The International Trade Law Review: Turkey

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ACTECON
25 August 2022

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.

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*.

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.

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.

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.

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.

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.

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 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, 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 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 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]
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 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.

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 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 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.

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.

Trade disputes

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

As regards Turkey's situation at the WTO, it has been involved in six cases as complainant, 12 cases as respondent and 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.

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.

Footnotes

[1] M Fevzi Toksoy is a managing partner, Ertugrul 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.

[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.

[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.

[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.

[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.

[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.

[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.

[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.

[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.

[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.

[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.

[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.

[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.

[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.

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