

section 7.10.1.2.2 that Turkey did not provide any explanation as to how the relevant modifications to the definitive safeguard made through the first and the second review regulations that Turkey points to made the measure more restrictive in a manner that would give rise to an inconsistency with Article 7.4 of the Agreement on Safeguards.⁶¹⁶ We also rejected in section 7.10.1.2.1 Turkey's contention that the reduction in the pace of liberalization of the definitive safeguard necessarily creates a disincentive for the domestic industry to undertake adjustment. Given that Turkey's claim under Article 5.1 rests on the same grounds and suffers from the same flaws, we find that Turkey has not established that the European Union acted inconsistently with Article 5.1 of the Agreement on Safeguards.

7.11 Article II:1 of the GATT 1994

7.337. Turkey also claims that the definitive safeguard is inconsistent with Article II:1(b) of the GATT 1994. Turkey argues that the 25% out-of-quota duty set out in the definitive safeguard constitutes "other duties or charges" within the meaning of Article II:1(b), and that as a result of the claimed inconsistencies with Article XIX:1(a) of the GATT 1994, those duties or charges are not excused by Article XIX and are therefore inconsistent with Article II:1(b).⁶¹⁷

7.338. We recall that we have already found that the definitive safeguard (i) is inconsistent with Article XIX:1(a), because the European Commission did not establish that the increase in imports was "as a result of" the unforeseen developments it relied upon and did not identify the obligations whose effect resulted in the injurious increase in imports, and (ii) is inconsistent with Article 4.1(b) of the Agreement on Safeguards, because it rests on a determination of threat of injury that is not "based on facts". In view of this, we do not find it necessary to examine whether, for the same reasons, the definitive safeguard is also inconsistent with Article II:1 of the GATT 1994.

8 CONCLUSIONS, RECOMMENDATION, AND REQUEST FOR A SUGGESTION

8.1. For the reasons set out in this Report, we conclude as follows:

- a. Turkey *has established* that the definitive safeguard is inconsistent with:
 - i. Article XIX:1(a) of the GATT 1994, because the European Commission did not ascertain that the increase in imports took place as a result of the unforeseen developments it had identified, and did not identify in its published reports the obligations whose effect resulted in the increase in imports; and
 - ii. Article 4.1(b) of the Agreement on Safeguards, because two central elements of the European Commission's determination of a threat of serious injury were not "based on facts" as required by that provision.
- b. Turkey *has not established* that the definitive safeguard is inconsistent with:
 - i. 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 because of the European Commission's approach to product scope;
 - ii. Article XIX:1(a) of the GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards because of alleged errors in the European Commission's determination of an increase in imports;
 - iii. Article 5.1 of the Agreement on Safeguards because the European Commission did not take into account data from the first six months of 2018 in determining the size of the TRQs, or because of the double remedy regulation, or because the European Union reduced the pace of liberalization or allegedly made the measure more restrictive;

⁶¹⁶ As noted in para. 7.332 above, we need not make findings on Turkey's arguments concerning the automotive end-use requirements as that requirement is no longer in force.

⁶¹⁷ Turkey's first written submission, paras. 375-380.

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- iv. Article XIII:2(d) and the *chapeau* of Article XIII:2 of the GATT 1994 and Article 5.2(a) of the Agreement on Safeguards because the European Commission did not take into account data from the first six months of 2018 in allocating the TRQs; and
 - v. Article 7.4 of the Agreement on Safeguards because the European Union reduced the pace of liberalization and allegedly made the measure more restrictive.
- c. We do not consider it necessary to decide whether the definitive safeguard is inconsistent with:
- i. Articles 4.1(a) and 4.2(a) of the Agreement on Safeguards for reasons substantively identical to those put forward under Article 4.1(b) of the Agreement on Safeguards;
 - ii. Article 2.1 of the Agreement on Safeguards as a consequence of the inconsistency with Article 4.1(b) of the Agreement on Safeguards;
 - iii. Article 4.2(b) of the Agreement on Safeguards because of errors in the determination of causation;
 - iv. Articles 2.1, 5.1, and 7.1 of the Agreement on Safeguards as a consequence of the claimed inconsistency with Article 4.2(b) of the Agreement on Safeguards; and
 - v. Article II:1(b) of the GATT 1994 as a consequence of the inconsistency with Article XIX:1(a) of the GATT 1994.
- d. The automotive end-use requirement is no longer in force, and we do not consider it in reviewing the definitive safeguard.
- e. The provisional safeguard is no longer in force, and we do not make findings on its consistency with the covered agreements.

8.2. Under Article 3.8 of the DSU, "where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment". We conclude that, to the extent that the definitive safeguard is inconsistent with the GATT 1994 and the Agreement on Safeguards, it has nullified or impaired benefits accruing to Turkey under those agreements.

8.3. Pursuant to Article 19.1 of the DSU, we recommend that the European Union bring its measure into conformity with the Agreement on Safeguards and the GATT 1994.

8.4. In addition to requesting recommendations, Turkey asks us to suggest that the European Union implement our recommendation by revoking the safeguard at issue, pursuant to Article 19.1 of the DSU.⁶¹⁸

8.5. Article 19.1 of the DSU contains two prongs. First, "[w]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it *shall* recommend that the Member concerned bring the measure into conformity with that agreement".⁶¹⁹ Thus, panels are required to make such a recommendation when an inconsistency is established. Second, "[i]n addition ... the panel or Appellate Body *may* suggest ways in which the Member concerned could implement the recommendations".⁶²⁰ Thus, suggestions are additional to recommendations, and the choice whether to make such suggestions falls squarely within the discretion of each panel.⁶²¹

⁶¹⁸ Turkey's first written submission, para. 382.

⁶¹⁹ Emphasis added; fn omitted.

⁶²⁰ Emphasis added.

⁶²¹ See also e.g. Appellate Body Report, *US – Continued Zeroing*, para. 389.

8.6. Some panels have made suggestions under Article 19.1 of the DSU.⁶²² Others have preferred to decline to do so, reasoning in particular that the choice on the manner of implementation is, in the first place, for the Member concerned.⁶²³

8.7. In this case, we decline to make a suggestion under Article 19.1 of the DSU.

⁶²² Panel Reports, *Argentina – Poultry Anti-Dumping Duties*, paras. 8.3-8.7; *US – Offset Act (Byrd Amendment)*, para. 8.6; *US – Cotton Yarn*, paras. 8.4-8.5; *Guatemala – Cement II*, paras. 9.4-9.6; *US – Underwear*, paras. 8.1-8.3; *Mexico – Steel Pipes and Tubes*, paras. 8.7-8.12; *Ukraine – Passenger Cars*, paras. 8.7-8.8; *US – Lead and Bismuth II*, para. 8.2; *India – Quantitative Restrictions*, paras. 7.1-7.7; *EC – Bananas III (Article 21.5 – Ecuador)*, paras. 6.154-6.159; *EC – Trademarks and Geographical Indications (Australia)* and *EC – Trademarks and Geographical Indications (US)*, paras. 8.4-8.5; *EC – Export Subsidies on Sugar (Australia)*, *EC – Export Subsidies on Sugar (Brazil)*, and *EC – Export Subsidies on Sugar (Thailand)*, paras. 8.6-8.8; and *Pakistan – BOPP Film (UAE)* [appealed by Pakistan 22 February 2021], para. 9.6.

⁶²³ See e.g. Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 8.6.