

TURKEY- ADDITIONAL DUTIES ON CERTAIN PRODUCTS FROM THE UNITED STATES

(DS561)

**U.S. Responses to Questions from the Panel to the Parties
Prior to the Second Substantive Meeting**

December 4, 2020

TABLE OF REPORTS

SHORT TITLE	FULL CITATION
<i>Chile – Price Band System (AB)</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/AB/R, adopted 23 October 2002
<i>EC – Chicken Cuts (AB)</i>	Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , WT/DS269/AB/R, WT/DS268/AB/R, adopted 27 September 2005, and Corr.1
<i>EC – Selected Customs Matters (AB)</i>	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R, adopted 11 December 2006

TABLE OF EXHIBITS

EXHIBIT NO.	DESCRIPTION
USA-52	UNITED STATES TRADE REPRESENTATIVE, REPORT ON THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION (Feb. 2020)

1 MEASURE AT ISSUE

1.1 To both parties

69. If the Panel were to find that Presidential Decision 1130/2019 is within its terms of reference, should it make findings and recommendations on that measure only? Or should it also make findings and recommendations on (a) the Implementation Decision; and/or (b) Presidential Decree 21/2018? Please explain the legal basis for your view.

Response:

1. Turkey is incorrect that Presidential Decision 1130/2019 of May 22, 2019¹ is within the Panel's terms of reference. First, the measure at issue in this dispute is plainly set out in the U.S. request for panel establishment, and Presidential Decision 1130/2019 is not listed as part of that measure. Furthermore, Presidential Decision 1130/2019 post-dates the establishment of the Panel, and thus could not be within the Panel's terms of reference. The Dispute Settlement Body (DSB) established the Panel on January 28, 2019,² and set its terms of reference to examine the matter in the U.S. panel request. In the discussion below, the United States explains that the measure that exists **at the time of panel establishment** is the measure within the Panel's terms of reference, and on which the Panel should make findings and recommendations.

2. Before discussing the relevant provisions of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), the United States recalls that in the U.S. panel request, the United States explained that Turkey's *Decision on Implementation of Additional Duties on the Import of Certain Products Originating in the United States of America* (Implementation Decision) and Turkey's *Decision to Amend the Decision to Impose Additional Duties on the Import of Certain Products Originating in the United States of America* (Presidential Decree 21/2018) are the legal instruments through which Turkey imposes the additional duties measure at issue in this dispute.³

3. A panel's terms of reference are set out in Articles 7.1 and 6.2 of the DSU. Specifically, when the DSB establishes a panel, the panel's terms of reference under Article 7.1 are (unless the parties to the dispute agree otherwise) "[t]o examine . . . the matter referred to the DSB" by the complainant in its panel request.⁴ Under Article 6.2 of the DSU, the "matter" referred to the DSB consists of "the specific measures at issue" and "a brief summary of the legal basis of the complaint."⁵ From the text of these provisions, it follows that a panel is to examine the matter as it existed on the date the panel was established – that is, a specific measure and a claim of WTO-

¹ Exhibit TUR-43.

² WT/DSB/M/425, para. 6.7.

³ WT/DS561/2

⁴ DSU, Art. 7.1.

⁵ DSU, Art. 6.2.

inconsistency – and not a different matter (measure and claim of inconsistency) that might exist at some other time.

4. In *EC – Chicken Cuts*, the Appellate Body recognized that “[t]he term ‘specific measures at issue’ in Article 6.2 suggests that, as a general rule, the measures included in a panel’s terms of reference must be measures that are in existence at the time of the establishment of the panel.”⁶ Thus, a claim alleges inconsistency of a measure with a WTO provision at a **particular point in time**. And the DSB tasks a panel with examining that matter: that is, the measure and the claim as of the point in time the DSB is requested to, and does establish, the panel.

5. In *EC – Selected Customs Matters*, the panel and Appellate Body were presented with the precise question of what legal situation a panel is called upon, under Article 7.1 of the DSU, to examine. The panel and Appellate Body both concluded that, under the DSU, the task of a panel is to determine whether the measures at issue are consistent with the relevant obligations “**at the time of establishment of the Panel**.”⁷ Accordingly, it is Turkey’s additional duties measure as it existed at the time of the Panel’s establishment (*i.e.*, the Implementation Decision and Presidential Decree 21/2018) that is properly within the Panel’s terms of reference and on which the Panel should make findings.

6. Under the DSU, a possible change during the dispute settlement proceeding of a measure within the Panel’s terms of reference does not somehow alter the scope of a panel’s terms of reference or a panel’s mandate under the DSU. Under Article 19.1 of the DSU, where a panel “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.”⁸ Thus, a panel is required to make a recommendation on any measure within its terms of reference that it has found to be inconsistent with a Member’s obligations.⁹

7. In contrast, subsequent measures – such as Presidential Decision 1130/2019 – that did not exist at the time of the panel request could not have been identified in the panel request and are not within the Panel’s terms of reference. Accordingly, there would be no basis for the Panel to make findings on Presidential Decision 1130/2019.

⁶ *EC – Chicken Cuts (AB)*, para. 156.

⁷ *EC – Selected Customs Matters (AB)*, para. 187 (finding that the panel’s review of the consistency of the challenged measure with the covered agreements properly should “have focused on these legal instruments as they existed and were administered at the time of establishment of the Panel”) (emphasis added); *id.*, para. 259 (finding the panel had not erred in declining to consider three exhibits, which concerned a regulation enacted after panel establishment, because although they “might have arguably supported the view that uniform administration had been achieved by the time the Panel Report was issued, we fail to see how [they] showed uniform administration at the time of the establishment of the Panel”).

⁸ DSU Art. 19.1 (Internal citations omitted) (Emphasis added).

⁹ See UNITED STATES TRADE REPRESENTATIVE, REPORT ON THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION, pp. 66-68 (Feb. 2020) (Exhibit USA-52) (noting that the Appellate Body has violated Article 19.1 of the DSU by failing to make the recommendation required in instances where a measure has expired after panel establishment).

1.2 To the United States

70. In its response to Panel question No. 5, Turkey argues that, "[b]ased on the panel request, the Panel is entitled to consider amendments to the measures at issue that do not change the essence of the measure. Decreasing the duty does not change the essence of the measure". Please comment.

Response:

8. As an initial matter, the United States observes that the U.S. panel request noted that the legal instruments through which Turkey imposes the additional duties measure include “any amendments, replacements, related measures or implementing measures” to the Implementation Decision and Presidential Decree 21/2018.¹⁰ This language in the U.S. panel request covers amendments made between the time of the U.S. panel request and panel establishment. As the United States explained in the U.S. response to question 69, the measure within the Panel’s terms of reference is the measure that exists at panel establishment.

9. Regarding Turkey’s response to question number five and its apparent reference to Appellate Body findings concerning terms of reference and the “essence” of a measure,¹¹ the United States makes the following observations. First, the Appellate Body’s “essence” test has no basis in the text of the DSU. The Appellate Body has asserted that, under certain circumstances, panels can make findings concerning legal instruments that came into effect after the panel was established when those instruments do not “change the essence” of a measure.¹² As the United States explained in the U.S. response to question 69, there is **nothing** in the text of the DSU to support this assertion.

10. Second, even if the Panel were to entertain Turkey’s “essence” argument, the United States observes that Presidential Decision 1130/2019 lowered some duty rates imposed by Presidential Decree 21/2018 for certain tariff headings. Specifically, Presidential Decision 1130/2019 amends Presidential Decree 21/2018 by reverting to some of the duty rates stipulated in the Implementation Decision for certain tariff headings. This clearly is a **material change** because it affects the U.S. claim concerning Article II of the GATT 1994. As demonstrated below, Presidential Decree 21/2018 affects Turkey’s bound rate commitments for 210 tariff lines. Presidential Decision 1130/2019, however, affects Turkey’s bound rate commitments for 116 tariff lines.

¹⁰ WT/DS561/2.

¹¹ Turkey’s Responses to Panel Questions to the Parties After the First Substantive Meeting, pg. 2 (January 30, 2020).

¹² See, e.g., *Chile – Price Band System (AB)*, para. 139 (finding that the measure before the it included a law enacted after the panel’s establishment because the law “amend[ed] Chile’s price band system without changing its essence.”)

Measure	Time Period	Total Tariff Lines	Applied Duty Exceeds MFN	Applied Duty Exceeds Binding
<i>Implementation Decision</i>	6/21/18 – 8/14/18	479	479	116
<i>Presidential Decree 21/2018</i>	8/14/18 - 12/31/18	479	479	210
<i>Presidential Decree 21/2018</i>	1/1/19 – 5/20/19	479	479	210
<i>Presidential Decision 1130/2019</i>	5/21/19 – present	479	479	116

11. This dispute is about the rates of duties applied by Turkey to goods of the United States. Whatever is meant by the term “essence” (which again, is a term not found in the DSU), certainly a measure that changes the applicable rates of duty in a dispute involving duties rates is not of the same “essence” as the tariff measures properly within the Panel terms of reference. Accordingly, under any theory, there is no basis for finding that Presidential Decision 1130/2019 is within the Panel’s terms of reference.

71. In its response to Panel question No. 8, Turkey states that it "would appreciate if the United States could agree to the Panel using Turkey's translation" of Exhibit TUR-41. Does the United States agree to Turkey's request? If not, please explain.

Response:

12. The United States does not object to the Panel using Turkey’s translation of Exhibit TUR-41.
