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## **TURKEY – ADDITIONAL DUTIES ON CERTAIN PRODUCTS FROM THE UNITED STATES**

### **NOTIFICATION OF AN APPEAL BY TÜRKİYE UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU), AND UNDER RULE 20(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW**

The following communication, dated 26 January 2024, from the delegation of Türkiye, is being circulated to Members.

Pursuant to Articles 16.4 and 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Türkiye hereby notifies the Dispute Settlement Body of its decision to appeal to the Appellate Body certain issues of law and legal interpretations in the report of the panel established to hear the case *Türkiye — Additional Duties on Certain Products from the United States* (WT/DS561/R).

Pursuant to Rule 20(1) of the Working Procedures for Appellate Review, Türkiye is simultaneously filing this Notice of Appeal with the Appellate Body Secretariat (by submitting the document in the WTO Registry). For reasons that will be set out in greater detail in its submissions to the Appellate Body, Türkiye appeals and requests the Appellate Body to reverse, amend, or declare moot and of no legal effect the following findings, conclusions, rulings, and recommendations of the Panel with respect to errors of law or legal interpretation contained in the Panel Report.

#### **1 THE PANEL INCORRECTLY INTERPRETED ARTICLE 11.1(C) OF THE AGREEMENT ON SAFEGUARDS**

1.1. First, Türkiye appeals the Panel's legal interpretation of Article 11.1(c) of the Agreement on Safeguards.<sup>1</sup> Article 11.1(c) provides, in relevant part, that the Agreement on Safeguards "does not apply to measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX, and Multilateral Trade Agreements in Annex 1A other than this Agreement ...". The Panel read this language to mean that Article 11.1(c) "excludes from the scope of the Agreement on Safeguards measures that are sought, taken, or maintained by virtue of or under provisions of the GATT 1994 other than Article XIX" and "is not concerned with *the consistency* of such measures with the provisions of the GATT 1994 pursuant to which they are sought, taken, or maintained".<sup>2</sup> The finding that Article 11.1(c) is not concerned with the consistency of measures with the provisions of the GATT 1994 pursuant to which they are sought taken or maintained is in error, for the following reasons.

1.2. As the Panel itself acknowledged, the English term "pursuant to" in Article 11.1(c), on its own, can be read as denoting the consistency or conformity of a measure with the relevant provision.<sup>3</sup> But when this phrase is read in the light of the Spanish-language version, as it must be, it becomes clear that this reading is the *sole correct reading* of the term in Article 11.1(c). The Spanish version of Article 11.1(c) uses the term "de conformidad con". That phrase conveys an unambiguous

<sup>1</sup> Panel Report, paras. 7.50 – 7.62.

<sup>2</sup> Panel Report, para. 7.60. (emphasis added)

<sup>3</sup> Panel Report, para. 7.52.

requirement of *substantive consistency or conformity*.<sup>4</sup> Article 33.4 of the Vienna Convention on the Law of Treaties (Vienna Convention) requires that the "meaning which best reconciles [different language] texts ... shall be adopted". The Panel failed to grant the proper significance to this important principle of treaty interpretation.

1.3. The Panel itself even acknowledged that this meaning of the phrase "pursuant to" is confirmed by its context in the Agreement on Safeguards. For example, Article 2.1 of the Agreement uses this phrase in the sense of consistency or conformity.<sup>5</sup> However, the Panel still failed to reach the proper conclusion that Article 11.1(c) should similarly be read to require consistency or conformity.

1.4. Türkiye, therefore, requests the Appellate Body to reverse the Panel's conclusions and the Panel's legal interpretations contained in paragraphs 7.50-7.62 of the Panel Report. Moreover, this fundamental error in the Panel's interpretation of Article 11.1(c) vitiates the Panel's analyses, findings, and conclusions in Sections 7.1.2.5.2, 7.1.3, 7.2, and 8 of the Panel Report, because the Panel applied an incorrect legal standard when applying Article 11.1(c) to the United States' measures. Türkiye, therefore, also requests the Appellate Body to declare moot and of no legal effect the Panel's analyses, findings, and conclusions in these sections too.

## **2 THE PANEL INCORRECTLY DETERMINED THAT THE UNITED STATES' SECTION 232 MEASURES – AND CONSEQUENTLY ALSO TÜRKİYE'S ADDITIONAL DUTY MEASURES, WHICH WERE A DIRECT RESPONSE TO THE UNITED STATES' SECTION 232 MEASURES – WERE NOT COVERED BY ARTICLE XIX:3(A) AND ARTICLE 8.2 OF THE AGREEMENT ON SAFEGUARDS.**

2.1. Next, Türkiye appeals the Panel's finding that the Agreement on Safeguards does not apply to the United States' measures under Section 232 of the 1962 Trade Expansion Act (Section 232)<sup>6</sup> and that, as a consequence, Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 also do not apply to Türkiye's additional duties measure<sup>7</sup>.

2.2. The Panel's finding is based on an improper interpretation of Article 11.1(c), as explained in Section 1 above. Because the Panel espoused an incorrect interpretation of Article 11.1(c), its subsequent application of that legal standard to the facts of this case – and the Panel's ultimate finding concerning the applicability of Article XIX and the Agreement on Safeguards – are necessarily vitiated by that incorrect interpretation and must therefore be reversed.

2.3. But even accepting *arguendo* as correct the Panel's articulation of the legal standard under Article 11.1(c), the Panel applied its legal standard incorrectly. Its finding should, therefore, be reversed for this reason also. In other words, even under its legal standard, the Panel should have found that the United States' Section 232 measures were by their very nature safeguard measures and were, therefore, subject to Article XIX of the GATT 1994 and the Agreement on Safeguards (as opposed to Article XXI of the GATT 1994). The Panel should have also found that the measures imposed by Türkiye were a response to these safeguard measures and thus qualify as rebalancing measures under Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994. In what follows, Türkiye expands on these additional legal errors in the Panel's analyses.

### **2.1 The Panel granted improper deference to the designation of the measures under United States domestic law and in the United States' notifications to the WTO**

2.4. The Panel's finding in paragraphs 7.80 and 7.81 is legally incorrect because the Panel granted almost total deference to the manner in which the United States labelled its measures for purposes of United States domestic law and for purposes of the United States' notifications of these measures to the WTO.

2.5. The Panel spent the bulk of its analysis describing the details of United States' statutory law (in particular, Section 232), the procedures conducted by the United States Department of Commerce (USDOC) that led to the adoption of the measures at issue, the repeated references to "national security" (within the meaning of United States law) found throughout Section 232, the

<sup>4</sup> Türkiye's response to Panel question 78.a.

<sup>5</sup> Panel Report, footnote 149.

<sup>6</sup> Panel Report, para. 7.80.

<sup>7</sup> Panel Report, para. 7.81.

content of the USDOC's determinations, and the Presidential Proclamations that adopted the import restrictions at issue. This analysis constitutes the opening and dominant part of the Panel's analysis.<sup>8</sup> The Panel thus erroneously used an assessment based primarily on the characterization of the measure under domestic law to reach its conclusion that the measures were not, by their nature, safeguard measures.

2.6. The Panel's approach is incorrect. According to well-established WTO legal principles, characterization under domestic law cannot determine classification of measures for purposes of WTO law. Self-designation under domestic law is, therefore, of secondary and limited relevance.<sup>9</sup> This is also in line with the generally recognised principle that domestic law cannot serve as justification for a Member's failure to observe its international obligations.<sup>10</sup> The Panel's finding ignores these well-established principles. If the Panel's finding is allowed to stand, it creates the risk that WTO Members may in the future seek to ensure or avoid the applicability of specific WTO legal norms simply by strategically labelling their measures in a particular way, under domestic law. This is a fundamental departure from how WTO law has been understood and applied since 1995.

2.7. In addition to relying excessively on domestic law, the Panel also relied extensively on the United States' notification of its Section 232 measures to the WTO as "national security" measures, rather than as safeguard measures.<sup>11</sup> As the Appellate Body explained in prior disputes, "a degree of caution must be exercised in attributing decisive weight to characteristics *that fall exclusively within the control of WTO Members*, 'because otherwise Members could determine by themselves which of the provisions would apply to their [measures]'".<sup>12</sup> Clearly, the choice of a particular label for a measure notified to the WTO falls exclusively within the control of a WTO Member and, therefore, cannot be attributed decisive weight when seeking to determine the legal nature of the measure for purposes of WTO law. In precisely this vein, the 1993 Decision on Notification Procedures, which may serve as context for the interpretation of the term "safeguard measures" in Article 1 of the Agreement on Safeguards, also states explicitly that Members' notifications are not dispositive of the legal nature of a measure for purposes of WTO law.<sup>13</sup>

## **2.2 The Panel's analysis of the substantive features of the United States' Section 232 measures was incorrect**

2.8. The Panel examined the substantive characteristics of the United States Section 232 measures only after it had effectively already decided that the measures were "national security" measures, rather than safeguard measures, based solely on the labelling of those measures under United States domestic law and in the United States' notification of the measures to the WTO. The Panel examined this characteristic in the final part of its analysis, when it rebutted selectively some of the arguments that Türkiye had presented concerning the substantive characteristics of the measures. The Panel's rebuttal of Türkiye's arguments can be summarized, in essence, as stating that economic aspects may be present in a national security measure without compromising the status of that measure as a national security measure.<sup>14</sup>

2.9. This analysis is flawed. The Panel's analysis of Türkiye's arguments is selective and superficial and lacks any systematic assessment of the dominant nature, central characteristics, and content of the measure, as required by a long and well-established series of decisions by prior WTO panels and the Appellate Body.<sup>15</sup> As Türkiye established, the measures are import restrictions whose primary intended effect is to limit competition in the United States' steel and aluminium market and thereby provide economic benefits to United States' producers of these products. This is their primary purpose. Any "national security" purpose is a secondary, additional feature that follows from the economic characteristics of the measure. The Panel failed to discuss these fundamental characteristics of the United States' measures and made no attempt to relate the question before

<sup>8</sup> Panel Report, paras. 7.63-7.80.

<sup>9</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60.

<sup>10</sup> See Article 27 of the Vienna Convention.

<sup>11</sup> Panel Report, para. 7.73.

<sup>12</sup> Appellate Body Report, *China – Auto Parts*, para. 178. (emphasis added)

<sup>13</sup> Decision on Notification Procedures, adopted by the Committee on Trade Negotiations on 15 December 1993, as annexed to the Final Act embodying the results of the Uruguay Round of multilateral trade negotiations, done at Marrakesh on 15 April 1994.

<sup>14</sup> Panel Report, paras. 7.74 – 7.79.

<sup>15</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, paras. 5.60, 5.64.

the Panel to the Appellate Body's approach of identifying the central "constituent features" of a measure to determine whether it is a safeguard measure.

2.10. Similarly, the Panel never conducted an "objective assessment" of what may constitute a national security rationale for purposes of WTO law. The Panel *simply took as a given* that concerns about, and measures addressing, "rising levels of aluminium and steel imports" may qualify as concerns or measures addressing "national security" within the meaning of WTO law.

2.11. For instance, in paragraph 7.72, the Panel describes the question before it as whether the measures "were designed and expected to operate *to address the threat to national security that the United States had determined to arise from rising levels of aluminium and steel imports*".<sup>16</sup> This wording implies that the Panel simply accepted that the United States was free to label "rising levels of aluminium and steel imports", and their subsequent impact on United States' steel and aluminium producers, as a "national security" concern and was, therefore, free to label measures to address these rising imports as "national security" measures. It is obvious that, if Members were permitted to label imports of some product as a threat to national security, all increases on imports could be described as "national security" concerns, and restrictions on those imports would automatically pass the test whether they are "designed and expected to operate" as measures relating to national security.

2.12. But that cannot be the correct question relating to the essence and fundamental features of the measures. Instead of simply accepting the proposition that imports of a product can be deemed to be a "national security" concern, the Panel should have asked itself whether a WTO Member is at liberty to consider, for purposes of WTO law, that rising levels of imports of a product and the impact of these imports on the economic health of an industry can, without more, give rise to national security concerns *within the meaning of WTO law*. Asking this question is part and parcel of the proper standard of review – that is, the "objective assessment" of the matter – that applies to the Panel's analysis under Article 11.1(c) of the Agreement on Safeguards.

2.13. The notions of "safeguard measures" and "essential security interests" (national security) are not, for purposes of WTO law, placeholders or empty vessels that a WTO Member can fill with meaning at its discretion. These are treaty terms and must, therefore, have a legal meaning. Measures falling into one or the other category must have certain constituent features. This is, among other reasons, because the drafters created important rights for WTO Members affected by a safeguard measure, including, in particular, the authorization to adopt rebalancing measures.

2.14. The Panel's approach, without any scrutiny, of permitting the United States to label its safeguard measures as "national security" measures, and thereby to escape the application of WTO safeguard disciplines, eviscerates these rebalancing rights granted to other WTO Members. This loss of the right to take rebalancing measures is obviously not compensated by the possibility that the alleged national security measures may subsequently be declared inconsistent with Article XXI of the GATT 1994. Even when a WTO Member in Türkiye's position can successfully challenge the United States' measures as national security measures, because the United States is unable to justify these measures under Article XXI of the GATT 1994, Türkiye has nevertheless been deprived of its right to adopt rebalancing measures that the drafters of Article XIX and the Agreement on Safeguards considered vital for preserving the legitimate interests of WTO Members affected by safeguard measures.

### **2.3 The Panel's balancing of the measures' national security objectives vs economic objectives is not even-handed**

2.15. The Panel's analysis is also undermined by how the Panel balanced the two objectives of the measures.

2.16. First, the Panel states that "references to the economic welfare of domestic industries ... are in the context of the relationship of such economic welfare to the United States' national security."<sup>17</sup> Elsewhere, the Panel states that the economic aspects of the Section 232 measures "cannot be divorced from [their] background and context, which reflect the measures' national security

<sup>16</sup> Panel Report, para. 7.72. (emphasis added)

<sup>17</sup> Panel Report, para. 7.76.

objectives ..."<sup>18</sup> This rebuttal can be summarized, in essence, as stating that economic aspects may be present in a national security measure without compromising the status of that measure as a national security measure.<sup>19</sup>

2.17. But the Panel's reasoning can easily be turned on its head. It is equally possible to say that the references to *national security* in the United States' measures must be seen in the "context of the[ir] relationship" to the *economic welfare of domestic industries* and that the alleged national security aspect of these measures "cannot be divorced from their background and context", which reflects the measures' *economic* goals. Thus, the Panel's approach begs the very question it pretends to answer – what is the principal "context" of the measures?

2.18. If the two aspects of the measures cannot be divorced from each other, the Panel must as a legal matter determine the "central aspect"<sup>20</sup> of the measure and provide a basic explanation of how it reached that conclusion. But the Panel does not provide that explanation. Instead, the Panel effectively assumes – without any explanation – that the national security element of the United States measures is the "central", dominant aspect. This does not reflect a correct analysis under Article 11.1(c), nor does it reflect a correct application of the standard of review. Moreover, the lack of proper and duly substantiated explanation of a core element of its ruling appears to be inconsistent with Article 12.7 of the DSU, which requires a panel to provide a basic rationale underpinning the core elements of its ruling.

2.19. The Panel also failed to conduct a legally correct analysis when weighing the economic and national security rationales, because it failed to mention, let alone analyse, various elements that Türkiye had highlighted in order to demonstrate that the defining characteristics of the measures – including the underlying policy objectives – were of an economic nature. Most prominently, the Panel failed to discuss or give proper weight to, among other things, the *economic rationale* of the USDOC steel and aluminium investigations, as well as *their purpose to save jobs* in the United States' domestic market, as reflected in the USDOC Reports, the Memorandum initiating the Section 232 steel investigation, and various statements of senior United States government officials.<sup>21</sup>

2.20. As another example, and as Türkiye also pointed out to the Panel, when the United States exempted various countries from the Section 232 measures, it did so to a large extent based on *economic* reasons for the exemptions, such as "the physical proximity of our respective industrial bases", "the robust economic integration between our countries", and "the export of steel articles produced in the United States to Canada and Mexico". The Panel failed even to mention these considerations, let alone analyse them.<sup>22</sup>

2.21. Similarly, when the United States, on the one hand, and Canada and Mexico, on the other hand, settled their respective WTO disputes about the Section 232 measures, the settlements were conditioned almost exclusively on economic considerations. As the text of the settlement documents reveals, these economic considerations revolved around the prevention of the importation of unfairly subsidized and/or dumped aluminium and steel articles, and monitoring for import surges. The Joint Statements issued by these parties did not even mention national security.<sup>23</sup> These Joint Statements thus further confirm the economic nature of these parties' disputes and of their ultimate settlements. To the extent that any surges in unfairly subsidized and/or dumped aluminium and steel imports

<sup>18</sup> Panel Report, para. 7.77.

<sup>19</sup> Panel Report, paras. 7.74 – 7.79.

<sup>20</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, paras. 5.60, 5.64; Panel Report, *US – Steel and Aluminium Products (Turkey)*, paras. 7.111 and 7.114.

<sup>21</sup> See, *inter alia*, Türkiye's first written submission in DS564, para. 3.8, (Exhibit TUR-40) ("The artificially low prices caused by excess capacity and unfairly traded imports suppress profits in the American steel industry, which discourages long-term investment in the industry and hinders efforts by American steel producers to research and develop new and better grades of steel. If the present situation continues, it may place the American steel industry at risk by undermining the ability of American steel producers to continue investment and research and development, and by reducing or eliminating the jobs needed to maintain a pool of skilled workers essential for the continued development of advanced steel manufacturing"). See also Türkiye's first written submission in DS564, paras. 3.95, 3.103. (Exhibit TUR-40)

<sup>22</sup> Presidential Proclamation 9705, para. 10. (Exhibit TUR-6)

<sup>23</sup> See Exhibits TUR-48 and TUR-49.

have also raised national security concerns in the United States, these concerns are clearly of a subsidiary nature, and cannot be considered as a central aspect of the Section 232 measures.

2.22. As a result, the Panel's juxtaposition of the economic and national security rationales cannot be described as legally correct or objective.

## 2.4 Conclusion

2.23. In sum, the Panel's analysis under Article 11.1(c) and its assessment of the applicability of WTO covered agreements to the United States' Section 232 measures constitutes legal error. The Panel incorrectly interpreted and applied Article 11.1(c) and failed to apply the appropriate standard of review. Moreover, parts of the Panel's analysis fail to articulate the basic rationale of its findings, as required under Article 12.7 of the DSU.<sup>24</sup> The Panel finding should therefore be reversed.<sup>25</sup> Instead, the Appellate Body should find that, even under the Panel's own legal standard under Article 11.1(c), the Panel should have found that the United States' Section 232 measures constitute safeguard measures and that, therefore, Türkiye's additional duties qualify as rebalancing measures within the meaning of Article 8.2 and Article XIX:3(a) of the GATT 1994.

## 3 THE PANEL INCORRECTLY FOUND THAT THE APPLICATION OF ARTICLES I AND II OF THE GATT 1994 IS NOT SUSPENDED IN RELATION TO TÜRKIYE'S MEASURE AND THAT TÜRKIYE'S MEASURE IS THUS INCONSISTENT WITH THESE PROVISIONS

3.1. Türkiye also appeals separately the Panel's finding that the application of Articles I and II of the GATT 1994 is not suspended in relation to Türkiye's measure<sup>26</sup> and that Türkiye has acted inconsistently with both of these provisions.<sup>27</sup>

3.2. This finding flows directly and logically from the Panel's findings on the applicability of Article XIX and the Agreement on Safeguards, which Türkiye appeals in Sections 1 and 2 of this Notice of Appeal. Should the Appellate Body agree with Türkiye that the Panel erred in finding that Article XIX and the Agreement on Safeguards are not applicable to the United States' underlying Section 232 measures – and by extension are also not applicable to Türkiye's rebalancing measures – the Appellate Body should also reverse the Panel's finding that the application of Articles I and II of the GATT 1994 is not suspended in relation to Türkiye's measures.

## 4 THE PANEL ERRED IN FINDING THAT AT LEAST SOME OF THE PRODUCTS CLASSIFIED UNDER HEADINGS 870340100000, 870340900000, 870350000000, 870360100000, 870360900000, AND 870370000000 IN TÜRKIYE'S APPLIED TARIFF SCHEDULE ARE BOUND UNDER TÜRKIYE'S WTO SCHEDULE

4.1. As a final point, Türkiye appeals the treatment by the Panel of two specific tariff lines with respect to which the parties disagreed on whether a tariff binding existed. The Panel improperly found, for those two tariff lines, that Türkiye has acted inconsistently with Articles II:1(b) and II:1(a) of the GATT 1994, by imposing duties that exceed the tariff binding on products covered by these two tariff lines.

4.2. By way of background, Türkiye's measures concerned a total of 479 tariff lines under Türkiye's 2017 domestic applied tariff schedule. These 479 tariff lines are set out in Annex E-1 of the Addendum of the Panel's Report.

<sup>24</sup> Should the Appellate Body consider that the nature of the Panel's error in assessing the nature of the United States' Section 232 measures is such as to be properly challengeable exclusively under Article 11 of the DSU, as a failure to conduct an objective assessment of the matter, Türkiye also presents an appeal under Article 11 of the DSU.

<sup>25</sup> See Sections 7.1.2.5.2, 7.1.3, 7.2, and 8 of the Panel Report.

<sup>26</sup> Panel Report, para. 7.81.

<sup>27</sup> Panel Report, paras. 7.112-113, 7.130, 7.133, 7.138, 7.142, 7.146, 7.149, 7.150, 7.151-7.153, and 8.1-8.3.

4.3. With respect to 269 of these 479 tariff lines, the Panel found that no tariff binding existed and that, therefore, Türkiye had not violated Articles II:1(a) and II:1(b).<sup>28</sup>

4.4. With respect to the remaining 210 tariff lines, the Panel found that the United States had demonstrated that Türkiye's additional duties measure resulted in the imposition of ordinary customs duties on imports from the United States in excess of the rates set forth in Türkiye's bound Schedule.<sup>29</sup>

4.5. This finding with respect to 210 tariff lines has three parts.

4.6. First, with respect to 201 tariff lines, the Panel stated that the parties were in agreement that a binding existed. Therefore, the Panel did not provide a detailed analysis. Subject to paragraphs 4.14 to 4.21 below, Türkiye does not appeal this finding.<sup>30</sup>

4.7. Second, with respect to the remaining nine<sup>31</sup> tariff lines, the Panel conducted a more detailed analysis that is divided into two sections. In the first of these two sections (Section 7.2.3.2.2.1), the Panel examined more closely a set of tariff lines for which the Parties agreed that a binding existed, but disagreed – in the early parts of the panel process – as to what was Türkiye's *applied* MFN rate during the period relevant to this dispute.<sup>32</sup> The Panel accepted that the applied rate was as argued by Türkiye and found that, for all of these tariff lines, a violation of Article II:1(a) and II:1(b) existed.

4.8. In the following section 2.3.2.2.2, concerning the second set of tariff lines – a total of six tariff lines – the Panel was confronted with a disagreement between the parties *as to whether these tariff lines were bound under Türkiye's bound GATT Schedule*.<sup>33</sup> These six tariff lines are set out in Türkiye's applied tariff schedule and, like all other tariff lines, were reproduced in Annex E-1 to the Panel Report. These six tariff lines – just like the entire applied tariff schedule of Türkiye at the time of the panel proceedings – reflect the 2017 version of the *Harmonized System* nomenclature. These six tariff lines are the following:

- a) 8703.4010.0000
- b) 8703.4090.0000
- c) 8703.5000.0000
- d) 8703.6010.0000
- e) 8703.6090.0000
- f) 8703.7000.0000

4.9. The United States argued that these six tariff lines were bound at 19 per cent. In contrast, Türkiye argued that these tariff lines were unbound.<sup>34</sup> The origin of the parties' disagreement was that Türkiye's current *GATT schedule of concessions* is based on the 2002 *Harmonized System* nomenclature, whereas Türkiye's *domestic applied tariff schedule* during the time period relevant

<sup>28</sup> However, the Panel found a violation of Article I of the GATT 1994. See Panel Report, paras. 7.130-7.131.

<sup>29</sup> Panel Report, paras. 7.150 and 8.1.c.i.

<sup>30</sup> Türkiye does not appeal this finding with respect to those tariff lines for which the parties were in agreement about the existence of a tariff binding. However, as explained below in paragraphs 4.14 – 4.21, the Panel appears to have erroneously included within this set of allegedly undisputed tariff lines two tariff lines with respect to which the parties were *not* in agreement. As a separate issue, with respect to the specific number of 201 tariff lines, Türkiye notes that the Panel Report is internally inconsistent, in that it alternatively characterizes the number of tariff lines subject to this finding as 199 (in paragraph 7.130) or as 201 (in paragraph 7.150). The difference between these two figures is not explained anywhere in the Panel Report.

<sup>31</sup> The number 9 stated in the Panel Report (paras. 7.150 and 8.1.c.ii) is in reality incorrect and reflects one of several errors and internal inconsistencies in the Panel Report. The number of tariff lines that the Panel examined in greater detail was in reality 11. In paragraph 7.131, at the outset of its analysis, the Panel lists 11 tariff lines to be examined. The Panel indeed examines these 11 tariff lines (5 tariff lines in Section 7.2.3.2.2.1 and 6 tariff lines in Section 7.2.3.2.2.2) and concludes for all of these 11 tariff lines that a binding exists and that a violation of Articles II:1(a) and II:1(b) has occurred. However, in paragraphs 7.150 and 8.1.c.ii, two of these 11 tariff lines disappear, and the Panel refers only to 9 tariff lines. There is no explanation for the two missing tariff lines.

<sup>32</sup> The United States had argued that an MFN rate of 58.5 per cent applied, whereas Türkiye indicated that the correct MFN rate was a combined tariff of 9 per cent plus a specific amount. See Panel Report, para. 7.132.

<sup>33</sup> Panel Report, paras. 7.130-7.131.

<sup>34</sup> See Panel Report, Section 6.2.1.

for this proceeding, as already mentioned above, was based on the 2017 *Harmonized System* nomenclature. The parties held different views concerning the correspondence between differently-numbered tariff lines in these two HS versions.

4.10. This question was, of course, of fundamental importance for the Panel's analysis of the United States' claim of a violation of Articles II:1(b) and II:1(a) of the GATT 1994. If the tariff lines at issue were unbound, no violation under Article II:1 could exist for these tariff lines, regardless of the level of the duty imposed by Türkiye. Conversely, if these tariff lines were bound as alleged by the United States, Türkiye's applied duty would be in excess of these tariff bindings and thus in violation of Article II:1(b) and II:1(a).

4.11. In its Interim Report, the Panel "analysed these tariff lines on the basis that the bound rate is 19 per cent", effectively agreeing with the assertions that the United States had made during the panel proceedings.<sup>35</sup> In response, Türkiye pointed out that the Panel's finding – that is, that the tariff lines were bound and that the level of binding was 19 per cent – was incorrect as it did not rest on any substantive analysis by the Panel. Rather, the Panel had merely made an assumption, and the basis for the Panel's assumption that the tariff lines were bound and that the level of binding was 19 per cent was simply a recitation of the Parties' arguments and a conclusory, unsubstantiated statement that "Türkiye has not provided adequate evidence to justify its request that the Panel consider these tariff lines to be unbound".<sup>36</sup> Türkiye explained that a WTO panel is not entitled to make findings on an issue that is disputed by the parties without providing a basic analysis and explanation for its finding. This is especially so, given that this issue was not an issue of fact, but rather an issue of law, because it concerned the interpretation of a part of the WTO Agreement, i.e., Türkiye's GATT schedule of concessions.

4.12. In any event, Türkiye argued that the Panel should not engage in a substantive analysis of this issue, and should refrain from making a ruling on these specific tariff lines under Article II:1. This was because, by ruling on the substance of this disagreement, the Panel could improperly prejudge the currently ongoing WTO Harmonized System transposition process, through which Türkiye's WTO schedule is being transposed from the 2002 version of the Harmonized System to the 2007 version. Türkiye submitted that the institutionally mandated division of tasks between WTO panels and a dedicated HS transposition process, managed by the WTO Member at issue and by the WTO Secretariat, meant that the Panel should not rule on the substance of this matter.

4.13. In the Final Report sent to the parties on 1 December 2023 – that is, the version of the Final Report that has not yet been circulated to the rest of the WTO membership and the public – the Panel "reject[ed] Türkiye's request to leave the question regarding the determination of the bound rates for the abovementioned [sic] six tariff lines unresolved".<sup>37</sup> At the same time, the Panel accepted Türkiye's concern that the Panel had failed to provide any substantive analysis for its conclusions in the Interim Report. In its Final Report, the Panel set out a detailed examination of the question whether for (some or all of the) products covered by the six tariff lines, a tariff binding existed.<sup>38</sup> It is worth noting that the parties first saw the Panel's analysis on this issue in the Final Report sent to the parties, at which point, in principle, no further comments by the parties are envisaged.

4.14. In this new analysis, presented to the parties for the first time in the Final Report, the Panel committed an error by analyzing not the six tariff lines that were actually contested by the parties. Instead, due to an apparent clerical error in the Panel's listing of the tariff lines, the Panel analysed a set of six tariff lines that *corresponds only partially to the six contested tariff lines*. Specifically, the Panel analysed tariff lines (a), (b), (c), and (d) as listed in paragraph 4.8 above. Instead of

<sup>35</sup> Interim Report, para. 7.132.

<sup>36</sup> Interim Report, para. 7.132.

<sup>37</sup> Final Report, para. 6.26.

<sup>38</sup> Final Report, para. 6.26. Türkiye notes that the Panel has phrased its finding as being "to the extent" that these tariff lines apply to products subject in Türkiye's bound Schedule to a bound rate. Read in the light of the entirety of the Panel's finding, this phrase is not to be read as a mere *arguendo assumption* that the tariff lines at issue cover products subject to a bound rate. Rather, the phrase "to the extent" was used by the Panel in the sense that the Panel found that the tariff lines at issue cover products some of which are subject to a bound rate of 19 and 20 per cent in Türkiye's bound Schedule and some of which are unbound. This reading appears to be confirmed by the entry 19/20/U for the relevant tariff lines in Annex E-1 of the Addendum of the Panel's Report. Türkiye continues to consider it would have been more appropriate for the Panel to refrain from ruling on this issue, which remains subject to the dedicated HS transposition process, which is managed by Türkiye and by the WTO Secretariat.

analyzing also tariff lines (e) and (f) as listed in paragraph 4.8 above, however, the Panel analysed two entirely different tariff lines and found that these two tariff lines were subject to a tariff binding.<sup>39</sup>

4.15. The finding on the two different lines was entirely superfluous, because Türkiye had never argued that these two tariff lines were unbound. Therefore, the Panel could have simply included these tariff lines in its finding on those tariff lines for which the Panel did not provide a detailed analysis, because the Parties agreed that these tariff lines were bound.<sup>40</sup> But a more problematic consequence of this error was that the Panel failed to analyse items (e) and (f), which were actually in dispute between the parties.

4.16. Türkiye pointed out this error to the Panel in its comments on the Final Report, before the Final Report was circulated to the WTO Members and the public. There can be no doubt about which were the precise six tariff lines that were in dispute, because *these six tariff lines are listed explicitly, with their complete codes, in the Panel's Interim Report*.<sup>41</sup> Moreover, *even the Panel's Final Report to the Parties* listed the correct six tariff headings in one of the headings, even though the substance of the Panel's analysis pertained to a different (incorrect) set of six tariff lines.

4.17. In response to Türkiye's comments, the Panel made certain minor changes to the report that, however, failed to address the fundamental problem. In its Final Report circulated to all WTO Members and to the public, the Panel merely adjusted the text of the relevant heading to match its incorrect substantive analysis. However, the Panel did not change the underlying analysis of its findings. The Final Report still lacks any analysis with respect to tariff lines (e) and (f) and instead contains redundant findings with respect to two others.

4.18. One of the consequences of the Panel's focus on an incorrect (partially correct) set of six tariff lines is that the Panel has made a finding of violation with respect to two tariff lines (items (e) and (f) mentioned in paragraph 4.8 above) whose tariff binding was contested between the parties, but that the Panel did not analyse specifically.

4.19. The Panel appears to have included tariff lines (e) and (f) among the supposedly uncontested tariff lines that the Panel did not analyse in detail, simply stating in a conclusory manner that, for these tariff lines, a tariff binding existed and that this tariff binding has been exceeded. This approach was acceptable for the tariff lines that were not in dispute. However, this approach is not acceptable for tariff lines (e) and (f). A Panel is not permitted to simply ignore a disagreement between the parties on a central issue that underpins the interpretation of Türkiye's GATT schedule of concessions and, consequently, underpins the finding of violation.

4.20. This finding is inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994. Moreover, because the Panel failed to articulate the reasons why it considered tariff lines (e) and (f) to be bound, the Panel also appears to have acted inconsistently with Article 12.7 of the DSU, which requires a panel to explain the basic rationale for its findings.<sup>42</sup>

4.21. For all of above reasons, Türkiye requests the Appellate Body to reverse the Panel's ruling for tariff lines 8703.6090.0000 and 8703.7000.0000 under Articles II:1(a) and II:1(b) of the GATT 1994.<sup>43</sup>

<sup>39</sup> These two tariff lines were 870333909011 and 870333909019. See Panel Report, paras. 7.135 – 7.138.

<sup>40</sup> Türkiye recalls that, as already described in footnotes 30 and 31, the Panel analysed these two tariff lines in detail and found that a violation of Article II:1(a) and II:1(b) existed, but subsequently omitted these tariff lines from the summary of its findings in paragraph 7.150 and the Conclusions section of its report in paragraph 8.1.c.ii. The Panel did not provide any explanation for this omission. Türkiye also recalls that, although the Panel had previously stated that it would examine a total of eleven tariff lines (paragraph 7.131) and indeed examined eleven tariff lines, it referred only to "nine" tariff lines in paragraphs 7.140 and 8.1.c.ii and failed to mention the two undisputed tariff lines.

<sup>41</sup> Interim Report, para. 7.131.

<sup>42</sup> Should the Appellate Body consider that the nature of the Panel's error and lack of analysis with respect to tariff lines (e) and (f) is such as to be properly challengeable exclusively under Article 11 of the DSU, as a failure to conduct an objective assessment of the matter, Türkiye also presents an appeal under Article 11 of the DSU.

<sup>43</sup> See Panel Report, heading 7.2.3.2.2.2, as well as paras. 7.130-7.131, 7.134, 7.150, 7.151-152, 7.153, and 8.1.c.ii.

## 5 CONCLUSION

5.1. For all these reasons, Türkiye respectfully requests the Appellate Body to reverse the interpretations and findings of the Panel identified in this Notification of Appeal. These grounds for appeal are without prejudice to the more detailed arguments to be set forth in the Türkiye's appellate submission during the appeal.

5.2. In initiating this appeal, pursuant to Article 16.4 of the DSU and Rule 20(1) of the Working Procedures for Appellate Review, Türkiye is aware that, as a matter of fact, the Appellate Body is, for the time being, unable to function, given that there are currently no Appellate Body Members to constitute a division to hear the Türkiye's appeal.

5.3. In these exceptional circumstances, and in the interests of fairness and orderly procedure in the conduct of the appeal, in accordance with Rules 16(1) and 16(2) of the Working Procedures for Appellate Review, Türkiye will await further instructions from the division, when it may eventually be composed, or the Appellate Body, regarding any further steps to be taken by Türkiye in this appeal. Türkiye thus reserves the right to submit an appellant submission. Alternatively, this document is deemed to also be Türkiye's appellant's submission.

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