

1. INTRODUCTION

1.1 Complaint by Turkey

1.1 On 13 March 2020, Turkey requested consultations with the European Union pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Article 14 of the Agreement on Safeguards with respect to the measures and claims set out below.¹

1.2 Consultations were held on 29 April 2020 but failed to resolve the dispute.

1.2 Panel establishment and composition

1.3 On 16 July 2020, Turkey requested the establishment of a panel pursuant to Article 6 of the DSU and Article 14 of the Agreement on Safeguards with standard terms of reference.² At its meeting on 28 August 2020, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Turkey in document WT/DS595/3, in accordance with Article 6 of the DSU.³

1.4 The Panel's terms of reference are the following:

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Turkey in document WT/DS595/3 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.⁴

¹ Request for consultations by Turkey, WT/DS595/1 (Turkey's consultation request).

² Request for establishment of a panel by Turkey, WT/DS595/3 (Turkey's panel request).

³ DSB, Minutes of the meeting held on 28 August 2020, WT/DSB/M/444.

⁴ Constitution note of the Panel, WT/DS595/4.

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1.5 On 29 September 2020, the parties agreed that the panel would be composed as follows:

Chairperson: Mr William Davey
Members: Ms Silvia Lorena Hooker Ortega
Mr Marco Tulio Molina Tejada

1.6 Argentina, Brazil, Canada, China, India, the Republic of Korea, Japan, Norway, the Russian Federation, Switzerland, Chinese Taipei, Ukraine, the United Arab Emirates, the United Kingdom, and the United States notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.7 After consultation with the parties, the Panel adopted its Working Procedures⁵ on 26 October 2020, the Additional Working Procedures of the Panel for the first substantive meeting⁶ on 31 March 2021, and the Additional Working Procedures of the Panel for the second substantive meeting⁷ on 2 June 2021. To give effect to certain requests made jointly by the parties on 22 March 2022, and after consulting the parties, the Panel also adopted further Additional Working Procedures on 1 April 2022.⁸

1.8 After consultation with the parties, the Panel adopted a partial timetable on 26 October 2020 and revised the timetable on 25 November 2020, 9 February 2021, 22 March 2021, 2 June 2021, 25 October 2021, and 3 November 2021. The timetable adopted by the Panel on 26 October 2020 envisaged that the European Union would file its first written submission by 22 December 2020. However, on 23 November 2020, the European Union requested the Panel to extend the deadline for the submission of its first written submission to 15 January 2021. On 24 November 2020, Turkey opposed the European Union's request. After considering both parties' positions, the Panel granted the European Union's request and accordingly revised the timetable on 25 November 2020. On 8 February 2021, the European Union requested the Panel to extend (a) the deadline for filing responses to the questions sent by the Panel to the parties on 5 February 2021 from 12 February 2021 to 26 February 2021; and (b) the deadline for filing the second written submission from 5 March 2021 to 19 March 2021. On 9 February 2021,

⁵ Working Procedures of the Panel (Annex A-1).

⁶ Additional Working Procedures of the Panel for the first substantive meeting (Annex A-2).

⁷ Additional Working Procedures of the Panel for the second substantive meeting (Annex A-3).

⁸ See Agreed procedures for arbitration under Article 25 of the DSU, WT/DS595/10; Additional Working Procedures of the Panel (Annex A-4); and paragraph 1.9 below.

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Turkey opposed the European Union's request. After considering both parties' positions, the Panel revised the timetable on 9 February 2021, partially granting the European Union's request by changing the two deadlines to 19 February 2021 and 12 March 2021, respectively. On 27 May 2021, the European Union asked the Panel to extend the deadline for filing comments on the other party's responses to the Panel's questions after the first substantive meeting from 4 June 2021 to 18 June 2021. On 27 May 2021, Turkey opposed the European Union's request. After considering both parties' positions, the Panel partially granted the European Union's request by changing the deadline to 8 June 2021. The revised timetable issued by the Panel on 25 October 2021 set the date for the parties to request review of precise aspects of the interim report and/or to request an interim review meeting as 5 November 2021, and the deadline for the parties to comment on the other party's review requests and for the interim review meeting (if requested) as 12 November 2021. On 2 November 2021, Turkey requested the Panel to change the two dates to 12 November 2021 and 19 November 2021 respectively. The European Union did not object to Turkey's request. In light of both parties' positions, the Panel revised the timetable on 3 November 2021, granting Turkey's request.

1.9 The Panel held a first substantive meeting with the parties on 4, 5, and 6 May 2021. A session with the third parties took place on 5 May 2021. According to paragraph 15 of the Working Procedures adopted by the Panel, the Panel retained the discretion to hold a second substantive meeting with the parties upon request by either party. On 17 May 2021, the European Union requested the Panel to hold a second substantive meeting. On 20 May 2021, Turkey opposed the European Union's request. After considering both parties' positions, the Panel granted the European Union's request and held a second substantive meeting with the parties on 22 and 23 June 2021. Because of restrictions due to the COVID-19 pandemic, the Panel conducted both substantive meetings via secure videoconference.⁹ On 19 August 2021, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 29 October 2021. The Panel issued its Final Report to the parties on 10 December 2021. The Panel Report was scheduled to be circulated on 21 December 2021. On 20 December 2021, Turkey requested the Panel to suspend its work, pursuant to Article 12.12 of the DSU, until 21 January 2022, and the European Union did not object. The Panel granted the suspension request.¹⁰ Subsequently, Turkey filed three requests to extend the suspension of the Panel's work pursuant to Article 12.12 of the DSU, until 11 February 2022, 25 February 2022, and 25 March 2022, respectively. The European Union did not object to any of the three requests. The Panel granted

⁹ The Panel adopted additional working procedures for each of these meetings. (See fn 6-7 above).

¹⁰ See Suspension of Panel Work dated 21 December 2021, WT/DS595/6.

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these requests.¹¹ On 22 March 2022, the European Union and Turkey transmitted to the Panel a document signed by both parties entitled "Agreed Procedures for Arbitration under Article 25 of the DSU" (Agreed Procedures).¹² Through the Agreed Procedures, the parties jointly requested the Panel to extend indefinitely the suspension of its work pursuant to Article 12.12 of the DSU, except to the extent necessary for the Panel to effect certain steps set out in the Agreed Procedures. On 24 March 2022, the Panel decided to grant that suspension request.¹³ To give effect to the parties' requests, made through the Agreed Procedures, that the Panel undertake certain steps relating to the report of the Panel and to the record of the Panel proceedings, the Panel adopted the Additional Working Procedures referred to at paragraph 1.7 above. Through the Agreed Procedures, paragraph 6, the parties also jointly requested the Panel to resume its work if neither party initiated arbitration under the Agreed Procedures within 30 days from the date on which the Agreed Procedures were notified to the DSB. Neither party initiated such arbitration, and on 26 April 2022 the parties confirmed their request that the Panel resume its work. The Panel Report was therefore circulated on 29 April 2022.

2. FACTUAL ASPECTS: THE MEASURES AT ISSUE

2.1 In its panel request, Turkey identified the measures at issue as "the provisional and definitive safeguard measures imposed by the European Union on the imports of certain steel products and the investigation leading to the imposition of those measures". Turkey indicated that those measures "cover[ed] all decisions, notices, notifications and regulations" specifically mentioned in the panel request, and "include[d] any amendments, supplements, reviews, replacement, renewals, extensions, implementing measures and any other related measures taken by the European Union in relation to the investigation and/or the safeguard measures at issue".¹⁴ Turkey repeated this formulation in its first written submission.¹⁵

2.2 In response to a question from the Panel, Turkey clarified that its challenge to the "investigation" leading to the imposition of the provisional and

¹¹ See Suspension of Panel Work dated 20 January 2022, WT/DS595/7; Suspension of Panel Work dated 10 February 2022, WT/DS595/8; and Suspension of Panel Work dated 25 February 2022, WT/DS595/9.

¹² See Agreed procedures for arbitration under Article 25 of the DSU, WT/DS595/10.

¹³ See Communication from the Panel dated 24 March 2022, WT/DS595/11.

¹⁴ Turkey's panel request, para. 17. Paragraph 17 of the panel request refers to sections 1.1-1.4 of the panel request, which describe in more detail the legal instruments comprising the challenged measures. (See also Turkey's request for consultations, para. 17).

¹⁵ Turkey's first written submission, para. 34.

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definitive safeguards was not distinct from its challenge to the provisional and definitive safeguards themselves.¹⁶

2.3 The legal instrument setting out the provisional safeguard measures on certain steel products (the "provisional safeguard") is Commission Implementing Regulation (EU) No. 2018/1013 of 17 July 2018 imposing provisional safeguard measures with regard to imports of certain steel products (the "provisional determination").¹⁷

2.4 The legal instruments setting out the definitive safeguard measures on certain steel products ("definitive safeguard"¹⁸) include:

- a. Commission Implementing Regulation (EU) No. 2019/159 of 31 January 2019 imposing definitive safeguard measures against imports of certain steel products (the "definitive determination")¹⁹;
- b. Commission Implementing Regulation (EU) No. 2019/1382 of 2 September 2019 amending certain regulations imposing anti-dumping or anti-subsidy measures on certain steel products subject to safeguard measures (the "double remedy regulation")²⁰;
- c. Commission Implementing Regulation (EU) No. 2019/1590 of 26 September 2019 amending Implementing Regulation (EU) No. 2019/159 imposing definitive safeguard measures against imports of certain steel products (the "first review regulation")²¹;
- d. Commission Implementing Regulation (EU) No. 2020/35 of 15 January 2020 amending Implementing Regulation (EU) No. 2019/159 imposing definitive safeguard measures against imports of certain steel products²²; and

¹⁶ Turkey's response to Panel question No. 15, para. 1.

¹⁷ Provisional determination, (Exhibit TUR-3).

¹⁸ Turkey requested the Panel to refer to this as "definitive safeguards", in the plural. (Turkey's comments on the descriptive part of the Panel Report, para. 2.4). The Panel has rejected the request, without prejudice to the Panel's consideration of the question whether there is a single definitive safeguard or multiple definitive safeguards, which the Panel discusses in paras. 7.43-7.57 below. Turkey made an equivalent request also for the provisional safeguard. (Turkey's comments on the descriptive part of the Panel Report, para. 2.3).

¹⁹ Definitive determination, (Exhibit TUR-5). The definitive determination incorporates by reference certain findings and reasoning set out in the provisional determination.

²⁰ Double remedy regulation, (Exhibit TUR-7).

²¹ First review regulation, (Exhibit TUR-9).

²² European Commission Implementing Regulation (EU) 2020/35, (Exhibit TUR-10).

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- e. Commission Implementing Regulation (EU) No. 2020/894 of 29 June 2020 amending Implementing Regulation (EU) No. 2019/159 imposing definitive safeguard measures against imports of certain steel products (the "second review regulation").²³

3. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 Turkey requests the Panel to find that the measures at issue are inconsistent with Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.1(c), 4.2(a), 4.2(b), 4.2(c), 5.1, 5.2(a), 6, 7.1, and 7.4 of the Agreement on Safeguards, and with Articles II:1(b), XIII:2 *chapeau*, XIII:2(d), and XIX:1(a) of the GATT 1994.²⁴

3.2 Turkey requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that the European Union bring its measures into conformity with its obligations under the Agreement on Safeguards and the GATT 1994.²⁵ In addition, Turkey requests the Panel to suggest, pursuant to the second sentence of Article 19.1 of the DSU, that the European Union implement that recommendation by revoking the measures at issue.²⁶

3.3 The European Union requests that the Panel reject Turkey's claims in this dispute in their entirety.²⁷

4. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 22 of the Working Procedures adopted by the Panel (see Annexes B-1 and B-2).

5. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of Argentina, Brazil, Canada, Japan, the Republic of Korea, Switzerland, Ukraine, the United Kingdom, and the United States are reflected in their executive summaries, provided in accordance with

²³ Second review regulation, (Exhibit TUR-12).
²⁴ Turkey's first written submission, para. 381; second written submission, para. 268.
²⁵ Turkey's first written submission, para. 382; second written submission, para. 269.
²⁶ *Ibid.*
²⁷ European Union's first written submission, para. 313.

paragraph 22 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, C-3, C-4, C-5, C-6, C-7, C-8, and C-9). China, India, Norway, the Russian Federation, Chinese Taipei, and the United Arab Emirates did not provide the Panel with a third-party submission and did not make an opening oral statement at the third-party session of the first substantive meeting with the Panel.

6. INTERIM REVIEW

6.1 On 29 October 2021, the Panel issued its Interim Report to the parties. On 12 November 2021, Turkey and the European Union submitted their written requests for review. On 19 November 2021, the parties submitted comments on the other parties' written requests for review.

6.2 The parties' requests made at the interim review stage as well as the Panel's discussion and disposition of those requests are set out in Annex A-5.

7. FINDINGS

7.1 Turkey claims that the provisional and definitive safeguards on certain steel products adopted by the European Union in July 2018 and January 2019, respectively, are inconsistent with a number of provisions of the Agreement on Safeguards and the GATT 1994.

7.2 Below, we begin by considering whether we should make findings on both these measures, or only on the definitive safeguard, and we decide to make findings only on the definitive safeguard (section 7.1).

7.3 Our subsequent discussion follows the structure of Turkey's arguments. We therefore examine²⁸, in turn, the following aspects of the definitive safeguard: the European Commission's approach to product scope (section 7.2); unforeseen developments (section 7.3); the effect of obligations under the GATT 1994 (section 7.4); the increase in imports (section 7.5); threat of injury (section 7.6); causation (section 7.7); whether the safeguard was applied beyond the extent and time necessary to prevent serious injury (section 7.8); the allocation of shares in the tariff rate quotas that are one element of the definitive safeguard (section 7.9); whether the European Union did not progressively liberalize the safeguard and in fact made it more restrictive over time (section 7.10); and whether the out-of-quota duty that is another element of the

²⁸ In some instances, we exercise economy.

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definitive safeguard is a duty or charge inconsistent with Article II:1(b) of the GATT 1994 (section 7.11).

7.1 *The measures on which the Panel will make findings*

7.4 We recall that Turkey challenged (a) the provisional safeguard and (b) the definitive safeguard applied by the European Union on imports of certain steel products, as set out in more detail in section 2 above. Below, we discuss whether we should make findings on the provisional safeguard.

7.5 In response to a question from the Panel, Turkey has confirmed that the provisional safeguard is no longer in force, having been replaced by the definitive safeguard.²⁹ The European Union has not argued otherwise. It is therefore undisputed that the provisional safeguard is no longer in force.

7.6 At the same time, Turkey has observed that the regulation that applied the provisional safeguard (which we refer to as the provisional determination) is still in force.³⁰ In response to a further question from the Panel, Turkey has indicated that this means that "the legal basis remains to collect provisional safeguard measures retroactively" and, in support for this proposition, refers to findings of the panel in *India – Iron and Steel Products*.³¹

7.7 In this regard, we note that in these proceedings whether the provisional determination continues to provide the basis to collect out-of-quota safeguard duties is a question of fact. The findings of a different panel regarding the effects of a different safeguard adopted by a different Member cannot serve to establish as a matter of fact the effects of the provisional determination adopted by the European Union. In this case, we note that the reference to the findings of the panel in *India – Iron and Steel Products* is the only support that Turkey has provided for its statement that duties could still be collected retroactively under the provisional safeguard. In other words, Turkey has not provided the Panel with any evidence that duties are either continuing to be collected, or could be collected, by the European Union under the provisional safeguard at issue, and it has also stated that the provisional safeguard is no longer in force.³²

²⁹ Turkey's response to Panel question No. 1, paras. 2 and 4.

³⁰ Turkey's response to Panel question No. 1, para. 4.

³¹ Turkey's response to Panel question No. 16, para. 2 (referring to Panel Report, *India – Iron and Steel Products* [appealed by India on 14 December 2018, appealed by Japan on 21 December 2018]).

³² We also note that Article 9 of the definitive determination provides that any amounts paid under the provisional determination "shall be definitively collected", which indicates that it is the definitive determination that provides the basis for the definitive collection of duties on imports covered by the provisional safeguard.

7.8 Article 6.2 of the DSU does not limit to measures still in existence "the specific measures at issue" that can be brought before a panel. A panel may, therefore, issue findings on an expired measure where the panel believes it is necessary to do so to resolve a dispute. Conversely, a panel need not make findings on an expired measure where such findings are not necessary to resolve the dispute.³³ In addition, we note that when a panel does make findings on an expired measure, the fact that the measure has expired may affect the recommendations a panel may make pursuant to Article 19.1 of the DSU, which requires panels to make recommendations "to bring *the measure* into conformity" with the covered agreements.³⁴

7.9 In this instance, Turkey concedes that the provisional safeguard is no longer in force. Turkey claims that the provisional safeguard is inconsistent with Article 6 for a subset of the reasons for which it claims the definitive safeguard is inconsistent with other provisions of the Agreement on Safeguards. Indeed, Turkey makes no distinction between its arguments against the provisional safeguard and the corresponding arguments against the definitive safeguard.³⁵ Given that the provisional safeguard is no longer in force, and that Turkey challenges the provisional safeguard for some of the same reasons for which it challenges the definitive safeguard, we do not consider that making findings on the consistency of the provisional safeguard with the covered agreements is necessary to resolve the dispute, and we therefore refrain from making such findings.

7.10 Notwithstanding this, we note that the provisional determination forms part of the record in the underlying investigation that led to the adoption of the definitive safeguard, and that the definitive determination refers to part of the findings and reasoning set out in the provisional determination. Therefore, although we decline to make findings on the consistency with the covered agreements of the provisional safeguard as a challenged measure, we still consider the provisional determination as appropriate when examining Turkey's claims against the definitive safeguard.

³³ See e.g. Panel Reports, *China – Electronic Payment Services*, paras. 7.226-7.229; and *Argentina – Textiles and Apparel*, para. 6.15.

³⁴ DSU, Article 19.1 (emphasis added). See e.g. Appellate Body Report, *US – Certain EC Products*, para. 81; and Panel Report, *EU – PET (Pakistan)*, para. 8.3.

³⁵ See e.g. Turkey's first written submission, paras. 49-76.

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7.2 *Product scope*

7.11 Turkey claims that the definitive safeguard is inconsistent with Article XIX:1(a) of the GATT 1994 and Articles 2.1, 3.1, 4.1(c), 4.2(a), 4.2(b), and 4.2(c) of the Agreement on Safeguards, based on two sets of arguments.

7.12 First, Turkey argues that the European Commission applied 26 distinct safeguards, on 26 products, but did not examine whether the circumstances and conditions for imposing a safeguard existed for each of those products individually. We refer to this as the "mismatch" argument. According to Turkey, this gives rise to an inconsistency with Article XIX:1(a) of the GATT 1994 and Articles 2.1, 4.1(c), 4.2(a), and 4.2(b) of the Agreement on Safeguards.³⁶

7.13 Second, Turkey argues that the European Commission adopted an internally inconsistent approach to product scope at different stages of the investigation and application of the measures. We refer to this as the "internal inconsistency" argument. According to Turkey, this gives rise to an inconsistency with Article XIX:1(a) of the GATT 1994 and Articles 2.1, 3.1, 4.1(c), 4.2(a), 4.2(b), and 4.2(c) of the Agreement on Safeguards.³⁷

7.14 We note that within each of these sets of arguments, Turkey presents its arguments for the most part without distinguishing among the various claims it has raised. That is, Turkey sets out its arguments typically without specifying to what claim(s) each refers, and then cites a string of provisions in its concluding paragraphs; the Panel has sought some clarification in this regard but has obtained only very limited clarification.³⁸

7.15 To Turkey's arguments, the European Union responds that it adopted a single definitive safeguard on certain steel products comprising 26 product categories, and that it ascertained the existence of the circumstances and conditions necessary for imposing a safeguard on the product as thus defined.³⁹ As regards the allegation of internal inconsistency, the European Union responds that it did, as required, conduct an objective and unbiased evaluation and set out its findings and reasoned conclusions, and that the Agreement on Safeguards

³⁶ See e.g. Turkey's first written submission, para. 67. See, more broadly, Turkey's first written submission, paras. 50-67; and second written submission, paras. 17-46.

³⁷ See e.g. Turkey's first written submission, para. 76; response to Panel question No. 17, para. 3. See, more broadly, Turkey's first written submission, paras. 68-76; and second written submission, paras. 48-54.

³⁸ The second set of arguments is presented in support of the same claims as the first set of arguments, plus Articles 3.1 and 4.2(c) of the Agreement on Safeguards. (Turkey's response to Panel question No. 17, para. 3).

³⁹ European Union's first written submission, paras. 27-46; second written submission, paras. 1, 3-5, 7-16, and 24-29.