

TURKEY AS A WTO LITIGANT: A CASE OF WAIVED LEVERAGE AND MISMATCHED POLICY ENDS AND MEANS

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ABSTRACT

This Article analyzes Turkey’s involvement in the World Trade Organization’s (“WTO”) dispute settlement system to determine whether litigation has helped or could help Turkey attain its trade policy objectives. After identifying these objectives and conducting an empirical analysis of Turkey’s participation in 113 disputes—as Complainant, Respondent and interested Third Party—we conclude that litigation has not played a significant role in advancing Turkey’s trade objectives. Next, we ascertain the extent to which litigation’s de minimis impact stems from: (i) limitations inherent to WTO litigation (e.g., prospective-only remedies, bilateral focus, etc.); and/or from (ii) Turkey’s diminished ability to sue its biggest trade partners and competitors, some of which remain non-WTO Members or are in the European Union, Turkey’s senior customs union partner. The Article concludes with a call for Turkey to embark on a renewed push for further trade liberalization, which will require reforming the current EU-Turkey trade framework. (JEL: F13, F53, K41).

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I. INTRODUCTION

Turkey is an upper-middle-income country with a mostly young population exceeding eighty-one million.¹ Geographically unique, Turkey serves as a “bridge” between the East and West and has a dynamic, diversified, and open economy, with a large private sector. The seventeenth largest economy in the world with a GDP of \$851 billion (2017),² Turkey faces challenges common to sizeable middle-income countries, like Brazil, Mexico, and Russia—where social and economic conditions lag behind more advanced economies. Yet, unlike these countries, Turkey experiences high perennial trade and current account deficits.³

When a country runs current account deficits, it must find external sources of financing, such as borrowing, greater foreign direct investment, and short-term capital inflows.⁴ Turkey has experienced current account deficits for decades, but has managed (mostly) to find external sources to finance them.⁵ However, reducing the trade deficit—the main item in Turkey’s current account deficit—has always been a

1. See IMF, *Turkey: 2017 Article IV Consultation—Press Release; Staff Report; and Statement by the Executive Director for Turkey*, IMF Staff Country Report 17/23, 1 (Feb. 2017).

2. See Press Release, Turkish Statistical Institute, Quarterly Gross Domestic Product, Quarter IV: October–December 2017, Press Release No: 27825 (Mar. 29, 2018), <http://www.turkstat.gov.tr/PreHaberBultenleri.do?id=27825>; THE WORLD BANK IN TURKEY COUNTRY SNAPSHOT, AN OVERVIEW OF THE WORLD BANK’S WORK IN TURKEY, WBG (Oct. 2018), <http://pubdocs.worldbank.org/en/468111539181217578/Turkey-Snapshot-Fall2018.pdf>.

3. Generally, a country’s “current account” captures the balance of trade-transaction income (e.g., income from exports and imports of goods and services), property income (e.g., payments or receipts of royalties and other rents), and gifts, received or remitted. Because, historically, Turkey has run trade deficits that exceeded net property income and gifts (despite substantial expatriate remittances from abroad), Turkey has also run perennial current account deficits. For further discussion on balance of payments see RAJ BHALA, *DICTIONARY OF INTERNATIONAL TRADE LAW* 90–92 (2d ed. 2012).

4. See Atish Ghosh & Uma Ramakrishnan, *Current Account Deficits: Is There a Problem?*, IMF FIN. & DEV. (Dec. 18, 2018), <https://www.imf.org/external/pubs/ft/fandd/basics/current.htm>.

5. See CURRENT ACCOUNT BALANCE (% OF GDP) - TURKEY, WBG, <http://data.worldbank.org/indicator/BN.CAB.XOKA.GD.ZS?end=2016&locations=TR&start=1974&view=chart> (last visited Aug. 12, 2019).

difficult challenge. In fact, Turkey's trade deficit in goods has gone uninterrupted since 1946.⁶ The export-import ratio has fluctuated between .521 and .757 in the last two decades.⁷ This ratio was .753 in 2018.⁸ Yet, as trade has expanded since Turkey's last major crisis (2001), its trade deficit has increased and, thus, its current account deficit.

To reduce both trade and current account deficits, Turkey has set two major trade policy goals: (i) reducing import dependency; and (ii) expanding exports while diversifying its portfolio of export destinations.⁹ Despite conspicuous state involvement in managing imports (for example, imposition of import licensing requirements, application of antidumping remedies, etc.)¹⁰ and in promoting exports (for example, granting small export credits via EximBank, bestowal of agricultural export subsidies),¹¹ Turkey has only rarely been the target in WTO dispute settlement proceedings.¹²

This Article offers a thorough analysis of Turkey's involvement in the entire range of WTO litigation—as Complainant, Respondent, or interested Third Party—and explains why WTO adjudication was neither designed for nor could be effective in helping Turkey address its perennial trade challenges. Some major clues lie in Turkey's neighborhood profile and restricted trade autonomy, both of which significantly curtail the benefits of litigation, particularly, as a trade policy tool for Turkey. Section II briefly examines the operation of the WTO dispute settlement system. Section III lays out the study's methodology and briefly summarizes Turkey's litigation performance, and Section IV examines whether WTO litigation has helped Turkey address its trade policy objectives. Because Section IV concludes that this has not been the case, Section V analyzes the extent to which such de minimis impact

6. See TURKISH STATISTICAL INSTITUTE, FOREIGN TRADE STATISTICS, TOTAL IMPORT AND EXPORT [hereinafter *TSI-FOREIGN TRADE BY YEAR*], http://www.turkstat.gov.tr/PreIstatistikTablo.do?istab_id=621 (last visited Aug. 24, 2020).

7. See *id.*

8. See *id.*

9. See Onuncu Kalkınma Planinin (2014-2018) Onaylandığına İlişkin Karar, 66-68, 75-76, 99-101, 174-175 R.G.: 02.07.2013 Savi: 1041, translated in SBB.GOV.TR, http://www.sbb.gov.tr/wp-content/uploads/2018/11/The_Tenth_Development_Plan_2014-2018.pdf (last visited Sept. 9, 2020); see also Onbirinci Kalkınma Planinin (2019-2023) Onaylandığına İlişkin Karar 29, 30, 32, 37-40 R.G. 18.07.2019 Savi: 1225.

10. See WTO Secretariat, *Trade Policy Review of Turkey*, WT/TPR/S/331 11, 66-70 (Feb. 9, 2016) [hereinafter Turkey TPR 2016].

11. See *id.* at 87-89, 126-40.

12. See MEMBER INFORMATION: TURKEY AND THE WTO, WTO, https://www.wto.org/english/thewto_e/countries_e/turkey_e.htm (last visited Aug. 24, 2020).

stems from: (i) limitations related to litigation itself (e.g., remedial nature, bilateral reach, etc.); and/or from (ii) Turkey's diminished ability to sue its neighbors (most of which are non-WTO members) and the European Union (Turkey's senior customs union partner). The Article concludes with a call for Turkey to embark on a renewed push for further trade liberalization, which will require reforming the current EU-Turkey trade framework.

II. THE WORLD TRADE ORGANIZATION DISPUTE SETTLEMENT SYSTEM

Among the WTO's major achievements is the establishment of a rules-based trade order with an accompanying dispute settlement system, the Dispute Settlement Body ("DSB"), a mechanism designed to further "multilateral trade cooperation," and, when necessary, provide a forum for litigation.¹³ Members are expected to comply with the WTO agreements.¹⁴ If a Member acts inconsistently with its WTO commitments, another Member whose "benefit . . . is being nullified or impaired" by such inconsistency can use the DSB to seek redress.¹⁵ The DSB is specifically regulated under the Dispute Settlement Understanding ("DSU"),¹⁶ a compendium of rules that, among other things, authorizes the DSB to "administer [all] rules and procedures" applicable to all Members.¹⁷ DSU Article 2 provides that the DSB has "the authority to establish panels, adopt panel or Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions . . ." in cases of non-compliance.¹⁸ Therefore, despite the fact that only Members can adopt binding interpretations,¹⁹ the DSB exercises de facto supreme authority over decisions that bind WTO Members.²⁰

13. Some commentators have referred to the GATT as the "constitution" of the WTO. See JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 135–158 (2005).

14. See Dani Rodrik, Commentary, *Rethinking the World Economy*, STANFORD.EDU 3, 7 (Mar. 2001), <http://web.stanford.edu/class/polisci243c/readings/v0002088.pdf> (last visited Aug. 12, 2019).

15. General Agreement on Tariffs and Trade 1994 art. XXIII, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 [hereinafter *GATT 1994*].

16. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter *DSU*].

17. *Id.* art. 2.

18. *Id.* art. 2.1.

19. See Marrakesh Agreement Establishing the World Trade Organization art. II, Apr. 15, 1994, 1867 U.N.T.S. 154.

20. See Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT'L L. REV. 845, 936–56 (1999).

Dispute settlement under the DSB may involve four major phases.²¹ First, an “aggrieved Member” may request consultations.²² The Member to whom a request for consultations is made shall respond within ten days and shall enter into such consultations *in good faith*.²³ Should such a Member fail to respond “within 10 days”, fail to enter consultations within thirty days, or should both parties “fail to settle the dispute within 60 days,” the Member who requested the holding of consultations may request the DSB to form a panel.²⁴

Second, pursuant to a Complainant’s request, the DSB establishes a panel.²⁵ Members with a “substantial interest” in a given dispute may request to participate as Third Parties, and the DSB invariably accommodates such requests.²⁶ Panels are expected to rule on the dispute and submit final reports within six months, yet the time for deliberations may be extended, as necessary.²⁷ Once submitted, the panel report shall be adopted by the DSB within sixty days, unless the losing Member (Respondent or Complainant) decides to appeal the report, or all Members, by consensus, agree not to adopt it.²⁸

Third, should there be an appeal, the Appellate Body (“AB”),²⁹ whose decision is final, “may uphold, modify or reverse the legal findings and conclusions of the panel.”³⁰ As with un-appealed panel reports, AB reports “shall be unconditionally accepted by the parties” and shall be adopted by the DSB, unless all Members decide, by consensus, not to adopt them.³¹

21. See JOHN H. JACKSON, WILLIAM J. DAVEY & ALAN O. SYKES, JR., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS CASES, MATERIALS AND TEXT* 286 (6th ed. 2013).

22. *GATT 1994*, *supra* note 15, art. XXII.

23. See *DSU*, *supra* note 16, art. 4.3.

24. See *id.*, arts. 4.3–4.7. Note that the time period might differ in case of urgency (e.g., perishable goods). See *DSU*, *supra* note 16, arts. 4.8, 4.9.

25. See *id.*, art. 6.1. Panel members are elected by their qualities among international trade scholars, former senior trade policy officers, etc. See *DSU*, *supra* note 16, art. 8.1.

26. *Id.*, art. 10.2.

27. *Id.*, arts. 12.8, 12.9.

28. *Id.*, art. 16.4.

29. The Appellate Body is a standing body composed of 7 members nominated for potential, once-renewable four-year terms. See *id.*, arts. 17.1, 17.2.

30. *Id.*, art. 17.13.

31. *Id.*, art. 17.14. That the Appellate Body ceased operations in December 2019 does not mean dispute settlement work has stopped at the WTO. Panels can still be formed and function, as before. Though important, this development might be seized as an opportunity for regional dispute settlement systems to take on a greater role in trade adjudication going forward.

Fourth, and finally, any eventual losing Respondent is required to implement final panel or AB recommendations. Ordinarily, the losing Respondent must comply with the recommendations of the panel or AB report within a reasonable time.³² In cases where immediate withdrawal of Respondent's inconsistent measure is impracticable, that Member is expected to provide compensation to the successful Complainant.³³ Should such Member fail to comply with the recommendations in a timely fashion or provide compensation, the Complainant may request consultations to reach a mutually agreed compensation.³⁴ If the parties fail to agree on a mutually acceptable compensation or disagree on whether the violating Respondent has complied, the Complainant may request authorization to suspend concessions against the non-compliant, recalcitrant Respondent.³⁵ As of August, 2019, WTO Members had resorted to the DSB 586 times.³⁶ Turkey was involved in 113 disputes.³⁷ The following section provides a review of Turkey's litigation performance under the DSB.

III. TURKEY'S LITIGATION PERFORMANCE AT THE WTO

Before summarizing Turkey's litigation performance, subsection A provides a note on this Article's data and methodology. The nonempirically inclined reader may skip to subsection B.

A. Data and Methods

WTO website data show that, since DSB began operations in 1995, Turkey has been involved in five cases as Complainant, twelve cases as Respondent, and ninety-five cases as Third Party, totaling 112 cases or over nineteen percent of all disputes.³⁸ However, WTO data fails to account for one case: *United States—Measures Concerning the Importation,*

32. *See id.*, art. 21.3.

33. *See id.*, art. 3.7.

34. *See id.*, art. 22.1.

35. *See id.*, art. 22.2.

36. *See* CHRONOLOGICAL LIST OF DISPUTES CASES, WTO, https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Aug. 24, 2020). The data is current as of August 7, 2019, and the most current case at the WTO DSB could be found at *United States—Anti-Dumping Measures on Carbon-Quality Steel from Russia*, WTO Doc. WT/DS258 (Aug. 12, 2019), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds586_e.htm.

37. *See* MEMBER INFORMATION: TURKEY AND THE WTO, WTO, https://www.wto.org/english/thewto_e/countries_e/turkey_e.htm (last visited Aug. 24, 2020). The data is current as of August 2019.

38. *See id.* The data is current as of August 2019.

Marketing and Sale of Tuna and Tuna Products.³⁹ Turkey participated in the *US–Tuna* panel proceedings but decided to withdraw its Third-Party appearance at the appellate stage.⁴⁰ Thus, Turkey was a Third-Party litigant ninety-six times, and was involved in a total of 113 disputes.

Although nominally involved in 113 cases, some of these are double counted. Pursuant to DSB Article 9.1, “more than one Member [may] request[] the establishment of a panel . . . [on] the same matter,” and the DSB may form a single panel for more than one request.⁴¹ To illustrate, in 1996, Hong Kong, China, India, and Thailand separately requested consultations with Turkey on the same subject matter, namely Turkey’s restrictions on imports of textiles and clothing.⁴² However, Hong Kong, China, and Thailand decided to participate as Third Parties in the dispute initiated by India.⁴³ Although the WTO database reports Hong Kong’s, China’s, and Thailand’s filings as still “in consultations,” the claims raised in the India-prosecuted case—a dispute in which these three countries appeared as Third Parties—are substantially the same and were adjudicated in that case, making their original filings, effectively, data aberrations. In another example, the European Union, Japan, South Korea, China, Switzerland, Norway, New Zealand, and Brazil requested the establishment of a panel regarding U.S. safeguard measures on imports of certain steel products in 2002.⁴⁴ Turkey also reserved its third-party rights in all (eight) disputes

39. Appellate Body Report, *United States–Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc. WT/DS381/AB/R (adopted May 16, 2012) [hereinafter *US–Tuna*].

40. *See id.*, ¶ 7.

41. *See DSU*, *supra* note 16, art. 9.1. For a detailed discussion on combining disputes into a single panel, see EUN SUP LEE, *WORLD TRADE REGULATION: INTERNATIONAL TRADE UNDER THE WTO MECHANISM* 320–21 (2012).

42. *See, e.g., Turkey–Restrictions on Imports of Textile and Clothing Products*, WTO Doc. WT/DS29 (Feb. 12, 1996) (Complainant: Hong Kong and China); *Turkey–Restrictions on Imports of Textile and Clothing Products*, WTO Doc. WT/DS34 (July 19, 2001) (Complainant: India); *Turkey–Restrictions on Imports of Textile and Clothing Products*, WTO Doc. WT/DS47 (June 20, 1996) (Complainant: Thailand).

43. *See Turkey–Restrictions on Imports of Textile and Clothing Products*, WTO Doc. WT/DS34 (July 19, 2001) (Complainant: India).

44. *See, e.g., United States–Definitive Safeguard Measures on Imports of Certain Steel Products*, WTO Doc. WT/DS248 (Dec. 16, 2003) (Complainant: European Union); *United States–Definitive Safeguard Measures on Imports of Certain Steel Products*, WTO Doc. WT/DS249 (Dec. 16, 2003) (Complainant: Japan); *United States–Definitive Safeguard Measures on Imports of Certain Steel Products*, WTO Doc. WT/DS251 (Dec. 16, 2003) (Complainant: South Korea); *United States–Definitive Safeguard Measures on Imports of Certain Steel Products*, WTO Doc. WT/DS252 (Dec. 16, 2003) (Complainant: China); *United States–Definitive Safeguard Measures on Imports of Certain Steel Products*,

involving these safeguard measures. Because the DSB established a *single* panel to hear the dispute by the eight Complainants (plus Turkey and others, as Third Parties) against the United States, Turkey's eight filings amounted to an appearance in one case, rather than eight.⁴⁵

There are also eleven other instances where more than one Member requested the establishment of panel, and the DSB decided to establish a *single* panel.⁴⁶ Thus, to provide a more accurate count of disputes, we

WTO Doc. WT/DS253 (Dec. 16, 2003) (Complainant: Switzerland); *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WTO Doc. WT/DS254 (Dec. 16, 2003) (Complainant: Norway); *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WTO Doc. WT/DS258 (Dec. 16, 2003) (Complainant: New Zealand); *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WTO Doc. WT/DS259 (Dec. 16, 2003) (Complainant: Brazil).

45. See Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WTO Docs. WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R (adopted Dec. 10, 2003).

46. See, e.g., *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WTO Docs. WT/DS174, WT/DS290 (Apr. 11, 2006) (Complainants: United States and Australia); *European Communities and Its Member States—Tariff Treatment of Certain Information Technology Products*, WTO Doc. WT/DS375, WT/DS376, WT/DS377 (July 11, 2011) (Complainants: United States, Japan, and Taiwan); *China—Measures Related to the Exportation of Various Raw Materials*, WTO Docs. WT/DS394, WT/DS395, WT/DS398 (Jan. 23, 2013) (Complainants: United States, European Union, and Mexico); *Dominican Republic—Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric*, WTO Docs. WT/DS415, WT/DS416, WT/DS417, WT/DS418 (May 9, 2012) (Complainants: Costa Rica, Guatemala, Honduras, and El-Salvador); *China—Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WTO Docs. WT/DS431, WT/DS432, WT/DS433 (May 26, 2015) (Complainant: United States, European Union, and Japan); *Australia—Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Docs. WT/DS434 (June 30, 2016) (Complainants: Ukraine); *Australia—Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Docs. WT/DS435, WT/DS441 (July 2, 2020) (Complainants: Honduras, Dominican Republic); *Australia—Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Docs. WT/DS458, WT/DS467 (Aug. 30, 2018) (Complainants: Cuba, and Indonesia); *Argentina—Measures Affecting the Importation of Goods*, WTO Docs. WT/DS438, WT/DS444, WT/DS445 (Jan. 20, 2016) (Complainants: European Union, United States, and Japan); *China—Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes from Japan*, WTO Docs. WT/DS/454, WT/DS460 (Feb. 23, 2016) (Complainants: Japan and European Union); *Brazil—Certain Measures Concerning Taxation and Charges*, WTO Docs. WT/DS/472, WT/DS/497 (Jan. 17, 2020) (Complainants: European Union and Japan); *United States—Certain Measures on Steel and Aluminium Products*, WTO Docs. WT/DS/544, WT/DS548, WT/DS/552, WT/DS/554, WT/DS/556 (Sept. 10, 2019) (Complainants: China, European Union, Norway, Russia, and Switzerland); *United States—Certain Measures on Steel and Aluminium Products*, WT/DS/550, WT/DS/551 (July 11, 2019) (Complainants: Canada, Mexico); *Canada—Additional Duties on Certain Products from the United States*, WTO Doc. WT/DS/557 (July 11, 2019) (Complainant: United States); *China—Additional Duties on Certain Products from the United States*, WTO Doc. WT/

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will consider all disputes decided by a single panel as one even where, nominally, they appear as “separate” cases. After eliminating such instances of double counting, one can conclude that Turkey has been involved in five cases as Complainant; ten cases as Respondent; and fifty-nine cases as Third Party.⁴⁷

In the following subsections, we assess Turkey’s litigation performance by focusing on the following variables: Case Type, Product Type, Opposing Country, and Win-Loss rate. As explained in a previous general WTO litigation study, these variables allow us to analyze whether differences in the invoked trade agreements (for example, trade-remedy vs. non-trade-remedy claims); types of products affected (for example, commodities vs. non-commodities); or Members challenged (for example, high-income vs. middle-income countries) have affected Turkey’s litigation performance, which we measure by using Turkey’s Win-Loss rate.⁴⁸ To determine Win-Loss rates under this methodology, a dispute counts as a win for Complainant (and loss for Respondent) whenever Complainant wins on any claim.⁴⁹ Thus, when litigation effectively changes the status quo ex ante—triggering Respondent’s obligation to bring its violating measure(s) into compliance⁵⁰—Complainant scores a win (and Respondent, a loss), even if Complainant fails in other claims.

B. Turkey’s Performance as Complainant

A five-time Complainant, Turkey has brought disputes against Egypt (2000), South Africa (2003), Morocco (2016), and the United States (2017 and 2018).⁵¹ Because two of these disputes are pending at the

DS/558 (Sept. 11, 2019) (Complainant: United States); *European Union—Additional Duties on Certain Products from the United States*, WTO Doc. WT/DS/559 (Sept. 11, 2019) (Complainant: United States); *Mexico—Additional Duties on Certain Products from the United States*, WTO Doc. WT/DS/560 (July 11, 2019) (Complainant: United States); *Russian Federation—Additional Duties on Certain Products from the United States*, WTO Doc. WT/DS/566 (Sept. 11, 2019) (Complainant: United States).

47. As the same phenomenon (that is, having one panel hear challenges by or against different Members to a set of measures that share common legal and/or factual issues) may have also occurred in disputes in which Turkey did not participate, we refrain from providing total participation rates for Turkey, because refining the denominator would require eliminating potential double counting for other countries, a task that falls outside the scope of this study.

48. See Juscelino F. Colares, *The Limits of WTO Adjudication: Is Compliance the Problem?*, 14 J. INT’L ECON. L. 403, 413–22 (2011).

49. See Juscelino F. Colares, *A Theory of WTO Adjudication: From Empirical Analysis to Biased Rule Development*, 42 VAND. J. TRANSNAT’L L. 383, 401 (2009).

50. See *DSU*, *supra* note 16, art. 21.1.

51. See *infra* Appendix I, Table A.

Appellate Body, and the other two disputes are still nominally in consultations, to date, Turkey has fully prosecuted only one dispute: *Egypt–Definitive Anti-Dumping Measures on Steel Rebar from Turkey* (2003), which it won.⁵²

Although such a low number of observations does not permit statistical analysis, Turkey’s role as a Complainant appears to reveal two interesting “patterns.” As far as Case Type is concerned, to date, Turkey has filed only trade-remedy claims. These claims appear in three antidumping (“AD”) cases, one countervailing duty (“CVD”) case, and one safeguard case.⁵³ As to Product Type, iron and steel products (i.e., steel rebar, hot-rolled steel, and steel pipe and tube products) were the object of four disputes, while one dispute concerned blankets.⁵⁴ Notably, Turkey seems focused on undermining other Members’ trade remedy determinations, presumably in an attempt to maintain market access for its commodity and low-tech exports.

Clearly, Turkey has not been a frequent Complainant before the DSB and has not sued the European Union, although, technically, it is not barred from doing so under the terms of the EU-Turkey Customs Union (“CU”).⁵⁵ Remarkably, Turkey did not use the DSB offensively for a thirteen-year period (2003-16).⁵⁶ One would expect Turkey, a junior partner in a customs union dominated by a much larger trading block, to be naturally disinclined from adopting an aggressive, independent litigation strategy. Thus, Turkey’s infrequent offensive appearances are no surprise. Perhaps, its newfound interest in bringing cases (starting in 2016) is the more interesting question.⁵⁷

C. Turkey’s Performance as Respondent

Since the establishment of the DSB, Brazil (2000), Ecuador (2001), Hungary (2002) India (1996 and 2012), the United States (1996, 2005 and 2018), Thailand (2018), and the European Union (2019) have

52. In this case, Turkey alleged that Egypt had violated the Anti-Dumping Agreement, arts. 2, 3, and 6; and the GATT, art. X. Although the Panel rejected most of Turkey’s claims since Turkey failed to establish its claims under the Anti-Dumping Agreement, arts. 2 and 3, the panel found that Egypt was in violation of the Anti-Dumping Agreement, arts. 3 and 6. See Panel Report, *Egypt–Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WTO Doc. WT/DS211/R (adopted Aug. 8, 2002).

53. See *infra* Appendix I, Table A.

54. See *infra* Appendix I, Table A.

55. See MELTEM SARIBEYOGLU, DUNYA TICARET ORGUTU, GUMRUK BIRLIGI VE TURKIYE [WORLD TRADE ORGANIZATION, CUSTOMS UNION AND TURKEY] 276–77 (2010).

56. See *infra* Appendix I, Table A.

57. Turkey initiated three of its five disputes after 2016. See *infra* Appendix I, Table A.

requested consultations with Turkey, pursuant to GATT Art. XXII.⁵⁸ Because five disputes remain in consultations;⁵⁹ two disputes were settled during consultations, with the parties agreeing on mutually acceptable solutions;⁶⁰ and one dispute is still active (that is, at the panel stage), Turkey has been a respondent in only two disputes before the DSB: *Turkey–Restrictions on Imports of Textile and Clothing Products*; and *Turkey–Measures Affecting the Importation of Rice*.⁶¹ In both cases, the panel and/or AB found that Turkey’s measures were inconsistent with the WTO agreements, that is, Turkey lost both cases.⁶² Later, Turkey would notify the DSB that it had reached mutually acceptable implementations of report recommendations with India and the United States.⁶³ Thus, Turkey maintains a perfect compliance record.

As far as Case Type is concerned, Complainants bringing cases against Turkey raised non-trade-remedy claims (e.g., GATT Arts. I, II, III, and XI claims) in seven out of ten disputes.⁶⁴ Turkey was the target of trade-remedy claims (e.g., one AD and two safeguard challenges) in

58. See *infra* Appendix I, Table B. As explained earlier, Hong Kong and China (i.e., *Turkey–Restrictions on Imports of Textile and Clothing Products*, WT/DS29 (Feb. 12, 1996)) and Thailand (i.e., *Turkey–Restrictions on Imports of Textile and Clothing Products*, WT/DS47 (June 20, 1996)) requested consultations with Turkey, yet those countries decided to participate as Third Parties in the dispute raised by *India: Turkey–Textiles*. We counted these disputes as one despite the fact that they remain in consultations. See *infra* Appendix I, Table B.

59. See *infra* Appendix I, Table B.

60. See *infra* Appendix I, Table B.

61. See *infra* Appendix I, Table B.

62. In *Turkey–Textiles*, India alleged that Turkey had restricted textiles and clothing imports in violation of the GATT, arts. XI, XIII and XXIV and the Agreement on Textiles and Clothing, art. 2.4. The panel found that Turkey’s measures were inconsistent with the GATT, arts. XI and XIII and the Agreement on Textiles and Clothing, art. 2.4. On appeal, while conceding having taken measures restricting the importation of textiles and clothing, Turkey argued that such measures had been enacted pursuant to the EU–Turkey CU, thus qualifying under the GATT, art. XXIV exception. The panel rejected Turkey’s resort to Article XXIV because Turkey had less restrictive, alternative options (for example, rules of origin) that would meet its CU commitments. As such, Turkey could not claim that “the formation of a customs union . . . would be prevented if it were not allowed to adopt [the challenged] quantitative restrictions.” See Appellate Body Report, *Turkey–Restrictions on Imports of Textile and Clothing Products*, ¶¶ 46, 61, 63, WTO Doc. WT/DS34/AB/R (adopted Oct. 22, 1999). In *Turkey–Rice*, the United States alleged that Turkey’s measures on the importation of rice had violated the GATT, arts. III:4, X:1, X:2, and XI:1; the Agreement on Agriculture, art. 4.2; the Agreement on Import Licensing Procedures, arts. 1, 3, and 5; and TRIMS, art. 2.1. The panel found that Turkey’s measures were inconsistent with the Agreement on Agriculture, art. 4.2 and the GATT, art. III:4. Furthermore, the panel did not address most of the claims raised by the United States on the grounds of judicial economy. See *Turkey–Measures Affecting the Importation of Rice*, Panel Report, WT/DS334/R (adopted Oct. 22, 2007).

63. See *infra* Appendix I, Table B.

64. See *infra* Appendix I, Table B.

only three disputes.⁶⁵ Again, although the number of cases here is too small, cautioning one against making extrapolations, a seven-to-three, non-trade-remedy-to-trade-remedy ratio is intriguing. When one considers that Turkey has been among the most frequent users of trade remedies,⁶⁶ one would expect Turkey to be sued more frequently for alleged misapplication of trade remedies than otherwise. That Turkey's frequent application of trade remedies seems mostly *consistent* with its WTO commitments (or at least infrequently challenged) might be an indicator of its fair, rules-based behavior.

In regard to Product Type and Opposing Country, we cannot discern any "patterns." Complainants challenged orders imposing restrictions on textiles and clothing and related products (for example, cotton yarn) in two disputes.⁶⁷ They also targeted orders affecting agricultural products (banana and rice) twice.⁶⁸ The remaining challenges focused on orders involving foreign movie pictures, iron pipe fittings, pet food, air conditioners and, more recently, pharmaceuticals.⁶⁹ Among Members challenging Turkey's measures were the United States (three times); India (twice);⁷⁰ and a few single-filers: Brazil, Ecuador, the European Union (most recent request for consultations),⁷¹ Hungary, and Thailand.⁷²

Thus, Turkey has been involved in nine disputes as Respondent. Six of these disputes were filed before 2005.⁷³ Since then, Turkey has been involved in four disputes, three of which are in consultations, and one in the panel stage.⁷⁴ This record suggests Turkey's trade policies and actions have been mostly WTO-compliant.

D. *Turkey's Performance as Third-Party Litigant*

Because Turkey has appeared seldomly as main Complainant or Respondent, its frequent participation as Third-Party litigant (fifty-nine

65. See *infra* Appendix I, Table B.

66. See Turkey TPR 2016, *supra* note 10, at 68–70.

67. See *infra* Appendix I, Table B.

68. See *infra* Appendix I, Table B.

69. See *infra* Appendix I, Table B.

70. See *infra* Appendix I, Table B.

71. As indicated earlier, the European Union filed, recently, a request for consultations with Turkey on Turkey's localization and technology transfer requirements for certain pharmaceutical products. See European Union, Permanent Mission of the World Trade Organization, the Ambassador 1–2, (Apr. 2, 2019), http://trade.ec.europa.eu/doclib/docs/2019/april/tradoc_157821.pdf (last visited Aug. 12, 2019) [hereinafter EU Request for Consultations].

72. See *infra* Appendix I, Table B.

73. See *infra* Appendix I, Table B.

74. See *infra* Appendix I, Table B.

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disputes) is both intriguing and deserving of closer scrutiny.⁷⁵ Table A shows the current status of these disputes. Because two were settled or terminated by the Parties,⁷⁶ and twenty-one are still active, a total of thirty-six disputes have been finalized by a panel or the AB and adopted by the DSB.⁷⁷ Together with the main Complainants in these cases, Turkey has won thirty-three times,⁷⁸ losing in only three instances.⁷⁹ Turkey’s success rate in these finalized “Third-Party” cases is quite high: 91.66 percent. Such a high success rate is unremarkable, however. Prior empirical research has showed high Complainant success rates in *all* WTO substantive litigation (i.e., regardless of Case Type, Product Type, or Respondent Type).⁸⁰ According to Colares (2009), Complainants have won about ninety percent of substantive disputes that see final adjudication before the DSB.⁸¹ In broader perspective, Turkey’s Third-Party success merely replicates the major systemic trends found in WTO litigation.

TABLE A: TURKEY AS THIRD PARTY—CASE STATUS

Case Status	N	Win Rate (%)
DSB-Adopted Report	36	91.66
Settled	2	N/A
Active	21	N/A
Total	59	N/A

Table B shows that, as Third-Party, Turkey took a keen interest in closely monitoring litigation against high-income countries. Such

75. See Appendix II (listing Turkey’s Third-Party appearances). Due to space constraints, this lengthy appendix can be made available upon request to the corresponding author. As we have explained in Section III.A, to account for the commonality of issues of law and fact and to avoid double counting of Third-Party disputes decided by a single panel, we count any grouping of overlapping disputes as one.

76. The cases that were settled or terminated are: *United States—Measures Affecting Imports of Women’s and Girls’ Wool Coats*, WT/DS32 (Apr. 30, 1996) and *European Union—Measures on Atlantic-Scandian Herring*, WT/DS469 (Aug. 25, 2014).

77. See Appendix II, *supra* note 75.

78. See Appendix II, *supra* note 75.

79. See Appendix II, *supra* note 75.

80. See Colares, *supra* note 49, at 402–12. See also ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM 253 (1993) (reporting similar Complainant success rates during the pre-WTO, GATT panel period).

81. See Colares, *supra* note 49, at 402–13. For a discussion of erstwhile Complainant success rates in *compliance* litigation see Colares, *supra* note 49, at 419–26.

countries were the respondents nearly two-thirds of the time (66.10 percent). Turkey appeared in twenty-three such disputes involving the United States⁸² and in eleven such disputes involving the European Union.⁸³ As far as middle-income countries are concerned, China was Respondent in six disputes, and Russia in three.⁸⁴ Hoping to gain greater market access for its exports, Turkey has concentrated its Third-Party appearances on challenges against high-income (e.g., the United States, the European Union, Australia, and South Korea) and large middle-income (e.g., China, Russia, and Brazil) countries, presumably because they have larger and more dynamic markets. Together, both groups, appearing as Respondents, account for 93.2 percent of Turkey’s participation as Third-Party litigant.⁸⁵

TABLE B: TURKEY AS THIRD PARTY—RESPONDENT TYPE

Respondent Type ⁸⁶	N (%)
High Income	39 (66.10)
Middle Income	20 (33.90)
Total	59 (100)

As with [Table B](#), [Table C](#) contains enough observations to allow some extrapolation. At the outset, one specific trend can be detected: in nearly two-thirds of cases in which Turkey has participated as Third-Party, the Complainants were targeting Respondent’s use of trade

82. See Appendix II, *supra* note 75.

83. See Appendix II, *supra* note 75. Note that Turkey is participating as Third-Party litigant in *European Union—Additional Duties on Certain Products from the United States*, WT/DS/559 (September 11, 2019), a case in which the United States challenges EU’s unauthorized retaliation against US-imposed Section 232, national security tariffs on steel and aluminium. Although included in our database, this case does not appear in our (electronically available) Third-Party statistics because Turkey was also sued by the United States regarding the same subject matter in a parallel case, namely *Turkey—Additional Duties on Certain Products from the United States*, WT/DS/561 (September 11, 2019), and it is likely that the DSB will establish a single panel for these and other similar, parallel disputes. Furthermore, because Turkey and the European Union share similar positions in this controversy, Turkey’s Third-Party appearance in this case should not be coded as adversarial to the European Union. See Appendix I, Table B; Appendix II, *supra* note 75.

84. See Appendix II, *supra* note 75.

85. See Appendix II, *supra* note 75.

86. See WORLD BANK COUNTRY AND LENDING GROUPS—LOWER-MIDDLE-INCOME ECONOMIES—UPPER-MIDDLE-INCOME ECONOMIES—HIGH-INCOME ECONOMIES, WBG [hereinafter *WORLD BANK COUNTRY INCOME*], <https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups> (last visited Aug. 12, 2019).

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remedies.⁸⁷ Among these cases, only seven were related to safeguards,⁸⁸ while thirty involved AD or CVD challenges.⁸⁹ Arguably, Turkey has remained vigilant of other Members’ “misuse” of trade remedies in an proactive attempt to protect its export interests, even when Turkish products are not directly implicated. By monitoring other parties’ anti-trade remedy litigation, Turkey maintains a watchful eye on potential abuse of such disciplines in its direct trade relations. This suggests that Turkey might be following a subtle play-for-precedent strategy in its choice of Third-Party litigation.⁹⁰

TABLE C: TURKEY AS THIRD PARTY—CASE TYPE

Case Type	N (%)
Trade Remedies	37 (62.71)
Non-Trade Remedies	22 (37.28)
Total	59 (100)

Table D summarizes the interface between Turkey’s appearance as Third-Party litigant and the types of product involved in such disputes. Along with its fellow Third-Party litigants, Turkey joined disputes where the main Complainant(s) challenged orders affecting *commodities* and mature-industry products almost ninety percent of the time. Among such products, the main targets were: iron and steel products (eleven disputes); automobiles and auto parts (nine disputes); agricultural foodstuffs (ten disputes); and textile and clothing products (six disputes).⁹¹ Notably, Turkey is an exporter of all such products, which, again, illustrates its concern with ensuring market access even when its products are not targeted by other importers’ (challenged) measures.

TABLE D: TURKEY AS THIRD PARTY—PRODUCT TYPE

Product Type	N (%)
Commodities	52 (88.13)
Non-Commodities	7 (11.86)
Total	59 (100)

87. See Appendix II, *supra* note 75.

88. See Appendix II, *supra* note 75.

89. See Appendix II, *supra* note 75.

90. For a similar argument see Colares, *supra* note 49, at 418.

91. See Appendix II, *supra* note 75.

Turkey's Third-Party filings also illustrate its close commercial relationship as well as frictions with the European Union. In all of Turkey's Third-Party appearances (fifty-nine disputes), the European Union was a participant.⁹² The latter was either the main Complainant (thirteen times), a fellow Third-Party litigant (thirty-five times),⁹³ or the Respondent (eleven times).⁹⁴ The forty-eight clearly non-adversarial appearances indicate that, as the junior partner in the CU, Turkey has largely incorporated and followed the senior partner's litigation positions at the DSB. Yet, the eleven quasi-adversarial appearances (i.e., disputes where Turkey appeared as a Third-Party while the EU was the Respondent), suggest a non-trivial level of divergence. Of these eleven, eight were challenges to EU use of trade remedies (i.e., seven AD challenges and one safeguard dispute).⁹⁵ Besides revealing a measure of independence, Turkey's participation as Third Party in these eight trade-remedy disputes "against" the European Union might be viewed as an attempt by Turkey to change EU trade-remedy regulations, which it cannot pursue as the CU's junior party. Remarkably, seven of these eight cases were brought in the last nine years.⁹⁶ This might indicate Turkey's growing interest in revisiting aspects of its trade relationship with the European Union, short of leaving the CU. The following section examines the nexus between Turkey's trade policy goals and its litigation performance.

IV. RELATIONSHIP BETWEEN TURKEY'S TRADE OBJECTIVES AND LITIGATION PERFORMANCE

As set out in the Introduction, Turkey's first and foremost trade policy objective has been to reduce its current account deficit, which largely stems from the country's high trade deficit in goods. To reduce this deficit, uninterrupted since 1946, Turkey has deployed two strategies: (i) reducing import dependency on intermediate goods; and (ii) expanding exports, while diversifying export destinations. In pursuit of these two goals, Turkey has applied various trade policy tools, which might have impacted its litigation performance at the WTO.

92. See Appendix II, *supra* note 75.

93. See Appendix II, *supra* note 75.

94. Specifically, these "Turkey vs. European Union," indirect clashes occurred in *EC-Trademarks and Geographical Indications*; *EC-Provisional Steel Safeguards*; *EC-IT Products*; *EC-Fasteners (China)*; *EU-Footwear (China)*; *EU-Fatty Alcohols (Indonesia)*; *EU-Herring, European Union-Anti-Dumping Measures on Biodiesel from Argentina*; *EU-Cost Adjustment Methodologies (Russia)*; *EU-Biodiesel (Indonesia)*; and *EU-Price Comparison Methodologies*. See Appendix II, *supra* note 75.

95. See Appendix II, *supra* note 75.

96. See Appendix II, *supra* note 75.

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A. *Red Flags on the Intermediate Goods Front*

Because Turkey is bound to apply EU-set, *low-level* tariffs, reducing import dependency on intermediate goods has required Turkey to aggressively implement measures that protect domestically produced, intermediate goods. To assist the intermediate goods industry, Turkey has also granted a wide range of subsidies and incentives.⁹⁷ Arguably, one would expect that such trade management would nullify or impair the benefits of Turkey's WTO counterparts, thus triggering the filing of disputes before the DSB. However, Turkey's infrequent appearance as a Respondent seems to indicate that its trade policies have been either mostly consistent with its WTO commitments or not so conspicuous as to trigger other Members' trade sensitivities.

Although officials have adopted measures favoring Turkey's manufacturing sector, the country seldomly has been challenged before the DSB. For instance, as of August 2019, Turkey has been the target of consultations requests only ten times. Compared to Argentina (twenty-two cases); Brazil (sixteen cases); Chile (thirteen cases); China (forty-three cases); India (thirty-one cases); Indonesia (fourteen cases); and Mexico (fifteen cases)⁹⁸—all middle-income countries⁹⁹—Turkey has been targeted less often, despite being a frequent user of subsidies and trade remedies. Although it lost the only two disputes that made it to the final panel stage, one cannot say, based on two instances, that Turkey has done much worse than any other Respondent. The more important lesson here might be that Turkey has calibrated its trade policy to further its intermediate-good industry with measures that, though deviating from market principles at times, have not drawn much attention of its trade partners.

B. *Benign Export Measures?*

Expanding exports and diversifying export destinations is the other major trade strategy that would help Turkey decrease its trade and current account deficits.¹⁰⁰ Indeed, Turkey intends to reach \$500 billion worth of exports by 2023.¹⁰¹ This overly ambitious objective has been pursued in two ways. First, Turkey has deployed various export

97. See *Turkey TPR 2016*, *supra* note 10, at 29, 41.

98. See DISPUTE SETTLEMENT: THE DISPUTES, DISPUTES BY MEMBER, WTO [hereinafter *WTO DISPUTES BY MEMBER*], https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (last visited Aug. 12, 2019).

99. See *WORLD BANK COUNTRY INCOME*, *supra* note 86.

100. See *supra* Section I.

101. See *Turkey TPR 2016*, *supra* note 10, at 17.

promotion tools.¹⁰² Not unlike the measures designed to reduce Turkey's dependence on intermediate goods, export promotion has not led to much trade friction—Turkey's measures have only been the target of consultations requests ten times, definitely less than other middle-income peers.

Second, to help promote its exports, Turkey has been a seemingly strategic and definitely frequent user of indirect trade litigation (fifty-nine appearances as Third-Party litigant). As Third-Party adjudicator, Turkey has taken advantage of trade-remedy law litigation (seven safeguards and 29 AD/CVD challenges) to protect existing (safeguard disputes) or open potential markets (AD/CVD disputes) for its significant export sectors (iron and steel, automobiles, textiles and clothing, and agriculture, etc.). Notably, because safeguards are not country-specific measures, Turkey benefits directly from defeating them—while also saving resources—by entering Third-Party appearances. Yet, Turkey's Third-Party appearance in country-specific, AD/CVD disputes can be viewed as part of a “play-for-precedent” strategy that involves suing with an interest in undermining other Members' trade-remedy practices that could eventually jeopardize Turkish exporters.¹⁰³

That said, Turkey has been an infrequent (direct) Complainant. It has brought only five cases: three targeting countries not among Turkey's top-ten exporting partners (*e.g.*, Egypt, South Africa and Morocco), and two targeting the United States.¹⁰⁴ Although the CU technically does not restrict Parties from suing each other at the DSB and excludes agricultural products, Turkey has yet to challenge the EU's massive agricultural subsidies (CAP). In fact, as of August 2019, Turkey has been a Complainant less frequently than: Argentina (twenty-one cases); Brazil (thirty-three cases); Chile (ten cases); China (twenty cases); Guatemala (ten cases); Honduras (eight cases); India (twenty-four cases); Indonesia (eleven cases); Mexico (twenty-five cases); Panama (seven cases); Russia (eight cases); Taiwan (six cases); Thailand (fourteen cases); and Ukraine (nine cases).¹⁰⁵ At a time when Complainants typically win ninety percent of their challenges, Turkey's infrequent use of direct litigation is intriguing. Other than its close ties with the European Union and the litigation-restricting effects of their

102. *See id.*, at 87–96.

103. For a different application of such strategy see Colares, *supra* note 49, at 418.

104. *See infra* Appendix I, Table A (indicating the Respondents in Turkey's five direct filings); TURKISH STATISTICAL INSTITUTE, STATISTICS BY THEME, FOREIGN TRADE STATISTICS, EXPORTS BY COUNTRY AND YEAR, http://www.turkstat.gov.tr/PreIstatistikTablo.do?istab_id=2889 (last visited Aug. 24, 2020).

105. *See WTO DISPUTES BY MEMBER*, *supra* note 98.

CU, Turkey's lack of interest in direct litigation might be explained by a reluctance to restrain its trade management options in case it succeeds in challenging those of other Members.

Clearly, Turkey's performance as a WTO litigator has not secured its trade policy objectives. As previously discussed, Turkey's dependency on intermediate-good imports has remained too high—intermediate-good imports amounted to 67.6, 76.6, and 76.2 percent of Turkey's total imports in 2016, 2017, and 2018, respectively.¹⁰⁶ Further, although Turkey's exports increased to \$167 billion in 2018, which is the highest level in Turkey's history,¹⁰⁷ its main export destinations remain the same (i.e., the European Union, capturing fifty percent of Turkey's total exports; and the Near/Middle East and Northern African countries, receiving twenty-three percent of Turkey's total exports) in 2018.¹⁰⁸ Hence, Turkey's trade deficit remains uninterrupted since 1946, increasing to \$55 billion in 2018.¹⁰⁹ The structural impacts of Turkey's trade profile clearly affect the efficacy of trade litigation as a policy tool.

The following section examines the extent to which such inefficacy stems from limitations inherent in the WTO DSB (e.g., remedial nature of litigation, limited bilateral reach, etc.) as well as the *sui generis* composition of Turkey's trade partners, most of which are either: (i) neighbors that have yet to become WTO members; or (ii) members of the European Union, to whom Turkey has surrendered its trade sovereignty, pursuant to the CU. In light of the limitations of trade litigation, the analysis that follows demonstrates the need to identify more promising tools for addressing Turkey's persistent dual trade challenges.

V. WHY LITIGATION CANNOT ADDRESS TURKEY'S TRADE IMBALANCES

Could WTO litigation ever become an effective trade policy tool to help Turkey address, partly, at least, its perennial trade and current account deficits? Two main reasons explain why litigation is ill-suited for these purposes: one systemic, the other, *sui generis*.

106. See TURKISH STATISTICAL INSTITUTE, STATISTICS BY THEME, FOREIGN TRADE STATISTICS, STATISTICAL TABLES AND DYNAMIC SEARCH, FOREIGN TRADE CLASSIFICATION BY BROAD ECONOMIC CATEGORIES (BEC), http://www.turkstat.gov.tr/PreTablo.do?alt_id=1046 (last visited Aug. 24, 2020). We made the percentage calculations above based on data from this source.

107. See *TSI-FOREIGN TRADE BY YEAR*, *supra* note 6.

108. See TURKISH STATISTICAL INSTITUTE, STATISTICS BY THEME, FOREIGN TRADE STATISTICS, EXPORTS BY COUNTRY GROUPS, http://www.turkstat.gov.tr/PreIstatistikTablo.do?istab_id=2891. We made the percentage calculations above based on data from this table.

109. See *TSI-FOREIGN TRADE BY YEAR*, *supra* note 6.

A. *Systemic Limitations*

Dispute settlement at the DSB has obvious, inherent limitations associated with its bilateral nature and type of remedies it can offer. As a Member-to-Member¹¹⁰ (i.e., bilateral) dispute settlement system, a Member can *only* protect its bargained-for concessions if it can establish that another Member's trade measures have nullified or impaired its benefits. This means that an aggrieved member can only vindicate its interest if it prevails upon the other to change its conduct either through consultations, or as a result of successful litigation. Yet, the scope of what can be offered in settlement during the consultations stage can be quite limited. Operation of the MFN principle limits what potential Respondents can offer as settlement to induce potential Complainants to forgo litigation, because settlement offers can trigger the obligation to extend similar concessions to non-litigant, third countries. That being the case, outright litigation is perhaps more likely in the WTO system than in other adjudicatory systems.

Furthermore, the range of remedies obtained through WTO litigation is also somewhat restricted, because successful litigation can only offer forward-looking remedies.¹¹¹ A harmed Member can only obtain relief, if successful, later in time and only against the Member that infringed its obligations. In fact, in some cases, such remedies come too little, too late. For instance, by the time the Complainant wins, the violating measure may have already entrenched the unlawful advantage the Respondent Member's industry obtained, so that removal of the violating measure becomes a Pyrrhic victory. To wit, the flagrantly WTO-inconsistent Ontario Feed-in Tariffs ("FIT"), a program that provided subsidies to local producers of equipment associated with generating renewable energy in Canada, which hurt Japanese exports in that sector. Once adjudicated inconsistent with WTO rules, Japanese exports to Canada never recovered, a clear case where law-breaking first and removing offending measures later paid off.¹¹²

Finally, the duration of disputes is another major systemic limitation that reduces the value of WTO litigation. According to Reich (2017), the average duration of disputes (i.e., from the request of consultations

110. Although "state-to-state" is the more intuitive phrase, technically, only states who are WTO members can sue each other, hence the term "Member-to-Member." *But see* Joost Pauwelyn, *The Limits of Litigation: "Americanization" and Negotiation in the Settlement of WTO Disputes*, 19 OHIO ST. J. DISP. RESOL. 121, 129 (2003).

111. *See* Colares, *supra* note 48, at 430.

112. *See* Appellate Body Report, *Canada—Measures Relating to the Feed-in Tariff Program*, WTO Doc. WT/DS412/AB/R (adopted May 6, 2013).

to the adoption of a panel/AB report) was twenty-eight months between 2007 and 2011.¹¹³ Of course, many disputes do not end with the voluntary adoption of the resulting DSB report by the losing Member.¹¹⁴ Such Member also benefits from the right to implement WTO-consistent measures within a reasonable time.¹¹⁵ Although Members seem to have a very high compliance rate (i.e., eighty-three percent) overall, the *on-time*-compliance rate is only about sixty percent.¹¹⁶ Thus, recalcitrance as well as built-in protections can result in delayed and ineffective justice.¹¹⁷ This problem has also been noticed by other scholars.¹¹⁸ To some, trade disputes could be more easily solved through trade diplomacy rather than trade litigation.

A recent example, involving Turkey, illustrates how limited and delayed remedies might affect potential Complainant's attitudes toward WTO litigation. In 2015, Russia imposed a number of sanctions, including trade sanctions, against Turkey. Most Turkish exports were embargoed following Turkey's shooting of a Russian jet that violated Turkey's airspace.¹¹⁹ Bozkurt Aran, former Ambassador of Turkey at the WTO, posited that Turkey had a solid case and would bring the dispute against Russia before the DSB, because, according to him, Russian measures seemed inconsistent with Russia's WTO commitments.¹²⁰ Yet, Turkey never brought a dispute before the DSB. Rather, Turkey decided to solve the matter solely via diplomacy. Within less than two years, Turkey settled the matter with Russia without going into protracted litigation.¹²¹ Regardless of one's views on the desirability of Turkey's handling of this issue (directly) with Russia or the terms of

113. Arie Reich, *The Effectiveness of the WTO Dispute Settlement System: A Statistical Analysis* 23, 31 (European Univ. Inst., EUI Working Paper No. LAW 2017/11).

114. See Pauwelyn, *supra* note 110, at 136.

115. See DSU, *supra* note 16, art. 21.3.

116. William J. Davey, *Compliance Problems in WTO Dispute Settlement*, 42 CORNELL INT'L L. J. 119, 119–21 (2009).

117. See *id.* at 119; Bartosz Ziemblicki, *The Controversies over the WTO Dispute Settlement System*, EUROPEANA.EU 196, 199–201 (2009), https://www.europeana.eu/portal/en/record/09404/id_oai_www_bibliotekacyfrowa_pl_32203.html (last visited Aug. 12, 2019).

118. See Ziemblicki, *supra* note 117.

119. See Kathrin Hille, *Russia Lifts Most Sanctions Imposed on Turkey after Downing of Jet*, FIN. TIMES (May 31, 2017), <https://www.ft.com/content/38698b56-460c-11e7-8519-9f94ee97d996>.

120. Hacer Boyacıoğlu, *Russia's Sanctions on Turkey against World Trade Agreement*, HÜRRIYET DAILY NEWS (Dec. 2, 2015), <http://www.hurriyetdailynews.com/russias-sanctions-on-turkey-against-world-trade-agreement-91975>.

121. See Hille, *supra* note 119.

settlement reached, one has to wonder whether one could expect the WTO system to provide a more expedient outcome for Turkey.¹²²

B. *Geographic Limitations*

A non-systemic, notably geographical reason why litigation has not and could not have been an effective trade policy tool for Turkey has to do with Turkey's limited capability to use litigation against most of its sui generis, neighboring trade partners. The majority of Turkey's neighboring trade partners (i.e., Iraq, Syria, Iran, Azerbaijan, Algeria, etc.) are not WTO Members, and Russia, another important trade partner, only became a Member in 2012.¹²³ Hence, the prosecution of WTO disputes against these neighbors has been mostly impossible.

Turkey has also been severely constrained from litigating against its main Western neighbor, the European Union, because of their partnership in a customs union. Indeed, so far, neither Turkey nor the European Union have brought disputes against each other.¹²⁴ As the junior partner in the CU, Turkey agreed to adopt EU trade laws and regulations¹²⁵ and has applied EU CETs on industrial products,¹²⁶ while it has been excluded in the decision-making process of the European Union.¹²⁷ Turkey's ambition to become a full member of the European Union has also been an important, litigation-constraining factor.¹²⁸

In sum, trade litigation at the WTO has not and could not have been an effective trade policy tool for Turkey. Litigation-systemic and geographic constraints continue to affect Turkey's ability to resort to trade litigation as a main Complainant. That Turkey has occasionally become a Third-Party adjudicator against the European Union—hoping,

122. Determining whether such negotiations led to a reasonable deal for Turkey is well beyond the scope of this Article.

123. ACCESSIONS: RUSSIAN FEDERATION, WTO, https://www.wto.org/english/thewto_e/acc_e/ai_russie_e.htm (last visited Aug 12, 2019).

124. Recently, the European Union filed its first request for consultations in relation to Turkey's localization and technology transfer requirements for certain pharmaceutical products. See EU Request for Consultations, *supra* note 71.

125. See Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on Implementing the Final Phase of the Customs Union 96/142, art. 12, 1996 O.J. (L 035) (EC) [hereinafter *CU Decision*].

126. See *id.*, art. 13.

127. See Ufuk Alkan, *The Modernization of Turkey's Customs Union with the European Union: Reasons and Possible Outcomes*, C. OF EUR. DEP'T OF EU INT'L REL. & DIPL. STUD. EU DIPL. PAPER 5-8 (Sept. 2017), https://www.coleurope.eu/system/files_force/research-paper/edp-9-2017_alkan.pdf?download=1.

128. See SARIBEYOGLU, *supra* note 55.

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presumably, to affect EU trade administration in one-off, discrete interventions—is likely to yield little tangible gain. Turkey’s exports are not directly impacted by favorable outcomes in these disputes; new opportunities from (Third-Party) wins must be shared with a wide range of trade competitors; and eventual changes in EU measures might need to be implemented by Turkey, pursuant to the CU.¹²⁹ For these reasons, Turkey should incorporate other trade policy tools to address its trade policy objectives.

VI. CONCLUSION

To address its high perennial trade and current account deficits, Turkey must surely look beyond WTO litigation and candidly reevaluate its options. Exporting a relatively larger share of its GDP—an outcome that will require expanding/diversifying exports—and reducing intermediate-goods import dependency will demand, *inevitably*, effective deployment of Turkey’s trade discretion under the WTO system. Because Turkey negotiated quite favorable (i.e., high) tariff bindings in the Uruguay Round, resumption of free trade agreement (“FTA”) negotiations would be feasible, as some commentators indicated recently.¹³⁰ Yet, such an undertaking would demand a major policy shift on the part of Turkey, which would have to initiate negotiations aiming to restructure its economic relationship with the European Union, particularly the shift from customs union to comprehensive FTA.

A broad, EU-Turkey FTA that secures low-tariff rates on industrial and agricultural goods—the latter not within the scope of the current CU¹³¹—would not cause much trade disruption. Specifically, with the FTA, already low EU MFN (bound) rates would go lower, while Turkey’s much higher (bound) rates would converge to the agreed-upon FTA level.¹³² Furthermore, the CU experience has created much convergence on rules of origin, which should not lead to unwieldy negotiations. Such a deal could be very much politically palatable to both sides, too: free to conduct its own trade policy with third countries, Turkey would cope better with further delays on accession talks, while

129. See *CU Decision*, *supra* note 125 art. 12.

130. See, e.g., Juscelino F. Colares & Mustafa T. Durmuş, *TURK-SWITCH: The Tariff-Leverage and Legal Case for Turkey’s Shift from Customs Union to FTA with the European Union and Beyond*, 22 J. INT’L ECON. L. 99, 108–10, 112–13 (2019) (stating that Turkey negotiated “an average 42.6 percent tariff on slightly more than one-third of industrial goods—leaving remaining industrial goods unbound from WTO commitments”).

131. See *CU Decision*, *supra* note 125, art. 2.

132. See Colares & Durmuş, *supra* note 130, at 117–18 (indicating that “EU MFN tariff rates on industrial goods” average about 4.1 percent).

national leaders in some EU-member states would not have to address undesirable yet politically delicate, religious- and ethnic-based opposition to Turkey's EU membership.¹³³

Besides transactional and political advantages, restructuring EU-Turkey trade relations would allow Turkey to leverage its favorable WTO tariff schedule on industrial and agricultural goods against third countries.¹³⁴ Able to pursue and forge new trade ties particularly with countries beyond its immediate European and Middle Eastern neighborhood, Turkey would be better positioned to expand and diversify its exports, which, in turn, could help it reduce its trade and current account deficits. In fact, as the United States and Japan seek to reduce their reliance on Chinese products and technology, a CU-free Turkey could become one new hub in their more decentralized supply networks. Finally, in light of the current stalemate over WTO Appellate Body replacements and the associated interruption of its operations, the opportunity to sign new FTAs would also allow Turkey and its new FTA partners to create new, more responsive and directly accountable dispute settlement systems that could help reduce eventual trade friction.

133. *See id.* at 109–10.

134. *See id.* at 118–21.

TURKEY AS A WTO LITIGANT

APPENDIX I

TABLE A: TURKEY AS COMPLAINANT

	Dispute	Report No.	Respondent	Third Parties	Current Status	Filing Year	Product Involved	Agreement Involved	Winner
1	Egypt-Definitive Anti-Dumping Measures on Steel Rebar from Turkey	WT/DS211/R	Egypt	Chile; EC; Japan; and United States	Implementation notified by Respondent	2000	Steel Rebar	ADA, arts. 3, 4 & 6.8	Complainant
2	South Africa-Definitive Anti-Dumping Measures on Blanketing from Turkey	WT/DS288	South Africa	N/A	In consultations	2003	Blanket	ADA, arts. 5, 6 & 9; GATT arts. III & X	N/A
3	Morocco-Anti-Dumping Measures on Certain Hot-Rolled Steel from Turkey	WT/DS513/R	Morocco	China; Egypt; European Union; India; Japan; Kazakhstan; South Korea; Russia; Singapore; United Arab Emirates; and United States	Panel Report under Appeal	2016	Hot-Rolled Steel	ADA, arts. 3 & 6; GATT, arts. I, X & XI	N/A

TABLE A: CONTINUED

	Dispute	Report No.	Respondent	Third Parties	Current Status	Filing Year	Product Involved	Agreement Involved	Winner
4	United States— Countervailing Measures on Certain Pipe and Tube Products (Turkey)	WT/ DS523/ R	United States	Brazil; Canada; China; European Union; Japan; Kazakhstan; South Korea; Mexico; Russia; Saudi Arabia; and United Arab Emirates	Panel Report under Appeal	2017	Steel Pipe and Tube Products	SCM, arts. 1, 2, 10, 12, 14, 15, 19 & 32; GATT, arts. VI:3	N/A
5	United States— Certain Measures on Steel and Aluminum Products	WT/ DS564	United States	Bahrain; Brazil; Canada; China; Colombia; Egypt; European Union, Guatemala; Hong Kong; Iceland; India; Indonesia; Japan; Kazakhstan; New Zealand; Norway; Malaysia; Mexico; Qatar; Russia; Saudi Arabia; Singapore; Switzerland; Taiwan, Thailand; Ukraine; Venezuela; and Bolivia.	Panel Composed	2018	Steel and Aluminum Products	GATT, arts. I, II, X, XI, XIII & XIX; Safeguards, arts. 2, 3, 4, 5, 7, 8, 9, 11.1 & 12	N/A

Source: See MEMBER INFO., TUR. & THE WTO, Dispute cases involving Turkey, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/countries_e/turkey_e.htm (last visited Aug. 8, 2019).

TURKEY AS A WTO LITIGANT

TABLE B: TURKEY AS RESPONDENT

	Dispute ^{135*}	Report No.	Complainant	Third Parties	Current Status	Filing Year	Product involved	Agreement Involved	Winner
1	Turkey–Restrictions on Imports of Textile and Clothing Products	WT/DS47	Thailand	N/A	In consultations	1996	Textiles and Clothing	GATT, arts. I, II & XI	N/A
1	Turkey–Restrictions on Imports of Textile and Clothing Product	WT/DS29	Hong Kong and China	N/A	In consultations	1996	Textiles and Clothing	GATT, arts. XI & XXIV	N/A
1	Turkey–Restrictions on Imports of Textile and Clothing Products	WT/DS34/AB/R	India	Hong Kong; China; Japan; Philippines; Thailand; and United States	Mutually acceptable solution on implementation notified	1996	Textiles and Clothing	GATT, arts. XI & XXIV	Complainant
2	Turkey–Taxation of Foreign Film Revenues	WT/DS43	United States	Canada	Settled or terminated	1996	Showing of foreign films	GATT, art. III	N/A

135. * As discussed in Section III.A, to prevent double counting disputes, the first three disputes (i.e., WT/DS47; WT/DS29; and WT/DS34) were counted as one, because Hong Kong and Thailand also participated as Third-Party litigants in the dispute raised by India (WT/DS34).

TABLE B: CONTINUED

	Dispute ¹³⁸	Report No.	Complainant	Third Parties	Current Status	Filing Year	Product involved	Agreement Involved	Winner
3	Turkey–Anti-Dumping Duty on Steel and Iron Pipe Fittings	WT/DS208	Brazil	N/A	In consultations	2000	Iron Pipe Fittings	GATT, art. VI; ADA, arts. 2, 3, 5 & 6	N/A
4	Turkey–Certain Import Procedures for Fresh Fruit	WT/DS237	Ecuador	Columbia; EC; and United States	Settled or terminated	2001	Banana	GATT, arts. III & XI; A.A., art. 4	N/A
5	Turkey–Import Ban on Pet Food from Hungary	WT/DS256	Hungary	N/A	In consultations	2002	Pet Food	GATT, art. XI; A.A., art. 14; SPS, arts. 2, 5, 6 & 7	N/A
6	Turkey–Measures Affecting the Importation of Rice	WT/DS334/R	United States	Argentina; Australia; China; Egypt; EC; South Korea; Pakistan; and Thailand	Implementation notified by respondent	2005	Rice	GATT, arts. III & XI; A.A., art. 4.2; Import Licensing, arts. 1, 3 & 5	Complainant

TURKEY AS A WTO LITIGANT

TABLE B: CONTINUED

	Dispute¹³⁶	Report No.	Complainant	Third Parties	Current Status	Filing Year	Product involved	Agreement Involved	Winner
7	Turkey—Safeguard Measures on Imports of Cotton Yarn (other than Sewing Thread)	WT/DS428	India	N/A	In consultations	2012	Cotton Yarn	GATT, art. XIX:1(a); Safeguards, arts. 4, 5, 6 & 7	N/A
8	Turkey—Additional Duties on Certain Products from the United States	WT/DS561	United States	Brazil; Canada; European Union; Guatemala; India; Indonesia; Japan; Kazakhstan; Mexico; New Zealand; Norway; Russia; Singapore; Switzerland; Taiwan; Thailand; Ukraine; Venezuela; and Bolivia	Panel composed	2018	Different Products	GATT, arts. I, II:1(a) & II:1(b)	N/A

TABLE B: CONTINUED

	Dispute ¹³⁶	Report No.	Complainant	Third Parties	Current Status	Filing Year	Product involved	Agreement Involved	Winner
9	Turkey—Additional Duties on Imports of Air Conditioning Machines from Thailand	WT/DS573	Thailand	Brazil; Canada; China; European Union; India; Japan; Russia; Singapore; Korea; Ukraine; and United States	Panel composed	2018	Air Conditioners	GATT, arts. I, II & XIX; Safeguards, arts. 8.2 & 12.3	N/A
10	Turkey—Certain Measures concerning the Production, Importation and Marketing of Pharmaceutical Products	WT/DS583	European Union	N/A	In Consultations	2019	Pharmaceutical Products	GATT, arts. III, X & XI; TRIMs, arts. 2 & 3; SCM, art. 1.3	N/A

Source: See MEMBER INFO., TURK. & THE WTO, Dispute Cases Involving Turkey, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/countries_e/turkey_e.htm (last visited Aug. 8, 2019).