

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

**(WT/DS334)**

**ANSWERS OF THE UNITED STATES OF AMERICA  
TO THE QUESTIONS OF THE PANEL AND TURKEY FOLLOWING  
THE SECOND SUBSTANTIVE MEETING WITH THE PARTIES**

February 6, 2007

### **Questions from the Panel**

**99. (Both Parties) The Panel has examined the data provided by each of the parties. Certain data contained in some of the Exhibits provided by the Parties show significant discrepancies. For example:**

**(a) Figures in Exhibits US-45 and TR-23 for rice imports from 2001 to 2006;**

**Please explain why, in your view, this is the case, referring to relevant evidence, as appropriate.**

1. The United States notes, as a general matter, that a number of the Panel’s questions relate to discrepancies in the data submitted by Turkey and the United States. The United States had noted some of the same discrepancies, and furthermore observed that even accounting for these discrepancies, the overwhelming evidence – the Letters of Acceptance, the rejection letters given to importers, the voluminous court documents, statements made by Turkish counsel and other government officials, and newspaper articles – indicates that Turkey is restricting trade in rice and is thus in breach of Article XI:1 of the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”).

2. There are at least two possible reasons for the apparent discrepancy between the rice importation data in Exhibits US-45 and TR-23. First, the U.S. numbers are estimated on a “milled rice equivalent” basis, under which imports of paddy rice and brown rice are converted into the weight they would be as milled rice. (When paddy rice is first milled into brown rice, the rice is de-husked. When brown rice is further processed into milled rice, the bran is removed. Thus, the total weight of the initial raw material, paddy rice, is reduced by a certain factor for brown rice and a certain factor for milled rice.) The U.S. data uses milled rice equivalent because milled rice is the final product that is consumed, so the conversion enables a better comparison between total supply (including imports) and total demand.

3. By contrast, it appears that Turkey’s numbers, which are higher than the U.S. numbers, are based on the “product weight” of paddy and brown rice prior to milling. Turkish trade data provided by the United States in Exhibit US-53 are on a product weight basis. In Exhibit US-81, the United States has added an annual totals column for each year to the original tables provided in Exhibit US-53. The annual totals for 2003, 2004, and 2005 in Exhibit US-81 are comparable to the annual totals for the same years provided by Turkey in Annex TR-23. With respect to the 2006 data, the annual total of Turkish rice imports contained in Exhibit US-81 is approximately 58,000 metric tons less than the figure provided by Turkey in Annex TR-23. The data provided by the United States in Exhibit US-81 are official Turkish import data for rice. To the extent Turkey’s data provided in Annex TR-23 is different, Turkey is in the best position to explain the discrepancy.

4. A second possible reason for the discrepancy is that Turkey and the United States appear to use different sources for estimating rice importation. Turkey uses Undersecretariat for Foreign Trade (FTU) data, which is reportedly based on imports. The United States Department of Agriculture (USDA) derives Turkish rice imports from export data. To do so, it uses a combination of sources. To estimate Turkey's imports of rice from the United States, USDA uses export data from the U.S. Department of Commerce, Bureau of Census.<sup>1</sup> To estimate Turkey's imports of rice from other countries, USDA uses export data from the customs authorities of other countries or entities, such as EuroStat, China Customs, and the Thai Customs Department.<sup>2</sup>

5. In addition, Turkey does not specify whether it used data covering a marketing year (MY) or a trade (i.e., calendar) year (TY) to arrive at its estimate. The United States provided data estimates for both periods for each year. Therefore, it is unclear to which estimate Turkey's figure should be compared. However, it is interesting to note that both the U.S. and Turkish data follow a similar trend. Imports appear to have been significantly lower in 2003/2004<sup>3</sup> than in 2001/2002 and 2002/2003 before rebounding in 2004/2005 and 2005/2006, although not to the levels seen prior to 2003/2004. Turkey issued its first Letter of Acceptance on September 10, 2003 and, as previously noted, during the period September 10, 2003 through at least late-April 2004, there was no mechanism to import rice into Turkey because the TRQ had not yet been opened. This explains the decrease in imports in 2003/2004. The fact that Turkey's restrictions have remained in place since that time explains why import levels have not recovered to pre-2003/2004 levels.

**(b) Figures in Exhibits US-53 and TR-25 for paddy rice imports in January and December 2004 and January to May 2006; for brown rice imports in March 2003 and January to September 2006; and for milled rice imports in July 2004 and January to July 2006.**

6. The United States cannot explain the discrepancies in the data. The United States provided data that was compiled by the State Institute of Statistics, which the United States understands has been renamed the Turkish Statistics Corporation (TUIK). The United States obtained this information by downloading it from the website of the widely used Global Trade Information Service ([www.gtis.com](http://www.gtis.com)), a "supplier of international merchandise trade data," to which the United States is a subscriber. The GTIS website states that the data posted on its

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<sup>1</sup>See Exhibit US-73.

<sup>2</sup>See Exhibit US-73.

<sup>3</sup>The 2003/2004 figure in Exhibit US-45 corresponds to the 2004 column in Annex TR-23, and each of the figures in the remainder of this paragraph follows the same pattern.

database was obtained from Turkey's State Institute of Statistics.<sup>4</sup> Thus, the United States has provided the Panel with official Turkish import data for rice. To the extent Turkey has provided data that is different from its official data, Turkey is in the best position to explain the discrepancies. With respect to milled rice imports in July 2004, the United States did not find a discrepancy between U.S. and Turkish data.

- (c) **Figures in Exhibits US-55 and TR-28 for landed CIF prices of paddy rice in December 2004; of brown rice in March 2003, March to June 2004, September to December 2004 and June 2006; and of milled rice in December 2005.**

7. Please see the answer to (b) above. The discrepancies in the quantity of imports between the official Turkish import data provided by the United States and the data provided by Turkey probably account for most of the discrepancies in the data for landed CIF prices. Turkey is in the best position to explain the discrepancies.

**On the other hand, some figures provided by the United States and Turkey show a high degree of similarity. For example:**

- (a) **Figures in Exhibits US-45 and TR-24 for milled rice consumption from 2001 to 2005.**

8. The primary source for USDA's milled rice consumption estimate is the Turkish rice industry. This may explain why Turkey's official estimate of milled rice consumption is similar to that of the United States.

- (b) **Figures in Exhibits US-53 and TR-25 for paddy rice imports throughout 2003, February to November 2004, throughout 2005, June and July 2006; for brown rice imports in January, February and April to December 2003, throughout 2004 and 2005; and for milled rice imports throughout 2003 (except for May), throughout 2004 (except for July), and throughout 2005.**

9. As previously noted, the United States has provided official Turkish trade data compiled by the State Institute of Statistics. In the instances noted by the Panel above, Turkey has apparently relied on the same data, which explains why the figures are similar.

- (c) **Figures in Exhibits US-55 and TR-28 for landed CIF prices of paddy rice throughout 2003, April to November 2004, throughout 2005 and June to August 2006; of brown rice throughout 2003 (except for**

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<sup>4</sup>See Exhibit US-73.

**March), throughout 2005, and April to June 2006; and of milled rice throughout 2003, throughout 2004, throughout 2005 (except for December) and from January to July 2005.**

10. Please see the answer to (b) above.

**100. (Both Parties) The Panel has considered the information provided by Turkey on "Monthly landed CIF values" in Exhibit TR-28, and noted a sharp increase in paddy rice prices in June 2003, January and November 2004, February 2005 and March 2006. Likewise, it has noted a sharp increase in milled rice prices in September 2003, January and August 2004 and September 2005. It has also noted a significant fall in the price for milled rice in December 2003. Please explain why, in your view, these sharp increases and this significant fall in prices occurred, referring to relevant evidence, as appropriate.**

11. The United States has the following observations regarding the price fluctuations noted by the Panel:

- *June 2003*: It is unclear to the United States what may have caused the increase in the price of imported paddy rice in June 2003.
- *September 2003*: On September 10, 2003, Turkey imposed a legal prohibition on the granting of Control Certificates for MFN trade in rice in the form of Letter of Acceptance 964. This had the effect of constricting the supply of milled rice in the Turkish market, which put upward pressure on prices. Imports of milled rice from Egypt dropped from 12,042 metric tons in August 2003 to zero in September 2003. Imports of milled rice from China dropped from 21,038 metric tons in August 2003 to zero in September 2003. And imports of milled rice from the United States dropped from 6,990 metric tons in August 2003 to zero in September 2003. Because EC origin rice imports were unaffected by the Minister's decision, as they are imported duty free under a separate quota regime, relatively expensive Italian milled rice was the only imported milled rice available for purchase. This also had a significant effect on average imported milled rice prices.
- *December 2003*: It is unclear whether there was an actual drop in milled rice prices. According to Turkish import data, China shipped 10,000 tons of milled rice in December 2003. However, there is no record in Annex TR-33 of any Control Certificate(s) granted by MARA for the import of Chinese milled rice that was used in December 2003. Assuming that the data provided in Annex TR-33 is correct, and assuming that the Turkish price data is based on erroneous import data, there may not have been a drop in price at all.

- *January 2004:* As submitted in Exhibit US-55, Turkish trade data shows that there were no paddy rice imports and negligible milled rice imports (of EC-origin) in January 2004. As previously mentioned, there had been a legal prohibition in place on the granting of Control Certificates for MFN trade in rice since September 10, 2003. It is possible that, after four months with no MFN rice imports, market prices for paddy and milled rice began to react.
- *August 2004:* The most likely reason behind the increase in average imported milled rice prices was two-fold. Imports of Italian milled, one of the most expensive types of imported rice in the Turkish market, which had been absent from the market during the previous five months, resumed in August. At the same time, imports of Vietnamese milled rice, one of the lowest priced imported milled rice in the Turkish market, which had been present in the market during the previous months, ceased in August.
- *November 2004:* With the TRQ closed in September/October 2004, and a legal prohibition on the granting of Control Certificates for MFN trade in rice still in place, imports of rice in the two months preceding November 2004 were severely restricted. Turkey re-opened the TRQ on November 1, 2004. The shortage of imported rice in the market may have caused an increase in the price of imports of paddy rice as shipping resumed.
- *February 2005:* The average U.S. landed CIF price in 2005 was \$260 per metric ton,<sup>5</sup> so this price spike appears to be an anomaly, which is amplified due to the fact that there was a very small quantity of paddy rice imported that month.
- *September 2005:* The TRQ was now closed and, with the legal prohibition on the granting of Control Certificates for MFN trade still in place, importers could only import EC origin rice. Indeed, Turkey's import data shows that only Italian milled rice was present in the market in September 2005, and Italian milled is one of the most expensive types of imported rice in the Turkish market. This probably explains the average price increase of imported rice.
- *March 2006:* The average U.S. landed CIF price in 2006 was \$274 per metric ton,<sup>6</sup> so this price spike also appears to be an anomaly.

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<sup>5</sup>See paragraph 70 of the U.S. Rebuttal Submission which explained how this figure was derived.

<sup>6</sup>This figure was derived by summing the U.S. monthly totals for 2006 in Annex TR-25 and dividing value by quantity.

**101. (United States) Could the United States provide monthly figures (separately for paddy, brown and milled rice) for 2003-2006 concerning:**

- (a) Total US rice production;**
- (b) Total US rice exports; and,**
- (c) Total US rice exports to Turkey.**

12. Please see Exhibit US-74, which contains annual U.S. rice production data and annual and monthly data on total U.S. rice exports and total U.S. rice exports to Turkey. With respect to monthly data on U.S. rice production, USDA does not maintain this data, so the United States is unable to provide it. USDA does not follow what industry mills on a monthly basis, and it does not collect data on paddy production on a monthly basis because paddy production is concentrated between August and October each year.

13. According to this data, U.S. rice producers exported to Turkey 14,333 metric tons of paddy rice in December 2003, 12,475 metric tons of paddy rice in January 2004, and 15,900 metric tons of paddy rice in March 2004. Yet Turkish import data shows that, between October 2003 and May 2004, Turkey did not import any rice from the United States. Letter of Acceptance 964, in which Turkey's Minister of Agriculture ordered that no Control Certificates were to be granted, was issued on September 10, 2003, and the TRQ did not open until at least late-April 2004. Thus, the discrepancy between the U.S. export data and Turkey's import data during the October 2003/May 2004 period provides further evidence that Turkey enforces the Letters of Acceptance and is prohibiting or restricting imports of rice. The United States believes that, because importers could not obtain Control Certificates, this rice was most likely put into bonded warehouses and, thus, did not register in Turkey's import statistics.

**116. (United States) According to the information contained in Exhibit TR-33, since 1 May 2006, 27 Certificates of Control have been approved for MFN rice imports from the United States. However, 25 of these approved Certificates of Control do not appear to have, as yet, been utilised. Although these Certificates of Control have been approved after the date when the panel was established, could the United States comment on this.**

14. The United States cannot confirm that these 27 Certificates of Control have actually been approved because Turkey has rejected the Panel's request that Turkey provide copies of the Certificates. In response to questioning from the Panel during the two substantive meetings, Turkey asserted that providing such information would violate elements of Turkish domestic law; however, Turkey did not identify a specific provision to that effect. Moreover, as the United States noted during that meeting, it is not uncommon for WTO panels to adopt procedures for the protection of confidential information submitted by a party. Such procedures, which ensure that only the panelists, the WTO Secretariat, and designated representatives of the

other party have access to such information, have generally worked well in the past and could have been employed in this dispute if Turkey had concerns. In response, Turkey asserted that it was less a matter of what Turkey could provide than what it was *choosing* to provide to the Panel.

15. Had Turkey provided copies of the Certificates it asserts were granted, this might have helped to clarify the situation with respect to other, contrary evidence before the Panel. For example, the United States has provided documentary evidence showing that two Turkish rice importers, ETM and Mehmetoglu, applied for Control Certificates after March 24, 2006 and were denied. In both cases, it was clear that the importers' applications were not denied for missing documents or other process deficiencies; rather, Turkish officials made clear that they were not granting Control Certificates for MFN trade at all. Further, the rumor that MARA had granted a Control Certificate to Mehmetoglu without requiring it to purchase domestic paddy rice reportedly caused 40 Turkish rice producers and importers to visit MARA in order to protest the alleged issuance of a Certificate under these circumstances. In response, Mehmetoglu strongly denied it had been granted such a Certificate.<sup>7</sup> Further, a recent article in the Turkish publication, *Referans*, also notes that, despite Minister Tuzmen's announcement that importation without domestic purchase would be permitted starting in April, "no companies were given a permission to import until August 1 [2006]."<sup>8</sup>

16. The United States also questions why importers would have applied for Control Certificates for the volumes allegedly granted, given the actual level of trade. As noted in paragraph 54 of the U.S. Rebuttal Submission, Turkey asserts that it granted Control Certificates for 400,000 metric tons of U.S. rice, while Turkey's import data shows that 90,000 metric tons of U.S. rice entered Turkey in 2006. U.S. export statistics record 17,789<sup>9</sup> metric tons of U.S. rice shipped to Turkey in 2006, and no future sales have been recorded in the USDA Export Sales Report. The United States understands that any additional entries would have come from U.S. rice Turkey finally released from bonded warehouse that had previously been refused entry. Under these circumstances, there would have been no reason for importers to apply for Control Certificates of the magnitude reported for imports of U.S. rice.

17. Finally, the United States also notes that by the time any Control Certificates for MFN rice imports were allegedly made available from May-July 2006 (recall that Letter of Acceptance 390 states that the period for granting Control Certificates would expire on August 1, 2006),

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<sup>7</sup>See Exhibit US-21.

<sup>8</sup>See Exhibit US-75. As described in the U.S. Answer to Question 150, Turkey instituted minimum import prices for rice on August 1, 2006. The article also noted that rice importation was only permitted in specific periods, and that the TRQ system was enacted to protect domestic producers.

<sup>9</sup>See Exhibit US-74.

shipment arrangements for that period would likely already have been made. Under Article 2 of the September 21, 2005 Notification, importers had to purchase domestic paddy rice prior to April 1, 2006, in order to import under the TRQ regime which “expired” on July 31, 2006.<sup>10</sup> Given the pattern in previous years, that rice imports would be halted after July 31, by April 1, 2006, importers likely had already planned out their importations under the TRQ through July 31, 2006.

**117. (United States) Could the United States clarify whether the import figures provided in Exhibit US-45 for imports (rows 6, 7 and 8) correspond to imports of milled rice or total rice imports?**

18. The import figures in Exhibit US-45 correspond to total rice imports. However, they are adjusted on a milled rice equivalent basis, as explained in the answer to Question 99. To convert paddy and brown rice into milled rice equivalent, USDA uses a conversion factor of 70 percent for volumes of paddy rice and 88 percent for volumes of brown rice. In other words, the total weight of paddy rice is reduced by 30 percent in order to arrive at the milled rice equivalent, and the total weight of brown rice is reduced by 12 percent in order to arrive at the milled rice equivalent.<sup>11</sup>

**131. (Both Parties) In its response to question 40 (d) posed by the Panel, Turkey submits that Certificates of Control provide importers with “trade facilitation benefits”, such as “guaranteeing consistency and uniformity in the customs clearance procedures ... provid[ing] greater commercial predictability and legal certainty to importers (in relation to what they can expect to happen at border control), and ... reduc[ing] the possibility for goods to be blocked at customs with the potential for costly and time-consuming customs litigation.”**

- (a) Are Certificates of Control in their current form the only instruments by which Turkey can achieve those “trade-facilitation benefits” or would there be any other way of achieving these same benefits? Please justify your answer, making reference to relevant evidence, as appropriate.**

19. Turkey’s Minister of Agriculture has ordered that no Control Certificates be granted for importing rice at the MFN rate. The United States fails to see how denying these Control Certificates facilitates trade in rice; in fact, it has the opposite effect, prohibiting or restricting

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<sup>10</sup>See Exhibit US-11.

<sup>11</sup>Andy Aaronson and Nathan Childs, “Developing Supply and Utilization Tables for the U.S. Rice Market,” Rice Situation and Outlook/RCS-2000/November 2000, page 45. See Exhibit US-80.

trade. Further, Turkey has not succeeded in its asserted goal of reducing the volume of lawsuits, given the large number of lawsuits brought by importers whose Control Certificate applications have been denied. Control Certificates serve neither a customs nor an SPS purpose and only serve as an access point for MARA to restrict the rice trade. Elimination of the Control Certificate requirement would be the best way to facilitate trade.

- (b) **Does the fact that Certificates of Control allegedly provide importers with trade facilitation benefits mean that, in the absence of the requirement to obtain Certificates of Controls, the importation of rice would in some way be more cumbersome? If so, please describe in what manner the importation of rice would be more cumbersome in the absence of such requirement, justifying your answer with appropriate arguments and evidence.**

20. In its answer to Panel Question 14, the United States explained the steps involved in the rice importation process in Turkey.<sup>12</sup> An importer must file paperwork with four different government agencies – FTU, MARA, the Turkish Grain Board, and Turkish Customs – and obtain two separate import licenses – the import permit from FTU and the Control Certificate from MARA. In addition, an importer must fill out the same type of customs-related paperwork three times – for the two import licenses and again for Turkish Customs. Moreover, an importer has to make two separate trips to Turkish Customs and two separate trips to MARA – once to the Provincial Agricultural Directorate in Ankara and once to the regional Agricultural Provincial Directorate – as part of the process.

21. Article 1.6 of the Import Licensing Agreement requires that “[a]pplication procedures . . . shall be as simple as possible.” It further provides that “[a]pplicants shall have to approach only one administrative body in connection with an application. Where it is strictly indispensable to approach more than one administrative body, applicants shall not need to approach more than three administrative bodies.” As previously described by the United States, the rice importation process in Turkey is far from simple. This highly cumbersome system would certainly be less so if the domestic purchase and Control Certificate requirements were eliminated. Further, the United States has demonstrated that multiple Turkish agencies are collecting the same customs-related information from importers, and that MARA’s collection of this information serves neither a customs nor an SPS purpose. Accordingly, it is not “strictly indispensable” that applicants approach more than one Turkish agency in order to import rice. Even if it were, Turkey requires that importers approach *four* agencies, which is more than the Import Licensing Agreement permits under the “strictly indispensable” exception.

- 134. (Both Parties) In response to question 44 (f) posed by the Panel, regarding the denial of Certificates of Control, Turkey provided the Panel with exhibit TR-36, listing the application date, origin, quantity and quality of the rice for**

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<sup>12</sup>See paragraphs 22-33 of the U.S. Answers to Panel Questions.

**which each Certificate of Control was requested during the years 2003 to 2006. As reasons for denial, the list states the following: “Missing documents not completed”, “Upon the demand of the Company” and “Incomplete Administrative Requirements”.**

**(a) What should be understood from these reasons?**

22. Without being able to examine the actual Control Certificates, it is impossible to state definitively how these terms should be understood.

**(c) Are detailed reasons for denial provided in writing to the requesting companies in the document of rejection or are these reasons communicated to applicants in a similarly succinct manner as what is indicated in Exhibit TR-36?**

23. It is our understanding from conversations with importers and the documentary evidence we have submitted that no or very little explanation is provided to importers whose Control Certificate applications are rejected. (Indeed, MARA sometimes fails to respond at all.) In some cases, as the United States has previously discussed, MARA officials have communicated to importers, either orally or in writing, that a Control Certificate application was being rejected because MARA was simply not granting, or could not grant (as a matter of Turkish law), Control Certificates. The United States submits that, whatever other procedural flaws MARA may have identified with particular applications, this was the fundamental reason for the rejections.

**136. (Both Parties) According to Turkey's statements (see, for example, para. 25 of its first submission), Certificates of Control for the importation of rice are valid for periods of 12 months.**

**(a) If this is the case, why would importers not import rice during periods in which Certificates of Control are allegedly not being approved, but some Certificates of Control are presumably still valid?**

24. As the data and arguments provided by Turkey demonstrate, MARA issues two types of Control Certificates: Control Certificates for in-quota imports and Control Certificates for out-of-quota imports. In Annexes TR-20 and TR-33, Turkey separates Control Certificates into these two categories. There is no category provided for “dual use” Certificates, or Certificates that can be used for either in-quota or out-of-quota trade in rice. Further, Turkey has repeatedly differentiated between in-quota and out-of-quota Control Certificates throughout its submissions in this dispute. For example:

- in paragraph 27 of Turkey’s First Submission, Turkey notes that the Control Certificate “has not been used differently on the basis of whether it related to TRQ *or* MFN rice import applications” (emphasis added);

- in its response to Question 83 from the Panel, Turkey stated that it “does not consider the number of *out-of-quota Certificates of Control* for 2004 and 2005 is ‘disproportionate,’ . . . In addition, the comparison between *out-of-quota and in-quota Certificates of Control* in 2005 shows no disproportion at all, as figures show that *394 Control Certificates were approved for out-of-quota imports and 432 for in-quota imports*”) (emphasis added);
- in paragraph 20 of Turkey’s Rebuttal Submission, Turkey stated that “of those 2,242 approved Certificates of Control, *1,335 (i.e., 59.5%) were approved in relation to out-of-quota trade (i.e., MFN or FTA trade)*” (emphasis added); and
- in paragraph 36 of Turkey’s Rebuttal Submission, Turkey refers to the “‘*de minimis*’ rate of approval of Certificates of Control *in connection with MFN imports*”) (emphasis added).

25. Because Control Certificates granted for in-quota trade cannot be used for out-of-quota trade (and vice versa), when the TRQ is closed, in-quota Control Certificates granted while the TRQ was open would no longer be valid.

26. In addition, while Turkey asserts that Control Certificates are valid for periods of 12 months, this is, at a minimum, not always the case. The Panel will recall that the Communiqués state that the validity periods of Certificates cannot be *extended*, but are silent on the issue of whether those periods can be *shortened*.<sup>13</sup> Exhibit US-79 contains a Control Certificate that MARA issued on August 15, 2003. The Certificate provides that it cannot be used beyond September 1, 2003 (the beginning of the Turkish rice harvest).<sup>14</sup> The validity period of this particular Control Certificate is far less than 12 months.

**(b) During periods when the TRQ was not open, why would imports of rice not occur under Certificates of Control that were presumably still valid?**

27. Please see answer to Question 136(a).

**(c) Is there any difference between the Certificates of Control issued to**

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<sup>13</sup>See, e.g., Article 9 of the 2004, 2005, and 2006 Communiqués (Exhibits US-7 and US-78; Annex TR-1).

<sup>14</sup>The Control Certificate number and date of issuance – August 15, 2003 – are noted in the upper right hand corner of the document. The document is stamped “26 Augustos 2003,” which is the date on which the importation was made. The phrase “FIILI ITHALAT 01/09/2003 Tarihine kadar yapilmalidir” towards the bottom left side of the document means “The importation must be carried out by September 1, 2003.”

**import at the MFN rate, under preferential trade agreements and under the TRQ? If so, please specify the differences between them. If not, does this mean that a same Certificate of Control could have been equally used to import under the different rates? Did an importer have to specify whether the intended import was to be in-quota or over-quota when applying for a Certificate of Control? Please make reference to relevant evidence, as appropriate.**

28. Please see answer to Question 136(a).

**(d) Would a Certificate of Control still be valid for twelve months, even during a period when a TRQ was in place? Would an in-quota Control Certificate maintain its validity of 12 months, and therefore still allow imports to take place at the preferential in-quota tariff rate, despite the tariff quota period closing?**

29. Please see answer to Question 136(a).

**(e) Does the amount permitted to be imported under the Certificate of Control hold any relation with the amount permitted to import when applying for an import license to the Turkish Foreign Trade Undersecretariat (FTU)?**

30. Please see answer to Question 136(a).

**139. (United States) The United States has claimed that Turkey has acted inconsistently with a number of provisions of the Import Licensing Agreement, inter alia, because it has failed to notify its alleged import licensing regime for rice. The United States also noted (in its first written submission, para. 127) that it "requested that Turkey notify its non-automatic import licensing regime for rice to the Import Licensing Committee." Has the United States notified Turkey's alleged licensing regime, as provided for in paragraph 5 of article 5 of the Import Licensing Agreement? If not, why?**

31. The United States notes that such a notification would be the first use of the paragraph 5 mechanism. The United States contemplated making such a notification to the Import Licensing Committee but concluded that any such notification would not add to the notification that the United States has already provided to the Committee on Import Licensing of Turkey's import licensing regime through the invocation of the dispute settlement procedures, including notifying Members of the Committee of the U.S. request for the establishment of a panel and the claims concerning Turkey's regime.

32. The United States claims in this dispute include that Turkey operates a discretionary import licensing system that is in breach of several WTO provisions, including paragraphs 1.4(a) and (b), 1.6, 3.5 (a), (e), (f), and (h), 5.1, 5.2 (a), (b), (c), (d), (e), (g), and (h), 5.3, and 5.4 of the Import Licensing Agreement. The question of the existence and nature of Turkey's import licensing regime will be resolved through the DSB recommendations and rulings on the issues at stake in this dispute.

**140. (United States) In paragraph 26 of its first written submission, the United States claims that on 30 December 2004, MARA's General Directorate would have issued a Letter of Acceptance which recommended "yet another 'delay' in the opening date for issuing Certificates of Control until August 1, 2005". How can this statement be reconciled with the figures in Annex TR-33 that show that Certificates of Control for imports of US rice would have been issued in April and May 2005 and that imports over the quota took place during these two months?**

33. Without being able to examine the actual Control Certificates, the United States cannot investigate the authenticity of these claims and the circumstances surrounding the alleged issuance of Certificates. Even assuming that Turkey's figures are correct, this was at most a temporary relaxation of the legal prohibition for U.S. imports. In this regard, the United States notes that, to the extent Certificates were in fact granted, this would have closely followed U.S. statements at the March 16, 2005 meeting of the WTO Committee on Agriculture, where the United States noted that Turkey's import licensing regime for rice appeared to be inconsistent with several provisions of the covered agreements, including Article III of the GATT 1994, the TRIMs Agreement, and Article 4.2 of the Agreement on Agriculture.<sup>15</sup>

34. As noted in paragraphs 47 and 48 of the U.S. Rebuttal Submission, Annex TR-33 purports to show that, during one six-week period during April/May 2005, MARA allegedly issued Control Certificates to import U.S.-origin paddy rice at the MFN rate. However, that data also indicates that, prior to March 16, 2005, MARA had not issued any Control Certificates for the importation of U.S.-origin rice at the MFN rate during the second TRQ opening. And during this six-week period, it is noteworthy that Egyptian milled rice continued to be imported under the TRQ – in other words, any relaxation of the legal prohibition only seemed to apply to imports of U.S. rice.

35. Moreover, under Turkey's figures, after May 12 the status quo resumed with nearly every Control Certificate granted for importation of U.S.-origin rice occurring at the in-quota rate. Thus, at most, Turkey's figures indicate that March/April certificates were an anomaly following U.S. statements at the WTO. Importers brought in U.S. rice almost exclusively under the TRQ for 2 ½ years, except for one six-week period where every single Control Certificate for U.S. rice was purportedly issued for out-of-quota imports.

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<sup>15</sup>G/AG/R/42, 25 May 2005, para. 21.

36. The United States notes that even if the United States could confirm that these Control Certificates were granted, the United States has provided voluminous evidence in the form of Letters of Acceptance, importer rejection letters, court documents, statements from Turkish officials, and newspaper articles that Turkey restricts rice importation in contravention of Article XI:1 of the GATT 1994. Further, as noted in paragraphs 60-62 of the U.S. Rebuttal Submission, the Appellate Body and a GATT panel have found that mandatory measures that were not enforced at all were, nonetheless, inconsistent with GATT/WTO rules. Here, all of the evidence and data points to the fact that the legal prohibition on the granting of Control Certificates at the MFN rate was consistently enforced for 2 ½ years, except for possibly one six-week period. Therefore, the Panel should still find that Turkey's restrictions on MFN trade in rice are inconsistent with Article XI:1.

**143. (Both Parties) Were so-called "Letters of Acceptance" issued prior to the ones identified by the United States in its submissions. If so, can you provide any evidence as to the existence of these earlier Letters of Acceptance?**

37. The United States does not possess any Letters of Acceptance that were issued prior to September 10, 2003. U.S. industry had raised concerns with the U.S. government since 2001 that Turkey had been imposing a seasonal ban on rice imports during the Turkish rice harvest, so it is very possible that Turkey's Minister of Agriculture had issued such Letters.

**145. (Both Parties) In its statement during the second substantive meeting with the Panel (para. 12), the United States argued that Turkish courts have attributed legal effect to the so-called "Letters of Acceptance" and upheld MARA's enforcement of such Letters. In response, in its closing statement during the same meeting (para. 9), Turkey argued that, in a specific case cited, a "Court of first instance appears to have given effect to an ultra vires act [from the Minister of Agriculture and Rural Affairs]". What should be the appropriate value given by the Panel, if any, to interpretations of domestic law developed by local courts? What should be the appropriate value given by the Panel, if any, to interpretations of domestic law advanced by the administration of a Member before a local court? Was the allegedly erroneous interpretation of Turkish domestic law developed by the local court appealed by the Turkish administration? Should interpretations of domestic law developed by local courts be accorded a different value by the Panel if they were issued by higher courts?**

38. The United States notes that regardless of the precise legal status in Turkey's municipal law of the Letters of Acceptance, Turkey's issuance of these letters restricts trade in breach of Article XI:1. Nevertheless, the evidence supports the conclusion that these documents are not, as Turkey asserts here, *ultra vires*, and the Panel need not accept Turkey's assertion.

39. Turkey's initial position in this dispute was that the Letters of Acceptance were internal/confidential and unenforceable documents. These assertions, even if true, would not have changed the fact that Turkey had in place a measure, for WTO purposes, that prohibited or restricted rice imports at the MFN rate. In any case, the United States has shown that these assertions were factually incorrect. The United States provided documentary evidence demonstrating that the Letters are not, in fact, internal/confidential, in the form of court documents showing that the Turkish government relied on the Letters in Turkish domestic court to defend its failure to issue Control Certificates. The United States also provided documentary evidence that the Letters are being enforced, in the form of Turkish court decisions, in which the courts agree with the government's position, as well as import data and rejection letters to importers. Turkey's own Control Certificate data supports the U.S. contention that Turkey has been restricting rice trade at the MFN rate.

40. Turkey's new assertion is that at least two Turkish Ministers of Agriculture acted *ultra vires* in issuing the Letters of Acceptance. As a general matter, when examining a Member's measure, WTO panels are not bound by that Member's characterization of the measure. As noted by the Panel in the *1916 Act* dispute:

[O]ur understanding of the term "examination" as used by the Appellate Body<sup>16</sup> is that panels need not accept at face value the characterisation that the respondent attaches to its law. A panel may analyse the operation of the domestic legislation and determine whether the description of the functioning of the law, as made by the respondent, is consistent with the legal structure of that Member. This way, it will be able to determine whether or not the law as applied is in conformity with the obligations of the Member

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<sup>16</sup>Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted January 16, 1998, para. 67. In that dispute, the Appellate Body noted that the United States had alleged that India's "administrative instructions" with respect to mailbox applications would not override, as a legal matter, the application of certain mandatory provisions of India's Patents Act, but that India disagreed with the U.S. characterization of the Indian measure. The Appellate Body upheld the Panel's finding that the measure in question was in breach of WTO rules, noting the Panel's statement that it had "reasonable doubts" concerning India's assertions with respect to how the Indian courts would reconcile the administrative instructions with the applicable provisions of the Patents Act. *Id.*, paras. 74-75. The Appellate Body further noted that the Panel had the authority to examine India's law to determine whether it was in compliance with the *TRIPs Agreement*:

To say that the Panel should have done otherwise would be to say that only India can assess whether Indian law is consistent with India's obligations under the *WTO Agreement*. This clearly cannot be so.

*Id.*, para. 66.

concerned under the WTO Agreement.<sup>17</sup>

41. In this specific case, Turkey’s suggestion that the Letters of Acceptance are *ultra vires* is strongly contradicted by other evidence. Not only the court opinions, but the overwhelming body of evidence presented, support the conclusion that the letters are legally binding. The Minister of Agriculture is the head of the Ministry of Agriculture and Rural Affairs (MARA). The Communiqués make clear that the Control Certificate system is administered by MARA. The application for the Control Certificate is contained in an annex to each Communiqué. The determination as to whether a Control Certificate is to be granted is in the hands of MARA, as provided by Article 2 of the Communiqués. Further, under Article 2, MARA’s granting of a Control Certificate application is contingent on an importer’s provision of certain documents that MARA may ask for, depending on the product. Thus, on the face of the regulation, MARA has the authority to deny the issuance of Control Certificates if certain unspecified documents are not provided. In fact, Turkey has been denying Control Certificates to importers who do not present documentation, in the form of proof of domestic purchase and an FTU import permit, demonstrating that the requirement to purchase domestic paddy rice has been satisfied. Therefore, Turkey’s Minister of Agriculture not only is the head of the agency that issues (or fails to issue ) Control Certificates, but the regulation the Minister administers provides ample authority to deny Control Certificates if certain unspecified product-specific documentation is not provided.

42. Turkey’s “*ultra vires*” argument is also at odds with its statements to its domestic courts and with the conclusions of those courts. Turkey has asked, or is continuing to ask, in at least 14 Turkish domestic court proceedings,<sup>18</sup> that the courts *enforce* the Letters of Acceptance. Turkey is continuing to argue in domestic court that the Letters are *valid* and that it cannot grant Control Certificates. At least five Turkish courts have upheld the government’s position thus far.<sup>19</sup> Whatever any court of appeal might or might not say on this issue, there is simply no evidence at this time to support Turkey’s assertion in this proceeding that its issuance of Letters of Acceptance was *ultra vires* under Turkish municipal law. Again, however, whatever the status of the Letters, they do restrict trade, and Turkey is therefore in breach of Article XI:1.

43. In order to resolve this dispute, it is thus not necessary to answer as a general matter the precise evidentiary weight to be given to court opinions, which will vary from Member to Member. Indeed, because of variations in the municipal legal systems of different Members, it is unlikely that there is one set of answers to the Panel’s questions that would be applicable to all Members.

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<sup>17</sup>Panel Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/R, adopted 26 September 2000, at para. 6.51.

<sup>18</sup>See Turkey’s Answers to Questions, Reply to Question 53(e).

<sup>19</sup>See Turkey’s Answers to Questions, Reply to Question 53(e).

44. WTO panels may consider domestic court proceedings, including arguments advanced by a Member in those proceedings and the decisions rendered by domestic tribunals, as relevant factual evidence in evaluating what a measure brought to WTO dispute settlement actually does and how it works in practice. In this case, the Panel should consider the Turkish government's stated position in domestic court on what the Letters of Acceptance mean and what force and effect the Turkish courts decide those Letters have as a matter of Turkish law, as relevant factual evidence in evaluating whether Turkey is prohibiting or restricting imports of rice through a discretionary import licensing regime.<sup>20</sup> The United States believes that the evidence presented on this score is compelling.

**150. (Both Parties) In paragraph 37 of its response to question 18 (c) posed by the Panel, the United States asserts that it "has been informed by the trade (sic) that MARA is orally informing importers that the MFN tariffs will henceforth be calculated based upon government-determined reference prices for paddy, brown, and milled rice, respectively, rather than on the actual customs value of the merchandise." Could the United States provide further information and evidence to support this assertion.**

45. The TRQ regime "expired" on July 31, 2006. The very next day, FTU sent a letter to Turkish Customs noting that FTU and MARA had arrived at a "mutual understanding" regarding Turkey's Control Certificate system. Specifically, as of August 1, 2006, duties would no longer be calculated on the actual value of imported rice but on certain reference prices: CIF \$340 USD per metric ton for imported paddy rice, CIF \$425 USD per metric ton for imported brown rice, and CIF \$570 USD per metric ton for imported paddy rice. On August 10, 2006, Turkey's General Directorate of Customs ordered all Turkish customs houses to take the above-mentioned reference prices into account when determining the price for purposes of calculating duty levels.<sup>21</sup> To the knowledge of the United States, neither document was ever published.

46. In the August 10, 2006 Order, the General Directorate of Customs noted that, under the understanding reached between MARA and FTU, calculation of the applicable duty according to the reference price calculation is made a component of Control Certificates for rice:

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<sup>20</sup>See Panel Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/R, adopted January 8, 2003, as modified by the Appellate Body Report, WT/DS212/AB/R, at paras. 7.124 - 7.128 (noting that relevant factual evidence a Panel must consider in analyzing whether a Member has complied with WTO rules includes municipal court decisions, declarations made by governmental authorities, and domestic application of a measure, and that such evidence must be examined jointly when evaluating whether the measure is in breach).

<sup>21</sup>The United States submitted this document in Exhibit US-68.

. . . a mutual understanding is reached for *application of a reference price in the control documents drawn up in connection with the export of rice and rice paddy pursuant to the Communiqué of Standardization in Foreign Trade with number 2006/5.*

[The reference prices noted above] will be considered as reference prices in case a control document is drawn up and this fact is communicated to the Ministry of Agriculture and Rural Affairs.

Consequently, *since the values mentioned above will be considered as reference in the establishment of control documents for the subject items from the date of 01.08.2006, this fact has to be taken into account while determining the price.*<sup>22</sup> (emphasis added).

47. On October 19, 2006, Turkey's General Directorate of Customs sent another unpublished letter to its customs houses.<sup>23</sup> This second document makes reference to the August 10, 2006 letter which noted the memorandum of understanding between MARA and FTU regarding the new reference prices that were executed in accordance with the 2006 Communiqué. In sum, the document states that the reference price system has not been properly enforced – some companies had been importing rice at a lower unit value than the applicable reference prices – and emphasizes that it is necessary for customs officials to enforce the reference prices. It suggests that customs officials had not been adequately considering the values specified in the invoices, which are attached to the Control Certificates, when determining the basis on which customs duties would be levied. The document concludes that:

it is extremely important to take the invoices that are attached to the import licenses issued by the Ministry of Agriculture and Rural Affairs, and, that are declared by the companies, as the basis in determining the value that will be the basis of customs tariff in the importation of the products in question.

In this regard, it is **absolutely necessary** that the values indicated on the invoices attached to the import licenses be taken into consideration in the import customs procedures for the goods in question, and that during the approval phase, the declaration should be checked against the invoices attached to the import licenses for any inconsistencies (emphasis in the original).

48. One Turkish importer, Mehmetoglu, attempted to avoid the reference price on milled rice imports by importing 42,000 metric tons of milled rice from Egypt at \$305 per ton, even though the company was obliged under the reference price regime to pay duties on \$570 per ton. The company apparently paid the duty on \$305 per ton and presented a letter of credit from its bank to Turkish Customs to cover the difference. According to a December 5, 2006, article in

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<sup>22</sup>Exhibit US-68.

<sup>23</sup>See Exhibit US-76.

*Referans*, Mehmetoglu expressed its intention to contest any assertion that it needed to pay the difference, on the grounds that the reference price scheme was illegal. Mehmetoglu's action apparently was the subject of discussion in Turkish Parliament, and Turan Comez, a member of Parliament from Balikesir, submitted a question to Minister Tuzmen asking him to investigate this specific Mehmetoglu transaction, from which he alleged Mehmetoglu realized \$5 million in illegal revenues.<sup>24</sup>

49. On December 15, 2006, perhaps in response to the controversy generated by “the Mehmetoglu affair,” Turkey’s Minister of Agriculture, Mehdi Eker, issued a public explanation of Turkey’s rice import regime through the Office of Press and Public Relations. In that explanation, Minister Eker noted that FTU started the reference price system in response to these WTO panel proceedings and in order to protect domestic rice producers. He further noted that any rumor that the reference rice system has been suspended was false and that, as of December 15, 2006:

our Ministry had not issued an *import license* (Control Document) that is below the Reference Prices . . . .<sup>25</sup>

Minister Eker closed by stating that Turkish Customs had opened an investigation into Mehmetoglu, in response to the inquiry that had been raised by Mr. Comez.

50. The December 15th statement by Turkey’s Minister of Agriculture is significant for at least two reasons. First, the Minister has *conceded* that the Control Certificate is an import license. This admission provides further evidence that the Control Certificate is an import license for purposes of Article XI:1 of the GATT 1994 and that Turkey’s Control Certificate system, as set forth in the Communiqués and the Letters of Acceptance, constitutes “import licensing” under the Import Licensing Agreement.<sup>26</sup>

51. Second, the Minister has made clear that the reference prices are not merely taken into consideration when issuing a Control Certificate and determining on what value the customs duty is levied. Rather, the reference prices, not the actual value of the merchandise, are the values on which the customs duty is levied. Moreover, if an importer attempts to avoid the

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<sup>24</sup>See Exhibit US-75.

<sup>25</sup>See Exhibit US-77 (emphasis added).

<sup>26</sup>The United States further notes that Minister Eker’s statement acknowledges that the TRQ resulted in an 87 percent increase in domestic rice production since 2002 and that, as a result, domestic rice increased from 40 to 66 percent as a percentage of total domestic consumption. The statement makes clear that the institution of Turkey’s import system for rice, including the TRQ with domestic purchase, was done with the objective of protecting domestic producers and increasing investment in the Turkish rice sector.

reference price, that importer risks being investigated. In other words, Turkey has put in place minimum import prices for rice, and those prices are being enforced. Minimum import prices on the import of agricultural products are specifically listed as prohibited in footnote 1 to Article 4.2 of the Agreement on Agriculture.

52. For purposes of this dispute, Turkey's establishment of minimum import prices for rice provides further evidence that Turkey restricts trade in rice and operates a discretionary import licensing regime. A joint examination of the official Customs documentation, Minister Eker's statements on December 15th, and the *Hurriyet* newspaper article reveals that MARA will not grant a Control Certificate for the import of rice unless the importer agrees to pay a duty based on the applicable reference price, rather than on the actual value of the imported rice. Instead of granting import licenses automatically, Turkey utilizes discretion in determining whether or not to grant them. If the importer agrees to the reference price, Turkey may decide to grant the license; if the importer does not agree to the reference price, Turkey will not issue the license. Accordingly, Turkey's import licensing regime prohibits or restricts trade in contravention of Article XI:1 of the GATT 1994 and constitutes discretionary import licensing under Article 4.2 of the Agreement on Agriculture.

**152. (United States) In its statement during the second substantive meeting with the Panel (para. 21), the United States argued that it would be necessary for the Panel to make a finding and recommendation regarding the so-called "domestic purchase requirement", in order to resolve the dispute between the parties.**

**(a) Could the United States explain why this would be the case, in its view.**

53. Turkey argues that the Panel should decline to make a finding or issue a recommendation with respect to the domestic purchase requirement because it allegedly has ceased to exist. However, as the United States has pointed out, under its terms of reference and under DSU Article 19.1, the Panel is charged with making findings and recommendations on the measures identified in the U.S. panel request, including the domestic purchase requirement. Inasmuch as the domestic purchase requirement was in existence at the time this Panel was established, that measure is within the Panel's terms of reference, the Panel is charged with examining that measure as it existed on the date of establishment.<sup>27</sup> The TRQ regime existed on March 17, 2006, the date this Panel was established by the DSB.

54. Further, the United States considers that findings and a recommendation with respect to the domestic purchase requirement are necessary to resolve the dispute. First, the United States believes that, contrary to Turkey's assurances, the TRQ regime is still in existence. Turkey has

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<sup>27</sup>See paragraphs 19-22 of the U.S. Oral Statement at the Second Panel Meeting and paragraphs 42-47 of the U.S. Oral Statement at the First Panel Meeting.

previously re-opened the TRQ on two separate occasions after it claimed that the TRQ had expired. In one of those instances, Turkey informed the WTO Committee on Agriculture that the TRQ had expired and would not be re-imposed. Yet Turkey subsequently re-opened the TRQ with domestic purchase. The fact that Turkey closes the TRQ periodically does not change the fact that the regime continues to exist. Turkey has neither repealed the legislation providing the legal basis under Turkish law for imposing a TRQ with an absorption requirement nor amended those regulations to ensure that FTU cannot re-open the rice TRQ. Because Turkey continues to argue that its TRQ scheme is beneficial in that it allegedly provides stability in the market with respect to price and supply and is beneficial to imports, it is likely that Turkey will re-open the TRQ when it deems appropriate.

55. Second, if the Panel were *not* to make findings and a recommendation with respect to the domestic purchase requirement, and if Turkey were to re-open the TRQ and impose a domestic purchase requirement, Turkey might argue before a WTO compliance panel that that panel would not have jurisdiction to make findings on the measure because it was not a “measure taken to comply” under Article 21.5 of the DSU. Were this argument to succeed, the United States would have to again request original panel proceedings, thereby needlessly prolonging a dispute that this Panel has the authority and mandate to resolve.

- (b) **In paragraph 20 of its statement, the United States also argued that its request that the Panel make findings and recommendations regarding the TRQ regime would be supported by the interpretation contained in the Appellate Body report in the Dominican Republic - Import and Sale of Cigarettes case. Could the United States elaborate on this assertion, explaining in what manner does the Appellate Body's decision in that case support its request. Please refer to specific sections of the report, as appropriate, and their relevance to the present case.**

56. The United States made this statement in response to Turkey’s continued unsupported allegations that WTO panel reports support its argument that this Panel does not need to make findings and recommendations on the domestic purchase requirement. Turkey has continually argued that WTO panels should not make findings on measures that have ceased to exist. What Turkey ignores is that, in determining whether a measure is still in existence, the relevant date for purposes of WTO dispute settlement is the date of panel establishment. Every single dispute cited by Turkey respects the distinction between measures that existed on the date of panel establishment, such as the domestic purchase requirement, and those measures that did not exist on the date of panel establishment.

57. The outcome of the *Dominican Republic – Cigarettes* dispute also supports the U.S. position. In that dispute, the panel made an adverse finding with respect to the Dominican Republic’s Selective Consumption Tax, which existed on the date of panel establishment, but which was subsequently modified. However, the panel decided *not* to make a *recommendation*

to the DSB that the Dominican Republic bring the measure into conformity with WTO rules, on the grounds that the measure was no longer in force.<sup>28</sup>

58. The Appellate Body disagreed with the panel by making a broad recommendation that the Dominican Republic bring its measures into compliance with WTO rules. Specifically, in paragraph 130 of its report, the Appellate Body states:

The Appellate Body also *recommends* that the Dispute Settlement Body request the Dominican Republic to bring its . . . measures [other than the tax stamp requirement], found in the Panel Report as modified by this Report, to be inconsistent with the GATT 1994, into conformity with its obligations under that Agreement.<sup>29</sup>

The Appellate Body’s broad recommendation covers the Selective Consumption Tax and other measures that the panel had found to be inconsistent with WTO rules.

59. Further, in paragraph 129, the Appellate Body recommended that the DSB request the Dominican Republic to bring into conformity with WTO rules its tax stamp requirement, a measure that existed on the date of panel establishment, even though the Dominican Republic had modified that requirement subsequent to panel establishment:

In view of the above, the Appellate Body recommends that the Dispute Settlement Body request the Dominican Republic to bring the tax stamp requirement, found in this Report and in the Panel Report as modified by this Report to be inconsistent with the GATT 1994, into conformity with its obligations under that Agreement if, and to the extent that, the said modifications to the tax stamp regime have not already done so.<sup>30</sup>

In recommending that the Dominican Republic bring into conformity a measure which had already been modified, the Appellate Body acknowledged the modification without prejudging whether it had brought the Dominican Republic into compliance.

60. Similarly, in *EC – Biotech*, the panel made a recommendation with respect to a measure

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<sup>28</sup>Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R, adopted May 19, 2005, as modified by the Appellate Body Report, WT/DS302/AB/R, at para.8.3 (“*Dominican Republic – Cigarettes*”).

<sup>29</sup>Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R (emphasis added).

<sup>30</sup>Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R (emphasis added).

the EC asserted no longer existed.<sup>31</sup> While the measure in that dispute allegedly expired prior to panel establishment, the panel’s reasoning in determining the need to make a recommendation is relevant for the instant dispute. First noting that the aim of WTO dispute settlement, pursuant to Article 3.7 of the DSU, was “to secure a positive resolution to a dispute,”<sup>32</sup> the panel stated:

In addition to noting the continuing existence of opposition to approvals amongst member States, we also recall the informal, *de facto* nature of the general moratorium on approvals, which means that it can be re-imposed just as soon as it can be ended. In these circumstances, we agree that even if the general moratorium ceased to exist after August 2003, if we were to find that the European Communities acted inconsistently with its WTO obligations by applying a general moratorium in August 2003, this could help prevent a WTO-inconsistent general moratorium from being reintroduced and, in this way, secure a positive resolution to this dispute.<sup>33</sup>

In a footnote to paragraph 7.1311, the panel further noted:

[I]f we were not to make findings on the general moratorium, there would effectively be a possibility of shielding it from scrutiny by a panel because this type of *de facto* measure could be ended shortly before or during panel proceedings and promptly re-imposed thereafter.

61. The panel ultimately recommended that the DSB request that the EC bring its measure into conformity with its WTO obligations “if, and to the extent that, that measure has not already ceased to exist.”<sup>34</sup>

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<sup>31</sup>Panel Reports, *European Communities - Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291, 292, 293/R, para. 8.16 (“*EC – Biotech*”).

<sup>32</sup>Panel Reports, *European Communities - Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291, 292, 293/R, para. 7.1309.

<sup>33</sup>Panel Reports, *European Communities - Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291, 292, 293/R, para. 7.1311.

<sup>34</sup>Panel Reports, *European Communities - Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291, 292, 293/R, para. 8.16.

In its reasoning, the panel cited the Panel Report in *Canada – Wheat* as an example of where a panel did not make a recommendation with respect to a measure that had been amended after panel establishment. That report, which addresses a measure that was *amended* during panel proceedings, is inapplicable to the present dispute, where the panel is addressing a measure that one party argues has *ceased to exist* during the panel proceedings. Nevertheless, the panel in *Canada – Wheat* noted that, during the panel proceedings, Canada had acknowledged that the

62. Turkey’s domestic purchase requirement existed on the date of panel establishment, and this Panel is charged with making findings and recommendations to the DSB, in accordance with Article 19.1 of the DSU and the Panel’s terms of reference, in order “to secure a positive resolution to a dispute” pursuant to Article 3.7 of the DSU. Turkey’s mere assurance that it has no intention of re-opening the TRQ with domestic purchase does not provide legal grounds for the Panel to disregard its mandate and the text of the DSU, and the guidance provided by past panels supports this conclusion.<sup>35</sup>

### **Questions from Turkey**

#### **Question TR-1: Could the United States indicate which specific provision of the Turkish law on Certificates of Control (i.e., Communiqué of Standardization for**

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amended measure, on which the panel made its recommendation, had the “same” “substantive effect” as the measure that existed on the date of panel establishment. (And the United States agreed with that assessment, as noted in U.S. Response to Panel Question 67 in that dispute.) Panel Report, *Canada - Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R, adopted September 27, 2004, para. 7.3 (*Canada – Wheat*). That the text of the DSU requires panels to make a recommendation is meant to ensure that a WTO-inconsistent measure cannot be subsequently re-imposed by the respondent. Because Canada’s amended measure was substantively the same as the original measure, a panel recommendation that Canada bring that measure into conformity with its WTO obligations would also have precluded Canada from re-imposing the original measure.

<sup>35</sup> See Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54, 55, 59, 64/R, adopted July 23, 1998, para. 14.9. The panel decided to make a finding on a measure that Indonesia deemed “obsolete” since it had allegedly been terminated after the panel was established:

In any event, taking into account our terms of reference, and noting that any revocation of a challenged measure could be relevant to the implementation stage of the dispute settlement process, we consider that it is appropriate for us to make findings in respect of the National Car programme. In this connection, we note that in previous GATT/WTO cases, where a measure included in the terms of reference was otherwise terminated or amended after the commencement of the panel proceedings, panels have nevertheless made findings in respect of such a measure. We shall therefore proceed to examine all of the claims of the complainants.

Footnote omitted. One of the referenced panel reports in the footnote was the Panel Report in *United States – Measures Affecting Imports of Wool Shirts and Blouses from India*, WT/DS33/R, adopted 23 May 1997 (where the Panel made a finding on a measure that the United States withdrew during the panel proceedings).

**Foreign Trade No. 2005/5, 2006/5 and 2007/21) defines, de jure, a Certificate of Control as an import license?**

63. The United States has not found any provision in the Communiqués that states “the Certificate of Control is an import license.” However, this is irrelevant for purposes of the Article XI:1 analysis. Article XI:1 states that:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party . . . .

64. According to customary rules of interpretation of public international law, as reflected in Articles 31 of the *Vienna Convention on the Law of Treaties*, the text of Article XI:1 of the GATT 1994 must be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” The ordinary meaning of the term “import licence” is formal permission from an authority to bring in goods from another country. Thus, the relevant starting point for purposes of Article XI:1 is whether the Control Certificate constitutes formal permission from the Turkish government to bring in rice from another country. The United States has made a *prima facie* case that the Control Certificate does amount to such permission and therefore is an import license for purposes of Article XI:1. The United States has also rebutted Turkey’s argument that the Control Certificate is required for either customs or SPS purposes.<sup>36</sup>

65. Turkey has not identified any provision in Article XI:1 or elsewhere in the WTO Agreement that a Member must label a document an “import license” in order for it to be one. Indeed, how a Member characterizes an instrument does not determine whether an instrument constitutes formal permission from an authority to bring in goods from another country, or is otherwise a measure for purposes of WTO dispute settlement.<sup>37</sup> Footnote 1 to Article 1 of the Import Licensing Agreement, which provides relevant context to the interpretation of the term “import license” in Article XI:1 of the GATT 1994, makes clear that regardless of how a Member characterizes or refers to particular administrative procedures, such procedures are still considered “import licensing” if they satisfy the criteria in Article 1.

66. In this case, however, the United States believes that Turkey’s characterization of the Control Certificate *is* relevant to the Panel’s determination. As previously noted in the U.S. Answer to Question 150, Turkey’s Minister of Agriculture, Mehmet Eker recently stated that:

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<sup>36</sup>Further, neither the words “de jure” nor “de facto” appear anywhere in the text of Article XI:1, so the United States is unsure of the legal basis for this distinction that Turkey is apparently making.

<sup>37</sup>See U.S. Response to Panel Question 145.

our Ministry had not issued an *import license* (Control Document) that is below the Reference Prices . . . .<sup>38</sup>

Thus, the Turkish official that is the ultimate authority on Control Certificates has characterized the Control Certificate as an import license. As noted by the United States in response to Panel Question 145, past panels have found that the characterization of a government’s measures by a governmental authority is relevant evidence in evaluating the meaning of a measure, and the United States urges the Panel to take Minister Eker’s statement into account.

**Question TR-2: Could the United States identify which specific provisions of Turkish law provide the Turkish Ministry of Agriculture and Rural Affairs, (i.e., MARA) with the discretion necessary to deny the approval of applications for Certificates of Control which otherwise comply with the requirements of the law?**

67. As noted in previous U.S. submissions and statements, paragraph 2 of the Communiqués provides that, in order to obtain a Control Certificate from MARA, an importer must provide the application form, an invoice, and “other documents which may be asked for, depending on product, by the Ministry.”<sup>39</sup> This provides MARA with the discretion necessary to deny the issuance of Control Certificates for rice, which should be automatically issued. Instead, the Ministry demands that importers provide proof of purchase of domestic paddy rice and an FTU import permit (which is issued contingent on such purchase) before approving a Control Certificate application.

68. In addition, at least two Ministers of Agriculture have issued Letters of Acceptance, ordering that no Control Certificates be granted unless this documentation is provided. Whether these Letters are an exercise of the discretion provided in Article 2 or override Article 2, the Letters are being enforced. The Government of Turkey is arguing in multiple domestic courts that it cannot grant Control Certificates pursuant to the Letters, and the courts are agreeing with the government’s position. Thus, the Letters of Acceptance are binding under Turkish law or, at the very least, provide strong evidence that Turkey operates a discretionary import licensing regime.

**Question TR-3: What leads the United States to argue that there should be an a priori exclusion of the Certificates of Control approved in relation to out-of-quota FTA trade from the alleged application of the "blanket denial" for all out-of-quota**

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<sup>38</sup>Exhibit US-77 (emphasis added).

<sup>39</sup>See Annex TR-1, which contains the text of the 2006 Communiqué. Paragraph 2 of the 2005 Communiqué contains the same language in Turkish. See Exhibit US-7. Paragraph 2 of the 2004 Communiqué uses the phrase “other documents that may be required by the Ministry of Agriculture and Rural Affairs.” See Exhibit US-78.

**requests for approval?**

69. Turkey continues to mis-characterize the U.S. claim. The U.S. claim is that Turkey is prohibiting or restricting imports of rice at the MFN rate by failing to issue Control Certificates. Since 2003, the United States has been requesting that Turkey provide copies of Control Certificates that it has granted. To date, Turkey has not done so. However, Turkey recently has clarified that it does require “in-quota Control Certificates” under the TRQ, as well as “out-of-quota Control Certificates” for both MFN and “FTA” trade, the latter of which apparently refers to trade with the EC, Macedonia, and other entities/countries with which Turkey has negotiated “free trade agreements.” The U.S. argument that there was a blanket denial of Control Certificates was made in support of the claim that there is a prohibition or restriction on MFN rice imports. Whether Certificates are required for non-MFN, out-of-quota trade is irrelevant.

## TABLE OF EXHIBITS

Exhibit US-	Title of Exhibit
73	Global Trade Information Services: Internet homepage and sources of data
74	U.S. Department of Agriculture: Data on Annual U.S. Rice Production and Annual and Monthly Data on Total U.S. Rice Exports and Total U.S. Rice Exports to Turkey (2003-2006)
75	<i>Referans</i> , “So-called protection of rice has left the producers on their own” December 5, 2006 (English translation, followed by the original Turkish version)
76	Correspondence from the S. Umman Hamidogullari, Assistant General Director of Customs, Undersecretariat of Customs – Directorate General of Customs, Republic of Turkey, Office of the Prime Minister, to All Head Directorates for Customs and Enforcement, 10.19.2006/27082, in reference to the Correspondence dated 10.08.2006, Numbered 20421 regarding the Importation of Rice (English translation, followed by the original Turkish version)
77	<i>Hurriyet</i> , “Paddy Imports: Ministry of Agriculture’s Explanation Regarding Paddy. The Minister of Agriculture, Mehdi Eker, kept his promise by publishing an explanation regarding paddy production and import policies, through the Office of Press and Public Relations,” December 15, 2006 (English translation, followed by the original Turkish version)
78	A communiqué on Standardization in Foreign Trade, Communiqué No. 2004/05 (Official Gazette, No. 25333, December 31, 2003) (English translation, followed by the original Turkish version) (English translation, followed by the original Turkish version)
79	Certificate of Control (issued to Torunlar on August 15, 2003)
80	Andy Aaronson and Nathan Childs, “Developing Supply and Utilization Tables for the U.S. Rice Market,” <u>Rice Situation and Outlook/RCS-2000/November 2000</u> .
81	Annual and Monthly Turkish Import Data for Paddy, Brown, and Milled Rice (2003-2006)