

***TURKEY – MEASURES AFFECTING THE
IMPORTATION OF RICE***

(WT/DS334)

**EXECUTIVE SUMMARY OF THE
OPENING ORAL STATEMENT OF
THE UNITED STATES OF AMERICA
AT THE SECOND MEETING OF THE PANEL**

January 25, 2007

1. Over the past several months, the Panel has read numerous submissions, examined dozens of exhibits, and listened to both Parties present oral argument. The United States wishes to provide a few general thoughts that we believe could help the Panel as it examines the evidence and evaluates the arguments that are being presented by the Parties with respect to the major claims.

The Control Certificate

2. With respect to the issues of whether a Control Certificate is an “import license” for purposes of Article XI:1 of the GATT 1994 and whether the Control Certificate system constitutes “import licensing” under the Import Licensing Agreement, Turkey errs in casting the U.S. claim as an attack on the SPS measures of all WTO Members. The United States maintains its own SPS measures on agricultural products, and it goes without saying that the United States believes that SPS measures are critical to protecting the health and life of its citizens, plants, and animals and those of other nations, and has no interest in undermining its ability or the ability of other Members to adopt legitimate measures to ensure the compatibility of agricultural products with SPS measures.

3. That being said, none of this discussion of SPS measures is relevant for resolving the dispute that is currently before this Panel. Turkey’s SPS argument simply overlooks the relevant inquiry: what is Turkey using the Control Certificate for?

4. Turkey has acknowledged that MARA conducts its SPS inspection after the Certificate has already been approved, so meeting SPS requirements is not a requirement for receiving a Certificate, and the Certificate is not a control or inspection procedure. Nor is the Certificate used simply as part of customs clearance. The Certificate, which is administered by the Ministry of Agriculture and Rural Affairs (MARA), requests submission of the same type of customs-related information that Turkish Customs already requires of importers, despite the fact that MARA is not involved in customs administration. Yet if MARA does not issue a Control Certificate, an importer cannot import rice into Turkey.

5. If a Control Certificate issued by MARA is unnecessary for SPS purposes and unnecessary for customs purposes, then why does MARA require that importers obtain a Certificate? The answer is clear: to restrict imports of rice. A Panel finding that MARA’s Control Certificate is an “import license” for purposes of Article XI:1 and constitutes “import licensing” under the Import Licensing Agreement is consistent with the ordinary meaning of these terms in their context and in light of the object and purpose of the GATT 1994 and the Import Licensing Agreement respectively, and consistent with the facts in this dispute.

MFN Trade in Rice

6. With respect to the issue of over-quota trade, since September 10, 2003, Turkey has restricted rice imports outside the TRQ by not granting Control Certificates for non-EC origin

imports. Turkey continually responds to this fact by stating that, in fact, it does grant Control Certificates and then it provides a large number. The number, which has changed over time and is currently 2,242, is incorrect and misleading for at least the following reasons, as shown in Exhibit US-71.

7. The 2,242 figure includes Certificates issued in two legally irrelevant time periods, namely the period prior to September 10, 2003, which is the date on which the first Letter of Acceptance of which the United States is aware was issued, and the period after March 17, 2006, which is the date when the Panel was established. Including these periods in the calculation makes the number of Certificates granted outside the TRQ appear larger than they really are during the legally relevant period. Subtracting those Certificates from the figure provided by Turkey yields a total of 1,718 Control Certificates allegedly granted.

8. The U.S. claim is that Turkey is using Control Certificates to restrict out-of-quota (or MFN) rice trade. Three adjustments need to be made to arrive at the total figure for MFN trade:

- First, the figure provided by Turkey includes Certificates granted for in-quota imports. Certificates granted for in-quota trade represent 43 percent of the Control Certificates granted, so inclusion of these Certificates further distorts the figure provided by Turkey. Subtracting those Certificates from the figure provided by Turkey yields a total of 969 Control Certificates allegedly granted.
- Second, the figure provided by Turkey includes Certificates granted for EC origin imports. Such imports are not subject to Turkish restrictions because they come in under a preferential trade arrangement; hence, the United States is not alleging that Turkey is failing to grant Control Certificates to importers of EC origin rice. However, Turkey has included those Certificates in its calculation anyway. Given that Certificates granted for imports of EC origin rice represent 91 percent of the Control Certificates granted outside the TRQ, the number that Turkey has provided vastly overstates the number of Control Certificates that MARA has issued for out-of-quota imports of rice of non-EC origin. Subtracting those Certificates from the figure provided by Turkey yields a total of 91 Control Certificates allegedly granted.
- Third, the figure provided by Turkey also includes 35 Certificates granted for imports of rice from Macedonia. In a Power Point presentation posted on the website of Turkey’s Secretariat General for EU Affairs, Turkey noted that, under the Turkey-Macedonia agreement, “Turkey has preferential import possibility within tariff quota (8,000 tons, 0% duty)”.¹ Subtracting those Certificates from

¹ See Exhibit US-72
(http://www.abgs.gov.tr/tarama/tarama_files/11/SC11DET_16g_Rice.pdf).

the figure provided by Turkey yields a total of 56 Control Certificates allegedly granted.

This figure is a mere 2.5 percent of the 2,242 Control Certificate figure provided by Turkey.

9. Turkey has not provided the original Control Certificates, so the United States is unable to confirm that these 56 Certificates, or at least the ones provided with respect to U.S. imports, were actually granted, despite the existence of a legal prohibition on the issuance of Control Certificates outside the TRQ. But these numbers pale in comparison to the 740 Control Certificates that MARA allegedly issued to importers under the TRQ during the same time period. In any event, a closer look at this figure reveals how even this tiny amount of Certificates overstates the amount of out-of-quota rice that Turkish authorities permitted to enter the Turkish market.

10. If the data are accurate, during the period September 10, 2003 - March 17, 2006, MARA granted:

- one Certificate for out-of-quota imports of rice for each of the following countries: Bulgaria (550 metric tons), China (742 metric tons), Pakistan (21 metric tons), and Thailand (21 metric tons);
- two Certificates for out-of-quota imports from Vietnam (300 metric tons total);
- ten Certificates for out-of-quota imports from Egypt. Those Certificates covered approximately 9,700 metric tons of rice over a 2 ½ year period. By contrast, during that same period, Turkish trade data indicates that 250,000 metric tons of Egyptian rice were imported using the TRQ’s domestic purchase requirement; and
- 40 Certificates for out-of-quota imports of U.S. rice. However, all but two of those Certificates were granted in a single period in April-May 2005, just after the United States had raised the issue of Turkey’s failure to issue Control Certificates in Geneva.

Therefore, Turkey’s own data supports a finding that there is a legal prohibition on the import of MFN rice.

11. Even if it were true that Turkey granted this small number of Control Certificates outside the TRQ – despite the existence of a legal prohibition, as the United States has documented – the United States still has met its burden to demonstrate a breach of Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture, for two reasons.

12. First, in order to demonstrate that a measure is inconsistent with Article XI:1, a complainant may show that there is a restriction on importation. The United States has proven that there is a legal prohibition in place, in that the Letters of Acceptance state as much on their face, and Turkish courts have supported that interpretation and upheld MARA's enforcement of the Letters. However, the United States has also demonstrated the presence of a restriction, which itself establishes a breach. And the United States has presented volumes of evidence in support of its claim that there is a restriction – the Letters of Acceptance, the rejection letters to importers, the numerous court documents, and articles from the Turkish press. Turkey has failed to rebut this evidence, as its arguments before the Panel flatly contradict what the documents say on their face and/or what Turkey is arguing in Turkish court.

13. Second, even if the documents submitted by the United States had no legal relevance in Turkey, as Turkey claims against all evidence to the contrary, the United States has still met its burden because the evidence it has provided shows that the granting of Control Certificates is discretionary. In the Letters of Acceptance, Turkish government officials state that Control Certificates must not be granted during particular time periods. Even if those Letters were completely disregarded by Turkish officials, the documents are compelling evidence that Turkish authorities possess the discretion not to issue Control Certificates. And the rejection letters and court documents show that this discretion has been utilized. Discretionary import licensing is a restriction on importation, which is prohibited by Article XI:1 of the GATT 1994, and is specifically prohibited under Article 4.2 of the Agreement on Agriculture.

14. In sum, while Turkey's own data bear out that there is a legal prohibition in place, the United States has, in any event, established that there is a legal restriction in place on imports of rice outside the TRQ and, even if that were not the case, that Turkey's import licensing system for rice is discretionary. That is all the United States must prove to sustain findings of inconsistency under these two provisions, and the United States has met that burden.

The Domestic Purchase Requirement

15. With respect to the domestic purchase requirement, the key question to ask is whether a measure is providing differential treatment. If a measure treats an imported product less favorably than the like domestic product, the measure is inconsistent with Article III:4 of the GATT 1994. As is clear from the text of this provision, as well as from the guidance provided by previous panels, any additional obstacle or hurdle to selling imported products domestically, any incentive or disincentive that favors the purchase of domestic over imported goods will adversely affect the competitive position of imported products in the domestic market and constitutes a breach of Article III:4.

16. In this instance, Turkey's domestic purchase requirement meets this standard. The domestic purchase requirement provides an advantage to domestic rice over imported rice because one can only obtain the advantage of an import license to import rice under the TRQ by purchasing domestic rice. The choice facing an importer is stark: an importer who applies for a

portion of the TRQ and presents a receipt to Turkey's Foreign Trade Undersecretariat (FTU) for the purchase of 1,000 metric tons of U.S. or Egyptian rice will not be permitted to import rice. However, if that same importer presents to FTU a receipt from a Turkish paddy rice producer for the purchase of 1,000 metric tons of Turkish paddy rice, FTU will grant that importer a permit to import a quantity of rice specified under Turkish regulations, provided that there is quota remaining. It is clear that this scheme provides an incentive to purchase domestic rice and correspondingly a disincentive to purchase imported rice, thereby giving domestic rice a tremendous advantage in the Turkish market.

17. Turkey has taken issue with the U.S. calculations in Exhibit US-52 regarding the cost of the domestic purchase requirement, calculations which utilize Turkey's own figures or numbers consistent with Turkey's figures. As of yet, Turkey has failed to explain which of these figures it now finds objectionable. It continues to focus on the cost per ton rather than the total cost to the importer. However, arguing over the cost of the domestic purchase requirement is irrelevant for purposes of the Article III:4 analysis. Again, the issue is whether the measure provides differential and less favorable treatment to imports. Under the TRQ, purchasing imported rice will not qualify an importer to import rice from abroad; only the purchase of domestic rice will do that. The differential treatment provided by Turkey to imported and domestic rice with respect to the absorption requirement appears on the face of Turkey's regulations and is undisputed.

18. The domestic purchase requirement also is inconsistent with Article XI:1 of the GATT 1994. Under the TRQ, importers must purchase large quantities of domestic rice in order to import rice -- oftentimes between 2-4 times the quantity of domestic rice as the quantity of imported rice an importer wants to import. As demonstrated by the U.S. calculations, which Turkey has failed to rebut, the domestic purchase requirement presents importers of rice with considerable expense as a condition for importing under the TRQ. The cost of satisfying the domestic purchase requirement acts as a restriction on the importation of rice in contravention of Article XI:1.

The Role of Panels in the WTO Dispute Settlement System

19. Quite simply, the United States believes that the role of a Panel established pursuant to the DSU is to assist the DSB to resolve the dispute presented by the parties. Panels are charged under the DSU with making findings and recommendations in order to do so. The United States believes that the Panel should evaluate the arguments raised by the parties in light of its role and responsibilities as set forth in the DSU and in its terms of reference.

20. In this regard, Turkey continues to request that the Panel ignore its mandate and not make findings or a recommendation on the TRQ regime, because that regime has allegedly expired. The United States has argued in its previous submissions and statements that the Panel is charged with making such findings and a recommendation with respect to the measures as they existed when this Panel was established. This interpretation is borne out by the text of the DSU,

past panel reports cited by both Turkey and the United States, and the Appellate Body report in *Dominican Republic Cigarettes*. The TRQ regime existed on March 17, 2006, the date this Panel was established by the DSB. This fact is uncontested.

21. Turkey insists that it is not necessary for the Panel to make findings or a recommendation regarding the domestic purchase requirement in order to resolve the dispute between the Parties. But consider the following facts:

- Turkey and the United States continue to disagree on whether the TRQ regime is still in existence.
- Turkey has previously re-opened the TRQ on two separate occasions after the TRQ allegedly expired and, in one of those instances, Turkey informed the WTO membership sitting as the WTO Committee on Agriculture that the TRQ had expired and would not be re-imposed.
- Turkey has never repealed the legislation providing the legal basis under Turkish law for imposing a TRQ with an absorption requirement.
- Turkey continues to argue that there is nothing wrong with its TRQ scheme because it provides stability in the market with respect to price and supply. This line of argument strongly suggests that it will re-open the TRQ when it deems appropriate.

Given these facts, would it be helpful for the Panel to disregard its mandate and not make findings or a recommendation? The United States thinks that the answer is clearly ‘no.’ And Turkey has identified no legal basis under the DSU for the Panel to ignore its mandate.

22. There is yet another reason that the Panel should reject Turkey’s argument on this matter. If the Panel were to find that the domestic purchase requirement is inconsistent with WTO rules but did not recommend that Turkey bring its measure into compliance with such rules, Turkey could re-impose a domestic purchase requirement and then claim before a WTO compliance panel – likely comprised of the same three panelists who are hearing this dispute – that the panel would not have jurisdiction to make findings on the consistency of that measure with WTO rules because it was not a “measure taken to comply” under Article 21.3 of the DSU. Returning to the same question – would such a development be helpful for resolving the dispute between the parties? – the United States again submits that the answer is ‘no.’