Textiles and Clothing disappear, or: (2) it made certain non-actionable subsidies disappear which Members now have come to regret.

iv E-commerce

Delegates also agreed to maintain the 24-year old moratorium on tariffs on digitally traded goods, services and other forms of e-commerce transmissions.[18] Since it was agreed in 1998, the extension of the moratorium caused little controversies at each ministerial conference. However, this year, India, Indonesia, Sri Lanka, Pakistan and South Africa threatened to block the renewal. Developing countries increasingly see the ban as a source of lost revenue, but 108 tech company associations urged the WTO to renew the moratorium on the grounds that failure to do so would undermine the global recovery and constitute a serious setback for a body that prides itself in reducing trade barriers. Some have argued that the threat was just a tactic used by developing countries to obtain concessions in other areas. On the other hand, one may wonder whether such countries should be allowed to impose tariffs on data flows if that is where their competitive advantage lies, in much the same way as everything else that works in the trade arena. For now, WTO Members agreed that the ban will remain in place at least until the next ministerial conference or until 31 March 2024, whichever comes first. In any event, the debate raises questions as to whether custom duties on data flows, such as movie and music streaming, will be imposed in the near future.

v WTO reform

Finally, the Members pledged to undertake a, by now, long-overdue major reform of the WTO encompassing all aspects of its operations.[19] No promise to restore the Appellate Body was made. However, all Members, including the US, acknowledged the challenges relating to the dispute settlement gridlock and committed to addressing them by no later than 2024. This is significant, as it shows that the restoration of the dispute settlement system has been recognised by the entire membership as a priority. While we wait to hear more about this major reform, the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) is yet to be

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miraculous-catch-or-struggling-to-staying-afloat-early-thoughts-on-the-wtos-12th-ministerial-conference/?utm_source=rss&utm_medium=rss&utm_campaign=miraculous-catch-or-struggling-to-staying-afloat-early-thoughts-on-the-wtos-12th-ministerial-conference>, last accessed on 18 June 2022.

16 WTO, Draft Ministerial Decision on the Fisheries Subsidies of 17 June 2022, WT/MIN(22)/W/22, Article 12 available at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/W22.pdf&Open=True>, last accessed on 17 June 2022.

17 Comments made during the webinar: SIEL Conversations: The Outcomes of MC12 and the Future of the Multilateral Trading System, held on 27 June 2022, accessible at https://www.youtube.com/watch?v=hI9i7onD34k; participants included Anabel González, Bernard Hoekman, Victor do Prado, Peter Ungphakorn and Iryna Polovets.

18 WTO, Work Programme on Electronic Commerce: Draft Ministerial Decision of 16 June 2022, WT/MIN(22)/W/23, available at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/W23.pdf&Open=True>, last accessed on 17 June 2022.

19 WTO, MC12 Outcome Document - Draft of 16 June 2022, WT/MIN(22)/W/16/Rev.1, available at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/W16R1.pdf&Open=True>, last accessed on 17 June 2022.

afforded the chance to take its first real test.[20] Interestingly, Turkey submitted a notification pursuant to Article 25 of the Dispute Settlement Understanding (DSU) in *Turkey – Pharmaceutical Products (EU)* (DS583) despite the fact that it is not a party to the MPIA. On the one hand, the label – whether this is MPIA or DSU Article 25 – should not make a big difference; what matters is that WTO Members are willing to restore trust and uphold the rule-based multilateral trade system by joining a rational means of dispute resolution.[21] On the other hand, one wonders whether Turkey's decision not to join the MPIA has any geopolitical reason, such as Turkey being a US key strategic partner.

Overall, despite the unprecedented challenges, the WTO Members have secured a truly unrivalled package of agreements. We are, therefore, pleased to realise that, last year, we were right to feel 'cautiously optimistic' about the WTO.[22] On the other hand, now that priorities have been set out and rules have been laid down, it remains to be seen how, in practice, everything will work out. For the just-ended MC12 negotiations to be meaningful, WTO Members must be faithful to their commitments. While Director-General Ngozi Okonio-Iweala deserves great credit for keeping the WTO alive, its future, health and vitality will depend on national governments – and in particular on whether the EU, the US and China, as major players in the international trade game, (continue to) see value in its existence.

III NEW TRENDS IN THE OLD CONTINENT

In Europe, Brexit may be done, but its implementation is far from complete. In particular, some substantive issues concerning imports from Northern Ireland remain outstanding.[23] The UK has also set out a phased plan to enforce new regulatory standards and controls for EU goods entering Great Britain,[24] according to which the introduction of sanitary and

20 At the time of writing, the following disputes involve parties which have submitted notifications pursuant to Article 25 of the Dispute Settlement Understanding indicating their commitment to using the MPIA in case of appeal: DS589: *China – Canola Seed (Canada)*; DS591: *Colombia – Frozen Fries*; DS598: *China – AD/CVD on Barley (Australia)*; and DS602: *China – AD/CVD on Wine (Australia)*. Furthermore, the following disputes involve parties which are both parties to the MPIA and are therefore likely to submit their notifications at the panel stage: DS603: *Australia – AD/CVD on Certain Products (China)*; DS607: *EU – Poultry Meat Preparations (Brazil)*; DS610 *China – Goods and Services (EU)*; and DS611: *China – IPRs Enforcement (EU)*.

21 In connection to this, see Section III.i, where we submit that one of the strategies behind the new the EU Anti-Coercion instrument may be to incentivise WTO members to join the MPIA.

22 See: Folkert Graafsma and Joris Cornelis, *The International Trade Law Review* (7th edition, 2021).

23 Although an agreement to not require the relabelling and retesting of medicines entering into Northern Ireland from Great Britain was achieved in spite of continued supply of these products. See also: Sam Meredith, 'The UK's plan to rip up Brexit trade rules slammed for being in "clear breach" of international law' (14 June 2022), CNBC, available at <www.cnbc.com/2022/06/14/uk-prompts-eu-backlash-over-plans-to-rip-up-northern-ireland-protocol.html>, last accessed on 15 June 2022.

24 Checks on highest risk imports of animals, animal products, plants and plant products were introduced in January 2022 and will remain in place.

phytosanitary checks, which was due in July 2022, has been postponed until the end of 2023.[25] Furthermore, the UK's latest attempt to unilaterally change some terms of the divorce with the EU may trigger interesting legal actions in the near future.[26]

Amid the implementation of Brexit, the UK Trade Remedies Authority (TRA) took its first real steps by initiating four 'independent' (standalone) trade remedies investigations.[27] In the first of these investigations, which concerns Chinese aluminum extrusions, the TRA has already imposed provisional measures requiring importers to have bank guarantees in place from 16 June 2022. As regards the two most recent investigations, which concern allegedly dumped and subsidised optical fibre cables from China, these effectively mirror two investigations concluded a few months ago by the European Commission.[28] It will therefore be interesting to see whether (and to what extent) the TRA will follow the same path of the Commission or whether it will go its own way in conducting the investigations. Some consider the TRA 'weaker' than its counterparts in the EU and the US because its role is confined to investigating complaints and recommending trade defence measures to the government – recommendations that the government will not necessarily follow.[29] By contrast, neither the Commission nor the US International Trade Commission need political approval to adopt trade defence measures. As such, it will also be interesting to see whether it will reach the same or different conclusions.

Other noteworthy developments concerning the UK's strategy as an 'independent trade nation' include: (1) the conclusion of free trade agreements (FTAs) with New Zealand and Australia; (2) the ongoing upgrades of FTAs with Mexico, Canada, Israel and South Korea; (3) the finalisation of a new Digital Economic Agreement with Singapore; (4) the application to join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP); and (5) the recent relaunch of the negotiations for an FTA with India. Interestingly, as regards the latter negotiations, the UK announced the ambitious plan to reach an agreement by the end of this year.[30] Yet, the UK will most likely have to concede on its immigration policy to persuade India to lower tariffs on the products which are of interest to the UK exporters (for example, whisky).[31]

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25 At the time of writing, this marks the fourth time the UK government has delayed the implementation of sanitary and phytosanitary checks on EU imports.

26 BBC News, 'EU set to take legal action against UK over post-Brexit deal changes' (15 June 2022), available at <www.bbc.com/news/uk-politics-61795553>, last accessed on 18 June 2022.

27 AD0012: Aluminium Extrusions from China; AD0020: Ironing Boards from Turkey; AD0021: Optical Fibres from China; and AS0022: Optical Fibres from China. For updates, see: UK TRA, 'Investigations currently in progress', available at <www.trade-remedies.service.gov.uk/public/cases/>, last accessed on 15 June 2022

28 See: Commission Implementing Regulation (EU) 2022/72 of 18 January 2022 imposing definitive countervailing duties on imports of optical fibre cables originating in the People's Republic of China and amending Implementing Regulation (EU) 2021/2011 imposing a definitive anti-dumping duty on imports of optical fibre cables originating in the People's Republic of China [2022] OJ L12/34.

29 Emilio Casalicchio, 'Meet the Trade Remedies Authority, the UK watchdog in a political storm' (9 June 2022), available at <www.politico.eu/author/emilio-casalicchio/>, last accessed on 18 June 2022.

30 UK Department for International Trade, 'UK-India Free Trade Agreement: the UK's strategy', available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1046839/uk-india-free-trade-agreement-the-uks-strategic-approach.pdf>, last accessed on 13 June 2022.

31 See: Dharshini David, 'Whisky and visas could be part of a UK-India trade deal' (22 April 2022), available at <www.bbc.com/news/business-61180390>, last accessed on 15 June 2022, who writes: 'No other nation

In some respects, in the context of international relations, the EU appears to be following the UK, as it renewed its efforts to conclude an FTA with Australia and started the negotiations to reach a comprehensive Digital Partnership with Singapore.[32] The latter is of particular importance in that, even though the world of trade is still dominated by paper forms, there is scope to improve the current state of play through digitalisation. For example, the initiatives led by the International Chamber of Commerce (such as the digitalisation of bills of lading) could have striking effects in terms of costs and efficiency, provided that the necessary data protection measures are in place.[33]

In addition, over the past few months, the EU institutions have been working on several pieces of EU legislation aimed at defending the EU's interests and values more fiercely. Moreover, the Commission has published several reports to illustrate and quantify how it is putting its trade policy into practice.[34] Following last year's edition, the most noteworthy developments which show this new EU trend are summarised below and will be addressed in more detail in the chapter on the EU.

i Draft regulation on foreign subsidies

The Commission, the European Parliament and the European Council have started discussions to agree on the final text of a new Regulation on Foreign Subsidies, which could potentially be adopted as early as the end of this year.[35] The Proposed Regulation is extremely

drinks as much whisky as India - which should have Scotland's world-famous industry celebrating. But each bottle of Scotch sold in India comes with a hefty price tag attached, thanks to tariffs of 150% on imported liquor. So currently the majority of whisky drunk in India is made within its borders.'

32 According to the European Commission, the partnership between the EU and Singapore is aimed at advancing cooperation 'on the full spectrum of digital issues, including digital economy and trade, as well as key enables for the successful digital transformation of our societies and economies'. See: European Commission, 'Joint Statement: EU and Singapore agree to accelerate steps towards a comprehensive Digital Partnership' (14 February 2022), available at <https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_22_1024>, last accessed on 13 June 2022.

33 See: International Chamber of Commerce, 'ICC digital initiatives for the next century of global trade', available at <https://iccwbo.org/media-wall/news-speeches/icc-digital-initiatives-that-will-equip-business-for-the-next-century-of-global-trade/>, last accessed on 13 June 2022.

34 See, for example: European Commission, 'First Annual Report on the screening of foreign direct investments into the Union' (2022), available at <https://trade.ec.europa.eu/doclib/docs/2021/november/tradoc_159935.pdf >, last accessed on 13 June 2022; 'Report on the implementation of Regulation (EU) 2021/821 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items' (2022), available at <https://trade.ec.europa.eu/doclib/docs/2021/november/tradoc_159936.pdf>, last accessed on 13 June 2022; 'Report on Implementation and Enforcement of EU Trade Agreements' (2022), available at <https://trade.ec.europa.eu/doclib/docs/2021/october/tradoc_159886.pdf>, last accessed on 13 June 2022; and '39th Annual Report from the Commission to the European Parliament and the Council on the EU's Anti-Dumping, Anti-Subsidy and Safeguard activities and the Use of Trade Defence Instruments by Third Countries targeting the EU in 2020' (2022), available at <https://trade.ec.europa.eu/doclib/docs/2021/august/tradoc_159782.PDF>, last accessed on 13 June 2022.

35 For a comparison of the amendments proposed by the European Parliament and the European Council, see: Council of the European Union, '8993/22 - Subject: Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market' (11 May 2022), available at <https://data.consilium.europa.eu/doc/document/ST-8993-2022-INIT/en/pdf>, last accessed on 28 May 2022.

far-reaching, particularly because it: (1) aims at tackling subsidies affecting both goods and services within the EU internal market; (2) targets any company that benefits from foreign subsidies and that operates in the EU, regardless of the country providing the subsidy and the country in which the company is established; and (3) empowers the European Commission to commence investigations and impose redressive measures on its own motion.

Questions arise as to the compatibility of this instrument with the WTO rules, as the definition of 'subsidy' under the draft regulation on foreign subsidies arguably covers a larger number of potential subsidies compared to the definition provided by the WTO Agreement on Subsidies and Countervailing Measures (e.g., subsidies granted to non-EU parent companies of subsidiaries established in the EU; subsidies granted by a third country to an entity established in a different country; financial contributions in the form of special rights or tax exemptions; measures 'economically equivalent' to a financial contribution; and transfer pricing). Moreover, if adopted, the draft regulation on foreign subsidies will have a strong impact on countries with large economies, which are those granting the subsidies (i.e., the US, the UK, Russia and, above all, China). If such countries start following the same logic as the EU, they may well retaliate by restricting their own markets to EU companies.

ii Revised enforcement regulation

Last year, the EU published its amendments to the Enforcement Regulation. The Revised Enforcement Regulation now (1) covers trade in services and IPR; and (2) empowers the EU to take retaliatory action where the adjudication of a trade dispute is hampered by the 'non-cooperation' of a trading party.[36] On the one hand, if the EU exploits this instrument to obviate the DSB's authorisation to impose countermeasures (in the event of non-compliance), questions arise as to its compatibility with the WTO legal framework. On the other hand, the Revised Enforcement Regulation seems to promote the use of the MPIA by preventing parties from appealing into 'the void'. Ultimately, should this instrument incentivise other WTO Members to join a rational and alternative means of dispute resolution (i.e., the MPIA or other arbitration mechanism), it may be welcomed.

iii Anti-coercion instrument

On 8 December 2021, the Commission published its proposal for a new instrument that would significantly enhance its trade defence instruments.[37] As the name suggests, the purpose of the proposed Anti-Coercion Instrument is to 'deter countries from restricting or threatening to restrict trade or investment to bring about a change of policy in the EU in areas such as climate change, taxation or food safety'. An obvious example of a situation that could trigger the countermeasures prescribed by this instrument is the WTO challenge recently brought by the EU against China concerning alleged restrictions on imports, exports,

36 Regulation (EU) 2021/167 of the European Parliament and of the Council of 10 February 2021 amending Regulation (EU) No 654/2014 of the European Parliament and of the Council concerning the exercise of the Union's rights for the application and enforcement of international trade rules [2021] OJ L49/1.

37 European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union and its Member States from economic coercion by third countries' (8 December 2021), COM (2021) 775 final. For the amendments proposed by the European Parliament, see: European Parliament, 'Amendments 58-280' (30 May 2022), 2021/0402(COD).

and supply of services from and to Lithuania.[38] Yet, some ambiguities remain as to: (1) who will make decisions about imposing new defensive policies (i.e., the Commission or the EU Member States); (2) the definition of 'economic coercion'; and (3) the types of remedy available under the instrument could cause legal complications as well as frictions with the third countries targeted by the instrument (i.e., mostly, but not only, China).[39]

iv Carbon border adjustment mechanism

The Commission's proposal regarding the carbon border adjustment mechanism (CBAM) still needs to be finally enacted by concluding its legislative procedure. Debates concerning technical and practical issues (e.g., questions as to whether the EU should reserve to maintain free allocations under the EU's emission trading scheme in order to prevent carbon leakage) seem to be slowing down its enactment.[40] Should the CBAM be adopted, the EU should be ready to deal with WTO complaints by other countries. For example, affected WTO members could argue that the CBAM equates to a discriminating tax or charge on imports or that the CBAM is inconsistent with the WTO 'national treatment' principle. Furthermore, some countries may not even wait for complaints to be processed by the DSB and take measures to counteract the new instrument (e.g., retaliatory measures may target like-for-like products or different products important to the EU's economy).[41] Either way, the result might be a decline in total trade and total EU exports. Therefore, one might wonder whether this initiative will go the way of some of its precedents, such as the Emission Trading System Aviation Scheme, which was suspended before being fully implemented.[42]

38 DS610: China – Goods, and Services (EU), facts and status available at <www.wto.org/english/tratop_e/dispu_e/cases_e/ds610_e.htm>, last accessed on 15 June 2022. It is also worth noting that, unsurprisingly, this EU challenge is being backed up by the US, Australia and the UK.

39 See, for example, Article 2 of the Commission's proposal (n. 32 above), according to which the draft regulation 'applies where a third country interferes in the legitimate sovereign choices of the Union or a Member State by seeking to prevent or obtain the cessation, modification or adoption of a particular act by the Union or a Member State, by applying measures affecting trade and investment.' The legal text does not specify what actions may amount to 'interference', does not explain what 'seeking to prevent or obtain' means and does not even define 'sovereignty'. This raises questions, for example, as to whether the remedies available under the instrument may be triggered by a third country' policies which affects EU actors but whose integrity is challenged by another third country instead of the EU (e.g., US sanctions on Iran affecting EU traders).

40 Kira Taylor, 'Lawmakers criticise plan for 'CBAM reserve' in EU carbon market reform' (2022), available at <www.euractiv.com/section/energy-environment/news/lawmakers-criticise-plan-for-cbam-reserve-in-eu-carbon-market-reform/>, last accessed on 13 June 2022; and Borderlex, 'In brief: CBAM vote in plenary postponed' (8 June 2022), available at <https://borderlex.net/2022/06/08/in-brief-cbam-fails-in-plenary/>.

41 Frederik Erixon, Oscar Guinea, Vanika Sharma and Renata Zilli Montero, 'The new wave of defensive trade policy measures in the European Union: design, structure and trade effects' (2022), p. 50, available at <https://ecipe.org/publications/new-wave-of-defensive-trade-policy-measures-in-eu?mc_cid=f536ecdc53&mc_eid=eae92434a4>, last accessed on 14 June 2022.

42 For information about the ETS Aviation Scheme, see: Lorand Bartels, 'The WTO Legality of the Application of the EU's Emission Trading System to Aviation' (2012), 3(2) Eur. J. Int. Law 429, available at <https://academic.oup.com/ejil/article/23/2/429/487254>, last accessed on 15 June 2022.

v Continued bilateral dispute settlement activity

On the day of finalising this preface, an important panel report on the third bilateral dispute settlement instigated by the EU was released.[43] This bilateral dispute between the EU and SACU, the first to involve international organisations on both sides, has been a testament to the enduring power of peaceful dispute settlement in international relations. Substantively, the case is interesting as well since it is the first time a safeguards regime has been subject to this type of adjudication. While we will discuss this case in detail next year, the panel ruled in favour of the EU and held that the safeguard measure was not proportionate and went beyond what was needed to remedy or prevent any serious injury or disturbances. Moreover, the delay between the investigation and the adoption of the safeguard measure was excessive and not in line with the EU–SADC EPA.[44]

IV IS THE UNITED STATES CHANGING ITS ATTITUDE TOO?

This year more than ever, it is impossible to talk about the EU's trade position without talking about the US. Indeed, following the suspension of the long-standing *Boeing/Airbus* dispute, the EU and the US decided to 'hit the pause button on [their] steel and aluminium trade dispute, while hitting the start button on cooperating on a new Global Arrangement on Sustainable Steel and Aluminium'.[45] As proof of their 'renewed trust', the US agreed not to apply Section 232 duties, and the EU agreed to suspend related tariffs on US products.[46] Against this background, they also established the EU–US Trade and Technology Council, which has the aim 'to deepen transatlantic trade and economic relations based on these shared values'.[47] Considering that, together, the EU and the US economies account for nearly a third of world trade flows, the parties' efforts to strengthen their trade relations could have a major impact on the global economic governance.

This is even more so if we ask ourselves what role, if any, this renewed alliance will have in the context of the Indo-Pacific Economic Framework (IPEF), which was officially launched by US President Joe Biden in May 2022.[48] The IPEF is a clear attempt to restore the US' leadership role in the Indo-Pacific and, at the same time, to limit China's leverage in

43 The first cases were litigated under the EU–Korea FTA and the EU–Ukraine FTA, see https://policy.trade.ec.europa.eu/enforcement-and-protection/dispute-settlement/bilateral-disputes_en.

44 More details can be found on https://policy.trade.ec.europa.eu/news/panel-rules-favour-eu-southern-african-customs-unions-safeguard-eu-poultry-cuts-2022-08-03_en.

45 European Commission, 'EU and US agree to start discussions on a Global Arrangement on Sustainable Steel and Aluminium and suspend steel and aluminium trade disputes' (31 October 2021), available <https://ec.europa.eu/commission/presscorner/detail/en/IP_21_5721>, last accessed on 15 June 2022.

46 European Commission, 'Joint EU-US Statement on a Global Arrangement on Sustainable Steel and Aluminium' (31 October 2021), available at <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_5724>, last accessed on 15 June 2022.

47 European Commission, 'EU-US Trade and Technology Council', available at <https://ec.europa.eu/info/strategy/priorities-2019-2024/stronger-europe-world/eu-us-trade-and-technology-council_en>, last accessed on 15 June 2022.

48 For further information about the IPEF, see: Su-Lin Tan 'The Indo-Pacific Economic Framework: what it is – and why it matters' (25 May 2022), available at <www.cnbc.com/2022/05/26/ipef-what-is-the-indo-pacific-framework-whos-in-it-why-it-matters.html>, last accessed on 15 June 2022.

the region.[49] Thus, although unlikely to become a formal FTA, the IPEF will not only bolster trade efforts through the Asia-Pacific Economic Cooperation, but it also has the potential to substantially influence the current global geopolitical order. As such, the EU will have to pay careful attention to the forthcoming negotiations.

It is fair to assume that the recent appointment of Katherine Tai as the new US Trade Representative is playing an important role in reshaping the US' international relations. Tai's nomination received significant worldwide support, and her attitude seems to be in sharp contrast with that of her predecessor, Robert Lighthizer. Most importantly, while it is clear that the US is trying to move 'away from a traditional dispute settlement mechanism',[50] some of Tai's statements lead us to believe that the US is now more willing 'to engage on dispute settlement as part of [a] larger vision for reinvigorating the WTO'.[51] Yet, will Katherine Tai's negotiation skills and political acumen be sufficient to navigate the US' complex relationship with China?

V AND WHAT ABOUT CHINA?

In China, new lockdowns are (again) disrupting maritime trade just as supply chain constraints seemed to be easing. Nevertheless, nothing, let alone covid-19, seems to be getting in the way of China's gradual approach to trade deals.

Amid the cheering of the new US' IPEF strategy, China kept a relatively low profile in hosting discussions for the largest trade agreement ever concluded outside the WTO. The Regional Comprehensive Economic Partnership (RCEP) has now come into force for 11 signatories.[52] At the national level, one of the most interesting implications of China signing the RCEP, is that the Chinese government committed to binding prohibitions against the localisation of data, which constitutes a departure from its long-standing hard sovereignty stance on this matter. At the international level, the RCEP may make it more difficult for US President Joe Biden to reverse the course of its predecessor's unilateralist actions. China is likely to continue sponsoring the huge market access offered by the RCEP, which the IPEF – at least currently – lacks.[53] Consistent with its adherence to multilateralism, China is also likely to focus its efforts on the on-going negotiations to join the CPTPP and the Digital Economy Partnership Agreement.

Ultimately, as evidenced by the last two decades of China's trade history, it has been consistent in supporting multilateralism. Meanwhile, the US (supported by the EU) is

49 Frederic Grare, 'Ambitions and access: the new economic framework for the Indo-Pacific' (7 June 2022), available at <https://ecfr.eu/article/ambitions-and-access-the-new-economic-framework-for-the-indo-pacific/>, last accessed on 15 June 2022.

50 International Economic Law and Policy Blog, 'Katherine Tai on IPEF Enforceability' (2022), available at <https://ielp.worldtradelaw.net/2022/06/katherine-tai-on-ipef-enforceability.html>, last accessed on 15 June 2022.

51 International Economic Law and Policy Blog, 'Katherine Tai on Fixing WTO Dispute Settlement' (2022), available at <https://ielp.worldtradelaw.net/2022/06/katherine-tai-on-fixing-wto-dispute-settlement.html>, last accessed on 15 June 2022.

52 The RCEP has come into force for Australia, Brunei Darussalam, Cambodia, China, Japan, Lao PDR, New Zealand, Singapore, Thailand, Vietnam and Korea.

53 See: Su-Lin Tan, 'Left out of the Indo-Pacific deal, China pushes toward the world's largest trade deal' (2022), available at <www.cnbc.com/2022/06/06/left-out-of-the-indo-pacific-deal-china-pushes-toward-rcep-trade-deal.html>, last accessed on 18 June 2022.

pushing to terminate China's special and differential treatment under the WTO rules. This was also evidenced by the recent MC12 negotiations regarding the TRIPS, during which the US (unsurprisingly) demanded that China be exempted from the vaccine waiver. The resulting tensions were resolved by including a footnote in the draft to recognise China's statement that it would not use the waiver as a binding commitment.[54] According to the new US Trade Representative, Katherine Tai, this deal proved that 'we can work together to make the WTO more relevant to the needs of regular people'. Nevertheless, if the US and the EU persist in trying to change the rules of the WTO game,[55] there is a risk of China learning the new rules quickly to then retaliate against the West.[56]

VI AFRICA: A NEW BIG TRADE PLAYER ON THE HORIZON

Speaking about large-scale trade deals, the African Continental Free Trade Area (AfCFTA) – the world's largest new free trade area since the establishment of the WTO in 1994 – came into force in January 2021.[57] The AfCFTA was referred to as a new 'very large elephant in the room'.[58] However, despite the enthusiasm, little progress has been made over the past year.[59] Sluggish negotiations on rules of origin and tariff schedules, concerns about the member countries' political commitment, lack of expertise at the national level as well as lack of coordination at the regional level appear to represent the main challenges to proper implementation. If these challenges are addressed, the AfCFTA is expected to lift 30 million people out of extreme poverty and significantly increase the income of 68 million people.[60]

The predictions cannot but increase the attractiveness of the AfCFTA's members as potential trade partners. While China has been strengthening its ties with the region by increasing imports of African agricultural goods and raw materials,[61] the US is considering

54 WTO, Draft Ministerial Decision on the TRIPS Agreement of 17 June 2022, WT/MIN(22)/W/15/Rev.2, available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/W15R2.pdf&Open=True, last accessed on 17 June 2022.

55 For example, by interpreting the WTO rules in 'creative' ways so as to target Chinese State-owned enterprises, as explained by Simon J. Evenett, Juhi Dion Sud and Edwin Vermulst in 'The European Union's New Move Against China: Countervailing Chinese Outward Foreign Direct Investment' (2020), 15(9) KLI BV 413.

56 Henry Gao, 'China's Changing Perspective on the WTO: From Aspiration, Assimilation to Alienation' (8 November 2021), available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3958510#:~:text=The%20paper%20argues%20that%20the,the%20core%20values%20of%20WTO>, last accessed on 18 June 2022.

57 As of June 2022, only 43 of the 54 signatories have ratified the AfCFTA and deposited their instruments of ratification of the Agreement with the AfCFTA Secretariat.

58 Webber Wentzel in alliance with Linklaters, 'AfCFTA Insights Series' (2020), p. 6, available at <www.webberwentzel.com/News/Documents/2021/africa-legal-webber-wentzel-2020-review.pdf>, last accessed on 13 June 2022.

59 UN Economic Commission for Africa (UNECA), 'The AfCFTA Country Business Index (ACBI) Report' (2022), available at <https://repository.uneca.org/bitstream/handle/10855/47595/b12003657.pdf?sequence=1&isAllowed=y>, last accessed on 13 June 2022.

60 The World Bank, 'The African Continental Free Trade Area' (2020), available at <www.worldbank.org/en/topic/trade/publication/the-african-continental-free-trade-area>, last accessed on 13 June 2022.

61 Virusha Subban, 'China's trade ties with Africa continue to strengthen' (2022), Namibia Economist, available at <https://economist.com.na/70954/special-focus/chinas-trade-ties-with-africa-continue-to-strengthen/>, last accessed on 18 June 2022.

options as to how it can promote the AfCFTA's success.[62] On its part, the EU appears slow in responding to the African policy changes.[63] Thus, overall, China seems to be ahead of the game (compared to the West) in terms of international trade relationships with the African continent. Given the AfCFTA's potential, such relationships may well be another factor capable of impacting the global economic governance in the near future.

VII LAST BUT NOT LEAST: TRADE REMEDIES

We live in the shadow of the pandemic, and many investigations continue to be conducted remotely. While this might help save some money in the short run, and reduce our carbon footprints, it also places heavy burdens on the companies being investigated by the relevant authorities. Investigations still take much longer than they used to, and the workload for respondents is not decreasing, on the contrary.

So what has changed in the trade remedies instruments (TDIs) context? The EU is carrying on with its ever-growing scrutiny of foreign subsidies, including in anti-dumping investigations. To remedy alleged distortions of the EU internal market, the Commission has been using TDIs to tackle new forms of subsidisation, for example, in the field of investment financing. Clearly, this needs to be considered in the wider context of the EU's increasingly defensive approach towards foreign trade actors. China remains the EU's main target, and the self-invented[64] methodology under Article 2(6a)(a) of the EU Basic Anti-Dumping Regulation continues to be applied unabated in anti-dumping investigations against China.[65] On its part, China has become more active in initiating both anti-dumping and anti-subsidy investigations.

The number of conducted investigations is increasing in Brazil, Turkey and India as well. In connection to this, it is interesting to note that the Indian Ministry of Finance seems to be following a peculiar trend by rejecting a significant number of recommendations by the

62 Landry Signé's testimony before the United States House Foreign Affairs Committee: Subcommittee on Africa, Global Health, and Global Human Rights. Hearing titled: 'Understanding the African Continental Free Trade Area and How the U.S. Can Promote its Success' (27 April 2022), recording available at <https://foreignaffairs.house.gov/hearings?ID=990AD3E3-C705-4156-88F1-CFA6EDD6314A>, last accessed on 18 June 2022.

63 Iza Lejarraga, 'Trading aims: The value of Africa's deep integration trade agreement' (3 May 2022), available at <https://ecfr.eu/publication/trading-aims-the-value-of-africas-deep-integration-trade-agreement/>, last accessed on 18 June 2022; and Foundation for European Progressive Studies, 'The EU-AU Trade and Development Partnership: towards a new era?' (October 2021), <https://feps-europe.eu/wp-content/uploads/downloads/publications/211103%20policy%20brief%20aueu%20relations%20on%20trade%20and%20development.pdf>, last accessed on 18 June 2022.

64 Or some would say: copied from the US.

65 Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members fo the European Union [2016] OJ L176/21, Article 2(6)(a). For a recent application of the methodology under Article 2(6)(a), see: Commission Implementing Regulation (EU) 2022/469 of 23 March 2022 correcting Implementing Regulation (EU) 2022/72 imposing definitive countervailing duties on imports of optical fibre cables originating in the People's Republic of China and amending Implementing Regulation (EU) 2021/2011 imposing a definitive anti-dumping duty on imports of optical fibre cables originating in the People's Republic of China [2022] OJ L96/36, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R0469>, last accessed on 19 June 2022.

Directorate General of Trade Remedies (DGTR) to impose anti-dumping and countervailing measures, without providing explanations as to its decisions.[66] The latest decision not to impose measures contrary to the DGTR's recommendations states that non-imposition has been decided 'considering the overall public interest'. However, except for this, the Ministry of Finance gave no further explanation for not following the DGTR's advice.[67] This, like the TRA's situation in the UK, may raise questions as to the 'strength' of the DGTR.

In the US, one of the latest developments concerns the highly debated tariffs on solar panels. As the war in Ukraine drove up energy prices worldwide, the US tariffs on solar panels received severe criticisms that, instead of punishing Chinese panel makers, they were 'crushing US companies and consumers'.[68] Therefore, President Joe Biden has recently announced the use of the Defence Production Act to promote domestic production and declared a two-year tariff exemption for solar panel products from Cambodia, Malaysia, Thailand and Vietnam. Unsurprisingly, China is not on this list. Nevertheless, the Chinese photovoltaic exporters may take advantage of this move, as they would not be responsible for tariffs eventually imposed as a result of an investigation into Chinese solar panel makers for alleged tariff circumvention.[69]

Interestingly, at the WTO level, China successfully obtained leave to retaliate up to US$645 million in annual goods, ranging from solar panels to steel wire, against the US.[70] This is the second time that China has been granted a favourable retaliation ruling at the expense of the US.[71] This may likely add to the heated *US v. China* saga in that, while China's aim is not to raise tariffs but rather to push the US to lower them, the US is still refusing to correct its practices in accordance with the WTO rulings. Yet, the latest developments concerning solar panels make us wonder whether the US' approach is hampering its trade interests instead of furthering them. Without a doubt, it will be interesting to see how the US is going to resolve the dilemma.

Finally, other interesting WTO rulings handed down over the past year include, among others: *Turkey – Pharmaceutical Products (EU)* (DS583), which, as discussed above, is currently under appeal pursuant to Article 25 DSU; and *EU – Safeguard Measures on Certain*

66 For example, the Indian Ministry of Finance rejected the Directorate General of Trade Remedies' positive recommendations regarding imports of Caprolactam, Glass Fibre, Vitamin C, Rubber Chemical PX-13 and Melamine.

67 While imposition of duties is indeed discretionary, as clarified by the Indian Supreme Court in *Designated Authority v. Andhra Petrochemicals* (2020), the exercise of this discretion cannot be arbitrary. See on this point: *Jubilant Ingrevia v. Designated Authority* (2021) CESTAT Anti-Dumping Appeal No. 50461 of 2021.

68 T.J. Rodgers 'Tariffs on China Throw Shade on the U.S. Solar Industry' (24 May 2022), *Wall Street Journal*, available at <www.wsj.com/articles/biden-solar-industry-tariff-china-philippines-climate-change-carbon-emissions-energy-prices-manufacturing-11653403852>, last accessed on 19 June 2022.

69 Global Times, 'China's PV firms eye bright prospects under US' tariff exemption for solar panels' (6 June 2022), available at <www.globaltimes.cn/page/202206/1267417.shtml>, last accessed on 19 June 2022.

70 Arbitrator Decision, DS437: US – Countervailing Measures (China), WT/DS437/ARB, adopted on 26 January 2022.

71 See: Arbitrator Decision, DS471: US – Anti-Dumping Methodologies (China), WT/DS471/ARB, adopted on 1 November 2019, which authorised China to request the DSB to suspend concessions or other obligations up to US$3,579.128 million per annum.

Steel Products (DS595). As for the future, we should keep an eye on the ongoing disputes in *China – AD/CVD on Wine (Australia)* (DS602) and *China – AD on Stainless Steel (Japan)* (DS601).

VIII SUMMARY

Referring to the past year as 'interesting and challenging' sells it short. It was impossible to highlight all noteworthy developments in trade law within this preface. Fortunately, what makes this edition of *The International Trade Law Review* particularly insightful are the comprehensive analyses provided by our loyal contributors. We are therefore evermore grateful to: Tetyana Payosova and Joanna Redelbach for the chapter on World Trade Organization; Matthew Weiniger QC and Alex Fawke for the chapter on UK Customs and Trade; Alfredo A Bisero Paratz, Anabella L Lombardo and Anny E Reyes for the chapter on Argentina; Mauro Berenholc, Renê Medrado, Carol Sayeg and Cora Mendes for the chapter on Brazil; Peter Jarosz and Philip Kariam for the chapter on Canada; Ignacio García and Andrés Sotomayor for the chapter on Chile; David Tang, Jessica Cai, Yong Zhou and Jin Wang for the chapter on China; Juan David López for the chapter on Colombia; Nicolaj Kuplewatzky and Akhil Raina for the chapter on The European Union; Shiraz Rajiv Patodia and Mayank Singhal for the chapter on India; Kunio Miyaoka, Shunsuke Imura, Ryo Kiuchi and Yu Soh for the chapter on Japan; Lim Koon Huan and Manshan Singh for the chapter on Malaysia; Saifullah Khan for the chapter on Pakistan; Apisith John Sutham, Chalermwut Nilratsirikul and Pumirad Pingkarawat for the chapter on Thailand; M Fevzi Toksoy, Ertuğrul Can Canbolat and E Kutay Çelebi for the chapter on Turkey; Matthew R Nicely, Devin S Sikes, Julia K Eppard and Brandon J Custard for the chapter on United States; and Giang Le for the chapter on Vietnam. Finally, we would like to thank Camilla Nervegna at VVGB for her most kind and invaluable assistance.

We wish all our readers much enjoyment with this latest edition of *The International Trade Law Review*.

Folkert Graafsma and Joris Cornelis
VVGB Advocaten | Avocats
Brussels, August 2022

Chapter 15

TURKEY

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

I OVERVIEW OF TRADE REMEDIES

Turkey ranks among the top World Trade Organization (WTO) members applying anti-dumping measures. Trade remedies continue to be an important policy tool for Turkey, as it is one of the WTO's main users of safeguard and anti-dumping measures. At the end of 2021, Turkey ranked third from all WTO Members in terms of the number of anti-dumping investigations initiated and anti-dumping measures imposed,[2] which mostly concerned imports of plastics and rubber, textiles and base metals. Turkey currently applies 191 anti-dumping and anti-subsidy measures (including anti-circumvention measures), and eight safeguard measures. During 2021 and the first six months of 2022, Turkey initiated seven new anti-dumping investigations, 21 expiry review investigations, two circumvention investigations and four safeguard investigations; decided on the application of six anti-dumping measures and the continuation of 22 anti-dumping measures as a result of the expiry of review investigations; and imposed 14 anti-circumvention measures. The Turkish government foresees that in 2023, there will be 24 safeguard and 31 anti-circumvention measures and that 63 anti-dumping and anti-subsidy investigations will be initiated.[3]

The Directorate General for Imports (the 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 during 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 an investigation, decide whether to accept a proposed undertaking and take appropriate action when undertakings are violated.

1 M Fevzi Toksoy is a managing partner, Ertuğrul Can Canbolat is a counsel and E Kutay Çelebi is a mid-level associate at ACTECON.

2 World Trade Organization, I-TIP Goods: Integrated analysis and retrieval of notified non-tariff measures database. Available at: https://i-tip.wto.org/goods/Forms/MemberView.aspx?data=default.

3 Republic of Turkey, the Ministry of Trade's Performance Programme for 2021, p. 40.

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.

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. 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 and 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.[4]

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[5] (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.

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

5 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.

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).

iii Anti-circumvention

Anti-circumvention is regulated by the following provisions:

a Article 11 of Decree No. 99/13482 on the Prevention of Unfair Competition in Imports; and
b Articles 4(4)(j) and 38 of Regulation No. 23861 on the Prevention of Unfair Competition in Imports.

iv Surveillance

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

a Decree No. 25476 on Safeguard Measures for Imports; and
b Regulation No. 25486 on Safeguard Measures for Imports.

Surveillance is an instrument by which import trends, import conditions and the effect of imports on the domestic industry may be observed. If the Ministry decides to implement a surveillance, every country will be subject to the measure. This allows the Ministry to monitor and have a better outlook on future imports from the subject countries. In other words, surveillance provides advance warning of the types of products and the number of products that a company plans to export to Turkey from those countries. The companies that do not have the required surveillance documents may be obliged to pay the relevant duties and taxes by considering the respective reference price.

III TREATY FRAMEWORK

The conclusion of free trade agreements (FTAs) is part of Turkey's willingness to conduct a growth policy based on exports 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 South Korea differing 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.

Considering 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. 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 like 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 about the substantial or procedural rules already applicable to trade defence cases.

The European Commission underlined in its 2021 Country Report for Turkey that although Turkey is generally aligned with the terms of the EU regarding FTAs it has entered into with third countries, it has continued to implement its FTA with Malaysia even though the EU has not yet concluded a similar agreement with Malaysia. It also continued the process of concluding an agreement with Venezuela.[7]

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

6 The agreement entered into force on 1 April 1992.

7 See Turkey 2021 Report, SWD (2021) 290 final/2, 19 October 2021, p. 114.

Most recently, in February 2022 after almost 15 years of negotiations Turkey signed an FTA with Ukraine, aiming to improve the bilateral trade to US$10 million between the two countries by establishing a trade bridge in the Black Sea. That said, the FTA has not entered into force, thus the text of the FTA is not publicly available yet.

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.

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 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.

Additionally, on 22 October 2020, Article 9 of Decree No. 99/13482 on the Prevention of Unfair Competition in Imports was amended to provide that, in cases where anti-dumping measures are applied on the importation of a product that is also subject to safeguard measures, the Ministry may decide to partially or fully suspend the concerned anti-dumping measure or modify its type for the duration of the application of the safeguard measure.

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 investigation,[10] 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

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.

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

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 investigation,[11] the China Ceramics Industrial Association argued that the normal value must be calculated based on actual costs and sales data of each exporter. The Ministry, however, indicated that the exporters included in the sampling applied for the non-market economy (NME) treatment and provided their data accordingly (i.e., without any costs or domestic sales information). In this regard, the Ministry stipulated that no provision in Turkish law recognises China as a market economy. Nevertheless, Additional Article 1 of Regulation No. 23861 on the Prevention of Unfair Competition in Imports provides that exporters and producers located in NMEs can request the provision applicable as regards market economies be applied to the determination of the normal value in their case; to this end, they must 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 investigation[12] without providing grounds for the refusal. However, in the *Welded stainless-steel tubes, pipes and profiles* investigation, the Ministry found that Vietnamese laws on land, price formation and energy prices, and the state's intervention in steel production, prevented the market economy conditions from prevailing.[13]

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. The Ministry developed a consistent practice of closing investigations upon withdrawal of the complaint and pursued this practice in a considerable number of investigations. The Ministry, however, reversed this practice in its *Porcelain* investigation, 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 regarding the *Porcelain* investigation, 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[14] carried out concerning imports of terephthalic acid originating in South Korea, Spain and Belgium, the expiry review investigation[15] initiated into the imports of uncoloured float glass originating in Israel,

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

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

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

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

15 See Communiqué No. 2021/16 on the Prevention of Unfair Competition in Imports, published on 7 April 2021.

the anti-dumping and anti-subsidy investigations[16] into imports of acrylic and modacrylic products originating in China, South Korea, Thailand and Germany and the anti-dumping investigation[17] conducted into imports of low density polyethylene originating in Saudi Arabia, were all terminated following the withdrawal of the complaints.

iii Absence of on-the-spot verification

The Ministry may conduct verification visits at the premises of the domestic producers and exporters. These visits enable the Ministry to examine the records, to verify the information provided and to comprehensively analyse the interested parties' accurate economic indicators. It is undisputed that on-the-spot verifications are critical in trade defence investigations and are necessary for the Ministry to base its determinations on positive evidence and to conduct an objective examination of the facts. These visits are particularly crucial in the context of expiry reviews, as the Ministry may confine its assessment to the injury analysis (i.e., based on domestic industry data). As a result of covid-19 measures, since the beginning of March 2020, the Ministry has been conducting verification visits and holding public hearings online. For instance, in *Yarn of man-made or synthetic or artificial staple fibres* anti-circumvention investigation, in response to an interested party's criticism regarding the absence of on-the-spot verifications, the Ministry stated that covid-19 measures prevented it from conducting on-the-spot verification, and in any event, it is not under any obligation to conduct such visits.[18] With the relaxation of such measures, the Ministry has again started to show an inclination towards conducting the on-the spot-verifications rather than online, and planning on-the-spot verifications at the premises of domestic producers and foreign exporters/producers.

iv Application of 5 per cent test and construction of export price

The Ministry has provided a clarification and interpretation regarding the imposition of anti-dumping duties and calculation of sales prices, respectively, in *Dental fittings*.[19] Normally, if the sales of like products constitute 5 per cent or more of their sales to Turkey based on the quantity, the normal value is determined based on the domestic sales accepted within the framework of in the ordinary course of trade, otherwise based on the constructed normal value. However, in favour of exporting companies, the Ministry found the 5 per cent test too high for each subproduct type and applied 1 per cent, since the product types in the concerned investigation had many subtypes and similar subtypes with close costs and sales prices. Moreover, in determination of export prices, an interested party requested that the Ministry use the constructed values calculated from the sales prices of the importer firm in Turkey, rather than its own export prices. Considering that the constructed export price is

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

17 See Communiqué No. 2022/11 on the Prevention of Unfair Competition in Imports, published on 26 March 2022.

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

19 See Communiqué No. 2022/12 on the Prevention of Unfair Competition in Imports, published on 14 April 2022.

defined as an exceptional method and that investigating authorities can apply is only under certain conditions, the Ministry decided not to apply this method; it was deemed appropriate to use the export price of the exporter company.

v Use of sampling in dumping investigations

Both the Anti-Dumping Agreement and the Regulation entitle the Ministry to employ sampling in cases where the number of exporters and product types are so large as to make individual margin calculation impracticable and prevent the conclusion of the investigation within due time. In those cases, the Ministry does not calculate dumping margins for non-sampled interested parties, and weighted average of sampled companies' dumping margin is accepted as dumping margin of non-sampled companies. The Ministry generally dismisses non-sampled exporters' request for calculation of individual margin on the ground that the number of exporters/producers are so large that it would be unduly burdensome and prevent the timely completion of the investigations. In recent dumping investigations, namely *Dental fittings*[20] and *Hot-rolled flat steel*, the Ministry employed sampling methodology.

vii Product scope and injury period in the Hot-rolled steel case

The dumping investigation concerning the imports certain hot-rolled steel products originating in the European Union and South Korea,[21] which was concluded on 7 July 2022, is also worth mentioning because of its significant number of cooperating companies and associations.

According to the information report attached to the closing communiqué, it has been decided that: (1) sheet metal rolled in plate rolling mills classified under the CN Codes 7208.52.99 and 7225.40.90; (2) CN Codes 722530.10, 7225.30.30, 7225.40.15 and 7226.91.20, which include high speed steel and tool steel products; (3) CN Codes 720837.00.90.12, 720838.00.90.12 and 720839.00.90.12, under which steels containing 0.006 per cent or less carbon (IF steel) are classified; and (4) IF steels classified under CN Code 7225.30.90 are excluded from the scope.

Additionally, the investigation period for the dumping determination has been accepted as 1 October 2019 to 30 September 2020, while the injury determination period has been determined as 1 January 2018 to 30 September 2020. Some of the interested parties have opposed to the investigation period and injury investigation period; and they have claimed that: (1) the relevant WTO Committee has a recommendation letter stating that the injury investigation period shall not be less than three years; (2) the last quarter of 2019 has been included twice in the analysis; and (3) this creates an inconsistency. In response to certain interested parties' above comments, the Ministry highlighted that the injury period and investigation period are determined by considering the alleged dumping the periods of the injury thereof, as well as the timing of the application, application examination and investigation initiation stages. Within this scope, the Ministry asserted that the examination of the injury, which allegedly took effect after 2018, has been made from 2018; due to the

20 See Communiqué No. 2022/12 on the Prevention of Unfair Competition in Imports, published on 14 April 2022.

21 See Communiqué No. 2022/21 on the Prevention of Unfair Competition in Imports, published on 7 June 2022.

timing of the investigation initiation stage, the examination period has been determined according to the most current data on a quarterly basis and in a way to ensure that the same number of periods has been taken as the basis.

vi 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 most of the exports to Turkey are made by a single company or there is a large number of cooperating exporters or producers in the subject country.

Accordingly, in the *Dioctyl phthalate* anti-dumping investigation, in which the cooperating exporter claimed that its own data were used,[22] 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 investigation, in which the Ministry found that the exports of the cooperating company located in Germany made up a significant part of the exports from Germany to Turkey, and therefore considered the Turkish Statistical Institute's country-specific data.[23] The following investigations are worth mentioning in this respect:

a *Kraft liner* anti-dumping investigation: 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 investigation: 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 investigation: the Ministry performed its price undercutting analysis based on the data provided by the only cooperating company from Italy.[24]

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

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

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

d *Yarn of man made or synthetic or artificial staple fibres* dumping investigation: the Ministry evaluated import trends on both company-specific and country-specific data while calculated price effects were based on the data provided by two exporter/producer companies located in Indonesia.[25]

e *Hot-rolled flat steel*: the Ministry calculated price undercutting and price depression caused by the imports from the EU and South Korea on the basis of the CIF import prices of ArcelorMittal, Tata Steel, POSCO and Hyundai Steel.

Conclusion of dumping investigations with no injury/dumping determinations

Within the scope of the injury determination, the Ministry holistically examines all relevant economic factors and indices that have a bearing on the state of the industry, such as actual and potential decline in sales, profits, output, market share, productivity, return on investments, utilisation of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual or potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments.

There have only been three cases recently where the Ministry decided not to impose any anti-dumping duties on the grounds that there is no injury and/or dumping.

In *Glass fibre reinforcement materials (Egypt)*,[26] although it was seen that the imports of the concerned products originating in Egypt caused price undercutting and price depression, the Ministry observed that there was neither dumping nor injury. Specifically, the Ministry emphasised that the holistic evaluation of the economic indicators of the domestic industry did not indicate any material injury or threat thereof and thus, concluded the investigation without imposing any anti-dumping duties.

In *Baby food with cereals*,[27] although the Ministry calculated a dumping margin of 36.82 per cent with negligible price effects (no price undercutting and price depression of zero to 5 per cent) the investigation was concluded without imposition of any duties. After evaluating the domestic industry's economic indicators, the Ministry observed that the domestic industry neither did face material injury nor is under the threat thereof since its profitability, export sales, stock circulation rate and return of investments increased significantly. The investigation was concluded without imposition of any duties.

In *Digital printing films*,[28] the Ministry observed that there were no price effects caused by the concerned imports since: (1) they were realised with unit prices that were 2 to 6 per cent higher than the prices of the complainant; and (2) the complainant reported high profitability during the period of investigation. When examining the complainant's economic indicators, it was seen that although there has been a decrease in production of the complainant, this was mainly caused by the decrease in export sales. Moreover, it was seen that the complainant's end-of-period stocks decreased, stock circulation rate increased and in line with the growth in profitability, cash flow and returns in investments have increased

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

26 See Communiqué No. 2018/31 on the Prevention of Unfair Competition in Imports, published on 26 September 2018.

27 See Communiqué No. 2021/45 on the Prevention of Unfair Competition in Imports, published on 12 October 2021.

28 See Communiqué No. 2022/18 on the Prevention of Unfair Competition in Imports, published on 10 June 2021.

significantly. As a result, the Ministry observed that there was neither material injury nor threat of material injury faced by the complainant and decided to terminate the investigation without imposing any anti-dumping duties.

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 measures 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 investigation, in which neither price undercutting nor price suppression was established for the imports from South 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 *Sodium percarbonates*, 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 that the Ministry consider the differences in the production processes (i.e., energy efficiencies) in the calculation of price undercutting and price depression. However, the Ministry rejected this request because 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*,[29] *Plastic baby products*,[30] *Dental fittings*,[31] *Welded stainless steel tubes*[32] and *Diesel or semi-diesel engines*[33] anti-dumping investigations through the application of the lesser duty rule and imposed duties at rates lower than the calculated dumping margins. In *Hot-rolled flat steel*, although the Ministry calculated significant dumping margins (ranging from 39.65 per cent to 49.7 per cent for the imports from the EU and 14.08 per cent to 18.59 per cent for the imports from South Korea), in line with the public interest principle and the lesser duty rule, the Ministry imposed anti-dumping duties varying from 7 per cent to 12.8 per cent.

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

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

31 See Communiqué No. 2022/12 on the Prevention of Unfair Competition in Imports, published on 14 April 2022.

32 See Communiqué No. 2021/38 on the Prevention of Unfair Competition in Imports, published on 10 July 2021.

33 See Communiqué No. 2021/52 on the Prevention of Unfair Competition in Imports, published on 15 January 2022.

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* investigation,[34] in contrast to its usual practice, the Ministry set, with regard to 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* investigation, 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* investigation 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 investigation,[35] 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.

vii Currency fluctuation

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

In the *Blankets* investigation, in which the domestic industry has been found to have suffered injury, the Ministry concluded that the deterioration of the domestic industry's

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

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

situation was not caused by imports from China, but rather was linked to macroeconomic circumstances, such as currency fluctuations.[36] On the other hand, in the *Polyester FDY*,[37] and *Synthetic filament yarns*[38] expiry review investigations, the Ministry found that currency fluctuations would not break the causal link between the dumped imports and the likelihood of continuation or recurrence of dumping in the absence of measures.

Additionally, in *Baby food with cereals*, it has been highlighted by the Ministry that the absence of price undercutting was due to the depreciation of the Turkish lira, which in turn caused imported products to be more expensive than the local products sold in the domestic market.

Similarly, in *Dental fittings*, the Ministry observed that the reason for minor price undercutting (zero to 5 per cent price undercutting) was that the prices of imported products in foreign currency remained high compared to domestic products sold in Turkish lira due to the exchange rate increases in recent years.

viii 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* investigation, 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, since, 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.

ix Substantial transformation in anti-circumvention investigations

Anti-circumvention investigations revolve around whether 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 *Polyester partially oriented yarn*, 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

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

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

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

transformation.[39] In the *Woven fabrics of synthetic and artificial staple fibres* investigation, 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.[40] Furthermore, in the *Staple fibres*[41] and *Chopped strands*[42] anti-circumvention investigations the Ministry observed that the created added values through certain processes did not exceed 30 per cent and thus decided that the substantial transformation requirement was not satisfied.

x Suspension of definitive anti-dumping measures

Article 9 of Decree No. 99/13482 on the Prevention of Unfair Competition in Imports (Decree No. 99/13482) 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* investigation, 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.[43] On 6 March 2020, the suspension was extended for one year.[44]

In accordance with the recent amendment made in the Decree, the Ministry has partially suspended the definitive anti-dumping measures concerning the imports of polyester staple fibres originating in China, Taiwan, Indonesia, Korea, India and Thailand.[45] It can be said that with this decision the Ministry's aim was to avoid double counting, which can occur as a result of imposition of anti-dumping and safeguard measures to the same product simultaneously. By partially suspending the applicable anti-dumping measure while the safeguard measure is in effect, the Ministry is ensuring that no additional measures, other than deemed necessary, will be imposed on the product.

xi Calculation of dumping margins in expiry reviews

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

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

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

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

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

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

44 See Communique No. 2020/5 on the Prevention of Unfair Competition in Imports, published on 6 March 2020.

45 See Communiqué No. 2021/44 on the Prevention of Unfair Competition in Imports, published on 8 September 2021.

In its *Polyester staple fibre*[46] and *Baby food with cereals*[47] expiry review investigations, 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 investigation,[48] 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 based on the prices on the website 'Alibaba.com'.

In the *Instantaneous gas water heaters* expiry review investigation,[49] 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*,[50] *Food grinders and mixers*,[51] *Padlocks*,[52] *Finished/semi-finished artificial leathers*,[53] *Welding machines*,[54] *Vulcanised rubber thread and cord*,[55] *Fancoil*[56] and *Sodium Formate*[57] expiry review investigations, the Ministry also calculated a new dumping margin in the absence of any cooperating company based on data relating to Turkish domestic costs. It should be noted, however, that the Ministry has not abandoned its general approach where it considers that dumping margins calculated in original investigations as the indicator of exporters' and producers' behaviour in the absence of anti-dumping measures.

VI TRADE DISPUTES

Although the relevant parties may appeal to request the annulment or the suspension of the execution of the Ministry's decisions, these are seldom challenged in court. In the rare cases where the Ministry's decision is called into question, the competent court regularly

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

47 See Communiqué No. 2021/45 on the Prevention of Unfair Competition in Imports, published on 12 October 2021.

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

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

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

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

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

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

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

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

56 See Communiqué No. 2022/1 on the Prevention of Unfair Competition in Imports, published on 2 February 2022.

57 See Communiqué No. 2022/2 on the Prevention of Unfair Competition in Imports, published on 2 February 2022.

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 106 cases as third party.

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

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, apart from Australia, Argentina, Brazil, Canada, the EU, South 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 has not published its decision yet.

In DS595: *European Union – Safeguard Measures on Certain Steel Products*, Turkey asserted that the concerned measures, as well as the investigation process, were inconsistent with the WTO rules in the GATT 1994 and the Agreement on Safeguards. More specifically, Turkey put forward that the EU had failed to make reasoned and adequate findings with respect to its determinations relating to: (1) like products; (2) the unforeseen developments and how those unforeseen developments resulted in increased imports; (3) the products concerned threatening to cause serious injury to domestic producers; (4) the increase in imports of the products concerned, in absolute or relative terms; (5) the existence of a threat of serious injury to the domestic industry; and (6) finding of a causal link between the increase in imports and the threat of serious injury to the domestic industry. While both the EU and Turkey claim victory over the concerned Panel report, it should be noted that the Panel found that the concerned definitive safeguards were only inconsistent with respect to the EU's failure: (1) to establish that the increase in imports had taken place 'as a result of' the unforeseen developments; (2) to identify in its published reports the obligations whose effect resulted in the increase in imports; and (3) to base its finding of serious injury on facts as required by the Agreement on Safeguards. As a result, the Panel recommended the EU to bring its measures into conformity with its obligations on 29 April 2022.

In DS583: *Turkey – Pharmaceutical Products (EU)*, which was initiated on 2 April 2019 upon the complaint of the EU, the EU claimed that various Turkish measures concerning the production, importation and marketing of pharmaceutical products amounted to: (1) localisation requirements; (2) technology transfer requirements; (3) an import ban on localised products; and (4) prioritisation measures. Accordingly, the EU asserted that the concerned measures were inconsistent with various provisions of the GATT 1994, the Agreement on Trade-Related Investment Measures, Agreement on Subsidies and Countervailing Measures and the Agreement on Trade-Related Aspects of Intellectual Property Rights. In its report, the Panel upheld the EU's arguments and recommended Turkey to bring its measures into conformity with its obligations under the GATT 1994. On 28 April 2022, Turkey decided to appeal the Panel report before the arbitrator in accordance with the Agreed Procedures for Arbitration reached between the EU and Turkey.

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.

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

Additionally, on 16 July 2021, Turkey took its first concrete step to implement the Green Deal. According to the Presidential Decree, the 'Action Plan for the Green Deal' was published by the Ministry of Trade to contribute to Turkey's transition to a sustainable and green economy and to ensure that Turkey adapts to the changes envisaged by the European Green Deal in a way that will preserve and further the integration provided within the scope of the Turkey–EU Customs Union. The Presidential Decree highlights the envisaged transformation in international trade and the economy, Turkey's 2023 development goals and the importance of maintaining and improving Turkey's competitiveness in its exports in terms of strengthening its integration into the global economy and supply chains with the advanced economic integration established by the Turkey–EU Customs Union. Turkey's Green Deal Action Plan consists of a total of 32 objectives and 81 actions under nine main headings: (1) carbon border adjustments; (2) green and circular economy; (3) green finance; (4) clean, affordable and secure energy supply; (5) sustainable agriculture; (6) sustainable smart mobility; (7) combatting climate change; (8) green diplomacy; and (9) information and awareness-raising activities.

Lastly, in line with the Turkish Green Deal Action Plan, Turkey is currently considering an appropriate carbon pricing mechanism as well as evaluating support mechanisms

for increasing costs on Turkish producers and exporters (i.e., 'Turkish sectors'). Enabling the recognition of monitoring systems for greenhouse gas emissions and certification in accordance with the EU's methodology is also on the agenda. In addition, the Ministry of Trade aims to evaluate the impact of the EU's carbon border adjustment mechanism on Turkish sectors and to determine the roadmaps and activities to support and incentivise the reduction of greenhouse gas emissions in energy-intensive sectors.

Appendix 1

ABOUT THE AUTHORS

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Dr M Fevzi Toksoy is an EU law specialist and an economist with master's degrees from Istanbul and Brussels (ULB) on EU law and economics and a PhD in EU competition law. Dr Toksoy focuses on EU and Turkish competition law and international trade remedies. He is the founding partner of ACTECON and offers solutions to customers in competition investigations, merger clearances and preventive competition compliance programmes.
After 1997, when the Turkish Competition Authority became active, he focused on EU and Turkish competition law and advised clients in the majority of the investigations conducted by that authority. He also prepared many successful merger notifications, negative clearance and exemption applications in a variety of industries.

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

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

He serves as an expert member of the Competition Law and WTO Committees of the Turkish Businessmen and Industrialists' Association. He is an associate member of the American Bar Association and a member of the antitrust and M&A committees and national reporter of the International Antitrust Committee. He is a non-government agent of the Turkish Competition Authority to the International Competition Network.

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

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

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

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

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

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

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ISBN 978-1-80449-102-7