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EUROPEAN UNION – SAFEGUARD MEASURES ON CERTAIN STEEL PRODUCTS

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY TURKEY

The following communication, dated 16 July 2020, from the delegation of Turkey to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 13 March 2020, the Government of Turkey ("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*, concerning the provisional and definitive safeguard measures imposed by the European Union on imports of certain steel products and the investigation that led to the imposition of those measures.

Turkey and the European Union held consultations on 29 April 2020. Unfortunately, those consultations failed to settle the dispute. Accordingly, pursuant to Article 6 of the DSU and Article 14 of the Agreement on Safeguards, Turkey requests that the Dispute Settlement Body establish a panel with the standard terms of reference as set out in Article 7.1 of the DSU to examine this matter and the claims set forth below.

I. Background and Measures at issue

1.1 Initiation of the original investigation

1. On 26 March 2018, the European Commission¹ published a "Notice of initiation of a safeguard investigation concerning imports of steel products" in the Official Journal of the European Union whereby it initiated an investigation with a view to impose safeguard measures on imports of certain steel products. The safeguard investigation has been initiated *ex officio* by the European Commission.² In its Notice of Initiation, the European Commission identified 26 products under investigation that were listed as 26 product categories together with their relevant tariff codes in Annex I to the Notice. On 27 March 2018, the European Union notified the WTO Committee on Safeguards of the initiation of the investigation.³

2. On 28 June 2018, the European Commission published a notice whereby it extended the scope of the investigation by including two additional product categories, namely product

¹ The measures at issue were imposed pursuant to an investigation conducted by the European Commission.

² Notice of initiation of a safeguard investigation concerning imports of steel products, Official Journal of the European Union, C 111, 26 March 2018, pp. 29-35 ("Notice of Initiation"). The duration of the investigation has been extended through a Notice extending the duration of the safeguard investigation concerning imports of certain steel products, Official Journal of the European Union, C 457, 19 December 2018, p. 14.

³ Notification under Article 12.1(a) of the Agreement on Safeguards on initiation of an investigation and the reason for it, European Union (Certain steel products), G/SG/N/6/EU/1, 27 March 2018.

categories 27 and 28, and provided clarification concerning product categories 1, 4 and 7.⁴ Those amendments were notified by the European Union to the WTO Committee on Safeguards.⁵

1.2 Preliminary determination and provisional safeguard measures

3. On 16 July 2018, the European Union notified the WTO Committee on Safeguards of its decision to impose provisional safeguard measures.⁶ On 17 July 2018, the European Union adopted a regulation imposing provisional safeguard measures ("EU provisional measures") on the imports of 23 out of the 28 product categories concerned.⁷ No provisional measures were imposed on product categories 10, 11, 19, 24 and 27 given that, according to the European Commission's preliminary analysis, no increase in imports could be observed over the period concerned (i.e. 2013-2017) for those five product categories.⁸ Regarding the 23 other product categories, the European Commission concluded that there had been an increase of imports in absolute terms when examined on a global basis.⁹ Regarding the serious injury analysis, the European Commission examined the situation of the Union steel industry at a global level but also individually for the 23 product categories. The European Commission concluded that although the Union steel industry had partially recovered for some product categories in 2017, the Union steel industry was in a situation of threat of serious injury and that this situation was likely to develop into actual serious injury in the foreseeable future. Given the critical circumstances, the European Commission considered that provisional safeguard measures should be imposed.¹⁰

4. A distinct provisional measure was imposed in the form of a tariff-rate quota ("TRQ") on each product category. The TRQ for each product category was calculated on the basis of the average of the annual level of imports in the years 2015, 2016, and 2017.¹¹ In the event that the TRQ for a product category would become exhausted, an additional duty of 25% on imports of that product category had to be paid.¹² The EU provisional measures were applied for a duration of 200 days from the date of their entry into force.¹³

5. The European Union excluded from the application of the EU provisional measures imports from developing country WTO Members, where the share of imports of a particular product category from a developing country WTO Member into the European Union did not exceed 3% and the collective share of imports from such developing countries did not account for more than 9% of total imports into the European Union of the product category concerned.¹⁴ Imports from the European Economic Area ("EEA") countries (Norway, Iceland, and Liechtenstein) were also exempted from the application of the EU provisional measures on account of the close integration of the European Union and EEA markets, the overall figures of imports from these countries, and the low risk of trade diversion.¹⁵

6. On 13 November 2018, the European Union excluded from the scope of the EU provisional measures imports from South Africa since it was a member of the Southern African Development

⁴ Notice amending the notice of initiation of a safeguard investigation concerning the imports of steel products, Official Journal of the European Union, C 225, 28 June 2018, pp. 54-56.

⁵ Notification under Article 12.1(a) of the Agreement on Safeguards on initiation of an investigation and the reason for it, European Union (Certain steel products), Supplement, G/SG/N/6/EU/1/Suppl.1, 29 June 2018.

⁶ Notification under Article 12.4 of the Agreement on Safeguards before taking a provisional safeguard measure referred to in Article 6, Notification pursuant to Article 9, Footnote 2 of the Agreement on Safeguards (Certain steel products), European Union, G/SG/N/11/EU/1, 18 July 2018.

⁷ Commission Implementing Regulation (EU) 2018/1013 of 17 July 2018 imposing provisional safeguard measures with regard to imports of certain steel products, Official Journal of the European Union, L 181, 18 July 2018, pp. 39-83 ("EU Provisional Measures Regulation").

⁸ EU Provisional Measures Regulation, recital 24.

⁹ EU Provisional Measures Regulation, recitals 26-29.

¹⁰ EU Provisional Measures Regulation, recitals 69 and 96.

¹¹ EU Provisional Measures Regulation, recitals 93 and 98.

¹² EU Provisional Measures Regulation, recitals 99 and 111; Article 1(3).

¹³ EU Provisional Measures Regulation, Article 1(1).

¹⁴ EU Provisional Measures Regulation, recital 119. Annex IV to the EU Provisional Measures Regulation contains the list of products originating in developing countries to which the provisional measures apply.

¹⁵ EU Provisional Measures Regulation, recital 121.

Community ("SADC") with which the European Union had concluded an Economic Partnership Agreement.¹⁶

1.3 Definitive determination and definitive safeguard measures

7. On 2 January 2019, the European Union notified the WTO Committee on Safeguards of its intention to impose definitive measures and offered consultations to other WTO Members.¹⁷ On 31 January 2019, the European Union adopted a regulation imposing definitive safeguard measures ("the EU definitive measures") for a period of three years, including the period of imposition of the provisional measures, the measures thereby being set to expire on 30 June 2021.¹⁸

8. The EU definitive measures were imposed on 26 out of the 28 product categories, product categories 11 and 23 being excluded from the scope of the EU definitive measures due to the European Commission's finding that imports of each of these two product categories had decreased in absolute terms from 2013 to the most recent period ("MRP"), i.e. July 2017 – June 2018.¹⁹ With regard to the remaining 26 product categories, the European Commission concluded that there had been an increase in imports both in absolute and relative terms when examining these product categories on a combined basis as well as when examining each of the three product families that it had defined for that stage of the investigation. The serious injury analysis was made by the European Commission on a combined basis for the 26 product categories concerned as well as at the level of each product family for the period 2013 – 2017. The European Commission concluded that the Union steel industry was in a situation of threat of serious injury and that the situation was likely to develop into actual serious injury in the foreseeable future, in the absence of safeguard measures.

9. A distinct definitive safeguard measure in the form of a TRQ was imposed on each of the 26 product categories. The TRQ for each product category was calculated on the basis of the average of the annual level of imports in the years 2015, 2016 and 2017 plus 5%.²⁰ Each TRQ for each product category, except product category 1, was divided into country-specific TRQs which were allocated to countries whose share of imports was more than 5% of the total imports of that product category into the European Union over the last three years preceding the imposition of the measures.²¹ All other countries whose imports into the European Union were below the 5% threshold were thus subject to a global TRQ which was established equally for each quarter of the period of imposition and available on a first-come-first-served basis.²² For product category 1, the European Union established only a global TRQ similarly managed quarterly.

10. TRQs were established for the following three periods: from 2 February 2019 to 30 June 2019; from 1 July 2019 to 30 June 2020; and from 1 July 2020 to 30 June 2021.²³ Should any of the TRQs become exhausted in each of the periods, the European Union then levied an additional duty of 25% on any additional imports.²⁴ An exporting country with a country-specific TRQ for a particular product category was also allowed to use the global TRQ during the last quarter of each period once its country-specific TRQ was exhausted.²⁵

11. The European Union provided for the progressive liberalisation of the definitive measures by providing for an increase in the level of the TRQs by 5% after each year of application of the

¹⁶ Commission Implementing Regulation (EU) 2018/1712 of 13 November 2018 amending Implementing Regulation (EU) 2018/1013 imposing provisional safeguard measures with regard to imports of certain steel products, Official Journal of the European Union, L 286, 14 November 2018, pp. 17-19.

¹⁷ Notification under Article 12.1(b) of the Agreement on Safeguards on finding a serious injury or threat thereof caused by increased imports, Notification of a proposal to impose a measure, Notification pursuant to Article 9, Footnote 2 of the Agreement on Safeguards, European Union (Certain Steel Products), G/SG/N/10/EU/1, 4 January 2019 and G/SG/N/10/EU/1/Suppl.1, 7 February 2019.

¹⁸ Commission Implementing Regulation (EU) 2019/159 of 31 January 2019 imposing definitive safeguard measures against imports of certain steel products, Official Journal of the European Union, L 31, 1 February 2019, pp. 27-74 ("EU Definitive Measures Regulation").

¹⁹ EU Definitive Measures Regulation, recital 31.

²⁰ EU Definitive Measures Regulation, recital 144.

²¹ EU Definitive Measures Regulation, Article 1(2) and recital 147.

²² EU Definitive Measures Regulation, Article 1(3) and recital 147.

²³ EU Definitive Measures Regulation, recital 187.

²⁴ EU Definitive Measures Regulation, Article 1(6), recitals 177 and 180.

²⁵ EU Definitive Measures Regulation, Article 1(5) and recital 150.

measures.²⁶ However, that pace of liberalisation was reduced following a review investigation as will be explained below.

12. The European Union excluded from the scope of the EU definitive measures imports from countries of the EEA and from certain countries with which the European Union had signed an Economic Partnership Agreement, including SADC states which contained specific provisions regarding the application of multilateral safeguard measures. The European Union also excluded imports from developing country WTO Members per product category provided that they satisfied the conditions laid down in Article 9.1 of the Agreement on Safeguards.²⁷

13. On 26 April 2019, the European Commission published a notice concerning the potential combined effects of anti-dumping or anti-subsidy measures with the safeguard measures on certain steel products,²⁸ indicating its intention to assess the effects of cumulating safeguard measures with anti-dumping and anti-subsidy measures. On 3 September 2019, the European Commission published a regulation so as to put in place measures to prevent the concurrent application with the safeguard measures of existing anti-dumping and/or countervailing measures.²⁹ In particular, the European Commission decided that for the product categories concerned, "the full above-quota tariff duty should be due, topped-up by the difference between the above-quota tariff duty and the level of the higher of the anti-dumping/anti-subsidy duty in place".³⁰

1.4 Review determinations

14. On 17 May 2019, the European Commission initiated a review of the EU definitive measures,³¹ which was notified to the WTO Committee on Safeguards on 20 May 2019.³² Based on the findings of this review, on 26 September 2019, the European Union adopted a regulation adjusting the definitive measures in a number of respects.³³ In particular, the European Union decided that the liberalisation rate of the TRQs will be decreased from 5% to 3%³⁴. The European Union introduced a 30% maximum usage limit of the residual TRQ of the last quarter of each year of the measures per country for product categories 13 and 16³⁵ and decided that, for product category 1, no country would be allowed to use more than 30 % of the TRQ available in each of the quarters.³⁶ In addition, the European Union replaced the existing country-specific TRQs with a single global TRQ for product category 25 administered quarterly³⁷ and made imports falling under product category 4.B subject

²⁶ EU Definitive Measures Regulation, Article 1(1) and recital 188.

²⁷ EU Definitive Measures Regulation, recitals 190-193.

²⁸ Notice concerning the potential combined effects of anti-dumping or anti-subsidy measures with the safeguard measures on certain steel products, Official Journal of the European Union, C 146, 26 April 2019, pp. 5-8.

²⁹ Commission Implementing Regulation (EU) 2019/1382 of 2 September 2019 amending certain Regulations imposing anti-dumping or anti-subsidy measures on certain steel products subject to safeguard measures, Official Journal of the European Union, L 227, 3 September 2019 ("Steel Products Double Remedy Regulation"), pp. 1-25.

³⁰ Steel Products Double Remedy Regulation, recital 17.

³¹ Notice of initiation concerning the review of the safeguard measures applicable to imports of certain steel products, Official Journal of the European Union, C 169, 17 May 2019, pp. 9-15. The five grounds of review included: (i) level and allocation of TRQ for a number of specific product categories; (ii) crowding-out of traditional trade flows; (iii) potential detrimental effects in achieving the integration objectives pursued with preferential trading partners; (iv) update of the list of developing WTO member countries excluded from the scope of the measures based on their most recent level of imports; and (v) other changes of circumstances that may require an adjustment to the level of allocation of the TRQ.

³² Notification under Article 12.1(c) of the Agreement on Safeguards upon taking a decision to initiate a review investigation of a safeguard measure, European Union (Certain steel products), Supplement, 21 May 2019, G/SG/N/10/EU/1/Suppl.2.

³³ Commission Implementing Regulation (EU) 2019/1590 of 26 September 2019 amending Implementing Regulation (EU) 2019/159 imposing definitive safeguard measures against imports of certain steel products, Official Journal of the European Union, L 248, 27 September 2019, pp. 28-64 ("EU Reviewed Definitive Measures Regulation"). Notification under Article 12.1(c) of the Agreement on Safeguards (review investigation of a measure), Notification pursuant to Article 9, footnote 2 of the Agreement on Safeguards, European Union, Supplement, 15 August 2019, G/SG/N/10/EU/1/Suppl.3 and 2 October 2019, G/SG/N/10/EU/1/Suppl.4.

³⁴ EU Reviewed Definitive Measures Regulation, Article 1(2)(b).

³⁵ EU Reviewed Definitive Measures Regulation, Article 1(1)(b).

³⁶ EU Reviewed Definitive Measures Regulation, Article 1(1)(a).

³⁷ EU Reviewed Definitive Measures Regulation, Article 1(1)(a).

to an end-use authorisation.³⁸ Finally, the European Union amended the list of developing countries excluded from the scope of the safeguard measures by including within the scope of the measures certain developing countries that now exceeded the thresholds provided for under Article 9.1 of the Agreement on Safeguards in 2018 per product category.³⁹

15. On 19 December 2019, the European Union notified the WTO Committee on Safeguards of its intention to further amend the definitive measures.⁴⁰ On 15 January 2020, the European Commission adopted a regulation amending the definitive safeguard measures.⁴¹ With this regulation, the European Commission withdrew the end-use authorisation procedure for product category 4.B and reallocated the TRQ volumes for Korea between product categories 4.A and 4.B.⁴² The European Union notified these amendments to the WTO Committee on Safeguards on 22 January 2020.⁴³

16. On 14 February 2020, the European Commission initiated a second review investigation of the definitive safeguard measures.⁴⁴ Based on the findings of this second review, on 29 June 2020, the European Union adopted a regulation adjusting the definitive measures in a number of respects.⁴⁵ In particular, the European Union divided the country-specific TRQs quarterly.⁴⁶ The European Union also replaced the single global TRQ for product category 1 by country-specific TRQs and a global TRQ and, for product category 8, replaced the existing country-specific TRQs and the global TRQ with a single global TRQ.⁴⁷ In addition, the European Union split product category 25 in two subcategories (product categories 25.A and 25.B). Product category 25.A is made of a single global TRQ while product category 25.B has country-specific TRQs and a global TRQ.⁴⁸ Moreover, the European Union limited or totally restricted access to the global TRQ during the last quarter of each period for imports from exporting countries once their respective country-specific TRQ for a particular product category is exhausted.⁴⁹ Finally, the European Union amended the list of developing countries excluded from the scope of the safeguard measures by including within the scope of the measures certain developing countries that now exceeded the thresholds provided for under Article 9.1 of the Agreement on Safeguards in 2019 per product category.⁵⁰

1.5 The Measures at issue

17. The measures at issue in this dispute are 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. The measures at issue cover all decisions, notices, notifications and regulations mentioned above in sections 1.1 to 1.4. They include 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.

³⁸ EU Reviewed Definitive Measures Regulation, Article 1(1)(a).

³⁹ EU Reviewed Definitive Measures Regulation, Article 1(2)(a).

⁴⁰ Notification under Article 12 of the Agreement on Safeguards, European Union, Supplement, G/SG/N/10/EU/1/Suppl.5, 19 December 2019.

⁴¹ Commission Implementing Regulation (EU) 2020/35 of 15 January 2020 amending Implementing Regulation (EU) 2019/159 imposing definitive safeguard measures against imports of certain steel products, Official Journal of the European Union, L 12, 16 January 2020, pp.13-16 ("EU Amendment of Reviewed Definitive Measures Regulation").

⁴² EU Amendment of Reviewed Definitive Measures Regulation, Article 1 and recital 7.

⁴³ Notification under Article 12 of the Agreement on Safeguards, European Union, Supplement, G/SG/N/10/EU/1/Suppl.6, 22 January 2020.

⁴⁴ Notice of initiation concerning a review of the safeguard measures applicable to imports of certain steel products, Official Journal of the European Union, C 51, 14 February 2020, pp. 21-25. The five grounds of review are the same as those of the first review described in footnote 31 above.

⁴⁵ Commission Implementing Regulation (EU) 2020/894 of 29 June 2020 amending Implementing Regulation (EU) 2019/159 imposing definitive safeguard measures against imports of certain steel products, Official Journal of the European Union, L 206, 30 June 2020, pp. 27-62 ("EU Second Reviewed Definitive Measures Regulation"). Notification under Article 12 of the Agreement on Safeguards, European Union, Supplement, G/SG/N/10/EU/1/Suppl.7, 2 June 2020.

⁴⁶ EU Second Reviewed Definitive Measures Regulation, Article 1(1)(a).

⁴⁷ EU Second Reviewed Definitive Measures Regulation, Article 1(1)(a).

⁴⁸ EU Second Reviewed Definitive Measures Regulation, Article 1(1)(a).

⁴⁹ EU Second Reviewed Definitive Measures Regulation, Article 1(1)(b).

⁵⁰ EU Second Reviewed Definitive Measures Regulation, Article 1(2).

II. Legal Basis

18. According to Article 11.1(a) of the Agreement on Safeguards, a Member shall not take or seek a safeguard action unless such action conforms with the provisions of Article XIX of the GATT 1994 applied in accordance with the Agreement on Safeguards.

19. Turkey is deeply concerned by the safeguard measures imposed by the European Union on imports of certain steel products and the underlying investigations that led to the imposition of those measures. Specifically, those measures are inconsistent with the European Union's obligations under the GATT 1994 and the Agreement on Safeguards as follows:

- Articles 2.1, 3.1, 4.1(b), 4.1(c), 4.2(a), 4.2(b), 4.2(c), 6 and 9.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994, because the European Union failed to make reasoned and adequate findings and conclusions with respect to its determinations relating to the products under investigation and the domestic like or directly competitive products. Among others, the European Union failed to define the products under investigation and the domestic like or directly competitive products in a consistent manner throughout the investigation and failed to carry out safeguard investigations with respect to the individual product categories while distinct safeguard measures were imposed on each individual product category.

- Articles 3.1 and 4.2(c) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994, because the European Union failed to make reasoned and adequate findings and conclusions with respect to its determinations as to the unforeseen developments and as to how those unforeseen developments resulted in increased imports of the products concerned threatening to cause serious injury to domestic producers. The European Union also failed to make reasoned and adequate findings and conclusions with respect to its determinations as to the effect of the obligations it incurred under the GATT 1994 and how that effect has resulted in increased imports of the products concerned threatening serious injury to domestic producers.

- Articles 2.1, 3.1, 4.2(a), 4.2(b) and 4.2(c) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 because the European Union failed to make reasoned and adequate findings and conclusions in its determinations with respect to the increase in imports of the products concerned, in absolute terms or relative to domestic production, in accordance with the requirements laid down in those provisions.

- Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b) and 4.2(c) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 because the European Union failed to make reasoned and adequate findings and conclusions with respect to its determinations as to the existence of an alleged threat of serious injury to the domestic industry, understood as a significant overall impairment in the position of a domestic industry that is clearly imminent.

- Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b) and 4.2(c) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994, because the European Union failed to make reasoned and adequate findings and conclusions with respect to its determinations of the causal link between the increase in imports and the threat of serious injury to the domestic industry. In particular, there are no reasoned and adequate findings and conclusions on the causal relationship between the increased imports and the alleged threat of serious injury to the domestic industry nor explanations as to how the injury to the domestic industry caused by factors other than imports was not attributed to the increased imports.

- Articles 2.1, 2.2, 3.1, 4.2(a), 4.2(b), 4.2(c), 5.1 and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994, because the European Union imposed the provisional and definitive safeguard measures on imports from certain countries only, excluding certain countries with which the European Union has concluded Free Trade Agreements.

- Articles 3.1, 4.2(c), 5.1 and 7.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 because the European Union failed to apply the safeguard measures only the extent and for such time necessary to prevent serious injury and to facilitate adjustment.

- Article XIII:2, including its chapeau and its paragraph (d), of the GATT 1994 and with Articles 5.1 and 5.2 of the Agreement on Safeguards because the European Union failed to determine the TRQs and allocate them among the exporting countries, including those having a substantial interest in

supplying the products concerned, in accordance with the requirements set in the mentioned provisions.

- Articles 3.1, 4.2(c), 5.1 and 7.4 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994, because, following the reviews of the definitive measures, the European Union reduced the pace of liberalization of the definitive safeguard measures and made the safeguard measures more trade restrictive.

- Article I:1 of the GATT 1994 because, when imposing the safeguard measures, the European Union has exempted imports originating in certain countries from the scope of application of the measures, and this constitutes an advantage that has not been accorded immediately and unconditionally to the like products originating in other WTO Members.

- Article XIII:1 of the GATT 1994 because the TRQs are applied by the European Union on the importation of products from certain countries but not on the importation of the like products of all third countries which are therefore not similarly restricted.

- Article II:1(b) of the GATT 1994 because, through the imposition of the safeguard measures at issue, the European Union imposed other duties or charges contrary to the second sentence of that provision.

20. The European Union's measures nullify and impair the benefits accruing to Turkey, directly or indirectly, under the covered agreements.

21. Accordingly, Turkey requests that the Dispute Settlement Body establish a Panel with the standard terms of reference as set out in Article 7.1 of the DSU to examine this matter.

22. In view of the 3-year validity period of the safeguard measures at issue and to ensure that the dispute settlement system provides an effective solution to this dispute, Turkey hopes that the panel will issue its final report to the parties as soon as possible and, in any case, no later than the period of six months from the date that the composition and terms of reference of the panel are agreed upon, as stipulated in Article 12.8 of the DSU.

23. Turkey asks that this request be placed on the agenda of the meeting of the Dispute Settlement Body to be held on 29 July 2020.
