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TURKEY – MEASURES AFFECTING THE IMPORTATION OF RICE

Report of the Panel

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TABLE OF WTO CASES CITED IN THIS REPORT

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Argentina – Textiles and Apparel	Panel Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R, adopted 22 April 1998, modified by Appellate Body Report, WT/DS56/AB/R, DSR 1998:III, 1033
Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
Canada – Aircraft	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377
Canada – Autos	Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, modified by Appellate Body Report, WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, 3043
Canada – Dairy	Panel Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/R, WT/DS113/R, adopted 27 October 1999, modified by Appellate Body Report, WT/DS103/AB/R, WT/DS113/AB/R, DSR 1999:VI, 2097
Canada – Dairy (Article 21.5 – New Zealand and US II)	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/AB/RW2, WT/DS113/AB/RW2, adopted 17 January 2003, DSR 2003:I, 213
Canada – Wheat Exports and Grain Imports	Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R, adopted 27 September 2004, upheld by Appellate Body Report, WT/DS276/AB/R, DSR 2004:VI, 2817
Chile – Price Band System	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3045
Chile – Price Band System	Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R, adopted 23 October 2002, modified by Appellate Body Report, WT/DS207AB/R, DSR 2002:VIII, 3127
Dominican Republic – Import and Sale of Cigarettes	Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005
Dominican Republic – Import and Sale of Cigarettes	Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R, adopted 19 May 2005, modified by Appellate Body Report, WT/DS302/AB/R
EC – Approval and Marketing of Biotech Products	Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, Corr.1 and Add.1, 2, 3, 4, 5, 6, 7, 8 and 9, adopted 21 November 2006
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
EC – Export Subsidies on Sugar (Australia)	Panel Report, *European Communities – Export Subsidies on Sugar, Complaint by Australia*, WT/DS265/R, adopted 19 May 2005, modified by Appellate Body Report, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135

Short Title	Full Case Title and Citation
EC – Poultry	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, 2031
Guatemala – Cement I	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, 3767
India – Autos	Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002, DSR 2002:V, 1827
India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
Japan – Apples	Appellate Body Report, *Japan - Measures Affecting the Importation of Apples*, WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, 4391
Japan – Film	Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179
Korea – Various Measures on Beef	Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, 5
Korea – Various Measures on Beef	Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/R, WT/DS169/R, adopted 10 January 2001, modified by Appellate Body Report, WT/DS161/AB/R, WT/DS169/AB/R, DSR 2001:I, 59
Mexico – Taxes on Soft Drinks	Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R, adopted 24 March 2006, modified by Appellate Body Report, WT/DS308/AB/R
Turkey – Textiles	Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, adopted 19 November 1999, modified by Appellate Body Report, WT/DS34/AB/R, DSR 1999:VI, 2363
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779
US – Certain EC Products	Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, 373
US – FSC (Article 21.5 – EC)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, 55
US – Gasoline	Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, adopted 20 May 1996, modified by Appellate Body Report, WT/DS2/AB/R, DSR 1996:I, 29
US – Shrimp	Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R and Corr.1, adopted 6 November 1998, modified by Appellate Body Report, WT/DS58/AB/R, DSR 1998:VII, 2821
US – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717

Short Title	Full Case Title and Citation
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323

TABLE OF GATT CASES CITED IN THIS REPORT

Short Title	Footnote Citation
Canada – FIRA	Panel Report, *Canada – Administration of the Foreign Investment Review Act*, adopted 7 February 1984, BISD 30S/140.
Italy – Agricultural Machinery	Panel Report, *Italian Discrimination Against Imported Agricultural Machinery*, adopted 23 October 1958, BISD 7S/60
US – Taxes on Automobiles	Panel Report, *United States – Taxes on Automobiles*, 11 October 1994, unadopted, DS31/R

TABLE OF ABBREVIATIONS USED IN THIS REPORT

DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Communities
FAO	Food and Agriculture Organization of the United Nations
FTU	Turkish Foreign Trade Undersecretariat
GATT	General Agreement on Tariffs and Trade
GATT 1947	General Agreement on Tariffs and Trade 1947
GATT 1994	General Agreement on Tariffs and Trade 1994
HS	Harmonised Commodity Description and Coding System
Import Licensing Agreement	Agreement on Import Licensing Procedures
MARA	Turkish Ministry of Agriculture and Rural Affairs
MFN	Most-Favoured Nation
TMO	Turkish Grain Board
TRIMs Agreement	Agreement on Trade-Related Investment Measures
TRQ	Tariff-rate Quota
WCO	World Customs Organization
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement establishing the World Trade Organization

I. INTRODUCTION

1.1 On 2 November 2005, the United States requested consultations with Turkey pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), Article 6 of the Agreement on Import Licensing Procedures (Import Licensing Agreement), Article 8 of the Agreement on Trade-Related Investment Measures (TRIMs Agreement), and Article 19 of the Agreement on Agriculture with respect to Turkey's alleged import restrictions on rice from the United States.[1]

1.2 On 16 November 2005, Australia and Thailand requested, pursuant to paragraph 11 of Article 4 of the DSU, to be joined in the consultations requested by the United States with Turkey.[2]

1.3 On 6 February 2006, the United States requested the establishment of a panel pursuant to Article 6 of the DSU, Article 6 of the Import Licensing Agreement, Article 8 of the TRIMs Agreement, and Article 19 of the Agreement on Agriculture, concerning Turkey's alleged import restrictions on rice.[3]

1.4 At its meeting on 17 March 2006, the Dispute Settlement Body (DSB) established a Panel pursuant to the request of the United States in document WT/DS334/4, in accordance with Article 6 of the DSU.[4]

1.5 On 20 July 2006, the United States requested the Director-General to determine the composition of the Panel, pursuant to paragraph 7 of Article 8 of the DSU. Accordingly, on 31 July 2006, the Director-General composed the Panel as follows:

Chairperson: Ms Marie-Gabrielle Ineichen-Fleisch

Members: Mr Johann Frederick Kirsten
Mr Yoichi Suzuki[5]

1.6 The Panel's terms of reference are the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by the United States in document WT/DS334/4, the matter referred to the DSB by the United States in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."[6]

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[1] Request for Consultations by the United States, *Turkey – Measures Affecting the Importation of Rice* (*Turkey – Rice*), 7 November 2005, WT/DS334/1.

[2] Request to Join Consultations, Communication from Australia, *Turkey – Rice*, 17 November 2005, WT/DS334/2 and Request to Join Consultations, Communication from Thailand, *Turkey – Rice*, 18 November 2005, WT/DS334/3.

[3] Request for the Establishment of a Panel by the United States, *Turkey – Rice*, 7 February 2006, WT/DS334/4.

[4] Constitution of the Panel Established at the Request of the United States (Note by the Secretariat), *Turkey – Rice*, 1 September 2006, WT/DS334/5/Rev.1, para. 1.

[5] Ibid., para. 4.

[6] Ibid., para. 2.

1.7 Argentina, Australia, China, Egypt, the European Communities, Korea, Pakistan and Thailand reserved their rights to participate in the Panel proceedings as third parties.[7]

1.8 In accordance with the timetable adopted after consultations with the parties, the Panel received written submissions from the United States and Turkey on 20 September and on 11 October 2006, respectively. The Panel received written rebuttals from the parties on 14 December 2006. The Panel also held two substantive meetings with the parties. The first meeting was held on 8 and 9 November 2006, and the second on 17 and 18 January 2007. The Panel received third-party written submissions from China, Egypt and the European Communities on 18 October 2006. It met with the third parties during a session of the first substantive meeting held on 9 November 2006. The Panel posed questions to the parties after each substantive meeting. Turkey also posed questions to the United States after the second substantive meeting. The Panel received replies from the parties on 30 November 2006 and on 6 February 2007. Parties submitted comments on each other's replies on 20 February 2007. The Panel also posed questions to third parties after the third party session. It received replies from some third parties on 21 November 2006.

1.9 The descriptive sections of the draft report, including facts and arguments, were circulated to both parties on 13 March 2007. On the same date, third parties were sent the relevant descriptive sections of the draft report, containing their respective arguments. The Panel received comments to the descriptive sections of the draft report from the United States and Turkey on 20 March. On the same date, Korea presented editorial comments on the section containing its arguments.

1.10 The Panel submitted its interim report to the parties on 3 May 2007. On 18 May, the Panel received written requests for review of precise aspects of the interim report from both parties. On 1 June, the parties submitted written comments on each other's written requests for review.

II. FACTUAL ASPECTS

A. PRODUCT DESCRIPTION

2.1 The current dispute concerns claims brought by the United States against Turkey's alleged import restrictions on rice.

2.2 Rice can be generally defined as:

> "The grain of the grass *Oryza sativa*, a major world cereal."[8]

2.3 As explained in a fact sheet published by the Food and Agriculture Organization of the United Nations (FAO):

> "Rice is the predominant staple food for 17 countries in Asia and the Pacific, nine countries in North and South America and eight countries in Africa. Rice provides 20 per cent of the world's dietary energy supply, while wheat supplies 19 per cent and maize 5 per cent."[9]

2.4 Under the Harmonized Commodity Description and Coding System (Harmonized System or HS) developed by the World Customs Organization (WCO), rice is classified under tariff item 1006.

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[7] Constitution of the Panel Established at the Request of the United States (Note by the Secretariat), *Turkey – Rice*, 1 September 2006, WT/DS334/5/Rev.1, para. 5.

[8] *Shorter Oxford English Dictionary*, Fifth Edition, Oxford University Press, 2003, Volume 2, p. 2577.

[9] Food and Agriculture Organization of the United Nations (FAO), "Rice and Human Nutrition", in: *http://www.fao.org/rice2004/en/f-sheet/factsheet3.pdf*.

Within this item, rice is classified according to the three stages of its production process into the following sub-items:[10]

(i) HS 1006.10: Rice in the husk, also known as paddy or rough rice, is "rice grain still tightly enveloped by the husk".

(ii) HS 1006.20: Husked rice, also known as brown or cargo rice, has had the husk "removed by mechanical huskers [but] is still enclosed in the pericarp. Husked rice almost always contains a small quantity of paddy."

(iii) HS 1006.30: Semi-milled or wholly-milled rice, whether or not polished or glazed, corresponds to "whole rice grains from which the pericarp has been partly removed" and "whole rice grains from which the pericarp has been removed through special tapering cylinders", respectively. It is otherwise known as white rice.[11]

B. TURKEY'S RICE MARKET

1. Turkey's rice production

2.5 Turkish paddy rice is grown in various Turkish provinces[12] by farmers holding a permit to plant paddy rice.[13] The Turkish rice harvest period lasts for several months in the second half of each calendar year. The United States alleges that the harvest period "begins in August and ends in October"[14]; while in Turkey's opinion it "begins in mid-September and lasts until the end of November".[15] The marketing year runs from September to August.

2.6 According to data provided by the United States and not contested by Turkey, the Turkish harvest area increased from 70,000 hectares in the marketing years between September 2001 and August 2004, to around 80,000 hectares in the marketing year between September 2004 and August 2005, and further to 90,000 hectares by the marketing year that commenced in September 2005.[16]

2.7 As maintained by both parties, Turkish rice production has shown a continuous increase over recent years[17], with a steeper increase in production after 2003.[18] This latter trend is underscored by the paddy rice production figures provided by the parties.

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[10] *Harmonised Commodity Description and Coding System*, Volume 1, First Edition (1986), Customs Cooperation Council, Brussels, Belgium, page 69. Tariff heading 1006 also includes enriched rice, parboiled rice and broken rice.

[11] Parties also referred to milled rice in some of their submissions as "rice".

[12] The United States mentions some of those rice producing provinces in its First Written Submission, identifying "Edirne [as] Turkey's largest rice producing province". United States' first submission, paras. 49 and 51. Exhibit US-24.

[13] Executive Summary of Turkey's first submission, para. 32. Turkey's response to question 40(c). Exhibit TR-34.

[14] United States' first submission, para. 14.

[15] Turkey's response to question 5.

[16] Exhibit US-45.

[17] United States' first submission, para. 11. Turkey's response to question 49(c).

[18] Turkey's response to question 49(c). United States' rebuttal, para. 78. United States' response to question 72, para. 111 and footnote 44.

TURKISH PADDY RICE PRODUCTION FIGURES PROVIDED BY PARTIES (TONNES)[19]			
Figures provided by the United States in exhibit US-45		**Figures provided by Turkey in exhibit TR-24**	
Sep 2001 – Aug 2002	360,000	360,000	**2001**
Sep 2002 – Aug 2003	360,000	360,000	**2002**
Sep 2003 – Aug 2004	415,000	372,000	**2003**
Sep 2004 – Aug 2005	500,000	490,000	**2004**
Sep 2005 – Aug 2006	600,000	550,000	**2005**
Sep 2006 – Aug 2007	600,000*		
** estimate*			

2.8 A statement by the Turkish Ministry of Agriculture mentions that "[a]n 87% increase in [paddy rice] productions was recorded in 2006, compared to the year 2002."[20]

2.9 Milled rice production figures provided by the parties also show an increase.

TURKISH MILLED RICE PRODUCTION FIGURES PROVIDED BY THE PARTIES (TONNES)			
Figures provided by the United States in exhibit US-45		**Figures provided by Turkey in exhibit TR-24**	
Sep 2001 – Aug 2002	234,000	216,000	**2001**
Sep 2002 – Aug 2003	234,000	216,000	**2002**
Sep 2003 – Aug 2004	270,000	223,000	**2003**
Sep 2004 – Aug 2005	300,000	294,000	**2004**
Sep 2005 – Aug 2006	360,000	330,000	**2005**
Sep 2006 – Aug 2007	360,000*	390,000**	**2006**
** estimate*		*** Turkey's response to question 49(c)*	

2.10 Despite the differences in the detailed figures provided by the parties[21], Turkish milled rice production has risen from around 40 per cent of Turkish rice consumption in the marketing year between September 2002 and August 2003 to around 60 per cent of Turkish rice consumption for the marketing year between September 2005 and August 2006.

2.11 As for the average price of paddy rice purchased from producers in the Turkish market, the United States provides wholesale prices for different types and origins of rice between 2003 and 2006[22], while Turkey considers its own figures on the unit price of domestic paddy purchases made by individual companies in 2005 "a more accurate and reliable source."[23] Despite those differences, parties seem to agree that the average price of paddy rice purchased by individual companies from

[19] Reference to "tonnes" is equivalent to "metric tons".
[20] Exhibit US-77. United States' comments on Turkey's responses to question 148, para. 60.
[21] Exhibit US-45 and exhibit TR-24.
[22] Exhibit US-54.
[23] Turkey's response to question 12 referring to exhibit TR-27.

producers in 2005 was YTL 640 per tonne[24], although they disagree whether the actual market price might be influenced by the purchases made by the Turkish Grain Board (TMO).[25]

2.12 Domestic paddy rice is processed into brown and milled rice by millers, who purchase paddy rice either directly from farmers or their cooperatives and unions, or through the TMO.

2. Rice consumption in Turkey

2.13 As shown in the following table, Turkish rice consumption increased in the past few years, from 550,000 tonnes in 2003 to 570,000 in 2005.[26]

TURKISH MILLED RICE CONSUMPTION FIGURES PROVIDED BY PARTIES (TONNES)			
Figures provided by the United States in exhibit US-45		**Figures provided by Turkey in exhibit TR-24**	
Sep 2001 – Aug 2002	540,000	540,000	**2001**
Sep 2002 – Aug 2003	545,000	545,000	**2002**
Sep 2003 – Aug 2004	550,000	550,000	**2003**
Sep 2004 – Aug 2005	560,000	560,000	**2004**
Sep 2005 – Aug 2006	570,000	570,000	**2005**
Sep 2006 – Aug 2007	575,000*		
* *estimate*			

2.14 According to Turkey, "consumption levels do not change considerably on a monthly basis. Therefore, average monthly consumption can be calculated by total consumption divided by 12."[27]

2.15 As regards consumer choices, the United States points out that "[n]early all rice consumed in Turkey is milled white rice"[28], as "[m]illed rice, and less frequently brown rice, is consumed at the dinner table."[29]

2.16 Turkey asserts that "since rice is not a homogeneous product in taste and quality, certain types of rice are preferred by consumers. Moreover, in the Turkish market [the] domestic types of rice are sold at higher prices".[30]

3. Turkey's imports of rice

2.17 Since the establishment of Turkey's TRQ for rice in 2004, Turkey provided for the importation of rice under the following three arrangements: (i) MFN, or over-quota imports at applied rates of duty of 34, 36 and 45 per cent for paddy, brown and milled rice, respectively[31]; (ii) preferential rates within predetermined tariff rate quotas (TRQs), for some periods between April 2004 and July 2006; and (iii) preferential trade arrangements, such as the free trade agreements with

[24] Turkey's response to questions 10 and 12. United States' response to question 11, para. 13, based on exhibits TR-27 and US-52.
[25] Turkey's response to question 110.
[26] United States' first submission, para. 12. Exhibits US-45 and TR-24.
[27] Turkey's response to question 6.
[28] United States' response to question 6, para. 14.
[29] United States' first submission, para. 10. Exhibit US-38.
[30] Turkey's response to question 49 (c), fourth paragraph.
[31] Turkey's first submission, para. 2.

the European Communities and the Former Yugoslav Republic of Macedonia (FYROM)[32] for a total of 28,000[33] and 8,000[34] tonnes of duty-free rice imports *per annum*, respectively.[35]

2.18 The parties concur that Turkey is a net rice importer[36], and their weight-based annual figures on realized imports, i.e, the actual volume of rice imports, according to rice type are rather similar, although not identical in all respects.[37]

ANNUAL WEIGHT-BASED FIGURES ON REALIZED IMPORTS BY TYPE OF RICE (TONNES)

Period	Party submitting information	Paddy Rice	Brown Rice	Milled Rice	Annual total
2003	*United States**	*247,723*	*10,036*	*213,519*	*471,997*
	Turkey**	247,723	10,934	213,528	472,186***
2004	*United States**	*26,749*	*26,177*	*101,188*	*154,485*
	Turkey**	35,432	26,176	103,887	165,496***
2005	*United States**	*102,198*	*42,193*	*158,423*	*302,814*
	Turkey**	102,197	42,193	158,422	302,813***
2006 Jan-Nov	*United States**	*91,744*	*41,704*	*53,063*	*186,513*
2006 Jan-Sep	Turkey**	102,761	54,430	87,597	244,789***

** Exhibit US-81rev, source: Turkish Statistics Corporation (TUIK)*
*** Exhibit TR-23, source: UFT. See also exhibit TR-25.*
**** Based on figures in exhibit TR-23*

2.19 The parties agree that 2003 has seen "the highest level of importation over the last 10 years".[38] They disagree, however, on the level of milled rice equivalent imports in 2003, as well as on the level and trend of total annual milled rice equivalent imports since 2004. On the one hand, Turkey argues that "together with the rise in domestic rice production, there has been a rise in [the figure of total annual rice equivalent] imports of rice into Turkey. For instance, in the period between 2004 and 2006, in which the TRQ regime was in force, rice equivalent imports have increased from 146,458 tonnes to 253,436 tonnes."[39] The United States, on the other hand, states that:

> "Turkey's argument that rice imports have increased from 2004 through 2006 is misleading. First, imports of rice in 2004 fell from 2003 levels... As shown in exhibit US-45, TY (trade, or calendar year) imports were 151,000 metric tons in 2004, as compared to 320,000 metric tons in 2003... [Subsequently, r]ice imports did not rebound to previous levels. While TY imports in 2005 were 298,000 metric tons,

[32] Turkey's response to question 123(c).
[33] United States' comments on Turkey's response to question 22, para. 22. Exhibits TR-31 and US-58.
[34] Exhibit US-72.
[35] United States' comments on Turkey's response to question 102. See also United States' rebuttal, footnote 20.
[36] United States' first submission, para. 12. Turkey's response to questions 49(c) and 92(d).
[37] As the United States points out, "[t]he annual totals for 2003, 2004, and 2005 in exhibit US-81[rev] 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[rev] is approximately 58,000 metric tons less than the figure provided by Turkey in Annex TR-23." United States' response to question 99, para. 3.
[38] Turkey's response to question 49(c), sixth paragraph, and to question 114(a). Exhibit US-47.
[39] Turkey's response to question 49 (c), fifth paragraph.

> they fell again in 2006 to approximately 154,000 metric tons, which is virtually the same quantity of imports as in 2004."[40]

These differences between the milled rice equivalent figures presented by each party could be due to the different methods of converting import figures for paddy and brown rice into the milled rice equivalent.[41] In any event, despite the Panel's questions pointing out the differences[42], the parties' responses did not provide a completely satisfactory explanation for them.

2.20 The weight-based annual realized import figures, on which the parties seem to largely agree, appear to confirm a significant fall between 2003 and 2004 in annual total import volumes, as well as in annual imports of milled rice and particularly of paddy rice. Further, the weight-based annual realized import figures provided by the parties show that imported quantities of paddy and milled rice, as well as total rice imports, have rebounded in 2005, although to lower levels than in 2003 – especially as regards paddy rice. This was followed by a significant decrease in the relevant periods of 2006 for total and milled rice imports. Whereas paddy rice imports in 2006 seem to be significantly higher than in 2004, figures for 2006 provided by the parties differ and do not cover the whole year, which makes it difficult to establish whether the total and milled rice import figures for 2006 are significantly higher or lower, respectively, compared to the relevant data for 2004. Finally, weight-based annual figures of realized brown rice imports seem to develop differently from other figures throughout the entire period between 2003 and 2006, in that weight-based realized brown rice imports, while relatively low, tend to continuously increase.

2.21 Turkey has repeatedly argued that it has imported rice in the past years. In particular, Turkey has stressed that milled rice equivalent imports between January 2004 and August 2006 amounted to 939,013 tonnes.[43] However, based on import data from the Turkish Statistics Corporation (TUIK), the United States contends that, if imports under the TRQ as well as duty-free imports realized under Turkey's free trade agreements with the European Communities and the FYROM are disregarded, "[m]onthly non-EU Turkish rice imports are zero or negligible when the TRQ is closed."[44]

2.22 Both parties have provided figures for total rice imports to Turkey by country of origin. The figures they provided on a milled rice equivalent basis are not comparable. First, as mentioned earlier, the parties use different conversion rates to convert paddy and brown rice imports into milled rice equivalent figures. Second, Turkey provides totals for the period between January 2004 and August 2006[45], while the United States provides data on an annual basis.[46] As regards actual import figures, a comparison of the figures and calculated totals in the relevant exhibits of the parties containing data on detailed actual imports[47] show that the total figures of annual imports per country of origin according to rice type are very similar, with a few exceptions.[48] Based on the data that is common to the exhibits submitted by both parties, the following observations can be made:

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[40] United States' comment on Turkey's response to question 151, para. 66. See also United States' response to question 99, para. 5.

[41] The United States, for instance, explained in its response to question 117, para. 18, that the US Department of Agriculture used a conversion factor of 70 per cent for of paddy rice and 88 per cent for brown rice. Turkey, on its part, clarified its conversion method in para. 4 of its comments to the descriptive part of the report, as 60 per cent for paddy rice and 80 per cent for milled rice. See exhibits TR-9 and US-10.

[42] See Panel's questions after the second substantive meeting, e.g., question 99(b).

[43] Turkey's response to question 4(c), second paragraph. Exhibit TR-8.

[44] Exhibit US-53.

[45] Exhibit TR-8.

[46] Exhibit US-47.

[47] See exhibits US-81rev, TR-25 and TR-26.

[48] In particular, as regards paddy rice imports, exhibit TR-25 shows 5,229.580 tonnes of paddy rice imports from the United States in December 2004 versus 195 tonnes in exhibit US-81rev. Under brown rice

<table>
<tr><th colspan="12">SIGNIFICANT REDUCTION OR LACK OF IMPORTS</th><th></th></tr>
<tr><th colspan="12">2003</th><th rowspan="2">RICE TYPE</th></tr>
<tr><th>Jan</th><th>Feb</th><th>Mar</th><th>Apr</th><th>May</th><th>Jun</th><th>Jul</th><th>Aug</th><th>Sep</th><th>Oct</th><th>Nov</th><th>Dec</th></tr>
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<tr><td colspan="3">no imports</td><td></td><td></td><td></td><td></td><td></td><td colspan="4">no imports</td><td></td><td>brown</td></tr>
<tr><td></td><td></td><td></td><td></td><td></td><td></td><td></td><td></td><td colspan="4">significantly lower imports</td><td></td><td rowspan="2">milled</td></tr>
<tr><td></td><td></td><td></td><td></td><td></td><td></td><td></td><td></td><td>only EC imports</td><td>mainly EC imports</td><td>only EC imports</td><td></td></tr>
<tr><th colspan="13">2004</th></tr>
<tr><th>Jan</th><th>Feb</th><th>Mar</th><th>Apr</th><th>May</th><th>Jun</th><th>Jul</th><th>Aug</th><th>Sep</th><th>Oct</th><th>Nov</th><th>Dec</th><th></th></tr>
<tr><td>parties disagree whether any imports</td><td colspan="2">no imports</td><td>minimal EC imports</td><td>no imports</td><td></td><td></td><td></td><td>significantly lower imports</td><td>no imports</td><td></td><td></td><td>paddy</td></tr>
<tr><td colspan="4">no imports</td><td>significantly lower imports</td><td></td><td></td><td></td><td colspan="4">no imports</td><td></td><td>brown</td></tr>
<tr><td colspan="3">minimal EC imports</td><td colspan="2">no imports</td><td></td><td></td><td></td><td></td><td></td><td></td><td></td><td>milled</td></tr>
<tr><th colspan="13">2005</th></tr>
<tr><th>Jan</th><th>Feb</th><th>Mar</th><th>Apr</th><th>May</th><th>Jun</th><th>Jul</th><th>Aug</th><th>Sep</th><th>Oct</th><th>Nov</th><th>Dec</th><th></th></tr>
<tr><td></td><td></td><td></td><td></td><td></td><td></td><td></td><td></td><td colspan="2">no imports</td><td>significantly lower imports</td><td></td><td>paddy</td></tr>
<tr><td></td><td>significantly lower imports</td><td></td><td></td><td>significantly lower imports</td><td></td><td></td><td colspan="3">no imports</td><td></td><td>brown</td></tr>
<tr><td></td><td></td><td></td><td></td><td></td><td></td><td></td><td></td><td colspan="3">significantly lower imports</td><td></td><td rowspan="2">milled</td></tr>
<tr><td></td><td></td><td></td><td></td><td></td><td></td><td></td><td></td><td colspan="2">only EC imports</td><td></td><td></td></tr>
<tr><th colspan="13">2006</th></tr>
<tr><th>Jan</th><th>Feb</th><th>Mar</th><th>Apr</th><th>May</th><th>Jun</th><th>Jul</th><th>Aug</th><th>Sep</th><th></th><th></th><th></th><th></th></tr>
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<tr><td colspan="13">Based on data in exhibits US-81rev, TR-25 and TR-26</td></tr>
</table>

imports, exhibit TR-25 shows imports from Argentina, Greece and Uruguay in 2005 and 2006, which are not reflected in exhibit US-81rev. Moreover, exhibit TR-25 shows higher brown rice import figures for Bulgaria, Egypt and Italy than exhibit US-81rev, which often shows nil or lower figures in the same period. Also, exhibit TR-25 shows brown rice imports of 1,049.540 tonnes from Egypt in May 2003, while exhibit US-81rev indicated 150 tonnes. As regards milled rice, exhibit TR-25 shows slightly higher figures for milled rice imports from Italy and Egypt in December 2004 than exhibit US-81rev. Further, various figures for milled rice imports in 2006, especially from summer 2006 onwards are higher in exhibit TR-25 than in exhibit US-81rev, partly because the latter shows no imports from August 2006 onwards.

2.23 Indeed, in one of its questions to the parties, the Panel noted that:

> "according to the information provided by Turkey in exhibit TR-25, there seems to have been no imports of... paddy rice or brown rice in the months of October in 2003, 2004 and 2005. In addition, the data in exhibit TR-33 suggest that no rice imports whatsoever (paddy, brown or milled) took place in February and March 2004. Further, the data in exhibit TR-33 seem to suggest that there were no rice imports other than EC/Former Yugoslav Republic of Macedonia out-quota rice imports in October – December 2003 and in September – October 2005."[49]

Parties did not contest these observations made by the Panel. In addition, in response to another question by the Panel[50], the parties pointed out that no imports of milled rice took place in April 2004.[51]

2.24 Turkey has noted that "the major importers of rice into Turkey used to be the millers, although their import share has recently decreased."[52] As regards imports of rice originating in the United States, the United States specifies that "[t]he main importers... are Torunlar, Akel, and Goze, but they may also import rice from other sources. All three of these companies have a large milling capacity, so they prefer to import US paddy rice."[53] The United States adds that these three Turkish importers, together with Mehmetoglu, which the "United States understands ... is the major importer of Egyptian rice into Turkey"[54], "account for approximately 90 per cent of all imported rice into Turkey."[55] Turkey has submitted data on the quantities and value of rice imports made by Torunlar, Mehmetoglu and ETM, another company referenced by the United States. The data show that Torunlar had an average share of 17 per cent of imports of paddy rice from the United States between 2002 and 2006, and that the three companies had an overall share of general imports of paddy, brown and milled rice, of 16, 1 and 10 per cent, respectively.[56]

2.25 The United States also points out that, overall "[t]he United States and Egypt are the two largest exporters of rice to Turkey."[57] In particular, according to the United States in 2003 the most important rice exporters to Turkey in terms of volume were Egypt, the United States, China, and the European Communities, and in 2004 and 2005 Egypt, the United States and the European Communities.[58] According to figures provided by Turkey, in 2003 the largest exporters of paddy rice to Turkey were the United States, Australia, Ukraine and Italy. The main exporters of milled rice to Turkey in the same year were Egypt, China, Italy, the United States, and Vietnam. The only exporter of brown rice was Egypt.[59] Figures provided by Turkey show that in 2004 the largest exporters of paddy rice to Turkey were the United States, Italy and Russia. The only exporter of brown rice was Egypt. The main exporters of milled rice to Turkey in the same year were Italy, Egypt, China, Vietnam, Thailand, and the United States.[60] In 2005, the largest exporters of paddy rice to Turkey were the United States, Russia and Bulgaria. The main exporters of brown rice were Egypt, Bulgaria

[49] Panel's question 102(a).
[50] Panel's question 108.
[51] Parties' responses to question 108.
[52] Turkey's response to question 102.
[53] United States' response to question 17, para. 35.
[54] United States' response to question 47, para. 72.
[55] Ibid., para. 70. United States' response to question 63, para. 100.
[56] Exhibit TR-39.
[57] United States' response to question 47, para. 70. United States' response to question 63, para. 100.
[58] Exhibit US-47.
[59] Exhibit TR-26.
[60] Exhibit TR-25.

and Italy. The main exporters of milled rice to Turkey in 2005 were Egypt, Italy, the United States, Vietnam, and China.[61]

2.26 With regard to imports from the United States, the United States stated that, "[g]iven the longer shipping distance, US exporters tend to ship rice less frequently and in larger allotments, typically between 10,000 and 20,000 metric tons."[62] The Panel notes that, "according to the information provided by Turkey in exhibit TR-25, there seem to have been no imports of... (b) milled rice from the United States during: (i) January – May 2004; (ii) July 2004; (iii) September – November 2004; (iv) July – December 2005; and, (v) January 2006 – onwards; (c) paddy rice from the United States during: (i) October – December 2003; (ii) February – May 2004; and, (iii) September – November 2005."[63] Further, the Panel noted in particular that, based on data provided by Turkey, it seems that "no over quota imports of US rice ... have actually occurred [between September 2003 and April 2005], with the exception of one shipment of 611 [metric] tons of paddy rice (date of Certificate of Control 15.09.2004; importation date 16.09.2004)."[64] In its response, Turkey did not appear to contest the substance of that data, although it noted that imports from other sources have taken place in that period.[65] As regards 2006, the United States pointed out that "Turkey's import data shows that 90,000 metric tons of rice from the United States entered Turkey in 2006. US export statistics record 17,789[66] metric tons of US 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 US rice Turkey finally released from bonded warehouse that had previously been refused entry."[67] Turkey, on its part, contended that, assuming there was a late release of rice, the reasons behind it could be the importers' "business calculations and decisions", such as keeping stocks until 'the appropriate moment to release it on the Turkish market in order to maximize the economic returns.[68]

2.27 As regards the price of imported rice, the parties generally dispute each other's figures. Their total monthly average c.i.f. landed prices for different types of imported rice, however, are largely similar[69], although some differences remain:[70]

[61] Exhibit TR-25.
[62] United States' rebuttal, para. 35.
[63] Panel's questions 102(b) and (c).
[64] Panel's question 114(b).
[65] Turkey's response to question 114(b).
[66] (*footnote original*) *See* exhibit US-74.
[67] United States' response to question 116, para. 16.
[68] Turkey's comments on United States' response to question 116.
[69] As the Panel noted in its question 99(c), "some figures provided by the United States and Turkey show a high degree of similarity: (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 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."
[70] As the Panel noted in its question 99(c), "[c]ertain data contained in some of the exhibits provided by the Parties show significant discrepancies: … 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."

MONTHLY AVERAGE LANDED CIF PRICES FOR PADDY RICE (Unit Price per Tonne in US Dollars)								
MONTH	2003		2004		2005		2006	
	*United States**	Turkey**	*United States**	Turkey**	*United States**	Turkey**	*United States**	Turkey**
January	*222*	218	*n/a*	897	*255*	262	*279*	257
February	*155*	154	*n/a*	0	*967*	964	*n/a*	229
March	*241*	241	*n/a*	0	*275*	273	*576*	537
April	*179*	179	*721*	726	*252*	254	*273*	268
May	*182*	177	*n/a*	0	*230*	231	*n/a*	265
June	*461*	457	*190*	191	*240*	243	*266*	265
July	*156*	159	*272*	273	*236*	237	*257*	258
August	*211*	214	*266*	268	*264*	260	*263*	260
September	*181*	175	*307*	305	*n/a*	0	*n/a*	0
October	*n/a*	0	*n/a*	0	*n/a*	0		
November	*n/a*	0	*888*	885	*201*	200		
December	*n/a*	0	*183*	503	*220*	219		

** based on exhibit US-55, source: Turkish Statistics Corporation (TUIK)*
*** based on exhibit TR-28*

MONTHLY AVERAGE LANDED CIF PRICES FOR BROWN RICE (Unit Price per Tonne in US Dollars)								
MONTH	2003		2004		2005		2006	
	*United States**	Turkey**	*United States**	Turkey**	*United States**	Turkey**	*United States**	Turkey**
January	*n/a*	0	*n/a*	0	*239*	244	*286*	289
February	*n/a*	0	*n/a*	0	*230*	236	*273*	358
March	*1,498*	214	*n/a*	0	*239*	238	*303*	324
April	*180*	180	*n/a*	0	*242*	244	*288*	289
May	*129*	131	*248*	247	*242*	241	*300*	301
June	*135*	136	*283*	283	*244*	244	*285*	291
July	*167*	165	*287*	287	*238*	239	*292*	321
August	*148*	151	*269*	274	*n/a*	0	*n/a*	307
September	*n/a*	0	*n/a*	0	*n/a*	0	*n/a*	342
October	*n/a*	0	*n/a*	0	*n/a*	0		
November	*n/a*	0	*n/a*	0	*270*	268		
December	*n/a*	0	*240*	239	*276*	278		

** based on exhibit US-55, source: Turkish Statistics Corporation (TUIK)*
*** based on exhibit TR-28*

MONTHLY AVERAGE LANDED CIF PRICES FOR MILLED RICE (Unit Price per Tonne in US Dollars)								
MONTH	2003		2004		2005		2006	
	*United States**	Turkey**	*United States**	Turkey**	*United States**	Turkey**	*United States**	Turkey**
January	*262.51*	258	*1,670.68*	1,643	*314.03*	319	*362.21*	365
February	*231.42*	231	*716.27*	711	*307.82*	310	*373.86*	375
March	*224.51*	225	*n/a*	0	*311.93*	312	*409.63*	408
April	*234.16*	233	*n/a*	0	*365.04*	368	*437.45*	441
May	*248.62*	247	*266.26*	266	*403.71*	405	*373.68*	392
June	*356.52*	355	*287.09*	288	*376.41*	380	*383.9*	384
July	*249.32*	249	*285.88*	285	*358.41*	358	*358.78*	382
August	*357.35*	364	*399.42*	403	*453.41*	451	*n/a*	332
September	*703.21*	688	*536.46*	537	*600.07*	607	*n/a*	354
October	*612.62*	607	*559.77*	561	*671.78*	671		
November	*717.56*	719	*404.03*	403	*384.04*	382		
December	*473.97*	464	*403.76*	411	*405.76*	361		
** based on exhibit US-55, source: Turkish Statistics Corporation (TUIK)* *** based on exhibit TR-28*								

2.28 These latter three tables illustrate that average monthly landed c.i.f. prices increased significantly at the beginning of 2004 for paddy and milled rice, and in the middle of 2004 for brown rice. In 2005 and 2006, these prices returned to levels slightly above the 2003 figures. Nevertheless, significant fluctuations in landed c.i.f. prices have occurred from one month to another, at different times of the year. As the Panel noted in one of its questions to the parties:

> "[T]he Panel has considered the information provided by Turkey on 'Monthly landed c.i.f. 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."[71]

Parties did not contest these observations made by the Panel.

4. Domestic rice producers

2.29 Turkey maintains a registration system for all domestic producers.[72] Applications to the National Farmer Registration System involve "controls of existence of agricultural production"[73] as well as the submission, *inter alia*, of a farmer registration form, copy of the Turkish identity card, proof of tax identification number, copy of a farmer document and one of the specified documents to prove land ownership.[74]

[71] Panel's question 100.

[72] *Regulation on National Farmer Registration System*, published in Turkey's Official Gazette No. 25,778 dated 16 April 2005, exhibit TR-34. See also Turkey's response to question 40(c).

[73] Regulation on National Farmer Registration System, Article 6.

[74] Ibid., Article 7.

C. GENERAL IMPORT REGIME

1. Tariff rates

2.30 Turkey's bound MFN rate for rice under heading HS 1006 is 45 per cent *ad valorem*.[75] However, Turkey's current applied rates for imports of paddy, brown and milled rice are, respectively, 34 per cent *ad valorem*, 36 per cent *ad valorem* and 45 per cent *ad valorem*.[76]

2. Preferential agreements for the importation of rice

2.31 According to the evidence on record, Turkey has bilateral arrangements with the European Communities and with FYROM, whereby preferential access into the Turkish market is granted for rice imported from these two origins. Asked by the Panel, Turkey has stated that these are the only preferential trade agreements signed by Turkey covering trade in rice.[77]

2.32 Under Decision No. 1/98 of the EC-Turkey Association Council of 25 February 1998 on the *Trade Regime for Agricultural Products*[78], Turkey committed to open annually a zero per cent duty tariff quota for 28,000 tonnes of semi-milled or wholly-milled rice that originated within the European Communities.[79]

2.33 Under a bilateral free trade agreement between Turkey and FYROM, Turkey grants an annual zero per cent quota for 8,000 tonnes of rice that originated in FYROM.[80]

3. General procedure for the importation of rice

2.34 From the evidence on record, an individual or company wishing to import rice into Turkey at the MFN tariff rate would need to complete the following steps:[81]

(a) obtain a Certificate of Control from MARA. The legal basis and the requirements for obtaining a Certificate of Control are explained below.[82]

(b) submit the Certificate of Control to the customs authorities at the port where the importation is to take place and complete the required customs form. The customs form requires information such as: (a) importer's identification information; (b) code of imported items; (c) description of the product being imported; (d) quantity of the

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[75] Schedule XXXVII-Turkey, Part I Most-Favoured Nation Tariff, Section I – Agricultural Products, Section I-A Tariffs, 15 April 1994. Uruguay Round of Multilateral Negotiations, Legal Instruments Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations Done at Marrakesh on 15 April 1994, Schedules, Vol. 10, p. 9332. See also United States' first submission, para. 13 and exhibit US-15.

[76] United States' first submission, para. 13 and Turkey's first submission, para. 14. See also, exhibit US-17.

[77] See Turkey's response to question 123(c).

[78] Decision No. 1/98 of the EC-Turkey Association Council of 25 February 1998 on the *Trade Regime for Agricultural Products*, Official Journal of the European Communities, 20.3.98, L 86/15, in exhibit TR-31.

[79] Ibid. See also Turkey's response to question 13(a) and *Decision Regarding Tariff Quota Imposition on Import of Certain Agricultural Products of European Community Origin*, published in Turkey's Official Gazette No. 23,225, dated January 9, 1998, in exhibit US-58.

[80] Exhibit US-72. See also Turkey's response to question 123, and para. 8 of the United States statement during the second meeting with the Panel.

[81] See United States' response to question 14, paras. 22-33, and Turkey's response to questions 14, 31, 39, 55 and 129.

[82] See paras. 2.35-2.49, below.

product being imported; (e) country of origin; (f) value of the product being imported; (g) country in which the product was loaded; (h) port.[83]

(c) submit the approved Certificate of Control with the required attachments, the customs declaration and the phytosanitary certificate, to MARA.

(d) customs authorities conduct a documentation control as well as an identity check between the product actually imported and the product in the declaration.

(e) MARA's and customs officials perform physical inspections.

D. CERTIFICATES OF CONTROL

1. Legal basis

(a) Situation at the time of the establishment of this Panel

2.35 At the time of the establishment of this Panel, the relevant legal basis for the regulation of the Certificates of Control was to be found in *Communiqué 2006/05 on Standardization in Foreign Trade*, issued by the Foreign Trade Undersecretariat (FTU).[84]

2.36 In turn, the legal authority for the FTU to issue such communiqués was found in Turkey's *Regime for Technical Regulations and Standardization for Foreign Trade*, contained in Decree No. 2005/9454.[85] According to Article 4 of this Regime:

"In the framework of this Decree, the [FTU] is authorized:

d) To harmonize the technical legislation, which is published in the framework of the competencies given by the legislation to the [FTU] and the Ministries and other institutions, with the foreign trade and to lay down the application principles."

2.37 Pursuant to this authority[86], and to the similar provision contained in earlier decrees, the FTU has issued a number of *Communiqués on Standardization in Foreign Trade*.

2.38 According to Article 1 of Communiqué 2006/05:

"Pursuant to subparagraph (d) of Article 4 of the Decree on Technical Regulations and Standardization for Foreign Trade which came in force with the Council of Ministers' Decree No. 2005/9454 on 7/9/2005, the conformity of the substances which are on the annex lists of this Communiqué and which are subject to the Entry into the Free Circulation Regime, the Internal Process Regime, the Regime on the Process under the Customs Control and the Temporary Import Regime, in respect of

[83] Exhibit US-62. See also United States' rebuttal, para. 19.

[84] *Communiqué 2006/05 on Standardization in Foreign Trade*, published in Turkey's Official Gazette No. 26,040, dated 31 December 2005, in exhibit TR-1. See Turkey's response to questions 15(a) and 30(b).

[85] *Regime for Technical Regulations and Standardization for Foreign Trade*, Decree No. 2005/9454, published in Turkey's Official Gazette No. 25,965, dated 13 October 2005, in exhibit TR-2. See also *Regime for Technical Regulations and Standardization for Foreign Trade*, Decree No. 96/7794, published in Turkey's Official Gazette No. 22,541*bis*, dated 1 February 1996, in exhibit US-1.

[86] Turkey's response to questions 15(a), 125(b) and 125(c).

> human health and safety, animal and plant existence and health shall be determined by the Ministry of Agriculture and Rural Affairs."[87]

2.39 Article 2 of Communiqué 2006/05 also states that:

> "At import stage of the products, which have been included in the annex lists (Annex I, Annex II/A-B, Annex III, Annex IV, Annex V/A-B, Annex VI-A), control certificate approved by the Ministry of Agriculture and Rural Affairs shall be asked for by relevant customs administration. For getting control certificate, it is necessary to apply to the mentioned Ministry or to provincial affiliates (bodies) authorized by the Ministry with control certificate form (Annex VII), pro forma invoice or invoice and other documents which may be asked for, depending on product, by the Ministry ..."[88]

2.40 Article 3 of Communiqué 2006/05 further adds that:

> "In case that the compatibility of substances, which are to be imported on the basis of control certificate, with human health and safety, animal and plant existence and health is determined by the Ministry or its authorized units, the importation of these substances is allowed."[89]

2.41 Rice (not including seeds) is listed in Annex VI-A of Communiqué 2006/05 and, therefore, a Certificate of Control from the Ministry of Agriculture and Rural Affairs (MARA) must be presented by the importer to the Turkish customs authorities as a condition for importation.[90]

2.42 In turn, *Communiqué No. 31 on the Issuance of Control Certification at the Importation of Foodstuffs and Packaging Materials that come into Contact with Foodstuffs and on Control Procedures at Importation Stage*[91] contains additional rules regarding the "procedures and principles to be complied with during the approval of control certification procedures at the importation of foodstuffs and packaging materials that come into contact with foodstuffs, and procedures at importation stage".[92]

2.43 As noted in Article 2 of Communiqué 2006/05, the form to be used in order to apply for a Certificate of Control is contained in Annex VII of the communiqué.[93] This form required information such as: tariff heading applicable to the product being imported; description of the product which would be in the consignment; list or annex in which the product was included (e.g., in the case of rice, Annex VI-A to Communiqué No. 2006/05); information on the importer (e.g., business title, address, telephone number); importer's tax registration number; information on

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[87] *Communiqué 2006/05 on Standardization in Foreign Trade*, published in Turkey's Official Gazette No. 26,040, dated 31 December 2005, in exhibit TR-1. See also *Communiqué 2005/05 on Standardization in Foreign Trade*, published in Turkey's Official Gazette No. 25,687, dated 31 December 2004, in exhibit US-7. Communiqué 2005/05 was repealed by Communiqué 2006/05. See Turkey's response to questions 15(a) and 30(b). See also Turkey's response to questions 36 and 37.

[88] *Communiqué 2006/05 on Standardization in Foreign Trade*, in exhibit TR-1.

[89] Ibid.

[90] Exhibit TR-3. See also Turkey's first submission, para. 18. United States' first submission, para. 19.

[91] *Communiqué No. 31 on the Issuance of Control Certification at the Importation of Foodstuffs and Packaging Materials that come into Contact with Foodstuffs and on Control Procedures at Importation Stage*, published in Turkey's Official Gazette No. 25,216, dated 1 September 2003. (An amendment to the communiqué was published in Turkey's Official Gazette No. 26,116, dated 22 March 2006.) See exhibit TR-21 and Turkey's response to question 14.

[92] Ibid., Article 1. See exhibit TR-21 and Turkey's response to question 14.

[93] Exhibit TR-4. See also Turkey's first submission, para. 20.

the exporter (e.g., business title, address, telephone number); intended use of the product; quantity of the product being imported; country of origin of the product; country in which the product was to be loaded for transportation into Turkey; customs point of entry of the product into Turkey; information on the firm which would use the imported product (e.g., business title, address, telephone number); and applicable information indicating compliance of the imported product with the relevant Turkish technical regulations or specifications implementing international standards (i.e., European Communities, World Health Organization or FAO Codex) for the specific imported product.[94]

2.44 In addition to this information, MARA may require other documents and information, to grant a Certificate of Control.[95] According to Turkey, other documents are required, in general,

> "[F]or processed agricultural products and agricultural products which are composed of more than one component. As rice does not involve more than one component, no other document such as 'the component list' is requested".[96]

Other information communiqués issued jointly by MARA and the Ministry of Health have approved particular additional specifications for rice.[97]

2.45 According to Article 9(c) of Communiqué 2006/05, once issued, the Certificate of Control from MARA is valid for 12 months.[98]

2.46 According to Article 6.B(a) of Communiqué 31, the application form for a Certificate of Control is to be presented "properly typed or filled out in computer, containing no erasures or abrasions, and... signed and sealed by the authorized person/persons of the company under their name/names and surname/surnames."[99]

2.47 As clarified by Turkey, even if an importer could demonstrate the fulfilment of the separate requisites that are normally verified through a Certificate of Control, an importation would not be allowed in the absence of a valid Certificate of Control approved by MARA.[100]

2.48 Furthermore, as Turkey has specified, the Certificate of Control does not guarantee that an import will be allowed. In other words, although the Certificate of Control is a prerequisite for importation, it does not guarantee it.

> "Turkish customs authorities have the legal authority to reject the importation of a shipment of goods, even if a Certificate of Control has been issued and approved by MARA... If the imports fail to comply with the specifications cited in the Certificate

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[94] Exhibit TR-4. See also Turkey's first submission, para. 21.

[95] Turkey's first submission, para. 22. United States' first submission, para. 20.

[96] Turkey's response to question 128 (a).

[97] *Communiqué 2001/10 on Rice*, Ministry of Agriculture and Rural Affairs and Ministry of Health, published in Turkey's Official Gazette No. 24,378, dated 19 April 2001, in exhibit TR-5. *Communiqué 2002/11 on Paddy Rice*, Ministry of Agriculture and Rural Affairs and Ministry of Health, published in Turkey's Official Gazette No. 24,672, dated 15 February 2002, in exhibit TR-6. *Communiqué 2002/12 on Rice*, Ministry of Agriculture and Rural Affairs and Ministry of Health, published in Turkey's Official Gazette No. 24,672, dated 15 February 2002, in exhibit TR-7. See also Turkey's first submission, para. 23.

[98] *Communiqué 2006/05 on Standardization in Foreign Trade*, in exhibit TR-1. See also Turkey's first submission, para. 25, and Turkey's response to questions 30(c) and 38(a).

[99] Communiqué No. 31, Article 6.B(a).

[100] See Turkey's response to question 32.

of Control, and if the inspections reveal that the imports are not consistent with SPS requirements, these imports are rejected."[101]

(b) New legislation after the establishment of this Panel

2.49 In the course of this Panel's proceedings, in January 2007, a new *Communiqué on Standardization in Foreign Trade* was published.[102] In response to a question from the Panel, Turkey has stated that, under the new Communiqué 2007/21, "there is no amendment affecting the importation of rice into Turkey".[103]

2. Approved Certificates of Control

(a) Statement by Turkey

2.50 Turkey has stated that a number of Certificates of Control have been authorized for the importation of rice. In its first submission, Turkey stated that 2,223 Certificates of Control for the importation of rice had been authorized between 2003 and September 2006, allowing the importation of 2,264,857 tonnes of paddy, brown and milled rice.[104] That figure was subsequently updated by Turkey to 9 November 2006, to a total of 2,242 Certificates of Control for the importation of rice.[105]

(b) Request for evidence from Turkey

2.51 After the first substantive meeting, the Panel asked Turkey to provide a photocopy of each of the 2,223 Certificates of Control approved between 2003 and September 2006 for the importation of rice.[106] In response, Turkey stated that "photocopies of Certificates of Control [were] available", but that "[t]he relevant Ministries [were] not, however, authorized to provide all the copies to the Panel".[107]

2.52 Turkey submitted that it would "be able to provide to the Panel in strict confidence copies of any individual Certificate of Control listed in Annex TR-33 [containing the list of Certificates of Control for the importation of rice authorized between 2003 and 9 November 2006] upon request from the Panel".[108]

(c) New request for evidence from Turkey

2.53 After the second substantive meeting, the Panel referred to its earlier request to Turkey that it provide a photocopy of each of the 2,223 Certificates of Control approved between 2003 and September 2006. The Panel asked Turkey to elaborate on the legal reasons why, under its domestic legislation, it would not be authorized to provide the copies requested by the Panel.[109] The Panel then asked Turkey, if it could not provide a photocopy of each of the 2,223 Certificates of Control approved between 2003 and September 2006, that it provide at least a photocopy of each of the 56 approved Certificates of Control, which had been characterized as "relevant" by the United States

[101] Turkey's response to question 55.
[102] *Communiqué 2007/21 on Standardization in Foreign Trade*, published in Turkey's Official Gazette No. 26,406, dated 17 January 2007, in exhibit TR-44. See Turkey's response to question 125(a). See also United States' comments on Turkey's response to question 125(a), in paras. 28-30.
[103] Turkey's response to question 125(a).
[104] Turkey's first submission, para. 26. Exhibit TR-20.
[105] Turkey's response to question 44. Exhibit TR-33. See also Turkey's rebuttal, para. 20.
[106] Panel's question 44(e) to Turkey.
[107] Turkey's response to question 44 (e).
[108] Ibid.
[109] Panel's question 133(a) to Turkey.

during the second substantive meeting with the Panel.[110] The Panel also asked Turkey to indicate how many of the 2,223 Certificates of Control, approved between 2003 and September 2006, were the result of resubmitted applications that had been initially rejected by the Turkish authorities, and to provide a photocopy of each one of these Certificates of Control.[111] Finally, the Panel proposed that, if Turkey could not provide the full photocopies requested, with the purpose of protecting the privacy of the companies involved, it at least provide those same photocopies after having blacked out the names of the companies.[112]

2.54 In response, Turkey stated that its Statistical Law prevents confidential data acquired, processed and kept for official statistics, to be passed-on to any administrative, judicial or military office, authority or person, to be used except for statistical purposes, or to be used as evidence. According to Turkey's statement, the same law provides that public officials violating these prohibitions would be punished in accordance with the Turkish Criminal Code.[113]

2.55 With regard to the Panel's question asking for the number of the Certificates of Control approved between 2003 and September 2006, which were the result of resubmitted applications that had been initially rejected by the Turkish authorities and requesting a photocopies of these Certificates of Control[114], Turkey responded that "this information and documentation [was] not available in the records kept by MARA".[115]

2.56 Finally, with respect to the Panel's new request for photocopies of the approved Certificates of Control, Turkey stated that it had provided a consolidation of the relevant information in exhibit TR-33. Regarding the actual Certificates of Control, Turkey stated that:

> "Given the strict confidentiality requirements provided by Turkish law... and the well-established communications and information-exchanges between the United States and a number of Turkish rice traders... Turkish officials involved in this Panel proceeding [did] not feel comfortable in risking information leaks and possible criminal accusations of violation of Turkish law on confidentiality."

It added that, while it:

> "[stood] firm in relation to the truthfulness, completeness and usefulness of the information that it provided earlier by means of its... consolidation... [it was] not in a position to provide copies of the actual Certificates of Control for circulation."

Turkey concluded that:

> "Exceptionally [it] would be willing to provide 'blacked-out' copies of the 56 'relevant' Certificates of Control only to the Panel and after a clear understanding with the Panel and between the parties to this dispute that these documents would not be

[110] Panel's question 133(b) to Turkey. See also para. 7 of the United States statement during the second meeting with the Panel and exhibit US-71. The United States clarified its characterization of 'relevant' in its comments to Turkey's response to question 115, as referring to the period during which it was alleging a breach (i.e. from 10 September 2003 through 17 March 2006).
[111] Panel's question 133(c) to Turkey.
[112] Panel's question 133(f) to Turkey.
[113] Turkey's response to question 133(a).
[114] Panel's question 133(c) to Turkey.
[115] Turkey's response to question 133(c).

made available to the United States nor to any other entity beside the Panel and the WTO Secretariat".[116]

2.57 The Panel notes that the possibility of the Panel adopting special rules to protect the confidentiality of information submitted by the parties was suggested by the complainant in the course of the substantive meetings with the parties. Turkey did not ask, however, that the Panel adopt any particular measures in order to grant special protection to the confidentiality of the Certificates of Control requested as evidence by the Panel. After a request from the Panel, Turkey offered to submit the Certificates of Control, but with "a clear understanding with the Panel and between the parties... that these documents would not be made available to the United States nor to any other entity beside the Panel and the WTO Secretariat."[117]

3. Rejection of Certificates of Control

(a) Rejection of Certificates of Control

2.58 The complainant has submitted evidence of the rejection of Certificates of Control for the importation of rice requested by two companies (Torunlar and Mehmetoglu). According to the record, requests filed by Torunlar were rejected in September 2003 and again in November 2003 for reasons respectively cited as "missing items"[118] or "spelling errors".[119] Turkey did not contest the authenticity of these rejections, but it noted that the application allegedly rejected for "spelling errors" could not be found among the records of MARA.[120] In 2004, this company filed a motion in a Turkish administrative court against the government's refusal to authorize the importation of rice.[121] In September 2004, after the motion had been filed in the administrative court, MARA rejected a third request for a Certificate of Control filed by the same company for the importation of rice.[122]

2.59 In the case of Mehmetoglu, a request made in April 2006 to obtain a Certificate of Control for the importation of milled rice from the United States, was rejected in May 2006. The letter of rejection from MARA states that "it is not possible to prepare a control certificate according to our laws and regulations".[123]

2.60 Documents related to procedures before Turkish administrative courts, which are on record in this case, refer to additional instances of rejection of Certificates of Control for the importation of rice.[124] One such document contains a decision by an administrative court in Ankara to dismiss the petition presented by the importing company Helin. As described in this document, Helin had its application rejected on 15 August 2005, on the grounds that "no [Certificates of Control] for husked rice would be approved until new guidelines are established for such importation, as expressed in the approval… dated July 29, 2005".[125]

2.61 Also on record are three petitions before the administrative courts, each filed by a different importing company. In these petitions, the companies describe that, after an initial rejection, they

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[116] Turkey's response to questions 133(b) and 133(f). See also Turkey's comments on United States' response to question 116.

[117] Turkey's response to question 133(b) and (f).

[118] Letter dated 10 September 2003, in exhibit US-28.

[119] Letter dated 23 October 2003, in exhibit US-29.

[120] See Turkey's response to question 135.

[121] Exhibit US-30. United States' first submission, para. 29.

[122] Exhibit US-33. See also exhibit US-34 and United States' first submission, para. 31.

[123] Exhibit US-22. See also exhibit US-40 and United States' first submission, paras. 35-36. See also Turkey's response to question 29.

[124] Exhibits US-63 to US-67.

[125] Exhibit US-63.

resubmitted requests for Certificates of Control for the importation of rice on 18 October 2005. These requests were rejected by MARA through letters dated 28 October 2005, and numbered 112603, 112604 and 112605, respectively, with an identical explanation that MARA was "unable to prepare [Certificates of Control] for rice, until the new application rules are confirmed".[126]

2.62 An additional petition, filed by another importing company before an administrative court, describes that, after three successive applications, MARA rejected its requests for Certificates of Control for the importation of rice through a letter dated 12 December 2005, and numbered 114092, with the explanation that MARA was "unable to prepare [Certificates of Control] for rice, until the new application rules are confirmed".[127]

(b) Request for evidence from Turkey

2.63 After the second substantive meeting, the Panel referred to exhibit TR-36 submitted by Turkey, which contains a list prepared by Turkey of the applications for Certificates of Control for the importation of rice which were rejected from 2003 to 21 September 2006, including the reasons for denial. The Panel asked Turkey to provide a photocopy of each of the rejected applications, cited in the list contained in exhibit TR-36, as well as of the corresponding letters by which its authorities had notified the requesting companies of the rejection of a requested Certificate of Control.[128]

2.64 The Panel proposed that, if Turkey could not provide the full photocopies requested, out of concerns for the privacy of the companies involved, it at least provide those same photocopies after having blacked out the names of the companies.[129]

2.65 In response, Turkey stated that "this information and documentation [was] not available in the records kept by MARA."[130]

(c) New request for evidence from Turkey

2.66 After the second substantive meeting, the Panel posed questions to Turkey regarding exhibit US-29, submitted by the complainant as an annex to its first submission.[131] That exhibit contains a photocopy of an application for a Certificate of Control for the importation of rice, filed on 23 October 2003 and which was rejected on 3 November 2003, allegedly "due to spelling errors".[132] The Panel noted that "spelling errors" had not been listed by Turkey as reasons for denial of Certificates of Control and asked Turkey to confirm whether such errors would be grounds for the rejection of an application for a Certificate of Control. If so, it asked Turkey to identify the legal basis for rejecting applications owing to "spelling errors".

2.67 In its reply, Turkey submitted that it could not provide an answer to this question, as the application cited by the United States could not be found among the records of MARA.[133] It argued, however, that it is not MARA's general policy to systematically deny applications on the basis of minor spelling mistakes. Nevertheless, it noted that, in certain instances, spelling errors may affect crucial elements of the application and the process of importation, which may lead to individual

[126] Exhibits US-64, US-65 and US-66.
[127] Exhibit US-67.
[128] Panel's question 133(e) to Turkey.
[129] Panel's question 133(f) to Turkey.
[130] Turkey's response to question 133(e).
[131] Panel's question 135 to Turkey.
[132] Exhibit US-29. United States' first submission, para. 28.
[133] Turkey's response to question 135.

rejections. In Turkey's opinion, this case cited by the complainant is an individual episode that does not "imply or suggest a pattern of systematic rejection of applications for futile reasons".[134]

4. Procedures in Turkish administrative courts

(a) Arguments by MARA before an administrative court

2.68 As mentioned above, in 2004, Torunlar filed a motion in a Turkish administrative court against the government's refusal to authorize the importation of rice.[135] In its response to this motion, filed in November 2004, the counsel for MARA argued before the court that the rejection of the Certificates of Control "was undertaken in observance of the common good and public service keeping in mind the goals of protecting [Turkish] national producer[s], to redress their grievances and to prevent unnecessary stock build up..."[136] In support of its argument, the counsel for MARA cited letters from MARA's General Directorate of Protection and Control and from the TMO, by which the authorization of Certificates of Control for the importation of rice was suspended over several periods. The counsel for MARA specifically referred to the following letters:

(a) Letter No. 964 from MARA dated 10 September 2003, by which the period for issuing Certificates of Control for the importation of rice would begin on 1 March 2004.[137]

(b) Letter by which the General Directorate of the TMO requested that no Certificates of Control for the importation of rice be issued until 30 June 2004, because existing rice and paddy rice stocks were estimated to be adequate for the nation's needs until the end of June 2004.[138]

(c) Letter No. 107 from MARA dated 23 January 2004, by which the period for issuing Certificates of Control for the importation of rice and paddy rice would begin in July 2004.[139]

(d) Letter No. 689 dated 4 June 2004, from the General Directorate of the TMO, by which "the instruction was given to extend the term for stopping the issuance of [Certificates of Control], from July 01, 2004 to the beginning of January 2005, in order to protect [Turkish] national production, to redress the grievances of the domestic grower, [and] to conserve national currency reserves by avoiding excessive imports".[140]

(e) Letter No. 905 from MARA dated 28 June 2004, by which the period for issuing Certificates of Control for the importation of rice and paddy rice was to open on 1 January 2005, with a closing date of 1 August 2005 for rice and 1 September 2005 for paddy rice.[141]

[134] Turkey's response to question 135.
[135] Exhibit US-30. United States' first submission, para. 29.
[136] Exhibit US-31.
[137] Ibid.
[138] Ibid.
[139] Ibid.
[140] Ibid.
[141] Ibid.

2.69 The lawsuit concluded with a decision in favour of MARA.[142] This decision was not appealed by Torunlar[143], nor by MARA.[144]

5. Decision by a Turkish administrative court

2.70 As mentioned above, also on record is a decision by an administrative court in the case of a petition presented by another importing company, Helin, against MARA's rejection of its application for a Certificate of Control for the importation of rice.[145] The court dismissed the petition on the grounds that:

> "[I]t is verified that the opening date for the issuance of the Inspection Document [Certificate of Control] was indeed determined as August 1, 2005 by the administration as is evident from the 'approval' document issued by the Office dated 12.30.2004, number 1795; however, as stated by the 'approval' document issued on 7.29.2005, number 1304, the stocks of produced and imported husked rice in 2004 were deemed to be at a level that would meet the needs of the country handily; therefore no Inspection Document [Certificate of Control] would be issued until consumption volume and trade policies are reviewed, and a basis for the new practices is established. Under these circumstances, the court finds no basis for the claim of illegality in the decision not to grant an inspection document until the establishment of new practices, or in the procedure by which the plaintiff's request was declined."[146]

E. THE TARIFF RATE QUOTA SYSTEM

1. Situation at the time of the establishment of this Panel

(a) Decree No. 95/6814 of 30 April 1995

2.71 Decree No. 95/6814 of 30 April 1995 on *Surveillance and Safeguard Measures for Imports and Administration of Quotas and Tariff Quotas*[147] contains procedures and principles related to, *inter alia*, "[t]he use of quotas in case tariff quotas are applied for imports in the framework of the bilateral or multilateral preferential trade agreements or unilaterally according to the provisions of the international agreements."[148] Article 3 of this decree grants the FTU the authority:

> "(b) To determine the quantities and/or values of quotas and the procedure and principles of distribution... and to issue documents with this objective and to instruct to the relevant institutions and organizations concerning the implementation and necessary permissions.
>
> (c) To determine the procedures and principles for use of the tariff quotas which are opened unilaterally according to international agreements or based on the bilateral or multilateral preferential trade agreements."[149]

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[142] Turkey's response to question 66. See also United States' rebuttal, para. 27.
[143] Turkey's response to question 66.
[144] Turkey's response to question 145.
[145] Exhibit US-63.
[146] Ibid.
[147] *Surveillance and Safeguard Measures for Imports and Administration of Quotas and Tariff Quotas*, Decree No. 95/6814, published in Turkey's Official Gazette No. 22,300, dated 1 June 1995, in exhibit TR-14.
[148] Ibid., Article 1.
[149] Ibid., Article 3 (b) and (c).

(b) Decree No. 2004/7333 of 10 May 2004

2.72 Rules on the matter are also contained in Decree No. 2004/7333 of 10 May 2004 on the *Administration of Quotas and Tariff Quotas*:[150]

> "This Decree covers the procedures and principles related to the administration of quotas and tariff quotas that can be applied in the framework of the measures adopted based on the bilateral or multilateral preferential trade agreements or unilaterally by taking the international obligations into consideration."[151]

2.73 According to Provisional Article 1 of Decree No. 2004/7333:

> "[T]he procedures concerning the quotas and tariff quotas imposed under the Decree on Surveillance and Safeguard Measures for Imports and Administration of Quotas and Tariff Quotas, which was put into force in accordance with the Council of Ministers Decree No. 95/6814 of 30 April 1995 shall carry on under the provisions of this Decree."[152]

2.74 In turn, Provisional Article 2 of Decree No. 2004/7333 states that:

> "References to the Decree on Surveillance and Safeguard Measures for Imports and Administration of Quotas and Tariff Quotas, which was put into force in accordance with the Council of Ministers Decree No. 95/6814 of 30 April 1995 concerning the administration of quotas and tariff quotas, shall be understood as referring to this Decree."[153]

2.75 Article 3 of Decree No. 2004/7333 maintains the authority of the FTU:

> "(a) to determine the procedures and principles of the application, distribution and use of quotas and tariff quotas and to prepare documents in this purpose...
>
> (d) to coordinate and give instructions to the relevant institutions and organizations for the implementation of this Decree;
>
> (e) to prepare Regulations and Communiqués concerning the implementation of this Decree."[154]

(c) Decree 2005/9315 of September 2005

2.76 Pursuant to Decree No. 2004/7333[155], a tariff quota regime for the importation of rice was put in place by Decree 2005/9315 of 10 August 2005 on the *Application of Tariff Quota for the*

[150] *Administration of Quotas and Tariff Quotas*, Decree No. 2004/7333, published in Turkey's Official Gazette No. 25,473, dated 26 May 2004, in exhibits US-4 and TR-15.
[151] Ibid., Article 1.
[152] Ibid., Provisional Article 1.
[153] Ibid., Provisional Article 2.
[154] Ibid., Article 3(a), (d) and (e).
[155] Turkey's first submission, para. 35.

Importation of Some Species of Paddy Rice and Rice.[156] This tariff quota was in force at the time this Panel was established.

2.77 Decree 2005/9315 opened a tariff quota for the importation of rice from 1 November 2005 to 31 July 2006.[157] Importers who purchased paddy rice from domestic producers or purchased paddy rice or milled rice from the TMO would be able to benefit from the tariff quotas.[158] These importers could enjoy tariffs of 20 per cent *ad valorem* for paddy rice (1006.10)[159], 25 per cent *ad valorem* for husked rice (1006.20), and 43 per cent *ad valorem* for semi-milled or milled rice (1006.30)[160], instead of paying the rates otherwise set in Turkey's domestic tariff schedule (respectively, 34, 36 and 45 per cent *ad valorem*).

2.78 The maximum amount assigned under the quota was equal to 300,000 tonnes of semi-milled or milled rice equivalent (with a conversion factor of 60 per cent for paddy rice and 75 per cent for brown rice). In other words, the quantity of the tariff quota was equal to 500,000 tonnes if wholly allocated to paddy rice (1006.10), 400,000 tonnes if wholly allocated to husked rice (1006.20), and 300,000 tonnes if wholly allocated to semi-milled or milled rice (1006.30).[161] In order to import under the tariff quota, importers would need to obtain an import licence from the FTU.[162]

2.79 An additional tariff quota of 50,000 tonnes of milled rice at a 43 per cent tariff rate, from 1 October 2005 to 31 July 2006, was assigned to the TMO "to be used in need".[163]

2.80 As noted above, Article 5 of Decree No. 2005/9315 established a domestic purchase requirement, which conditioned the allocation of tariff quotas to the purchase of:

> "[P]addy rice from [domestic] paddy producers having permission to plant paddy rice or from their cooperatives and unions [with proof of] this purchase with the certificate issued by Turkish Grain Board and ... [to the] purchase of paddy rice or rice from [the] Turkish Grain Board."[164]

(d) Communiqué No. 25,943 of the FTU

2.81 The rules for the implementation of the tariff rate quotas, including the conditions of eligibility, the implementation methods, the application procedures and requirements, the periods for application, the expiration dates, and other relevant details, were provided by means of decrees and FTU communiqués.

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[156] *Application of Tariff Quota for the Importation of Some Species of Paddy Rice and Rice*, Decree No. 2005/9315, published in Turkey's Official Gazette No. 25,935, dated 13 September 2005, in exhibits TR-9 and US-10.

[157] Ibid., Article 1.

[158] Ibid., Article 5.

[159] With the exception of item 1006.10.10 (rice planting seeds).

[160] Decree No. 2005/9315, Article 1.

[161] Ibid.

[162] Ibid., Article 4.

[163] Ibid., Article 2.

[164] Ibid., Article 5.

2.82 Accordingly, Communiqué No. 25,943 of the FTU on the *Application of Tariff Quota for the Importation of Some Species of Paddy Rice and Rice*[165] contained rules on the implementation of the tariff rate quota in force at the time of the establishment of this Panel.

2.83 Communiqué No. 25,943 conditioned the allocation of tariff quotas under the TRQ opened between November 2005 and July 2006 on the purchase of domestic rice from domestic producers and from the TMO from 1 September 2005 until 31 March 2006, according to the conversion coefficients provided therein.[166] In order to benefit from the tariff quotas, importers were required to purchase the domestic rice from local producers or from the TMO and to submit their form to the FTU, with all necessary documents, by 10 April 2006.[167] The FTU could allocate any portion of the quota that remained unallocated by 11 April 2006.[168] Import licences granted by the FTU would be valid from 1 November 2005 until 31 July 2006 and could not be transferred to third parties.[169]

2.84 The allocation of tariff quotas depended on the type of domestic rice which was purchased, its source and its region of origin. According to Communiqué No. 25,943, the following ratios were applied:

(a) The purchase of 1,000 kg of paddy rice from paddy producers permitted to plant paddy rice or from their cooperatives and unions, from regions other than Balikesir, Bursa, Çanakkale, Edirne, Istanbul, Kirkareli, Sakarya and Tekirdağ, allowed for the import of 800 kg of paddy rice, 640 kg of brown rice, or 480 kg of milled rice.

(b) The purchase of 1,000 kg of paddy rice from paddy producers permitted to plant paddy rice or from their cooperatives and unions located in Balikesir, Bursa, Çanakkale, Edirne, Istanbul, Kirkareli, Sakarya and Tekirdağ, allowed for the import of 600 kg of paddy rice, 480 kg of brown rice, or 360 kg of milled rice.

(c) The purchase of 1,000 kg of paddy rice from the TMO allowed for the import of 500 kg of paddy rice, 400 kg of brown rice, or 300 kg of milled rice.

(d) The purchase of 1,000 kg of milled rice from the TMO allowed for the import of 833 kg of paddy rice, 666 kg of brown rice, or 500 kg of milled rice.[170]

2. Earlier tariff quota regimes

(a) Decree 2004/7135 of 20 April 2004 (from 20 April 2004 to 31 August 2004)

2.85 A similar tariff quota regime had been in place the year before, under Decree 2004/7135 of 20 April 2004 on the *Application of Tariff Quota for the Importation of Some Species of Paddy Rice and Rice*.[171] This decree was issued pursuant to the rules contained in Decree No. 95/6814 of 30 April

[165] Communiqué of the FTU on the *Application of Tariff Quota for the Importation of Some Species of Paddy Rice and Rice*, published in Turkey's Official Gazette No. 25,943, dated 21 September 2005, in exhibits TR-13 and US-11. See also Turkey's first submission, para. 42.

[166] Communiqué of the FTU on the *Application of Tariff Quota for the Importation of Some Species of Paddy Rice and Rice*, published in Turkey's Official Gazette No. 25,943, dated 21 September 2005, in exhibits TR-13 and US-11, Articles 1 and 2.

[167] Ibid., Article 2.

[168] Ibid.

[169] Ibid., Articles 3 and 5.

[170] Ibid., Article 1.

[171] *Application of Tariff Quota for the Importation of Some Species of Paddy Rice and Rice*, Decree No. 2004/7135, published in Turkey's Official Gazette No. 25,439, dated 20 April 2004, in exhibits US-2 and TR-11. See also Turkey's first submission, paras. 32-33 and 35.

1995 on *Surveillance and Safeguard Measures for Imports and Administration of Quotas and Tariff Quotas*.

2.86 Decree 2004/7135 opened a tariff quota for the importation of rice from the date of the decree (20 April 2004) until 31 August 2004.[172] Under this regime, importers could enjoy tariffs of 32 per cent *ad valorem* for paddy rice (1006.10)[173], 34 per cent *ad valorem* for husked rice (1006.20), and 43 per cent *ad valorem* for semi-milled or milled rice (1006.30)[174], instead of paying the rates otherwise set in Turkey's domestic tariff schedule.

2.87 The maximum amount assigned under the quota was equal to 72,000 tonnes of semi-milled or milled rice equivalent (with a conversion factor of 60 per cent for paddy rice and 75 per cent for brown rice). In other words, the quantity of the tariff quota was equal to 120,000 tonnes if wholly allocated to paddy rice (1006.10), 96,000 tonnes if wholly allocated to husked rice (1006.20), and 72,000 tonnes if wholly allocated to semi-milled or milled rice (1006.30).[175] In order to import under the tariff quota, importers would need to obtain an import licence from the FTU.[176]

2.88 Communiqué No. 25,445 of the FTU on the *Application of Tariff Quota for the Importation of Some Species of Paddy Rice and Rice*[177]conditioned the allocation of tariff quotas under the TRQ opened between 20 April 2004 and 31 August 2004 to the purchase of domestic rice from the 2003/2004 crop season from the TMO since 1 September 2003, according to the conversion coefficients provided therein.[178] Import licences granted by the FTU would be valid until 31 August 2004 and could not be transferred to third parties.[179]

2.89 It does not appear that Communiqué No. 25,445 of the FTU specified the amounts of rice that an importer who purchased 1,000 kg of paddy rice from the TMO would be allowed to import. The communiqué only seems to have indicated that those amounts would be allocated "based on the purchase from TMO".[180] Turkey has informed, however, that the allocation of tariff quotas for the period from 20 April 2004 until 31 August 2004 was carried out according to the following ratios:

(a) The purchase of 1,000 kg of paddy rice from the TMO allowed for the import of 1,000 kg of paddy rice, 800 kg of brown rice, or 600 kg of milled rice.

(b) The purchase of 1,000 kg of milled rice from the TMO allowed for the import of 1,666 kg of paddy rice, 1,333 kg of brown rice, or 1,000 kg of milled rice.[181]

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[172] Decree No. 2004/7135, Article 1.
[173] With the exception of item 1006.10.10 (rice planting seeds).
[174] Decree No. 2004/7135, Article 1.
[175] Ibid.
[176] Ibid., Article 3.
[177] Communiqué of the FTU on the *Application of Tariff Quota for the Importation of Some Species of Paddy Rice and Rice*, published in Turkey's Official Gazette No. 25,445, dated 27 April 2004, in exhibits TR-12 and US-3. See also Turkey's first submission, para. 37.
[178] Communiqué of the FTU on the *Application of Tariff Quota for the Importation of Some Species of Paddy Rice and Rice*, published in Turkey's Official Gazette No. 25,445, dated 27 April 2004, in exhibits TR-12 and US-3, Article 1. See also United States' response to question 69, para. 105.
[179] Communiqué of the FTU on the *Application of Tariff Quota for the Importation of Some Species of Paddy Rice and Rice*, published in Turkey's Official Gazette No. 25,445, dated 27 April 2004, in exhibits TR-12 and US-3, Articles 3 and 5.
[180] Ibid., Article 1. See also United States' first submission, para. 39, and United States' comments on Turkey's response to question 146, in para. 56.
[181] See exhibit TR-12 and Turkey's response to question 146.

(b) Decree 2004/7756 of August 2004 (from 1 November 2004 to 31 July 2005)

2.90 Another tariff quota regime was put in place under Decree 2004/7756 of August 2004 on the *Application of Tariff Quota for the Importation of Some Species of Paddy Rice and Rice*.[182]

2.91 Decree 2004/7756 opened a tariff quota for the importation of rice from 1 November 2004 to 31 July 2005.[183] Importers who purchased paddy rice from domestic producers or purchased paddy rice or rice from the TMO would be able to benefit from the tariff quotas.[184] These importers could enjoy tariffs of 32 per cent *ad valorem* for paddy rice (1006.10)[185], 34 per cent *ad valorem* for husked rice (1006.20), and 43 per cent *ad valorem* for semi-milled or milled rice (1006.30)[186], instead of paying the rates otherwise set in Turkey's domestic tariff schedule.

2.92 The maximum amount assigned under the quota was equal to 300,000 tonnes of semi-milled or milled rice equivalent (with a conversion factor of 60 per cent for paddy rice and 75 per cent for brown rice). In other words, the quantity of the tariff quota was equal to 500,000 tonnes if wholly allocated to paddy rice (1006.10), 400,000 tonnes if wholly allocated to husked rice (1006.20), and 300,000 tonnes if wholly allocated to semi-milled or milled rice (1006.30).[187] In order to import under the tariff quota, importers would need to obtain an import licence from the FTU.[188]

2.93 An additional tariff quota of 50,000 tonnes of milled rice at a 43 per cent tariff rate, from 1 October 2004 to 31 July 2005, was assigned to the TMO "to be used in need".[189]

2.94 Communiqué No. 25,577 of the FTU on the *Application of Tariff Quota for the Importation of Some Species of Paddy Rice and Rice*[190] conditioned the allocation of tariff quotas under the TRQ opened between November 2004 and July 2005 to the requirement of purchasing domestic rice from domestic producers and from the TMO since 1 September 2004, according with the conversion coefficients provided therein.[191] In order to benefit from the tariff quotas, importers were required to submit their form to the FTU, with all the documents necessary, by 31 January 2005.[192] The FTU could extend this date, provided there remained an unallocated portion of the quota by 1 February 2005.[193] Indeed, the date for filing the forms was twice extended, first to 29 April 2005

[182] *Application of Tariff Quota for the Importation of Some Species of Paddy Rice and Rice*, Decree No. 2004/7756, published in Turkey's Official Gazette No. 25,566, dated 27 August 2004, in exhibit TR-16 and US-5. See also Turkey's first submission, para. 38.

[183] Decree No. 2004/7135, Article 1.

[184] Ibid., Article 5.

[185] With the exception of item 1006.10.10 (rice planting seeds).

[186] Decree No. 2004/7135, Article 1.

[187] Ibid.

[188] Ibid., Article 4.

[189] Ibid., Article 2.

[190] Communiqué of the FTU on the *Application of Tariff Quota for the Importation of Some Species of Paddy Rice and Rice*, published in Turkey's Official Gazette No. 25,577, dated 8 September 2004, in exhibit TR-17 and US-6. See also Turkey's first submission, para. 40.

[191] Communiqué of the FTU on the *Application of Tariff Quota for the Importation of Some Species of Paddy Rice and Rice*, published in Turkey's Official Gazette No. 25,577, dated 8 September 2004, in exhibit TR-17 and US-6, Article 1.

[192] Ibid., Article 2.

[193] Ibid.

and then to 15 June 2005.[194] Import licences granted by the FTU would be valid from 1 November 2004 until 31 July 2005 and could not be transferred to third parties.[195]

2.95 The allocation of tariff quotas depended on the type of domestic rice which was purchased, its source and its region of origin. According to Communiqué No. 25,577, the following ratios were applied:

(a) The purchase of 1,000 kg of paddy rice from paddy producers permitted to plant paddy rice or from their cooperatives and unions, from regions other than Balikesir, Bursa, Çanakkale, Edirne, Kirkareli, Sakarya and Tekirdağ, allowed for the import of 1,000 kg of paddy rice, 800 kg of brown rice, or 600 kg of milled rice.

(b) The purchase of 1,000 kg of paddy rice from paddy producers permitted to plant paddy rice or from their cooperatives and unions located in Balikesir, Bursa, Çanakkale, Edirne, Kirkareli, Sakarya and Tekirdağ, allowed for the import of 700 kg of paddy rice, 560 kg of brown rice, or 420 kg of milled rice.

(c) The purchase of 1,000 kg of paddy rice from the TMO allowed for the import of 500 kg of paddy rice, 400 kg of brown rice, or 300 kg of milled rice.

(d) The purchase of 1,000 kg of milled rice from the TMO allowed for the import of 833 kg of paddy rice, 666 kg of brown rice, or 500 kg of milled rice.[196]

3. Import licences

2.96 Under the tariff quota regime for the importation of rice that was in place at the time when this Panel was established, pursuant to Decree 2005/9315 of September 2005[197], importers who wished to benefit from the reduced tariffs needed to obtain an import licence from the FTU. The licence would then have to be presented to the related customs administration on the date in which the customs liability arises.[198]

2.97 Under Communiqué No. 25,943, applications for import licences could be submitted from the day the in which the communiqué entered into force (i.e., 21 September 2005), until 10 April 2006. Applications lacking the complete information or documents required and applications submitted after the depletion of the tariff quota would not be considered.[199]

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[194] Exhibits US-8 and US-9. See also United States' first submission, para. 46, and Turkey's first submission, para. 122.

[195] Communiqué of the FTU on the *Application of Tariff Quota for the Importation of Some Species of Paddy Rice and Rice*, published in Turkey's Official Gazette No. 25,577, dated 8 September 2004, in exhibit TR-17 and US-6, Articles 3 and 5.

[196] Ibid., Article 1.

[197] *Application of Tariff Quota for the Importation of Some Species of Paddy Rice and Rice*, Decree No. 2005/9315, published in Turkey's Official Gazette No. 25,935, dated 13 September 2005, in exhibits TR-9 and US-10.

[198] Ibid., Article 4.

[199] Communiqué of the FTU on the *Application of Tariff Quota for the Importation of Some Species of Paddy Rice and Rice*, published in Turkey's Official Gazette No. 25,943, dated 21 September 2005, in exhibits TR-13 and US-11, Article 2.

2.98 Import licences were non-transferable and valid from 1 November 2005 until 31 July 2006.[200] During this time, the items had to enter into circulation.[201] The import licences had to be returned to the FTU's Directorate General for Imports within 10 days of their expiration.[202]

2.99 The Annex of Communiqué No. 25943 of the FTU contained the form that should be completed by applicants and listed the information and documents required. This form required information such as: (a) importer's name, address, telephone and fax number, tax registration number and e-mail address; (b) country of origin and country in which the product was to be loaded for transportation into Turkey; (c) description of the product being imported, item name, as indicated in the HS code, and HS code in 12 digits; (d) quantity and unit of measurement of the product being imported; (e) value of the product being imported; (f) original invoice or proforma invoice; (g) identification of the Directorate of Customs and Customs Enforcement from which importation was to be made; (h) original certificate issued by TMO, which proved the purchase of domestic rice; (i) original invoice of the purchase of domestic rice; and, (j) approved copies that proved the signatory power of the applicant and Trade Records Gazette where the name of the company had been published.[203]

F. THE TURKISH GRAIN BOARD

2.100 The Turkish Grain Board is described as a "State Economic Corporation organized under the name Toprak Mahsulleri Ofisi (T.M.O.) A.Ş." by the *Turkish Grain Board (Agricultural Products Office, Inc.) Articles of Incorporation*[204], which is the legal instrument with "all relevant information regarding the nature, functions and composition of the TMO" provided by Turkey.[205]

2.101 A recent Trade Policy Review of Turkey conducted by the WTO Secretariat[206] only refers to the TMO when describing the changes it was undergoing at the time as part of its restructuring process:

> "[O]n the basis of the EU system... [i.e.] limiting TMO's purchases to emergency and supplementary purchases; transferring the existing storage facilities to the private sector, and then leasing such facilities to producers; maintaining TMO as a central institution with a view to facilitating emergency and intervention purchases in the medium term; and guaranteeing that the TMO's purchases are made only through the commodity markets.[207]"[208]

No particular reference is made to its participation in the Turkish rice market.

2.102 The TMO Articles of Incorporation define a state economic corporation as a "state economic enterprise the capital of which is fully held by the state and which is founded to operate in the economy according to commercial practices."[209] Article 3, paragraph 4, of the TMO Articles of

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[200] Communiqué of the FTU on the *Application of Tariff Quota for the Importation of Some Species of Paddy Rice and Rice*, published in Turkey's Official Gazette No. 25,943, dated 21 September 2005, in exhibits TR-13 and US-11, Articles 3 and 5.

[201] Ibid., Article 4.

[202] Ibid., Article 9.

[203] Exhibit TR-13. See also exhibit TR-10.

[204] *Turkish Grain Board (Agricultural Products Office, Inc.) Articles of Incorporation*, in exhibit TR-40.

[205] Turkey's response to questions 90 (a), (b) and (c).

[206] Trade Policy Review of Turkey – Report by the Secretariat, WT/TPR/S/125, 19 November 2003.

[207] (*footnote original*) Republic of Turkey (2002).

[208] Trade Policy Review of Turkey, para. IV.29.

[209] TMO Articles of Incorporation, Article 2, paragraph 3.

Incorporation provides that "the Corporation's capital is TL 50 (fifty) billion [Now, TL 330 trillion (YPK resolution no. 985/66 of 8.12.1998)] which is fully held by the State. The Corporation's capital may be changed by a Coordination Board decision upon a proposal by the competent Ministry."[210] Further, Articles 2 and 20 of the same legal text provide that the TMO's budget is controlled by the state and supervised by the competent Ministry and State Planning Organization.[211]

2.103 The function of the TMO is that of preventing "the falling of grain prices below normal levels in view of the producers and extraordinary increase thereof in view of the interests of the consumers".[212] One of the ways to achieve market stabilization, would be by buying and selling grains, as well as creating and keeping necessary stocks.[213] In Turkey's words, "the TMO acts as an intervention agency."[214]

2.104 The TMO neither buys nor sells any brown rice.[215] Both Decree No. 2004/7556 and Decree No. 2005/9315 granted the TMO a tariff quota of 50,000 tonnes of milled rice "to be used in need", in the context of the tariff rate quotas opened from November 2004 to July 2005 and from November 2005 to July 2006.[216] However, purchases of rice by the TMO have been restricted to paddy rice.[217]

2.105 Data provided by Turkey regarding the quantities purchased by the TMO between 2003 and 2006 is the following:[218]

TMO PADDY RICE PURCHASES (TONNES)	
2003	130,632
2004	14,855
2005	11,899
2006*	12,464
* As of 15 October 2006	

2.106 Based on these figures, Turkey asserts that:

> "In the years 2005 and 2006, the Turkish Grain Board (TMO) was not determining market prices, due to the fact that it made purchases of very little quantities of paddy rice (i.e., approximately 14,000 tonnes)".[219]

2.107 The quantities of rice sold by the TMO from 2003 to 2006, as presented by Turkey, correspond to:[220]

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[210] TMO Articles of Incorporation, Article 3, paragraph 4, and Article 20.
[211] Ibid., Articles 2 and 20. But see Turkey's response to question 92 (b).
[212] Article 4 of the Turkish Grain Board [Agricultural Products Office, Inc.] Articles of Incorporation.
[213] Ibid, Article 4, paragraph 1. See also Turkey's response to question 91.
[214] Turkey's response to question 111.
[215] Exhibit TR-29.
[216] *Application of Tariff Quota for the Importation of Some Species of Paddy Rice and Rice*, Decree No. 2004/7556, published in Turkey's Official Gazette No. 25,566, dated 23 August 2004, in exhibits TR-16 and US-5, Article 2. See also *Application of Tariff Quota for the Importation of Some Species of Paddy Rice and Rice*, Decree No. 2005/9315, published in Turkey's Official Gazette No. 25,935, dated 13 September 2005, in exhibits TR-9 and US-10, Article 2.
[217] Exhibit TR-30.
[218] Ibid.
[219] Turkey's response to question 110.

	TMO PADDY RICE SALES (TONNES)	TMO MILLED RICE SALES (TONNES)
2003	-	17,789
2004	119,880	14,122
2005	3,228	6,639
2006*	9,575	2,718
* As of 16 November 2006		

2.108 Regarding the prices at which TMO purchases rice, both Turkey and the United States have provided the Panel with the figures presented in the following tables: (a) the first table reflects the information submitted by the United States on paddy and milled rice, with periods corresponding to the Turkish Marketing Years from 2003 to 2007; (b) the second table contains the information submitted by Turkey on paddy rice, with periods corresponding to calendar years from 2004 to 2006; (c) the third table contains the information submitted by Turkey on milled rice, with periods corresponding to calendar years from 2003 to 2006; (d) the fourth table reflects the comparison between the first column of the first and the third tables. All the figures are expressed in new Turkish lira by Tonnes (YTL/T).[221]

Turkish Grain Board Announced Prices*:[222]

Turkish Marketing Year (Sept/Aug)	Paddy Procurement Prices from Producers for Osmancik	Milled Rice Sales Price for Osmancik
2003/2004	700	1250
2004/2005	756	1500
2005/2006	720	1500
2006/2007	720	1500
*Sources: Turkish Grain Board website 2004/2005, 2005/2006 and 2006/2007. Turkish Rice Millers Association 2003/2004 prices. Paddy prices are for rice with average milling rate.		

Paddy Rice Selling Prices Declared by the TMO (Yearly Averages)*:[223]

	BALDO	OSMANCIK
2004*	840	743
2005	978	871
2006	970	772
* No data available for the period prior to January 2004		

[220] Exhibit TR-30.

[221] Some of the tables below make reference to "Baldo" and "Osmancik". As explained by Turkey in exhibit TR-29, "[i]n Turkish rice market, long grain rices are sub-grouped under these specific names."

[222] Exhibit US-56.

[223] Exhibit TR-29.

Rice Selling Prices (Wholesale) Declared by TMO (Yearly Averages):[224]

	BALDO	OSMANCIK
2003	1,352	1,209
2004	1,543	1,338
2005	1,741	1,469
2006	1,630	1,470

Selling Price by the TMO of Osmancik Milled Rice as Presented by the United States and Turkey:

	United States	TURKEY
2003/2004 (2003)	1,250	1,209
2004/2005 (2004)	1,500	1,338
2005/2006 (2005)	1,500	1,469
2006/2007 (2006)	1,500	1,470

2.109 The TMO determines the price at which it purchases rice, which Turkey has submitted as the following:[225]

PURCHASING PRICES DECLARED BY TMO AND PRICES RECEIVED BY GROWERS FOR LONG GRAIN PADDY RICE (NEW TURKISH LIRAS BY TONNES)		
	DECLARED PRICE	RECEIVED PRICE*
2002	600	554
2003	700	628
2004	756	695
2005	720	612
2006	720	639
* The difference between the declared and the received prices is due to quality		

G. LETTERS OF ACCEPTANCE

1. The so-called "letters of acceptance"

2.110 The record shows that, in a number of cases, MARA's General Directorate of Protection and Control has recommended to the Minister of Agriculture and Rural Affairs that the granting of Certificates of Control be temporarily suspended. These recommendations have been made through documents that have been called "letters of Acceptance" throughout the proceedings of this Panel.

[224] Exhibit TR-29.
[225] Ibid.

Letters of Acceptance were signed by MARA's General Director, and then by the Minister in acceptance of the recommendation.[226]

2.111 As identified below, copies of several letters of acceptance of this type have been submitted as exhibits by the complainant. Their existence has not been rebutted by Turkey.[227] The legal nature of these documents, however, has been contested between the parties. Turkey has also argued that the letters of acceptance "often contain confidential positions".[228]

2. Evidence of letters of acceptance

2.112 The record shows evidence of the following letters of acceptance: (a) letter No. 107, dated 23 January 2004[229]; (b) letter No. 905, dated 28 June 2004[230]; (c) letter No. 1,795, dated 30 December 2004[231]; and, (d) letter number unknown, dated 24 March 2006[232].

2.113 Some of these letters, in turn, make reference to other letters of acceptance of which there is no copy on file. Namely: (a) letter No. 964 of 10 September 2003; and, (b) letter No. 1,304 of 29 July 2005.

3. Content of letters of acceptance

2.114 Letter No. 107 of 23 January 2004. Refers to a letter from the ministerial office No. 964 of 10 September 2003, which determined the period of issuance of Certificates of Control for rice from 1 March 2004 and for paddy rice from 1 August 2004, both ending on 1 September 2004. It then notes that the General Directorate of the TMO has asked that Certificates of Control for rice should not be issued until 30 June 2004, "on the grounds that it became evident through the talks with rice [and] paddy rice growers, as well as the importers, based on estimates, [that] rice stocks [would] be adequate for [Turkey's] needs until ... June 30, 2004." The letter concludes by requesting a rescheduling of the opening date for the period of issuance of Certificates of Control to 1 July 2004.[233]

2.115 Letter No. 905 of 28 June 2004. Refers to a letter from the ministerial office No. 107 of 23 January 2004, which determined the period of issuance of Certificates of Control from 1 July 2004 to 1 August 2004 for rice, and from 1 July 2004 to 1 September 2004 for paddy rice. It then notes that the General Directorate of the TMO has stated that:

> "[P]addy rice harvest season would begin as of September; and that even though it is difficult to make an accurate estimate, it is expected to be at the level of the previous year (370,000 tons); and that it would be appropriate to extend the period of [Certificates of Control] issuance which would initially have begun in July 01 2004, until January 2005, in order to protect the national growers, to redress their grievances and to avert building paddy rice and rice stocks needlessly".

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[226] See, for example, United States' first submission, paras. 22-34.
[227] See Turkey's opening statement in the second meeting with the Panel, para. 12.
[228] Turkey's first submission, paras. 78-79, and Turkey's response to question 27(b). Turkey did not ask, however, that the Panel adopt any particular measures in order to grant special protection to the confidentiality of the content of the letters that were submitted as evidence by the United States.
[229] Exhibit US-12.
[230] Exhibit US-13.
[231] Exhibit US-14.
[232] Exhibit US-36.
[233] Exhibit US-12.

The letter concludes by requesting a rescheduling of the opening date for the period of issuance of Certificates of Control to 1 January 2005 for milled rice and paddy rice, with a closing date of 1 August 2005 for milled rice and 1 September 2005 for paddy rice.[234]

2.116 Letter No. 1,795 of 30 December 2004. Refers to a letter from the ministerial office No. 905 of 28 June 2004, which determined the issuance period of Certificates of Control from 1 January 2005, with a closing date of 1 August 2005 for milled rice and 1 September 2005 for paddy rice. It then notes that the General Directorate of the TMO has stated "that the practice of not issuing [Certificates of Control] for the persons and corporations who do not purchase paddy rice from the growers controlled by TMO and directly from TMO is deemed appropriate to be extended until 07.30.2005". The letter concludes by requesting a rescheduling of the opening date for the period of issuance of Certificates of Control to 1 August 2005.[235]

2.117 Letter number unknown of 24 March 2006. Refers to a letter from the ministerial office No. 1,304 of 29 July 2005, which determined that Certificates of Control would not be issued "until a new policy [was] in place". It also refers to the fact that the United States has taken action in the WTO "about our implementations on rice imports". It goes on to note the letters received from the General Directorate of the TMO numbered 531 and 603 of 3 March 2006 and 14 March 2006, respectively.[236] Those letters allegedly state that:

> "The applicability of the Tariff Quota System will not be possible in the coming years. Our producers should be supported through paying the price difference to close the gap with world prices, and the system should be operated without leading to international disputes. Meanwhile, the temporary ban of issuance of control certificates during harvest season will be suitable to be kept in place".

The letter concludes by requesting that the dates to issue Certificates of Control to import milled rice and paddy rice be rearranged to begin on 1 April 2006 and close on 1 August 2006. It also recommends that Certificates of Control be issued one at a time, each limited to 10,000 tonnes for milled rice and 15,000 tonnes for paddy rice. New Certificates of Control for the importation of rice would only be authorized after the quota of each previous certificate was fully used.[237]

4. Nature of letters of acceptance

2.118 The nature of the letters of acceptance has been disputed by the parties. The United States has argued that these letters provide a binding instruction which is relied upon by MARA authorities to deny the issuance of Control Certificates for the importation of rice.[238]

2.119 In turn, Turkey has stated that these documents are:

> "[M]ere instruments of internal communication among Turkish administrators and public officials [that] often contain confidential positions and/or political statements which are aimed at developing unofficial policy recommendations."[239]

2.120 On the occasion of the second substantive meeting, the Panel referred to these statements. It then asked Turkey whether the Minister of Agriculture and Rural Affairs could refuse the

[234] Exhibit US-13.
[235] Exhibit US-14.
[236] See the latter in exhibit US-37.
[237] Exhibit US-36.
[238] United States' rebuttal, para. 29.
[239] Turkey's first submission, para. 78. See also Turkey's rebuttal, para. 23 and Turkey's response to question 23.

recommendation made by a Director General of MARA through a letter of acceptance. The Panel asked Turkey to provide documentary evidence in support of its response.[240] The Panel also asked Turkey to provide evidence of letters of acceptance containing policy recommendations that the Minister of Agriculture and Rural Affairs had not approved.[241] In response to these questions, Turkey replied that "the Minister may refuse the recommendation made by a Director General of MARA".[242] It did not provide any specific documentary evidence to support this response.[243] Turkey also stated that, "given the privileged nature of the communications internal to the Administration and the confidential nature of the information contained therein", "Turkey [was not] in the position to circulate" any such documents.[244]

2.121 Also on the occasion of the second substantive meeting, and in response to a different question from the Panel, Turkey stated that "[n]o Letters of Acceptance relevant to this proceeding were ever circulated within the Administration prior to the ones identified by the United States in its submission".[245]

H. LETTER FROM THE MINISTER OF STATE OF TURKEY

2.122 On 24 March 2006, after this Panel was established, the Minister of State of Turkey sent a letter to the United States Trade Representative, expressing the belief that a mutually agreed solution could be found to the dispute concerning the measures related to the importation of rice into Turkey. In his letter, the Minister of State informed that "Control Certificate will be issued as of April 1, 2006".[246]

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 In this dispute, the United States has challenged the restrictions allegedly maintained by Turkey on the importation of rice. More specifically, the United States has identified the following measures:

(a) The alleged denial or failure to grant licences to import rice at or below the bound rate of duty;

(b) The alleged requirement that importers must purchase specified quantities of domestic rice, in order to be allowed to import specified quantities of rice at reduced-tariff levels;

(c) Turkey's administration of tariff-rate quotas for reduced tariff duty imports of rice; and,

(d) Turkey's administration of its import regime for rice, more generally.

3.2 More specifically, in its submissions the United States has articulated the following claims with regard to the provisions of WTO covered agreements:

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[240] Panel's question 141(e) to Turkey.
[241] Panel's question 142 to Turkey.
[242] Turkey's response to question 141(e).
[243] Ibid.
[244] Turkey's response to question 142.
[245] Turkey's response to question 143.
[246] Exhibit US-35. See also United States' first submission, para. 32, and Turkey's response to question 138.

(a) That Turkey's alleged denial or failure to grant licences to import rice at or below the bound rate of duty is inconsistent with:

(i) **Article XI:1 of the GATT 1994**, because it is a prohibition or restriction on imports, other than in the form of a duty, tax or other charges;

(ii) **Article 4.2 of the Agreement on Agriculture**, because it is a measure of the kind that have been required to be converted into ordinary customs duties and which Members may not maintain or resort to;

(iii) **Articles 1.4(a) and 1.4(b) of the Import Licensing Agreement and Articles X:1 and X:2 of the GATT 1994**, because Turkey has not published such measure and, thus, has neither provided an opportunity for governments and traders to become acquainted with it, nor has it provided Members with the opportunity to provide written comments and to discuss those comments upon request; and

(iv) **Articles 3.5(e) and 3.5(f) of the Import Licensing Agreement**, because Turkey does not specify a timeframe within which import licence applications that are submitted will be approved or rejected and does not provide applicants with the reasons for rejection.

(b) That Turkey's alleged requirement that importers must purchase domestic rice is inconsistent with:

(i) **Article III:4 of the GATT 1994**, because Turkey accords imported rice less favourable treatment than that accorded to domestic rice, with respect to a measure that affects its internal sale, offering for sale, purchase, transportation, distribution or use;

(ii) **Article XI:1 of the GATT 1994**, because it is a restriction on imports other than in the form of duties, taxes, or other charges;

(iii) **Article 2.1 and paragraph 1(a) of Annex 1 (*sic*) of the TRIMs Agreement**; and

(iv) **Article 4.2 of the Agreement on Agriculture**, because it is a measure of the kind that have been required to be converted into ordinary customs duties and which Members may not maintain or resort to.

(c) That Turkey's administration of tariff-rate quotas (TRQs) for reduced tariff duty imports of rice is inconsistent with **Article 3.5(h) of the Import Licensing Agreement**, because Turkey administers its TRQs in such a way as to discourage the full utilization of quotas.

(d) That Turkey's alleged requirement that importers must purchase domestic rice, *in conjunction with* its alleged denial or failure to grant licences to import rice at or below the bound rate of duty, is inconsistent with:

(i) **Article XI:1 of the GATT 1994**, because it is a restriction on imports other than in the form of duties, taxes, or other charges;

(ii) **Article 4.2 of the Agreement on Agriculture**, because it is a measure of the kind that have been required to be converted into ordinary customs duties and which Members may not maintain or resort to; and

(iii) **Article 1.6 of the Import Licensing Agreement**, because applicants have to approach more than one administrative body in connection with their applications.[247]

(e) That Turkey's administration of its import regime for rice is inconsistent with:

(i) **Article 3.5(a) of the Import Licensing Agreement**, because Turkey has failed to provide, upon the request of the United States, all relevant information concerning the administration of its import licensing regime and the import licences which have been granted over a recent period; and

(ii) **Articles 5.1, 5.2(a), (b), (c), (d), (e), (g) and (h), 5.3 and 5.4 of the Import Licensing Agreement**, because Turkey has failed to notify its import licensing regime for rice.

3.3 Turkey has disputed the facts presented by the United States. More specifically, Turkey has argued that:

(a) Throughout the period covered by this dispute, over-quota imports have taken place and Certificates of Control have been issued;[248]

(b) Certificates of Control are not import licences;[249]

(c) The tariff-rate quotas (TRQs) regime for reduced-tariff duty imports of rice is no longer in force and the Panel should therefore refrain from making findings on those measures or, if it decided to make these findings, it should abstain from making any recommendation to the Dispute Settlement Body;[250]

(d) While it was in force, the TRQs regime for reduced-tariff duty imports of rice "was administered on the basis of automatic import licensing procedures and certain legal requirements which were applied in a non-discriminatory, predictable and transparent fashion"; and[251]

(e) The United States has not made a prima facie case to support its own claims and that Turkey's relevant laws, regulations and procedures, both in relation to MFN and to TRQ rice imports, are not inconsistent with Articles III:4, X:1, X:2, and XI:1 of the GATT 1994; Article 4.2 of the Agreement on Agriculture; Articles 1.4(a) and (b), 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 Agreement on Import Licensing Procedures; nor with Article 2.1 and paragraph 1(a) of Annex 1 of the Agreement on Trade-Related Investment Measures.[252]

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[247] Comments of the United States concerning the draft descriptive part of the Panel's Report, 20 March 2007, page 4.

[248] See, *inter alia*, Turkey's first submission, para. 26, Turkey's opening statement at the second substantive meeting, para. 8, and Turkey's closing statement at the second substantive meeting, paras. 1 and 4.

[249] See, *inter alia*, Turkey's first submission, paras. 27, 47 to 57, 71 and 87.

[250] See, *inter alia*, Ibid., paras. 2, 6, and 136 to 139.

[251] See, *inter alia*, Ibid., para. 2.

[252] See, *inter alia*, Ibid., para. 140.

IV. ARGUMENTS OF THE PARTIES AND THIRD PARTIES

4.1 The arguments of the parties and third parties are set out in their written submissions and oral statements to the Panel. Executive summaries of those submissions and statements are appended to this report.

V. INTERIM REVIEW

A. REQUESTS FOR REVIEW OF PRECISE ASPECTS OF THE INTERIM REPORT

5.1 The Panel submitted its interim report to the parties on 3 May 2007. On 18 May, the Panel received written requests for review of precise aspects of the interim report from both parties. On 1 June, the parties submitted written comments on each other's written requests for review.

5.2 Pursuant to Article 15.3 of the DSU, this section of the Panel Report contains the Panel's response to the requests and comments made by the parties in relation to the interim report. The Panel has modified aspects of its report in light of the parties' requests and comments where it considered it appropriate. The Panel has also made certain revisions and editorial corrections for the purposes of clarity and accuracy, as explained below. References to paragraph numbers and footnotes in this Section refer to those in the interim report, except as otherwise noted.

B. REQUEST FOR JUDICIAL ECONOMY

5.3 In paragraphs 7.109 to 7.118, the Panel had found that Turkey's denial or failure to grant Certificates of Control to import rice outside of the tariff rate quota, from September 2003 and for different periods of time, could be characterized as a quantitative import restriction and, therefore, as a measure of the kind which have been required to be converted into ordinary customs duties under Article 4.2 of the Agreement on Agriculture. Later, in paragraphs 7.119 to 7.131, the Panel found that the same measure could also be characterized as a practice of discretionary import licensing and, likewise, as a measure of the kind which have been required to be converted into ordinary customs duties under Article 4.2 of the Agreement on Agriculture.

5.4 Turkey requested that the Panel remove paragraphs 7.120 to 7.131 from the report. In Turkey's view, once the Panel found that the challenged measure could be characterized as a quantitative import restriction, it should then exercise judicial economy regarding its consideration of the same measure as a practice of discretionary import licensing.

5.5 In its comments on Turkey's requests for review, the United States asked the Panel not to exercise judicial economy in the manner requested by Turkey. In the United States' view, this would be a "false" exercise of judicial economy, as the "Panel's analysis with regard to the U.S. argument on discretionary import licensing is helpful to resolving the dispute". The United States added that nothing in the DSU requires a panel to exercise judicial economy. The United States recalled Articles 3.4 and 3.7 of the DSU to the effect that:

> "[A] panel's recommendations and rulings 'shall be aimed at achieving a satisfactory settlement of the matter' [and that] 'the aim of the dispute settlement mechanism is to secure a positive resolution to a dispute'."

5.6 The United States finally argued that:

> "[I]n *Chile – Price Bands*, a dispute with a closely analogous situation involving the same provision at issue (Article 4.2), the panel made findings that the measure at issue constituted both a variable import levy and a system of minimum import prices

within the meaning of footnote 1 of Article 4.2 of the *Agreement on Agriculture*. The Appellate Body agreed with this approach and upheld the panel's findings."

5.7 The Panel has reviewed the relevant paragraphs in the light of Turkey's request. As noted by the Appellate Body, a panel has the discretion to exercise judicial economy and, therefore:

> "[T]he discretion to determine the claims it must address in order to resolve the dispute between the parties -- provided that those claims are within that panel's terms of reference."[253]

5.8 In our view, the consideration of Turkey's denial or failure to grant Certificates of Control to import rice outside of the tariff rate quota as a quantitative import restriction would be enough to conclude that it is a measure of the kind which have been required to be converted into ordinary customs duties and, therefore, a measure inconsistent with Article 4.2 of the Agreement on Agriculture. In any event, if this measure was not to be considered as a quantitative import restriction, we believe that it can nevertheless be characterized as a practice of discretionary import licensing. The Panel has therefore decided not to exercise judicial economy in the manner requested by Turkey.[254]

C. BURDEN OF PROOF

5.9 The United States requested a change in the language of paragraph 7.57. In its original text, the paragraph stated that:

> "In order to assess whether the United States has met its initial burden, the Panel will accordingly consider if the evidence on the record, as submitted by both parties, is sufficient to raise a preliminary presumption that Turkey has engaged in the denial, or failure to grant, licences to import rice outside of the tariff rate quota. Only if the evidence on the record supported such a presumption, would the burden then be shifted unto Turkey to adequately rebut it. If the United States were successful in raising that preliminary presumption, and Turkey failed to rebut it, the Panel would then consider whether the facts so demonstrated can be qualified as constituting a border measure of the kind which has been required to be converted into ordinary customs duties by the Agreement on Agriculture."

5.10 The United States proposed the following text for the paragraph 7.57:

> "In order to assess whether the United States has met its initial burden, the Panel will accordingly consider if the United States has provided evidence and argumentation on the record, sufficient to establish that Turkey has engaged in the denial, or failure to grant, licences to import rice outside of the tariff rate quota. Only if the United States has provided evidence and argumentation on the record sufficient to make out a *prima facie* case, would the burden then be shifted onto Turkey to adequately rebut the U.S. allegations. If the United States were successful in establishing its *prima facie* case, and Turkey failed to rebut it, the Panel would then consider whether the United States has established that the facts so demonstrated can be qualified as

[253] Appellate Body Report on *India – Patents (US)*, para. 87.

[254] We additionally note that, in *Chile – Price Band System*, the Panel and the Appellate Body considered the same measure to be similar to both a variable import levy and a minimum import price and did not exercise judicial economy in this regard. Panel Report on *Chile – Price Band System*, paras. 7.26-7.47. Appellate Body Report on *Chile – Price Band System*, paras. 192-262.

> constituting a border measure of the kind which has been required to be converted into ordinary customs duties by the Agreement on Agriculture."

5.11 In the United States' opinion, the proposed change in language would:

> "[A]void any possible mis-interpretation of the current text as partially relieving the complainant of its burden of making out a *prima facie* case by placing some of that burden on the respondent. The burden of making out a *prima facie* case by making argumentation and providing evidence on the record lies solely with the complaining party – in this case, the United States. Once the complainant has made out a *prima facie* case, a burden which the United States has met, it falls to the responding party to rebut that *prima facie* case with evidence and arguments of its own."

5.12 In our view, the duty that a panel has, under Article 11 of the DSU, to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case", implies that the panel is bound to consider all the evidence on record, which includes the evidence submitted by the parties and that procured by the panel itself under its broad authority "to seek information and technical advice from any individual or body which it deems appropriate" in the terms of Article 13.1 of the DSU. As noted by the Appellate Body in *US – Wheat Gluten*, "under Article 11 of the DSU, a panel must draw inferences on the basis of *all of the facts of record* relevant to the particular determination to be made."[255] A panel's duty to consider all available evidence on record does not relieve the complaining party of its burden to make a prima facie case that a challenged measure is inconsistent with the WTO agreements by putting forward adequate legal arguments and evidence. Indeed, in the lack of adequate legal arguments and evidence to sustain its claim, the panel would have to conclude that the complaining party has failed to make a prima facie case. The aforementioned rule regarding the allocation of the burden of proof was articulated in paragraph 7.56 of the interim report:

> "[W]e are of the view that, in this case, the initial burden of proof rests upon the United States, as a complainant, to establish its prima facie case that the challenged conduct, first, has existed, and then, that it is inconsistent with the invoked provision of the WTO covered agreements, i.e., Article 4.2 of the Agreement on Agriculture. If the United States meets this test, the burden would then be on Turkey to rebut the said claim."

5.13 Accordingly, the Panel has revised the language of paragraph 7.57, so as to avoid any possible misinterpretation regarding the proper allocation of the burden of proof.

D. PARTIES' DUTY TO COLLABORATE

5.14 The United States requested that the Panel remove the references made to the Panel Report on *Argentina – Textiles and Apparel* in paragraphs 7.6 and 7.94, regarding the existence of a "rule of collaboration" by which "the adversary is obligated to provide the tribunal with relevant documents which are in its sole possession". In the United States' opinion:

> "[T]hese references to a 'rule of collaboration' [should] be deleted, as they are not necessary to resolve the matter, and could be read as going beyond the requirements of the DSU, which does not provide for such a rule."

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[255] Appellate Body Report on *US – Wheat Gluten*, para. 174. See also Appellate Body Report on *Canada – Aircraft*, paras. 204-205.

5.15 As noted above, panels are under a duty, pursuant to Article 11 of the DSU, to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case". In order to exercise such duty, panels have been given authority "to seek information and technical advice from any individual or body which [they deem] appropriate" by Article 13.1 of the DSU. Article 13.1 also refers explicitly to the Members' obligation to collaborate with panels in the exercise of their duty:

> "A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate."

5.16 The parties' rule of collaboration, therefore, does not go beyond the requirements of the DSU but rather flows explicitly from its text. In *Canada – Aircraft*, the Appellate Body referred to "the duty of a Member to comply with the request of a panel to provide information", noting that under Article 13.1 of the DSU "Members are [...] under a duty and an obligation to 'respond promptly and fully' to requests made by panels for information".[256]

5.17 Despite these considerations, the Panel has revised the language of the first part of section VII.A (on Burden of Proof) in order to avoid any misinterpretation of the applicable rules. In particular, the Panel has inserted an introductory paragraph to that section and made a small adjustment to the language of paragraphs 7.1 and 7.8 of the interim report. It also included two new paragraphs at the end of that section. The Panel has made small adjustments into paragraphs 7.94 and 7.95, mainly to avoid repeating the reference to the Panel Report on *Argentina – Textiles and Apparel*.

E. APPROPRIATE INFERENCES

5.18 The United States requested the Panel to modify the language in the second sentence of paragraph 7.103, replacing the expression "necessary adverse inferences" with "appropriate inferences". In the United States' opinion:

> "[W]hile paragraphs 7 and 8 of Annex V of the Agreement on Subsidies and Countervailing Measures specifically provide for 'adverse' inferences, no other covered agreement contains such language. Nevertheless, the 'appropriate' inference to be drawn from Turkey's failure to provide evidence in support of its arguments, either on its own or in response to repeated requests by the Panel, is that 'Turkey has failed to rebut the presumption that, from September 2003 and for different periods of time, it has adopted a decision to deny, or fail to grant, Certificates of Control to import rice outside of the tariff rate quota.'"

5.19 The United States has also requested that the Panel remove the last part of paragraph 7.103, including the reference to the Appellate Body Report on *Canada – Aircraft*.

5.20 In the light of such request, the Panel has revised the language of the paragraph 7.103.

F. PANEL'S RECOMMENDATIONS

5.21 The United States requested the Panel to issue a specific recommendation to the DSB regarding the domestic purchase requirement. In the United States' opinion, the Panel could recommend:

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[256] Appellate Body Report on *Canada – Aircraft*, para. 187.

> "[T]hat Turkey 'bring its domestic purchase requirement into conformity with its obligations under Article III:4 of the GATT 1994, if and to the extent that, that measure has not already ceased to exist.'"

5.22 The United States argued that such a recommendation would be required by Article 19.1 of the DSU, which states that:

> "Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned [footnote omitted] bring the measure into conformity with that agreement."

5.23 As the United States pointed out, such a qualified recommendation would also be similar to the recommendation made by the Panel in *EC – Approval and Marketing of Biotech Products*.

5.24 The United States added that "the question of the future behavior of a responding Member whose measure is found to be inconsistent is not a matter for an original panel to consider, but is an issue that could arise, if at all, in the compliance phase based on the actions of a responding party in response to the DSB's recommendations and rulings" and that it is not "necessary or appropriate for panels to reach definitive judgments on alleged changes to measures which take place after panel establishment". In its view, "[a] qualified recommendation in this dispute with respect to the domestic purchase requirement would... safeguard and preserve the rights and interests of all parties".

5.25 In its comments on the United States' requests for review, Turkey noted that it agrees "with the Panel's decision of not issuing any recommendation on Turkey's expired domestic purchase requirement." In Turkey's view:

> "[T]he Panel's decision is supported by the law and is in line with the practice and interpretation of previous panels and of the Appellate Body when dealing with measures that expired in the course of the proceedings."

5.26 Turkey argued that the Panel's decision is consistent with the language of Article 19.1 of the DSU which provides that:

> "Where a panel or the Appellate Body concludes that a measure *is* inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement." [Emphasis added, footnotes omitted.]

In Turkey's view, the wording and the use of the present tense in the provision indicate that recommendations are due when a measure *is* inconsistent with a covered agreement and not when it *was* inconsistent in the past.

5.27 Turkey added that the decisions of previous panels and the Appellate Body support its view that:

> "[T]here is no requirement for this Panel to issue recommendations to bring into conformity measures which have expired in the course of the proceedings. [I]t would be more correct to state that recommendations *are not* required in those cases."

5.28 Turkey finally noted that the parties have not contended that the measure has changed, but rather that it has expired:

> "In this context, Turkey does not believe that a qualified recommendation would be appropriate for this case."

5.29 With regard to this request for review, the Panel starts by noting that the domestic purchase requirement was part of the tariff quota regime for the importation of rice which was in force in Turkey at the time when this Panel was established. As noted in section II of this report (on Factual Aspects), such tariff quota regime was in force until 31 July 2006.[257] In the course of the proceedings, Turkey requested the Panel to refrain from making findings on the domestic purchase requirement, since the tariff quota regime was no longer in force, or, if the Panel decided to make those findings, not to make any recommendation to the DSB. In its report, the Panel has noted that the domestic purchase requirement was properly brought before the Panel and was within its terms of reference, but terminated after the Panel was established.[258] The Panel has also noted that tariff quotas for the importation of rice had expired and then been reopened by Turkey over the last few years. Furthermore, the legislative framework which has allowed for the establishment of the earlier TRQs remains in force.[259] The Panel has finally noted Turkey's statement that it has no intention to reinstate tariff quotas for the importation of rice.[260] In the light of such considerations, and in the absence of an agreement by the parties to terminate the proceedings with regard to the domestic purchase requirement, the Panel decided that it would be inappropriate to abstain from making findings with respect to such measure. Indeed, the Panel has found that the domestic purchase requirement was inconsistent with Article III:4 of the GATT 1994. It has considered, however, that there is no need to recommend to the DSB that it make any request to Turkey with respect to the domestic purchase requirement, in view of the fact that it has expired and that Turkey has declared its intention not to reintroduce the measure at issue.

5.30 In our view, the Panel's decision can already be considered as a "qualified decision", to the extent that the Panel decided not to make a recommendation regarding Turkey's domestic purchase requirement, only after taking into account that the submitted evidence pointed to the expiry of the measure, and Turkey's declared intention not to reintroduce it.

5.31 We do not see any reason to modify our earlier decision to abstain from making specific recommendations to the DSB regarding Turkey's domestic purchase requirement. In our view, such decision does not jeopardise the rights and interests of the United States, inasmuch as it is already qualified by the analysis which precedes it.

G. ADDITIONAL REVISIONS AND CORRECTIONS

5.32 The Panel made additional revisions and corrections to paragraphs 1.10, 2.102, 7.47, 7.127 of the interim report. New paragraphs on the consideration of relevant provisions on differential and more-favourable treatment for Turkey, as a developing country Member, were inserted at the end of Section VII. Minor editorial corrections were also made in paragraphs 2.19, 2.20, 2.26, 2.28, 2.44, 2.56, 2.60, 2.61, 2.62, 2.75, 2.80, 2.84, 2.95, 2.101, 2.106, 2.110, 2.115, 2.117, 2.119, 3.2(d), 7.47, 7.116, 7.127, 7.232, 7.270, and footnotes 91, 216 and 373.

VI. PRELIMINARY RULING BY THE PANEL ON THIRD PARTY RIGHTS

6.1 Argentina, Australia, China, Egypt, the European Communities, Korea and Thailand reserved their rights to participate in the Panel proceedings as third parties, either by announcing their interest in the course of the DSB meeting on 17 March 2006 when the Panel was established or within the ten

[257] See para. 2.77 above.
[258] See paras. 7.165 and 7.166 below.
[259] See para. 7.170 below.
[260] See para. 7.171 below.

subsequent days. On 15 August 2006, more than ten days after the establishment of the Panel, and after the Panel had been composed, Pakistan notified its interest in participating as a third party.[261]

6.2 The Panel raised this third party request by Pakistan with the parties at the organizational meeting, held on 16 August 2006. The complainant favoured Pakistan's request, while the respondent opposed it. Taking into account parties' views on this matter, on 30 August 2006 the Panel informed the parties and third parties in this case that:

> "[It had] decided to accept as third parties all Members that have so far expressed that interest, including Pakistan... [and f]urther details regarding the Panel's decision on the matter [would] be included in full in the Panel's Report."[262]

6.3 We start by noting that paragraphs 1 and 2 of Article 10 of the DSU provide that:

> "1. The interests of the parties to a dispute and those of other Members under a covered agreement at issue in the dispute shall be fully taken into account during the panel process.
>
> 2. Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a 'third party') shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report."

6.4 Article 10 of the DSU is silent on when Members need to notify to the DSB their interest in participating in any specific dispute as third parties. The Panel is aware, however, of the GATT Council Chairman's Statement of June 1994, which provided for a ten-day notification period:

> "Delegations in a position to do so, should indicate their intention to participate as a third party in a panel proceeding at the Council session which establishes the panel. Others who wish to indicate a third party interest should do so within the next ten days."[263]

6.5 As noted by the Panel in *EC – Export Subsidies on Sugar (Australia)*:

> "[T]he status of that Chairman's Statement [has] been discussed on several occasions at the DSB and the timing of third-party notifications [has been] the subject of proposals in the context of the *DSU* negotiations."[264]

6.6 In the same case, the Panel further noted that:

> "[T]he Appellate Body's decision in *EC – Hormones*... stated that 'the DSU leaves panels a margin of discretion to deal, always in accordance with due process, with

[261] Constitution of the Panel Established at the Request of the United States, *Turkey – Rice*, Note by the Secretariat, Revision, 1 September 2006, WT/DS334/5/Rev.1, footnote. 1 on page 2.

[262] Letter from the Panel to the parties, 30 August 2006, in Annex I.

[263] Third Party Participation in Panels, Statement by the Chairman of the Council, C/COM/3 of 27 June 1994, page 1. At the request of Turkey, the statement was read out at the organizational meeting in this case.

[264] Panel Report on *EC – Export Subsidies on Sugar (Australia)*, para. 2.2.

> specific situations that may arise in a particular case and that are not explicitly regulated.'[265]"[266]

6.7 The Panel in *EC – Export Subsidies on Sugar (Australia)* additionally noted, with regard to the requests to participate as third parties in that particular dispute, that:

> "(a) the selection and composition of the Panel did not appear to have been adversely affected; and
>
> (b) the Panel process had not been hampered."[267]

6.8 The relevant third party requests in *EC – Export Subsidies on Sugar (Australia)* were submitted "before the Director-General was asked by the parties to compose the Panel pursuant to Article 8.7 of the DSU."[268] In the present case, Pakistan's third party request was made after this Panel had been composed. Nevertheless, similarly to the relevant third party requests in *EC – Export Subsidies on Sugar (Australia)*, as a result of Pakistan's request, the Panel process has not been hampered. In addition, although the Panel had already been composed when Pakistan formulated its third party request, we see no reason to believe that accepting Pakistan's request would affect the "independence of the members" of this Panel, as stipulated by Article 8.2 of the DSU, nor does it seem to prejudice in any way the manner in which this Panel fulfil its functions specified in Article 11 of the DSU:

> "[T]o assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements..."

6.9 In the light of the above, as communicated on 30 August 2006 to the parties and third parties in these proceedings, we decided to accept as third parties all Members that had expressed a third-party interest and saw no reason to treat them differently. Similar to the Panel in *EC – Export Subsidies on Sugar (Australia)*[269], we emphasize that this decision is specific to this dispute and is not intended to offer a legal interpretation of the ten-day notification period referred to in the GATT Council Chairman's Statement of June 1994.

VII. FINDINGS

A. BURDEN OF PROOF

7.1 Under Article 11 of the DSU, panels have the duty to "make an objective assessment of the matter before [them], including an objective assessment of the facts of the case". In order to exercise such duty, panels have been granted the authority "to seek information and technical advice from any individual or body which [they deem] appropriate" by Article 13.1 of the DSU. Pursuant to Article 13.1 of the DSU, Members have committed to collaborate with panels in the exercise of their duties: "[a] Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate."

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[265] (*footnote original)* Appellate Body Report on *EC – Hormones*, footnote 138.
[266] Panel Report on *EC – Export Subsidies on Sugar (Australia)*, para. 2.3.
[267] Ibid.
[268] Ibid., para. 2.1.
[269] Ibid., para. 2.4.

7.2 As articulated by the Appellate Body, the general rule in dispute settlement procedures is that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.[270] Following this principle, the Appellate Body has explained that the complaining party in any given case should establish a prima facie case of inconsistency of a measure with a provision of the WTO covered agreements, before the burden of showing consistency with that provision or defending it under an exception is to be undertaken by the defending party.[271] According to the Appellate Body, a prima facie case is "one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the prima facie case."[272] To establish a prima facie case, the party asserting a particular claim must adduce evidence sufficient to raise a presumption that what is claimed is true.

7.3 Regarding the issue of the burden of proof, we recall the words of the Appellate Body:

> "[W]e find it difficult... to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof.[273] Also, it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.[274]"[275]

7.4 And, in the same case:

> "[A] party claiming a violation of a provision of the *WTO Agreement* by another Member must assert and prove its claim."[276]

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[270] Appellate Body Report on *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, p. 323 at p. 335. Panel Report on *US – Shrimp*, para. 7.14.

[271] Appellate Body Report on *EC – Hormones*, para. 104.

[272] Ibid.

[273] (*footnote original*) M. Kazazi, Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals (Kluwer Law International, 1996), p. 117.

[274] (*footnote original)* See M.N. Howard, P. Crane and D.A. Hochberg, *Phipson on Evidence*, 14th ed. (Sweet & Maxwell, 1990), p. 52: "The burden of proof rests upon the party, whether plaintiff or defendant, who substantially asserts the affirmative of the issue." See also L. Rutherford and S. Bone (eds.), *Osborne's Concise Law Dictionary*, 8th ed. (Sweet & Maxwell, 1993), p. 266; Earl Jowitt and C. Walsh, *Jowitt's Dictionary of English Law*, 2nd ed. by J. Burke (Sweet & Maxwell, 1977), Vol. 1, p. 263; L.B. Curzon, *A Directory of Law*, 2nd ed. (Macdonald and Evans, 1983), p. 47; Art. 9, Nouveau Code de Procédure Civile; J. Carbonnier, *Droit Civil,* Introduction, 20th ed. (Presses Universitaires de France, 1991), p. 320; J. Chevalier and L. Bach, *Droit Civil*, 12th ed. (Sirey, 1995), Vol. 1, p. 101; R. Guillien and J. Vincent, *Termes juridiques*, 10th ed. (Dalloz, 1995), p. 384; O. Samyn, P. Simonetta and C. Sogno, *Dictionnaire des Termes Juridiques* (Editions de Vecchi, 1986), p. 250; J. González Pérez, *Manual de Derecho Procesal Administrativo*, 2nd ed. (Editorial Civitas, 1992), p. 311; C.M. Bianca, S. Patti and G. Patti, *Lessico di Diritto Civile* (Giuffré Editore, 1991), p. 550; F. Galgano, *Diritto Privato*, 8th ed. (Casa Editrice Dott. Antonio Milani, 1994), p. 873; and A. Trabucchi, *Istituzioni di Diritto Civile* (Casa Editrice Dott. Antonio Milani, 1991), p. 210.

[275] Appellate Body Report on *US – Wool Shirts and Blouses*, p. 14.

[276] Ibid., p. 16.

7.5 In another case, the Appellate Body stated further:

> "[W]e have consistently held that, as a general matter, the burden of proof rests upon the complaining Member. That Member must make out a *prima facie* case by presenting sufficient evidence to raise a presumption in favour of its claim. If the complaining Member succeeds, the responding Member may then seek to rebut this presumption. Therefore, under the usual allocation of the burden of proof, a responding Member's measure will be treated as WTO-*consistent*, until sufficient evidence is presented to prove the contrary. We will not readily find that the usual rules on burden of proof do not apply, as they reflect a 'canon of evidence' accepted and applied in international proceedings."[277]

7.6 That said, as noted by the Appellate Body, these statements:

> "[D]o not imply that the complaining party is responsible for providing proof of all facts raised in relation to the issue of determining whether a measure is consistent with a given provision of a covered agreement. In other words, although the complaining party bears the burden of proving its case, the responding party must prove the case it seeks to make in response."[278]

7.7 Regarding the responding party's role in the proceedings, the Panel on *Argentina – Textiles and Apparel* stated that:

> "Another incidental rule to the burden of proof is the requirement for collaboration of the parties in the presentation of the facts and evidence to the panel and especially the role of the respondent in that process. It is often said that the idea of peaceful settlement of disputes before international tribunals is largely based on the premise of co-operation of the litigating parties. In this context the most important result of the rule of collaboration appears to be that the adversary is obligated to provide the tribunal with relevant documents which are in its sole possession. This obligation does not arise until the claimant has done its best to secure evidence and has actually produced some *prima facie* evidence in support of its case."[279]

7.8 With regard to evidence, the Appellate Body has stated that:

> "[P]recisely how much and precisely what kind of evidence will be required to establish such... [presumptions] will necessarily vary from measure to measure, provision to provision, and case to case."[280]

7.9 In the present case, the initial burden of proof rests upon the United States, as a complainant, to establish its prima facie case that the challenged measures at issue are inconsistent with certain provisions of the WTO covered agreements. Were the United States to establish such a case, the burden would then shift to Turkey to rebut that claim.

7.10 As noted above, Members are under the obligation to respond promptly and fully to requests made by panels for information. In *Canada – Aircraft*, the Appellate Body referred to "the duty of a Member to comply with the request of a panel to provide information", noting that under Article 13.1 of the DSU "Members are [...] under a duty and an obligation to 'respond promptly and

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[277] Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 66.
[278] Appellate Body Report on *Japan – Apples*, para. 154.
[279] Panel Report on *Argentina – Textiles and Apparel*, para. 6.40.
[280] Appellate Body Report on *US – Wool Shirts and Blouses*, p. 14.

fully' to requests made by panels for information".[281] In the absence of such collaboration, and pursuant to its duty to make an objective assessment of the facts of the case, a panel is entitled to draw appropriate inferences. In this context, the Appellate Body has stated that:

> "Where a party refuses to provide information requested by a panel under Article 13.1 of the DSU, that refusal will be one of the relevant facts of record, and indeed an important fact, to be taken into account in determining the appropriate inference to be drawn."[282]

7.11 Such inferences would then have to be considered by the panel, with all other available evidence on the record, to determine whether the complainant has succeeded in meeting its burden to make its prima facie case and whether the respondent has successfully rebutted such a case.

B. THE DENIAL OR FAILURE TO GRANT LICENCES TO IMPORT RICE AT OR BELOW THE BOUND RATE OF DUTY

1. The United States' claims

7.12 In its request for the establishment of a panel, the United States stated that "Turkey denies or fails to grant licenses to import rice at or below the bound rate of duty without domestic purchase, including at the over-quota rate of duty."[283] This measure was referred to by the United States as the "denial or failure to grant licenses to import rice at or below the bound rate of duty".

7.13 The United States has argued that, according to relevant Turkish legislation:

> "[T]he importation of certain agricultural products is subject to [the] approval [of the Turkish Ministry of Agriculture and Rural Affairs (MARA)]... MARA determines the 'fitness and compatibility' of certain products with respect to human health and safety and other concerns. Rice is listed in [the legislation], which means that rice importers must present a [so-called] Certificate of Control from MARA to Turkish Customs as a condition upon importation."[284]

7.14 The United States has stated that the Certificate of Control issued by MARA "is an import license within the definition in Article I of the Import Licensing Agreement."[285]

7.15 According to the United States, since September 2003, MARA has not been issuing Certificates of Control at the bound tariff rates, thereby effectively preventing out-of-quota imports.[286]

7.16 The United States has made the claim that Turkey's denial, or failure to grant, licences to import rice at or below the bound rate of duty, through MARA's denial of Certificates of Control to importers of rice, is inconsistent with Article XI:1 of the GATT 1994; with Article 4.2 of the

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[281] Appellate Body Report on *Canada – Aircraft*, para. 187.

[282] Appellate Body Report on *US – Wheat Gluten*, para. 174. See also Appellate Body Report on *Canada – Aircraft*, paras. 202-203 and 205.

[283] Request for the Establishment of a Panel by the United States, *Turkey – Rice*, 7 February 2006, WT/DS334/4, p. 1.

[284] United States' first submission, para. 19. See also United States' rebuttal, para. 1.

[285] United States' opening statement at the first substantive meeting, para. 10. See also United States' rebuttal, para. 7.

[286] United States' first submission, para. 22. See also United States' rebuttal, para. 1, United States' opening statement at the second substantive meeting, para. 6, United States' response to question 3 from Turkey, para. 69, and United States' comments on Turkey's response to questions 102 and 114, paras. 3 and 17.

Agreement on Agriculture; with Articles 1.4(a) and (b) and 3.5(e) and (f) of the Import Licensing Agreement; and with Articles X:1 and X:2 of the GATT 1994.[287]

2. Turkey's response

7.17 Turkey has confirmed that, in order to import rice, importers must obtain a Certificate of Control from MARA:

> "In order to facilitate the process of customs clearance, traders must submit at importation a document, known as Certificate of Control, which contains all the information required for customs purposes. This document must be approved by the Ministry of Agriculture and Rural Affairs."[288]

7.18 Turkey has argued, however, that the Certificates of Control are "administrative forms that are required exclusively for '*customs purposes*'"[289] and "[are] not, nor should... be interpreted as, an import license or an instrument of allocation of imports to origins or traders"[290] within the meaning of Article 1.1 of the Import Licensing Agreement,[291] nor under Article XI:1 of the GATT 1994.[292] Turkey has stated that there is neither a *de jure* nor a *de facto* "prohibition" or "restriction" in relation to the United States' allegation that Turkey denies or fails to grant licences to import rice at or below the bound rate of duty,[293] nor a practice that would constitute "discretionary import licensing" or a "quantitative import restriction" within the meaning of Article 4.2 of the Agreement on Agriculture.[294]

7.19 Turkey has also stated that:

> "Contrary to what is erroneously claimed by the United States, Certificates of Control have been systematically and regularly approved on a non-discriminatory basis since the entering into force of '*The Regime for Technical Regulations and Standardization for Foreign Trade'* in 1996... This has been the case both for rice imports occurring at the 'over-quota' MFN or applied rate level and... within the 'in-quota' volumes established each year since 2004."[295]

7.20 In Turkey's opinion:

> "Individual instances of administrative delay, rejection, or even domestic litigation in relation to the approval (or non approval) of a particular application for a specific

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[287] Request for the Establishment of a Panel by the United States, *Turkey – Rice*, 7 February 2006, WT/DS334/4, pp. 2-3.

[288] Turkey's first submission, para. 3. See also Ibid., para. 57.

[289] Turkey's rebuttal, para. 3. See also Turkey's closing statement at the second substantive meeting, para. 12.

[290] Turkey's first submission, para. 18. See also Ibid., para. 3; Turkey's statement at the first substantive meeting, paras. 4 and 47; and Turkey's opening statement at the second substantive meeting, para. 4.

[291] Turkey's first submission, paras. 47-57 and 87. See also Turkey's statement at the first substantive meeting, para. 11, and Turkey's response to question 59.

[292] Turkey's first submission, para. 58.

[293] Ibid., paras. 63, 66 and 69. See also Turkey's statement at the first substantive meeting, paras. 12-14, and Turkey's rebuttal, para. 16.

[294] Turkey's first submission, para. 71. See also Turkey's statement at the first substantive meeting, para. 37.

[295] Turkey's first submission, para. 26. See also Turkey's response to questions 15 (b) and 45; Turkey's rebuttal, para. 19; and Turkey's opening statement at the second substantive meeting, para. 8.

> Certificate of Control, cannot be used to claim or imply that Turkey adopted and/or applied this instrument as an intentional barrier to trade."[296]

7.21 Turkey has also indicated that the lack of publication of "certain internal unofficial working documents and the information contained therein" would not amount to a violation of Article X of the GATT 1994.[297]

3. The challenged measure

(a) The so-called "blanket prohibition"

7.22 At various moments during the proceedings, the United States stated that Turkey has maintained a "blanket prohibition on the issuance of Control Certificates."[298] At times, the United States argued that the "blanket prohibition [covered] all imports of rice",[299] that it applied to the issuance "of Control Certificates outside the TRQ"[300], or that it applied "to those importers who do not purchase domestic paddy rice".[301] In terms of the argument that Turkey has maintained a "blanket" prohibition on the issuance of Certificates of Control for the importation of rice, the United States stated in its first submission that "Turkey fails to grant Certificates of Control 100 per cent of the time"[302] and that "Turkey never grants Certificates of Control".[303]

7.23 Turkey has argued in response that:

> "[T]here is no clarity [regarding the 'measure contested' by the United States]: is it the alleged 'blanket denial', is it the 'Letters of Acceptance', is it the Certificate of Control as such, or is it something else?"[304]

7.24 Turkey has added that:

> "The United States has merely claimed the existence of an alleged 'blanket denial', but Turkey believes to have satisfactorily proved that no 'blanket denial' was ever in place."[305]

7.25 It has also stated that:

> "Individual instances of denial of approval in relation to specific applications made by individual importers cannot be used to imply a 'blanket denial' ..."[306]

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[296] Turkey's statement at the first substantive meeting, para. 9. See also Turkey's first submission, para. 29, and Turkey's rebuttal, para. 21.
[297] Turkey's first submission, para. 77. See also Turkey's response to question 61.
[298] United States' response to question 56, para. 87. See also United States' first submission, para. 79, and United States' response to question 61, para. 98.
[299] United States' response to question 26(b), para. 57.
[300] United States' rebuttal, para. 22. See also United States' response to question 60, para. 94.
[301] United States' rebuttal, para. 3. See also United States' rebuttal, para. 22.
[302] United States' first submission, para. 72.
[303] Ibid. (emphasis in the original).
[304] Turkey's rebuttal, para. 33.
[305] Turkey's opening statement at the second substantive meeting, para. 9. See also Ibid., paras. 10, 11 and 14.
[306] Turkey's response to question 60.

(b) The measure at issue

7.26 We agree with Turkey that the Panel should begin by identifying the precise measure challenged by the United States, i.e., the measure that should be the object of the Panel's analysis. Indeed, the jurisdiction of a panel with regard to the issues in a particular dispute is limited to the terms of reference that have been approved by the DSB. In turn, those terms of reference are, in accordance with Article 7.1 of the DSU, defined by the "matter" that has been referred to the DSB.[307] As stated by the Appellate Body:

> "'[T]he matter referred to the DSB' for the purposes of Article 7 of the DSU... must be the 'matter' identified in the request for the establishment of a panel under Article 6.2 of the DSU. That provision requires the complaining Member, in a panel request, to 'identify the *specific measures at issue* and provide a brief summary of the *legal basis of the complaint* sufficient to present the problem clearly'... The '*matter* referred to the DSB', therefore, consists of two elements: the specific *measures* at issue and the *legal basis of the complaint* (or the *claims*)."[308]

7.27 In other words, the Panel needs to determine at the outset and with precision which are the measures that constitute its terms of reference. In determining what measures are before the Panel, we turn to the United States' request for establishment of a panel, which is found in document WT/DS334/4 of 7 February 2006.

7.28 As noted above, in its request for the establishment of a panel[309], the United States referred to the measure under consideration as the "denial or failure to grant licenses to import rice at or below the bound rate of duty".[310] In that regard, the United States asserted that "Turkey denies or fails to grant licenses to import rice at or below the bound rate of duty without domestic purchase, including at the over-quota rate of duty."[311]

7.29 Regarding what can constitute a measure for WTO dispute settlement proceedings, we recall the words of the Appellate Body:

> "In principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings."[312]

7.30 Looking at the description of the measure contained in the United States' request for the establishment of a panel, we conclude that the measure before us is Turkey's alleged denial, or failure to grant, licences to import rice outside of the tariff rate quota, and not a so-called "blanket prohibition".

(c) Conclusion

7.31 For the reasons stated above, and noting the terms of reference contained in the request for establishment of this panel, we conclude that the measure before us is Turkey's alleged denial, or failure to grant, from September 2003 and for periods of time, licences to import rice outside of the tariff rate quota.

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[307] Appellate Body Report on *US – Carbon Steel*, para. 125.
[308] Appellate Body Report on *Guatemala – Cement I*, para. 72 (emphasis in the original).
[309] See para. 7.12 above.
[310] Request for the Establishment of a Panel by the United States, *Turkey – Rice*, 7 February 2006, WT/DS334/4, p. 1.
[311] Ibid.
[312] Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

4. Order of analysis

7.32 Regarding the proper order of analysis to be undertaken by the Panel in considering the different claims advanced by the United States in regard to the alleged denial of, or failure to grant, import licences to import rice outside of the tariff rate quota, the Panel will consider whether it should start its analysis under Article XI:1 of the GATT 1994; Article 4.2 of the Agreement on Agriculture; Articles 1.4(a), 1.4(b), 3.5(e) and 3.5(f) of the Import Licensing Agreement; or Articles X:1 and X:2 of the GATT 1994.

7.33 Article XI:1 of the GATT 1994 provides:

> "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 or on the exportation or sale for export of any product destined for the territory of any other contracting party."

7.34 In turn, Article 4.2 of the Agreement on Agriculture states that:

> "Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties[1], except as otherwise provided for in Article 5 and Annex 5.

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[1] These measures include quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties, whether or not the measures are maintained under country-specific derogations from the provisions of GATT 1947, but not measures maintained under balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement."

7.35 Articles 1.4(a) and (b) of the Import Licensing Agreement stipulate that:

> "(a) The rules and all information concerning procedures for the submission of applications, including the eligibility of persons, firms and institutions to make such applications, the administrative body(ies) to be approached, and the lists of products subject to the licensing requirement shall be published, in the sources notified to the Committee on Import Licensing provided for in Article 4 (referred to in this Agreement as "the Committee"), in such a manner as to enable governments[313] and traders to become acquainted with them. Such publication shall take place, whenever practicable, 21 days prior to the effective date of the requirement but in all events not later than such effective date. Any exception, derogations or changes in or from the rules concerning licensing procedures or the list of products subject to import licensing shall also be published in the same manner and within the same time periods as specified above. Copies of these publications shall also be made available to the Secretariat.

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[313] (*footnote original*) For the purpose of this Agreement, the term "governments" is deemed to include the competent authorities of the European Communities.

(b) Members which wish to make comments in writing shall be provided the opportunity to discuss these comments upon request. The concerned Member shall give due consideration to these comments and results of discussion."

7.36 In turn, Articles 3.5(e) and 3.5(f) of the Import Licensing Agreement provide that:

"(e) any person, firm or institution which fulfils the legal and administrative requirements of the importing Member shall be equally eligible to apply and to be considered for a licence. If the licence application is not approved, the applicant shall, on request, be given the reason therefor and shall have a right of appeal or review in accordance with the domestic legislation or procedures of the importing Member;

(f) the period for processing applications shall, except when not possible for reasons outside the control of the Member, not be longer than 30 days if applications are considered as and when received, i.e. on a first-come first-served basis, and no longer than 60 days if all applications are considered simultaneously. In the latter case, the period for processing applications shall be considered to begin on the day following the closing date of the announced application period".

7.37 Finally, Articles X:1 and X:2 of the GATT 1994 set out that:

"1. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published. The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

2. No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor, shall be enforced before such measure has been officially published."

7.38 In contrast to Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture, the provisions of the Import Licensing Agreement invoked by the United States and Articles X:1 and X:2 of the GATT 1994 deal with the administration or application of trade measures rather than with the substantive content of such measures *per se*. In this regard, the Appellate Body found in *EC – Poultry* that "Article X relates to the *publication* and *administration* of 'laws, regulations, judicial decisions and administrative rulings of general application', rather than to the

substantive content of such measures."[314] Likewise, in *EC – Bananas III* the Appellate Body found that:

> "As a matter of fact, none of the provisions of the *Licensing Agreement* concerns import licensing *rules*, *per se*. As is made clear by the title of the *Licensing Agreement*, it concerns import licensing *procedures*. The preamble of the *Licensing Agreement* indicates clearly that this agreement relates to import licensing procedures and their administration, not to import licensing rules. Article 1.1 of the *Licensing Agreement* defines its scope as the *administrative procedures* used for the operation of import licensing regimes."[315]

7.39 The Panel notes, in this context, that the European Communities stated that:

> "It is arguable that the *Agreement on Import Licensing* relates more specifically to the matter before this Panel than the *GATT* and the *Agreement on Agriculture*. Therefore in accordance with the Appellate Body report in *EC – Bananas*[316] the EC invites the Panel to consider whether the alleged violations of the *Agreement on Import Licensing* should be considered first before the alleged violations of Article 4.2. of the *Agreement on Agriculture* and the *GATT*."[317]

7.40 The Panel notes, however, that the United States has consistently structured its claims concerning Turkey's alleged denial, or failure to grant, licences to import rice outside of the tariff rate quota by invoking first the provisions that deal with the substantive content of that measure.

7.41 If the Panel finds that the measure at issue is in breach of substantive obligations under either Article XI:1 of the GATT 1994 or Article 4.2 of the Agreement on Agriculture, then the question of how the measure has been administered by Turkey becomes irrelevant. On the contrary, if the Panel finds that the measure in question is not in breach of substantive obligations under either Article XI:1 of the GATT 1994 or Article 4.2 of the Agreement on Agriculture, it would need to additionally consider whether Turkey, by its alleged denial, or failure to grant, licences to import rice outside of the tariff rate quota, has breached the provisions of the Import Licensing Agreement invoked by the United States in this context, or Articles X:1 and X:2 of the GATT 1994.

7.42 Accordingly, the Panel will begin its analysis with the substantive content of that measure in regard to Article XI:1 of the GATT 1994 or Article 4.2 of the Agreement on Agriculture.

7.43 In order to carry out its analysis of the substantive content of the measure in question, the Panel turns to the issue of whether it should start its analysis with Article XI:1 of the GATT 1994 or Article 4.2 of the Agreement on Agriculture.

7.44 The Panel notes that, in this respect, the United States has argued that:

> "Other panels have found, in similar circumstances, that where a measure with respect to agricultural products[318] is inconsistent with Article XI:1 of the GATT 1994,

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[314] Appellate Body Report on *EC – Poultry*, para. 115. See also Appellate Body Report on *EC – Bananas III*, para. 200.

[315] Appellate Body Report on *EC – Bananas III*, para. 197. See also Panel Report on *Korea – Various Measures on Beef*, paras. 784-785.

[316] (*footnote original*) Appellate Body Report, *EC – Bananas*, paras. 202-204.

[317] European Communities' third party submission, para. 18.

[318] (*footnote original*) As noted above, under the Harmonized System, rice is classified under tariff item 1006. Annex 1, paragraph 1, of the Agriculture Agreement states that "[t]his Agreement shall cover the following products": "(i) HS Chapters 1 to 24 less fish and fish products."

> it is necessarily inconsistent with Article 4.2 of the Agriculture Agreement, which provides in footnote 1 that, *inter alia*, 'quantitative import restrictions' and 'discretionary import licensing' are measures that Members may not maintain, resort to, or revert to.[319]"[320]

7.45 Similarly, Egypt has noted that:

> "[P]anels have found that restrictions on agricultural products that were found to be inconsistent with Article XI:1 of the GATT 1994 constituted violations of Article 4.2 [of the Agreement on Agriculture]."[321]

7.46 In contrast to those arguments by the United States and Egypt, while "agree[ing] with the US that there is a general systemic link between the two provisions"[322], the European Communities has stated that:

> "[A]part from the footnote in Article 4.2 of the *Agreement on Agriculture* in which reference is made to quantitative import restrictions, no automatic link has been made in the text of these provisions. The EC therefore considers that caution should be exercised in concluding that the violation of Article XI:1 of the *GATT* would necessarily and in all circumstances lead to the violation of Article 4.2. of the *Agreement on Agriculture*."[323]

7.47 Further, the European Communities has pointed out that:

> "It is arguable that the *Agreement on Agriculture* should be considered more specific in relation to the *GATT* in a situation where the import of a particular agricultural product is at stake. Consequently, in accordance with the Appellate Body report in *EC – Bananas*[324] it is arguable that the alleged violation of Article 4.2 of the *Agreement on Agriculture* should be considered first before the alleged violations of the *GATT*."[325]

7.48 Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture have similar scopes of application as they both apply to border measures. Article XI:1 of the GATT 1994, however, is generally applicable to import prohibitions or restrictions imposed on any product, while Article 4.2 of the Agreement on Agriculture is limited to measures imposed on products that fall within the scope of the Agreement of Agriculture. In other words, the Agreement on Agriculture deals more specifically than the GATT 1994 with the prohibition on maintaining quantitative restrictions or quotas, inasmuch as the Agreement on Agriculture refers to these measures only when applied to products falling within the scope of the Agreement of Agriculture, such as rice. In *EC – Bananas III*, the Appellate Body indicated that a panel should start by examining the claims presented under the agreement that "deals, specifically, and in detail" with the matter at issue.[326] Following this

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[319] (*footnote original*) *See India QRs*, paras. 5.238-5.242, and *Korea Beef*, para. 768 ("Since the panel has already reached the conclusion that the above measures are inconsistent with Article XI and the Ad Note to Articles XI, XII, XIII, XIV and XVIII relating to state-trading enterprises, the same measures are necessarily inconsistent with Article 4.2 of *the Agreement on Agriculture* and its footnote referring to non-tariff measures maintained through state-trading enterprises").

[320] United States' first written submission, para. 75.

[321] Egypt's third party submission, para. 22.

[322] European Communities' third party submission, para. 20.

[323] Ibid., para. 20.

[324] (*footnote original*) Appellate Body Report, *EC – Bananas*, paras 202-204.

[325] Third Party written submission by the European Communities, para. 21.

[326] Appellate Body Report on *EC – Bananas III*, para. 204. See para 7.38 above.

approach, the Panel will commence by examining the claims presented by the United States under Article 4.2 of the Agreement on Agriculture, since this Agreement may be considered more specific to the border measures imposed on agricultural products. The Panel will turn to Article XI:1 of the GATT 1994 only as a second step.

7.49 As regards the claims of the United States concerning the administration of the measure in question, the Panel has already noted that it will only consider whether Turkey, by its alleged denial, or failure to grant, licences to import rice outside of the tariff rate quota, has breached the provisions of the Import Licensing Agreement invoked by the United States in this context, or Articles X:1 and X:2 of the GATT 1994, if the Panel were to find that the measure at issue is not in breach of substantive obligations under either Article 4.2 of the Agreement on Agriculture or Article XI:1 of the GATT 1994.[327]

7.50 In order to analyze, if required, the claims made by the United States concerning the administration of the measure at issue, the Panel must determine whether to begin such analysis with Articles X:1 and X:2 of the GATT 1994 or with the provisions of the Import Licensing Agreement invoked by the United States in regard to the measure in question. In order to do so, if needed, the Panel would start by assessing whether the challenged measure falls within the coverage of the Import Licensing Agreement. If the Panel were to find that this is the case, based on the finding of the Appellate Body in *EC – Bananas III* referenced above[328], it would start with assessing the claims of the United States under the Import Licensing Agreement first, since that agreement deals specifically, and in detail, with the administration of import licensing procedures. In this respect, depending on any findings made under the Import Licensing Agreement, there may be no need for the Panel to make any additional findings under Articles X:1 and X:2 of the GATT 1994.

5. Claim under Article 4.2 of the Agreement on Agriculture

(a) Arguments of the parties

7.51 The United States has articulated the claim that Turkey's denial, or failure to grant, licences to import rice outside of the tariff rate quota, is a measure of the kind which have been required to be converted into ordinary customs duties, such as a "quantitative import restriction" or a "discretionary import licensing" practice, and is therefore inconsistent with Article 4.2 of the Agreement on Agriculture.[329]

7.52 In its rebuttal submission, the United States added that:

> "[F]or the United States to demonstrate successfully that Turkey is in breach of Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture, the United States is not required to show that no Control Certificates were granted at the MFN rate. The United States has demonstrated that Turkey is restricting at least some trade in rice, and that is sufficient to demonstrate a breach of Article XI:1... Even if Turkey's data had demonstrated that the Letters of Acceptance were not enforced at all, that would not change the conclusion that the Letters breach Article XI:1... [E]ven were the Panel to conclude that the Letters were not enforced at all, the Panel should still find, in line with findings of past panels with respect to non-enforced mandatory measures, that Turkey's restrictions on MFN trade in rice are inconsistent with Article XI:1 ... Lastly, Turkey's failure to issue Control Certificates

[327] See paras. 7.41 and 7.42 above.
[328] See Appellate Body Report, *EC – Bananas III*, para. 204. See para. 7.38 above.
[329] United States' first submission, paras. 76-78. See also United States' opening statement at the first substantive meeting, para. 26.

for the import of rice at the over-quota rates of duty breaches both Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture because it constitutes discretionary import licensing ... . [I]t is certainly clear that *Turkey* believes it has the discretion not to grant Control Certificates if it wants to, and the United States has provided documentary evidence highlighting instances where Turkey has denied or failed to grant such Certificates."[330]

7.53 Turkey stated that:

"[As] the Certificates of Control are not import licenses within the meaning of the Agreement on Import Licensing Procedures ... there is clearly no 'denial' of Certificates of Control, and ... there is no *de jure* or *de facto* import prohibition or restriction within the meaning of GATT Article XI:1 ... [, therefore] there cannot be '*discretionary import licensing*' and/or '*quantitative import restrictions*' within the meaning of Article 4.2 of the Agreement on Agriculture and footnote 1 thereof."[331]

(b) Article 4.2 of the Agreement on Agriculture

7.54 Article 4.2 of the Agreement on Agriculture states that:

"Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties[1], except as otherwise provided for in Article 5 and Annex 5.

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[1] These measures include quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties, whether or not the measures are maintained under country-specific derogations from the provisions of GATT 1947, but not measures maintained under balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement."

(c) The Panel's analysis

(i) Importance of Article 4.2 of the Agreement on Agriculture

7.55 The Appellate Body has highlighted the importance of Article 4 of the Agreement on Agriculture. The Appellate Body has called Article 4 "the main provision of Part III of the Agreement on Agriculture", and has defined it as "the legal vehicle for requiring the conversion into ordinary customs duties of certain market access barriers affecting imports of agricultural products".[332] In the words of the Appellate Body:

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[330] United States' rebuttal, paras. 58, 60, 62, 63 and 64. See also United States' opening statement at the second substantive meeting, paras. 12-14.

[331] Turkey's first submission, para. 71 (emphasis in the original). See also Turkey's statement at the first substantive meeting, para. 37, and Turkey's response to question 19.

[332] Appellate Body Report on *Chile – Price Band System*, para. 201.

> "[W]e turn now to Article 4, which is the main provision of Part III of the *Agreement on Agriculture*. As its title indicates, Article 4 deals with 'Market Access'.[333] During the course of the Uruguay Round, negotiators identified certain border measures which have in common that they restrict the volume or distort the price of imports of agricultural products. The negotiators decided that these border measures should be converted into ordinary customs duties, with a view to ensuring enhanced market access for such imports. Thus, they envisioned that ordinary customs duties would, in principle, become the only form of border protection. As ordinary customs duties are more transparent and more easily quantifiable than non-tariff barriers, they are also more easily compared between trading partners, and thus the maximum amount of such duties can be more easily reduced in future multilateral trade negotiations. The Uruguay Round negotiators agreed that market access would be improved—both in the short term and in the long term—through bindings and reductions of tariffs and minimum access requirements, which were to be recorded in Members' Schedules.
>
> Thus, Article 4 of the *Agreement on Agriculture* is appropriately viewed as the legal vehicle for requiring the conversion into ordinary customs duties of certain market access barriers affecting imports of agricultural products …"[334]

7.56 The objectives of the Agreement on Agriculture are described in its preamble: "to establish a fair and market-oriented agricultural trading system", and to initiate a reform process "through the negotiation of commitments on support and protection and through the establishment of strengthened and more operationally effective GATT rules and disciplines".[335] To achieve this objective, the preamble states that it is necessary to provide for reductions in protection, "resulting in correcting and preventing restrictions and distortions in world agricultural markets"[336], through achieving "specific binding commitments"[337], *inter alia*, in the area of market access.[338]

7.57 As has been noted by the Appellate Body, during the course of the Uruguay Round, negotiators decided that certain border measures, which restricted the volume of trade or distorted the price of imports of agricultural products, had to be converted into ordinary customs duties, with a view to ensuring enhanced market access for such imports. This agreement is reflected in the text of Article 4 of the Agreement on Agriculture which, as its title indicates, deals with "Market Access".[339]

(ii) Issues for the Panel's consideration

7.58 The issue to be decided by the Panel under this particular claim is whether Turkey's alleged conduct, i.e., its alleged denial, or failure to grant, licences to import rice outside of the tariff rate quota, is inconsistent with Article 4.2 of the Agreement on Agriculture. More specifically, whether this alleged conduct, if proven to have occurred, can be considered to be a border measure "of the kind which have been required to be converted into ordinary customs duties", such as a "quantitative import restriction", a "discretionary import licensing" practice, or another border measure that is sufficiently similar to either of the preceding two.

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[333] (*footnote original)* Part III contains only one other provision, namely, Article 5, which provides for a special safeguard mechanism that may be used to derogate from the requirements of Article 4 when certain conditions are met. We will discuss Article 5 later in this section.

[334] Appellate Body Report on *Chile – Price Band System*, paras. 200-201.

[335] Preamble to the Agreement on Agriculture, recital 2.

[336] Ibid., recital 3.

[337] Ibid., recital 4.

[338] Appellate Body Report on *Chile – Price Band System*, para. 196.

[339] Ibid., para. 200.

7.59 We have already addressed the general rules regarding the burden of proof.[340] Considering the above, we are of the view that, in this case, the initial burden of proof rests upon the United States, as a complainant, to establish its prima facie case that the challenged conduct, first, has existed, and then, that it is inconsistent with the invoked provision of the WTO covered agreements, i.e., Article 4.2 of the Agreement on Agriculture. If the United States meets this test, the burden would then be on Turkey to rebut the said claim.

7.60 In order to assess whether the United States has met its initial burden, the Panel will accordingly consider if the evidence on the record, as submitted by both parties, is sufficient to raise a preliminary presumption that Turkey has engaged in the denial, or failure to grant, licences to import rice outside of the tariff rate quota. Only if the evidence on the record is sufficient for the Panel to conclude that the United States has made a prima facie case, would the burden then be shifted onto Turkey to adequately rebut the United States' allegations. If the United States were successful in establishing its prima facie case, and Turkey failed to rebut it, the Panel would then consider whether the facts so demonstrated can be qualified as constituting a border measure of the kind which has been required to be converted into ordinary customs duties by the Agreement on Agriculture.

(iii) Has the United States produced evidence of the challenged measure?

7.61 As noted above, the first issue for the Panel to determine is whether there is enough evidence on the record that Turkey has denied, or failed to grant, licences to import rice outside of the tariff rate quota.

7.62 In order to prove this allegation, the United States has submitted the following evidence:

(a) photocopies of rejected applications for Certificates of Control for the importation of rice filed by importing companies in Turkey[341];

(b) photocopies of motions presented in Turkish administrative courts against the Government's rejection of the authorization to import rice[342];

(c) photocopies of documents related to procedures before Turkish administrative courts, which refer to additional instances of rejection of applications for Certificates of Control for the importation of rice[343];

(d) photocopies of documents containing arguments presented by the counsel for MARA before Turkish administrative courts, justifying the rejection of Certificates of Control for the importation of rice[344];

(e) photocopies of internal documents from MARA, in which MARA's General Directorate of Protection and Control recommended temporary suspensions of the granting of Certificates of Control for the importation of rice to the Minister of Agriculture and Rural Affairs, which the Minister apparently approved[345];

[340] See paras. 7.1 to 7.11 above.
[341] Exhibits US-22, US-28, US-29, US-33 and US-34.
[342] Exhibit US-30.
[343] Exhibits US-63 to US-67.
[344] Exhibit US-31.
[345] Exhibits US-12, US-13, US-14 and US-36.

(f) photocopy of a letter from the General Directorate of the TMO to MARA's General Directorate of Protection and Control, recommending the temporary suspension of the granting of Certificates of Control for the importation of rice[346];

(g) photocopy of a letter from the Minister of State of Turkey to the United States Trade Representative, informing that Certificates of Control for the importation of rice would be issued as of 1 April 2006.[347]

7.63 Turkey has not disputed the veracity of any of these documents. Turkey has admitted, for instance, that the so-called "letters of acceptance" (i.e, letters in which MARA's General Directorate of Protection and Control recommended to the Minister of Agriculture and Rural Affairs temporary suspensions of the granting of Certificates of Control for the importation of rice), such as those provided to the Panel by the United States, "were written and were in circulation".[348]

7.64 Parties differ, however, as to the facts that these documents would prove. In the United States' view, the documents are evidence that Turkey has maintained in place a legal prohibition and a restriction on the importation of rice.[349] The evidence also shows, according to the United States, "that the granting of Control Certificates is discretionary".[350] The United States has contended that it has "presented a large amount of documentary evidence demonstrating that Turkey does not issue Certificates of Control, which are necessary to import rice outside the TRQ."[351]

7.65 Turkey has stated that these copies of "letters of acceptance":

> "[M]ust be either considered as inadmissible evidence or considered as only partial and unreliable evidence of the real intention and trade policies of Turkey in relation to rice importation."[352]

7.66 While Turkey has admitted that "domestic courts appear to have given effect" to the "letters of acceptance", it argues that these documents are only "policy recommendations, falling outside the very competence of the Minister".[353] In its view, the "letters of acceptance":

> "[W]ere internal communications aimed at developing policies. These administrative communications never resulted in the adoption of laws or regulations. They were never used to systematically deny the approval of applications for Certificates of Control. And even if, hypothetically, they had been used to limit the approval of Certificates of Control, which Turkey vehemently denies, this is not evidence that there was a measure prohibiting or restricting imports … . The record shows that, despite the 'Letters of Acceptance', Certificates of Control were approved."[354]

7.67 As already noted, Turkey has not disputed the veracity of the documents submitted by the United States regarding rejected applications for Certificates of Control for the importation of rice and related briefs presented before Turkish administrative courts. In Turkey's opinion, however:

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[346] Exhibit US-37.
[347] Exhibit US-35.
[348] Turkey's statement at the first substantive meeting, para. 50.
[349] United States' opening statement at the second substantive meeting, para. 12. See also United States' response to question 56, para. 87.
[350] United States' opening statement at the second substantive meeting, para. 13.
[351] Ibid., para. 11. See also Ibid., para. 14, and United States' response to question 56, para. 89.
[352] Turkey's first submission, para. 81.
[353] Turkey's response to question 145.
[354] Turkey's statement at the first substantive meeting, paras. 50 and 51. See also Turkey's first submission, paras. 78 and 84, and Turkey's response to question 145.

> "[I]ndividual instances of non-approval by MARA of particular rice importers' applications must be seen as a natural component of the interaction between any WTO Member's administration and its business community and cannot be generalized into a '*denial of Certificates of Control to import rice*', particularly when the trade statistics clearly indicate otherwise."[355]

7.68 Turkey has referred to the rejections for Certificates of Control for the importation of rice identified by the United States as "individual rejections, perfectly compatible with Turkish legislation and with Turkey's obligations under the WTO".[356] With respect to these rejections, Turkey has added that:

> "The reasons for rejection of individual importers' applications have always been provided and, in general terms, were most often due to missing or wrong information supplied by the importers such as the introduction of the wrong customs code classification, the lack of indication of the chosen customs points of entry, or the wrong origin information."[357]

7.69 The processes before Turkish administrative courts, identified by the United States, regarding the denial of Certificates of Control for the importation of rice, have likewise been characterized by Turkey as:

> "[I]ndividual instances of domestic litigation [which] must be objectively seen as a natural component of the interaction between any WTO Member's administration and its business community and cannot be used to prove an instance of systematic trade restriction, let alone a trade prohibition (i.e., the 'blanket denial')."[358]

7.70 As noted, Turkey has admitted that "domestic courts appear to have given effect" to "letters of acceptance". In Turkey's view, however, by doing so "the domestic courts appear to have given effect to an *ultra vires* act of the Minister."[359] Consequently, Turkey has argued that "no value should be given to the rulings issued by the Administrative Courts of Ankara by this Panel and for purposes of this proceeding."[360]

7.71 Regarding the letter sent by the Turkish Minister of State to the United States Trade Representative, Turkey has stated that:

> "The diplomatic Letter … was designed to reassure the United States that, with the phasing-out of the TRQ, traders would likely resume trading on MFN terms. It was not an implicit confirmation of any systematic denial of the approval of Certificates of Control."[361]

7.72 Turkey has concluded that:

> "The United States has not shown that there was a systematic rejection of requests for approval. They have given evidence in relation to five individual cases which have

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[355] Turkey's first submission, para. 68 (emphasis in the original). See also Ibid., para. 29; Turkey's statement at the first substantive meeting, paras. 9 and 18; and Turkey's rebuttal, para. 21.

[356] Turkey's response to question 20. See also Turkey's rebuttal, para. 33.

[357] Turkey's statement at the first substantive meeting, para. 14.

[358] Turkey's opening statement at the second substantive meeting, para. 14.

[359] Turkey's comment on United States' response to question 145. See also Turkey's closing statement at the second substantive meeting, para. 9.

[360] Turkey's response to question 145.

[361] Turkey's closing statement at the second substantive meeting, para. 3.

> resulted in domestic litigation. This represents 0.2% of the approved Certificates of Control."[362]

7.73 Turkey has argued that it has "systematically and regularly" approved Certificates of Control allowing the importation of rice. Turkey has also indicated that "the only way to determine its actual policy is to look at the evidence provided by trade statistics."[363] In its words:

> "Contrary to what is erroneously claimed by the United States, Certificates of Control have been systematically and regularly approved on a non-discriminatory basis since the entering into force of '*The Regime for Technical Regulations and Standardization for Foreign Trade*' in 1996 (as promulgated in the Official Gazette dated 1 February 1996 and numbered 22541*bis*). This has been the case both for rice imports occurring at the 'over-quota' MFN or applied rate level and, most importantly for purposes of the allegations by the United States, within the 'in-quota' volumes established each year since 2004. In particular, from 2003 to date, Turkey has approved a total of 2,223 Certificates of Control, allowing a total importation of 2,264,857 tonnes of foreign rice (paddy, brown and milled). Of the aforementioned quantity, 497.469 tonnes of rice equivalent have been allocated under the TRQ system since January 2004." [364]

7.74 In support of this assertion, Turkey has provided statistics on the importation of rice[365] and lists of approved and rejected Certificates of Control for the importation of rice.[366]

7.75 As noted, Turkey has not contested that there have been cases in which, since September 2003, Turkish authorities have rejected applications for Certificates of Control for the importation of rice outside of the tariff-rate quota. In some cases on the record, the administration notified the applicant, as reasons for the rejection, that the application presented "missing items" or "spelling errors".

7.76 It is also an uncontested fact that the rejections of Certificates of Control for the importation of rice for which the United States has presented evidence, coincided with a period in which Turkey's Minister of Agriculture had received the recommendation, and allegedly had approved it, to temporarily suspend the granting of Certificates of Control for the importation of rice outside of the tariff-rate quota by MARA's General Directorate of Protection and Control.

7.77 The Panel is aware that merely because these two facts coincide in time, it does not automatically lead to the conclusion that the rejection of the Certificates of Control was a consequence of the recommendation of MARA's General Directorate of Protection and Control contained in the "letters of acceptance". Nor does such coincidence, in and of itself, necessarily imply that the Turkish government had put in place a general policy, during that period, of suspending the concession of Certificates of Control for the importation of rice outside of the tariff-rate quota.

7.78 Accordingly, the Panel turns to the other evidence available on the record. We start by noting, as a factual matter, that there are a number of statements and actions by different official Turkish authorities on the record, each of which tends to ascribe more importance to the instructions contained in the "letters of acceptance" than Turkey has granted them during the current proceedings. We refer in this regard to: (i) the explicit reference that some of these "letters of acceptance" make to

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[362] Turkey's closing statement at the second substantive meeting, para. 6.
[363] Turkey's first submission, para. 81.
[364] Ibid., para. 26. See also Ibid., para. 65.
[365] Exhibit TR-8.
[366] Exhibit TR-20.

previous "letters of acceptance"; (ii) the statements made in Turkish domestic courts by the representatives of MARA when defending it against actions brought by rice importers; (iii) the decisions of Turkish domestic courts; and (iv) the statement of Turkey's Minister of State to the United States Trade Representative.[367]

7.79 The Appellate Body has cautioned against ascribing too much importance to unilateral statements of Member's domestic authorities when characterizing their measures.[368] Given the particular circumstances of the present case, however, we do not feel that the concurrent actions adopted by authorities in different branches of the Turkish government should be totally disregarded and deprived of any value, inasmuch as they point to the existence of a conviction on the part of these authorities that the Ministry of Agriculture had the discretion to suspend the concession of Certificates of Control for the importation of rice.

7.80 There is evidence that, not only on a single occasion, but repeatedly and periodically, MARA's General Directorate of Protection and Control issued written recommendations to the Minister of Agriculture and Rural Affairs to temporarily suspend the granting of Certificates of Control for the importation of rice. The recommendations that are on the record cover the periods from September 2003 to March 2004[369], from January to July 2004[370], from July 2004 to January 2005[371], from January to August 2005[372], from July 2005 "until a new policy [was] in place", and from March 2006 to April 2006.[373]

7.81 Even assuming *ad arguendo* that, in themselves these letters were only recommendations and did not produce legal effects, many of these letters make explicit reference in their text to preceding suspensions of the concession of Certificates of Control for the importation of rice, made pursuant to recommendations contained in previous "letters of acceptance". For example, letter No. 107 of January 2004 refers to previous letter No. 964 of September 2003, which had limited the period of issuance of Certificates of Control for the importation of rice from 1 March 2004 and for paddy rice from 1 August 2004, both ending on 1 September 2004. In turn, letter No. 905 of June 2004 refers to the preceding letter (letter No. 107 of January 2004), which apparently limited the period of issuance of Certificates of Control for the importation of rice from 1 July 2004 to 1 August 2004 for rice, and from 1 July 2004 to 1 September 2004 for paddy rice. Thus, in their text, the letters record the existence of periodic suspensions of the issuance of Certificates of Control for the importation of rice.

7.82 Furthermore, we do not find convincing Turkey's argument that the Minister of Agriculture and Rural Affairs had no authority to order a temporary suspension of the granting of Certificates of Control for the importation of rice, because MARA's General Directorate of Protection and Control and the TMO continued to periodically recommend in writing that the Minister adopt exactly such action, and the Minister repeatedly noted such recommendation, by affixing his signature on the text of the document containing the recommendation. While we can agree with Turkey's characterization that these "letters of acceptance" contain "policy recommendations"[374], it remains unconvincing that such recommendations would be repeatedly brought to the attention of the Minister if, as Turkey has

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[367] The United States has also produced copy of a newspaper article, dated 7 April 2006, reporting a protest made by Turkish rice producers against MARA because of the supposed decision to grant an import permit to a company, "without procuring any paddy or milled rice domestically, which was required". The article also reports that the importing company "denied this claim, stating they were informed that rice imports would be possible after April 1, 2006." Exhibit US-21.

[368] Appellate Body Report on *Japan – Alcoholic Beverages II*, pp. 27-28, DSR 1996:I, p. 97, at pp. 119.

[369] Exhibits US-12 and US-31.

[370] Exhibit US-12. See also Exhibit US-31.

[371] Exhibit US-13.

[372] Exhibit US-14.

[373] Exhibit US-36.

[374] Turkey's response to question 145.

argued, they fell "outside the very competence of the Minister".[375] We note, in this regard, that Turkey was requested by the Panel to provide evidence of recommendations contained in "letters of acceptance" that the Minister of Agriculture and Rural Affairs had not approved. To this request, Turkey replied that:

> "There is no such document that Turkey is in the position to circulate given the privileged nature of the communications internal to the Administration and the confidential nature of the information contained therein."[376]

7.83 There is strong indication that, once the Minister had approved the letters, the recommendation effectively became an instruction to temporarily suspend the granting of Certificates of Control for the importation of rice, at least for imports falling outside of the tariff-rate quotas. This indication is confirmed not only by the text of the "letters of acceptance" themselves, many of which, as noted, refer to previous temporary suspensions of the granting of Certificates of Control. It is also confirmed by the statements of MARA's representatives when defending the actions of MARA before Turkish domestic courts[377] and by the decision of Turkish domestic courts to uphold the actions of MARA in denying specific requests for Certificates of Control for the importation of rice, based on one of these temporary suspensions as reflected in letters of acceptance.[378]

7.84 Turkey has argued that the Panel should give no value to the rulings issued by Turkish domestic courts upholding MARA's actions on the basis of the approved "letters of acceptance".[379] In the course of these proceedings, Turkey has argued that these court decisions would be contrary to Turkish domestic legislation and "appear to have given effect to an *ultra vires* act of the Minister."[380] Turkey has added that "[t]his Panel has to decide whether, *de jure*, there is any provision in the Turkish law on Certificates of Control which gives any administrative authority the discretion to deny their approval."[381]

7.85 We disagree with this last statement. The Panel does not need to decide whether there is any provision in Turkish domestic legislation which would give the Minister of MARA the discretion to deny the approval of Certificates of Control. Indeed, it would be outside this Panel's jurisdiction to determine whether the refusal to grant Certificates of Control for the importation of rice, made pursuant to recommendations contained in "letters of acceptance", is consistent or not with Turkish domestic legislation. We should presume that the actions of the authorities of a WTO Member are consistent with that Member's domestic legislation, in the absence of proof to the contrary. In any event, other than its statements made in the course of these proceedings, Turkey has not adduced any evidence that those rejections were illegal under Turkish legislation. It is also noteworthy that, before domestic courts, the Turkish government has argued exactly the opposite. In any event, even if the Minister's actions and the court decisions were contrary to Turkish domestic legislation and had given effect to *ultra vires* acts, there is no reason for the Panel to disregard them, as they constitute an additional indication that the Turkish government had put in place a policy of suspending the concession of Certificates of Control for the importation of rice outside of the tariff-rate quota.

7.86 Considering all of these elements taken together, we find that the letter sent by the Minister of State of Turkey to the United States Trade Representative on 24 March 2006, informing that

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[375] Turkey's response to question 145.
[376] Turkey's response to question 142.
[377] Exhibit US-31.
[378] Exhibit US-63.
[379] Turkey's response to question 145.
[380] Turkey's comment on United States' response to question 145. See also Turkey's closing statement at the second substantive meeting, para. 9.
[381] Turkey's opening statement at the second substantive meeting, para. 13.

Certificates of Control for the importation of rice would be issued as of 1 April 2006[382], is additional indication that those Certificates of Control were not being issued at the time.

7.87 In view of the above, we preliminarily conclude, as a factual matter, that there is sufficient evidence on the record to substantiate a prima facie case that, from September 2003, and for different periods of time[383], Turkey has adopted a decision to deny, or fail to grant, Certificates of Control to import rice outside of the tariff rate quota. In these circumstances, we feel that the burden has been adequately shifted onto Turkey to rebut this presumption.

(iv) Has Turkey produced evidence to rebut the presumption?

7.88 Having preliminarily found that the United States was able, based on the evidence on the record, to make a prima facie case that Turkey, from September 2003 and for different periods of time, has adopted a decision to deny, or fail to grant, Certificates of Control to import rice outside of the tariff rate quota, it is Turkey's burden to rebut such presumption.

7.89 As noted, Turkey has disputed the facts described by the United States. Turkey has argued that it has "systematically and regularly" approved Certificates of Control allowing the importation of rice. Turkey has also indicated that "the only way to determine its actual policy is to look at the evidence provided by trade statistics."[384] In the course of the proceedings, Turkey stated that 2,242 Certificates of Control for the importation of rice had been authorized between 2003 and November 2006.[385]

7.90 Noting the statistics provided by Turkey, the Panel repeatedly asked Turkey for evidence regarding approved and rejected Certificates of Control for the importation of rice. After the first substantive meeting, the Panel asked Turkey to provide a photocopy of each of the 2,223 Certificates of Control approved between 2003 and September 2006 for the importation of rice.[386] In response, Turkey stated that photocopies of Certificates of Control were available, but that the relevant Ministries were not authorized to provide "all the copies to the Panel".[387] Turkey added that, upon request from the Panel, it would "be able to provide to the Panel in strict confidence copies of any individual Certificate of Control" authorized between 2003 and 9 November 2006.[388]

7.91 Again, after the second substantive meeting, the Panel asked for evidence regarding approved and rejected Certificates of Control for the importation of rice. Referring to Turkey's previous statement, the Panel asked Turkey, if it could not provide a photocopy of each of the 2,223 Certificates of Control approved between 2003 and September 2006, that it provide at least a photocopy of each of the 56 approved Certificates of Control, which had been identified by the United States during the second substantive meeting with the Panel (as presumably corresponding to imports outside of the tariff rate quota and of preferential trade arrangements).[389] The Panel also asked Turkey to provide a photocopy of each one of the Certificates of Control approved between 2003 and September 2006 which were the result of resubmitted applications, initially rejected by the Turkish

[382] Exhibit US-35. See also United States' first submission, para. 32, and Turkey's response to question 138.

[383] See, for example, paras. 7.80 and 7.81 above.

[384] Turkey's first submission, para. 81.

[385] Turkey's response to question 44 and exhibit TR-33. See also Turkey's first submission, para. 26, Turkey's rebuttal, para. 20, and Exhibit TR-20.

[386] Panel's question 44(e) to Turkey.

[387] Turkey's response to question 44(e).

[388] Ibid.

[389] Panel's question 133(b) to Turkey. See also United States' statement at the second substantive meeting, para. 8, and exhibit US-71.

authorities.[390] Finally, the Panel proposed that, if Turkey could not provide the full photocopies requested, with the purpose of protecting the privacy of the companies involved, it at least provide those same photocopies after having blacked out the names of the companies.[391]

7.92 Regarding the requested photocopies of the 56 approved Certificates of Control identified by the United States during the second substantive meeting with the Panel, Turkey responded that:

> "With respect to the actual Certificates of Control, Turkey understands that the documents provided to the Panel would have to be made available also to the United States. Given the strict confidentiality requirements provided by Turkish law … and the well-established communications and information-exchanges between the United States and a number of Turkish rice traders, the Turkish officials involved in this Panel proceeding do not feel comfortable in risking information leaks and possible criminal accusations of violation of Turkish law on confidentiality…
>
> Turkey is not in a position to provide copies of the actual Certificates of Control for circulation. Exceptionally, Turkey would be willing to provide 'blacked-out' copies of the 56 'relevant' Certificates of Control only to the Panel and after a clear understanding with the Panel and between the parties to this dispute that these documents would not be made available to the United States nor to any other entity beside the Panel and the WTO Secretariat."[392]

7.93 Turkey has asserted that Certificates of Control allowing the importation of rice were "systematically and regularly" approved. It has also stated that individual instances of non-approval by MARA of particular rice importers' applications should not be seen as evidence of a general policy. We note, however, that as stated by the Appellate Body, "the mere assertion of a claim [does not] amount to proof".[393] Accordingly, we must determine whether there is enough evidence on the record to allow us to conclude that Turkey has adequately discharged its burden to rebut the presumption that, from September 2003 and for different periods of time, it has adopted a decision to deny, or fail to grant, Certificates of Control to import rice outside of the tariff rate quota.

7.94 We must note, as a factual matter, that despite repeated requests addressed to Turkey, the Panel was not able to obtain evidence that Turkey had been, as it stated, "systematically and regularly" approving Certificates of Control allowing the importation of rice outside of the tariff rate quota.

7.95 Turkey has argued that it has provided "ample evidence showing that no de facto 'prohibition' or '*restriction'* is to be found in relation to the approval of Certificates of Control.[394] Turkey has stated that "2,242 Certificates of Control were approved between 2003 and 9 November 2006"[395], i.e., the period "during which the United States allege that a 'blanket denial' was being enforced".[396] In addition, Turkey has submitted 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)".[397] The figure of 2,242 represented an approval rate of over 95 per cent of all applications lodged by importers for approval of Certificates of Control. According to Turkey:

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[390] Panel's question 133(c) to Turkey.
[391] Panel's question 133(f) to Turkey.
[392] Turkey's response to question 133(b) and (f).
[393] Appellate Body Report on *US – Wool Shirts and Blouses*, p. 14.
[394] Turkey's rebuttal, para. 19. See also, Turkey's first submission, para. 65.
[395] Turkey's rebuttal, para. 20.
[396] Ibid., para. 19.
[397] Ibid., para. 20.

> "[B]etween 2003 and September 2006, a total of 2,324 applications for approval were put forward and resulted in the approval of 2,223 Certificates of Control. Only 102 applications (equal to a mere 4.38%) were rejected for 'non-compliance with the requirements set forth in the relevant legislation'.[398] Turkey believes that a rejection rate of less than 5% cannot be quantified or qualified into a *de facto* import '*restriction*'."

7.96 The only evidence provided by Turkey to support these statements, however, have been copies of Turkish rules and regulations[399], copies of forms used for Certificates on Control and for import licences under the tariff rate quotas[400], as well as estimates, tables and calculations prepared by Turkey for purposes of the present case.[401] Such documents, including the estimates, tables and calculations that Turkey has especially emphasized in its submissions, cannot, in our opinion, be regarded as sufficient evidence to rebut the prima facie case made by the United States in this context.

7.97 We cannot fail to note, in particular, that the evidence requested by the Panel of Turkey, regarding Certificates of Control approved for the importation of rice, is in Turkey's possession.

7.98 In this regard, we have already found that the evidence provided by the United States is sufficient to substantiate a prima facie case that, from September 2003 and for different periods of time, Turkey has adopted a decision to deny, or fail to grant, Certificates of Control to import rice outside of the tariff rate quota.

7.99 In response to the Panel's requests for evidence regarding approved and rejected Certificates of Control for the importation of rice, Turkey cited limitations under its domestic legislation. In the light of the concerns expressed by Turkey, the Panel asked Turkey to elaborate on the legal reasons, under Turkish domestic legislation, which would deny authorization to the Turkish government to provide the documents requested by the Panel.[402] Turkey replied that:

> "According to Article 13 of the Turkish Statistical Law, the confidential data acquired, processed and kept for official statistics cannot be passed-on to any administrative, judicial or military office, authority or person, and cannot be utilized except for statistical purposes or be utilized as a tool for proof. Public officials or other authorities that gather the information have to abide by this rule. Article 53 of the same law provides that public officials violating the prohibitions embodied in Article 13 will be punished in accordance with Article 258 of the Turkish Criminal Code No. 5237."[403]

7.100 The Panel was explicit in the documents it requested from Turkey, both after the first and after the second substantive meeting with the parties.[404] As noted above, in response to the Panel's requests, Turkey expressed that its "officials involved in this Panel proceeding [did] not feel comfortable in risking information leaks and possible criminal accusations of violation of Turkish law on confidentiality".[405] Turkey offered to provide "'blacked-out' copies of [some] Certificates of Control only to the Panel and after a clear understanding... that these documents would not be made

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[398] (*footnote original)* See Annex TR-35 of Turkey's Replies to Questions posed by the Panel.

[399] Exhibits TR-1, TR-2, TR-5, TR-6, TR-7, TR-9, TR-11, TR-12, TR-13, TR-14, TR-15, TR-16, TR-17, TR-18, TR-19, TR-21, TR-22, TR-31, TR-34, TR-40 and TR-44.

[400] Exhibits TR-4 and TR-10.

[401] Exhibits TR-8, TR-20, TR-23, TR-24, TR-25, TR-26, TR-27, TR-28, TR-29, TR-30, TR-32, TR-33, TR-35, TR-36, TR-37, TR-38, TR-39, TR-41, TR-42 and TR-43.

[402] Panel's question 133(a) to Turkey.

[403] Turkey's response to question 133(a).

[404] Panel's questions 44(e) and 133 (b), (c), (d), (e) and (f).

[405] Turkey's response to question 133(b) and (f).

available to the United States nor to any other entity beside the Panel and the WTO Secretariat".[406] However, the Panel cannot accept such an offer from Turkey, which is one of the parties to this dispute. Indeed, the evidence requested by the Panel, as well as all submissions under the proceedings at issue, fall under the provision contained in Article 18.1 of the DSU:

> "1. There shall be no *ex parte* communications with the panel or Appellate Body concerning matters under consideration by the panel or Appellate Body."

7.101 In addition, rule 10 of this Panel's Working Procedures, adopted after consulting the parties to the dispute, provides that:

> "In the interest of full transparency, the presentations, rebuttals and statements referred to in paragraphs 5 to 9 of these working procedures [i.e., oral statements made by the parties and third parties during the substantive meetings with the Panel, and parties' and third parties' responses to questions posed by the Panel and the parties during the substantive meetings with the Panel] shall be made in the presence of the parties. Moreover, each party's written submissions, including any comments on the descriptive part of the report, responses to questions put by the Panel and comments on responses made by other parties, shall be made available to the other party."

7.102 Turkey has explicitly acknowledged that it "understands that the documents provided to the Panel would have to be made available also to the United States."[407]

7.103 At no point during the Panel's proceedings did Turkey request the adoption of special and additional rules for handling confidential information, nor was such a request made subsequently, even though the complainant raised the possibility of introducing such rules. The issue was brought up orally by the United States during the second substantive meeting with the Panel, and was reflected in its response to Panel's question 116:

> "[A]s 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."[408]

7.104 Turkey, for its part, commented on this response, reiterating its willingness to provide the requested copies of Certificates of Control but "blacked out" and only to the Panel, expressly excluding the United States.[409] This would suggest *ex parte* communication, which, as explained above[410], is in direct contravention of Article 18.1 of the DSU.

7.105 In addition to not being in a position to accept Turkey's offer to submit evidence through what would effectively amount to an *ex parte* communication of the requested documents, the Panel is not persuaded by Turkey's arguments regarding limitations on its ability to share this information under

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[406] Turkey's response to question 133(b) and (f).
[407] Ibid.
[408] United States' response to question 116.
[409] Turkey's comments on the United States' response to question 116.
[410] See para. 7.100 above.

domestic law. Without adequate knowledge of the full text of the legislation referred to by Turkey[411], the Panel fails to comprehend how, for example, its rules would prevent Turkey from sharing the requested information with the United States, but yet allow it to share such information with the Panel.

7.106 Even if the Panel were to assume as valid Turkey's arguments concerning its limitations under domestic law, that alone would not suffice to discharge Turkey from its evidentiary burden in these proceedings. In the absence of any rebutting evidence provided by Turkey, it is appropriate for this Panel to draw the appropriate inferences[412], as the United States has suggested on several occasions during this dispute.[413]

7.107 Accordingly, in the absence of the information required by the Panel and, more generally lacking any evidence that would allow us to reach a different conclusion, we conclude that Turkey has failed to rebut the presumption that, from September 2003 and for different periods of time, it has adopted a decision to deny, or fail to grant, Certificates of Control to import rice outside of the tariff rate quota.

(v) Is Turkey's decision to deny, or fail to grant, Certificates of Control to import rice outside of the tariff rate quota a "measure of the kind which have been required to be converted into ordinary customs duties"?

The Panel's Analysis

7.108 The Panel will now turn to the issue of whether Turkey's decision, from September 2003 and for different periods of time, to deny, or fail to grant, Certificates of Control to import rice outside of the tariff rate quota, can be considered as a "measure of the kind which have been required to be converted into ordinary customs duties" under Article 4.2 of the Agreement on Agriculture.

7.109 As noted by the Appellate Body in *Chile – Price Band System*:

> "Footnote 1 [to Article 4.2 of the Agreement on Agriculture] lists six categories of border measures and a residual category of such measures that are *included* in 'measures of the kind which have been required to be converted into ordinary customs duties' within the meaning of Article 4.2.[Footnote omitted] The list is illustrative, and includes 'quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties'. These kinds of measures were identified by the negotiators of the *Agreement on Agriculture* as measures that had to be converted into ordinary customs duties in order to ensure enhanced market access for imports of agricultural products."[414]

[411] Turkey did not provide a copy of the rules in its domestic legislation under which it would be would prevented from providing the evidence requested by the Panel, namely the Turkish Statistical Law and the Turkish Criminal Code No. 5237.

[412] See para. 7.10 above. See also Appellate Body Report on *US – Wheat Gluten*, para. 174.

[413] United States' closing statement at the second substantive meeting, para. 6. United States' comments on Turkey's responses to question 102, para. 4.

[414] Appellate Body Report on *Chile – Price Band System*, para. 219.

7.110 The United States has argued that Turkey's denial, or failure to grant, Certificates of Control to import rice outside of the tariff rate quota constitutes a "quantitative import restriction" and a practice of "discretionary import licensing".[415]

7.111 As noted, footnote 1 to Article 4.2 of the Agreement on Agriculture lists "quantitative import restrictions" and "discretionary import licensing" among the kind of measures which have been required to be converted into ordinary customs duties. In the words of the Appellate Body:

> "The footnote imparts meaning to Article 4.2 by enumerating examples of 'measures of the kind which have been required to be converted', and which Members must not maintain, revert to, or resort to, from the date of the entry into force of the *WTO Agreement*."[416]

Quantitative import restrictions

7.112 As mentioned by a previous panel:

> "The prohibition on the use of quantitative restrictions forms one of the cornerstones of the GATT system. A basic principle of the GATT system is that tariffs are the preferred and acceptable form of protection... The prohibition against quantitative restrictions is a reflection that tariffs are GATT's border protection 'of choice'. Quantitative restrictions impose absolute limits on imports, while tariffs do not. In contrast to MFN tariffs which permit the most efficient competitor to supply imports, quantitative restrictions usually have a trade distorting effect, their allocation can be problematic and their administration may not be transparent.
>
> Notwithstanding this broad prohibition against quantitative restrictions, GATT contracting parties over many years failed to respect completely this obligation. From early in the GATT, in sectors such as agriculture, quantitative restrictions were maintained and even increased to the extent that the need to restrict their use became central to the Uruguay Round negotiations. In the sector of textiles and clothing, quantitative restrictions were maintained under the Multifibre Agreement... Certain contracting parties were even of the view that quantitative restrictions had gradually been tolerated and accepted as negotiable and that Article XI could not be and had never been considered to be, a provision prohibiting such restrictions irrespective of the circumstances specific to each case. This argument was, however, rejected in an adopted panel report *EEC – Imports from Hong Kong*.[417]
>
> Participants in the Uruguay Round recognized the overall detrimental effects of non-tariff border restrictions (whether applied to imports or exports) and the need to favour more transparent price-based, i.e. tariff-based, measures; to this end they devised mechanisms to phase-out quantitative restrictions in the sectors of agriculture and textiles and clothing. This recognition is reflected in the GATT 1994 Understanding on Balance-of-Payments Provisions[418], the Agreement on

[415] United States' first submission, paras. 76-77.

[416] Appellate Body Report on *Chile – Price Band System*, para. 209.

[417] (*footnote original*) Panel Report on EEC – Quantitative Restrictions Against Imports of Certain Products from Hong Kong, adopted on 12 July 1983, BISD 30S/129, ("EEC – Imports from Hong Kong").

[418] (*footnote original)* See for instance paras. 2 and 3 of the GATT 1994 Understanding on the Balance-of-Payments Provisions which provide that Members shall seek to avoid the imposition of new quantitative restrictions for balance-of-payments purposes .

> Safeguards[419], the Agreement on Agriculture where quantitative restrictions were eliminated[420] and the Agreement on Textiles and Clothing... where MFA derived restrictions are to be completely eliminated by 2005."[421]

7.113 We have already determined that, from September 2003 and for different periods of time, Turkey adopted a decision to deny, or fail to grant, Certificates of Control to import rice outside of the tariff rate quota. We note as an additional factual matter that the decision to temporarily suspend the granting of Certificates of Control for the importation of rice was justified, on several occasions during the period observed, as an instrument to ensure the absorption of local rice production. This is clear in the reasons provided by MARA's General Directorate of Protection and Control, in several letters of acceptance, when recommending to the Minister of Agriculture and Rural Affairs the temporary suspension of the granting of Certificates of Control.[422] The justification of the decision to temporarily suspend the granting of Certificates of Control is also present in several letters from the TMO to MARA.[423]

7.114 As noted, in response to the United States' claim that the denial, or failure to grant, Certificates of Control to import rice outside of the tariff rate quota is a "quantitative import restriction", Turkey has argued that Certificates of Control should not be considered as import licences within the meaning of Article 1.1 of the Import Licensing Agreement[424], nor under Article XI:1 of the GATT 1994.[425]

7.115 Turkey has also stated that there is neither a *de jure* nor a *de facto* "prohibition" or "restriction" under Article XI:1 of the GATT 1994[426], nor a practice that would constitute a "quantitative import restriction" within the meaning of Article 4.2 of the Agreement on Agriculture.[427] Turkey has added that:

> "Certificates of Control have been systematically and regularly approved on a non-discriminatory basis... both for rice imports occurring at the 'over-quota' MFN or applied rate level and... within the 'in-quota' volumes established each year since 2004."[428]

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[419] (*footnote original)* The Agreement on Safeguards also evidences a preference for the use of tariffs. Article 6 provides that provisional safeguard measures "should take the form of tariff increases" and Article 11 prohibits the use of voluntary export restraints .

[420] (*footnote original)* Under the Agreement on Agriculture, notwithstanding the fact that contracting parties, for over 48 years, had been relying a great deal on import restrictions and other non-tariff measures, the use of quantitative restrictions and other non-tariff measures was prohibited and Members had to proceed to a "tariffication" exercise to transform quantitative restrictions into tariff based measures.

[421] Panel Report on *Turkey – Textiles*, paras. 9.63-9.65.

[422] See, *inter alia*, Exhibit US-12 and US-13.

[423] See, *inter alia*, Exhibit US-13. See also Exhibit US-31.

[424] Turkey's first submission, paras. 45-57. See also Ibid., paras. 3 and 18, Turkey's statement at the first substantive meeting, paras. 4, 11 and 47, Turkey's response to question 59, Turkey's rebuttal, para. 3, Turkey's opening statement at the second substantive meeting, para. 4, and Turkey's closing statement at the second substantive meeting, para. 12.

[425] Turkey's first submission, para. 58.

[426] Ibid., paras. 63, 66 and 69. See also Turkey's statement at the first substantive meeting, paras. 12-14, Turkey's response to question 19 and Turkey's rebuttal, para. 16.

[427] Turkey's first submission, para. 71. See also Turkey's statement at the first substantive meeting, para. 37.

[428] Turkey's first submission, para. 26. See also Turkey's response to questions 15 (b) and 45; Turkey's rebuttal, para. 19; and Turkey's opening statement at the second substantive meeting, para. 8.

7.116 In Turkey' view, since:

> "[T]he Certificates of Control are not import licenses within the meaning of the Agreement on Import Licensing Procedures... there is clearly no 'denial' of Certificates of Control, and... there is no *de jure* or *de facto* import prohibition or restriction within the meaning of GATT Article XI:1... [t]herefore... there cannot be '*discretionary import licensing*' and/or '*quantitative import restrictions*' within the meaning of Article 4.2 of the Agreement on Agriculture and footnote 1 thereof".[429]

7.117 We have already noted that Turkey has not provided evidence of its assertion that a certain number of Certificates of Control were approved between 2003 and 2006 for the importation of rice. Nor has Turkey provided evidence of the alleged high rate of approval of applications for Certificates of Control for the importation of rice. However, even if a number of Certificates of Control had been approved, that would not nullify the fact that a decision was adopted to suspend at times the concession of Certificates of Control to import rice outside of the tariff rate quota. From the statements contained in the different documents from the Turkish authorities related to the adoption of such decision, it is clear to the Panel that the suspension of the concession of Certificates of Control was adopted to limit the amount of rice imports, in order to ensure the absorption of local production.

7.118 In our view, the factual determination that, from September 2003 and for different periods of time, Turkey has decided to deny, or fail to grant, Certificates of Control to import rice outside of the tariff rate quota in order to ensure the absorption of local production, is enough in itself to conclude that this conduct constitutes a quantitative import restriction, within the meaning of footnote 1 to Article 4.2 of the Agreement on Agriculture.

7.119 The Panel recalls that in *Chile – Price Band System*, when referring to "variable import levies" within the meaning of footnote 1 to Article 4.2, the Appellate Body noted some features that are present in such measures:

> "These additional features include a lack of transparency and a lack of predictability in the level of duties that will result from such measures. This lack of transparency and this lack of predictability are liable to restrict the volume of imports... [A]n exporter is less likely to ship to a market if that exporter does not know and cannot reasonably predict what the amount of duties will be.[Footnote omitted] This lack of transparency and predictability will also contribute to distorting the prices of imports by impeding the transmission of international prices to the domestic market."[430]

7.120 In the present dispute, the challenged measure does not affect the level of duties, but rather the quantities of product that can enter the Turkish market. We find, however, that the features of "lack of transparency and lack of predictability" that result from Turkey's decision to deny or fail to grant Certificates of Control to import rice outside of the tariff rate quota are similar to those observed by the Appellate Body Report in *Chile – Price Band System*. Even without any systematic intention to restrict the importation of rice at a certain level, the lack of transparency and of predictability of Turkey's issuance of Certificates of Control to import rice is similarly liable to restrict the volume of imports.

7.121 In conclusion, we consider that there is sufficient evidence regarding the manner in which, from September 2003 and for different periods of time, Turkey has denied or failed to grant Certificates of Control to import rice outside of the tariff rate quota, to characterize this measure as a quantitative import restriction. Through this practice, the Turkish authorities have restricted the

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[429] Turkey's first submission, para. 71.
[430] Appellate Body Report on *Chile – Price Band System*, para. 234.

importation of rice for periods of time. This conduct can, therefore, be considered as a measure of the kind which have been required to be converted into ordinary customs duties under Article 4.2 of the Agreement on Agriculture.

Discretionary import licensing

7.122 Once found that Turkey's decision to deny or fail to grant Certificates of Control to import rice outside of the tariff rate quota may be characterized as a quantitative import restriction, in principle the Panel need not proceed to consider further whether it may also be considered as a practice of discretionary import licensing. We will nevertheless analyze this issue since, throughout the Panel's proceedings, the United States articulated its claim against Turkey's decision to deny or fail to grant Certificates of Control to import rice outside of the tariff rate quota, under Article 4.2 of the Agreement on Agriculture, both as a quantitative import restriction and as a practice of discretionary import licensing.[431]

7.123 In examining the ordinary meaning of the term "discretionary import licensing" as it appears in footnote 1 to Article 4.2, we note that a "licence" can be defined as a:

> "Formal, usu[ally] printed or written, permission from an authority to do something... or to own something ...; a document giving such permission; a permit".[432]

7.124 Parties have engaged in an extensive discussion regarding the appropriate interpretation of the terms "import licences" and "import licensing". In particular, they have discussed at length whether Certificates of Control may be characterized as "import licences". Turkey has stated that the purpose of the Certificates of Control is "to facilitate the process of customs clearance, [through the submission] at importation [of a single] document... which contains all the information required for customs purposes".[433]

7.125 We do not feel that, for the resolution of the present dispute, we need to articulate a general definition of what constitutes an "import licence". Neither the Agreement on Agriculture, nor any of the other WTO covered agreements, contain a general definition of "import licence".

7.126 Article 1.1 of the Import Licensing Agreement, however, contains a particular definition of "import licensing," provided for the purpose of that agreement:

> "For the purpose of this Agreement, import licensing is defined as administrative procedures[434] used for the operation of import licensing regimes requiring the submission of an application or other documentation (other than that required for customs purposes) to the relevant administrative body as a prior condition for importation into the customs territory of the importing Member."

7.127 Having referred to the ordinary meaning of the term "licence", we note that not all documents giving the permission to import may be necessarily considered to be "import licences". As noted by the parties, the importation process is often a complex procedure during which a number of steps must be completed in order to obtain the permission to import certain products. Throughout this process, governments may require that written documents be obtained and then produced to certify the completion of certain steps and thus the compliance with certain legal requirements, in order to allow

[431] United States' first submission, paras. 3, 75-78, United States' opening statement at the first substantive meeting, para. 26, and United States' rebuttal, para. 64.

[432] *The New Shorter Oxford English Dictionary* (Clarendon Press, 1993), Vol. I, p. 1578.

[433] Turkey's first submission, para. 3.

[434] (*footnote original)* Those procedures referred to as "licensing" as well as other similar administrative procedures.

the importation of goods and their final entry into the importing market. Each of these steps and documents may serve particular objectives. Strictly speaking, these special documents, when used for purposes such as sanitary and phytosanitary control, customs clearance, payment of taxes or duties, are not to be considered as "import licences".

7.128 In turn, not all practices of "import licensing" would be "discretionary import licensing". "Discretionary" is defined as "pertaining to discretion [or] left to discretion".[435] "Discretion" can be characterized in turn as the "[f]reedom to decide or act as one thinks fit, absolutely or within limits; having one's own judgement as the sole arbiter".[436]

7.129 In considering whether a measure may be characterized as an "import licence" or a conduct as an "import licensing" practice, the proclaimed objectives of a particular document or requirement are not the main issue to consider in this dispute. Based on our earlier analysis, we have concluded that there is sufficient evidence on the record to demonstrate that, regardless of the purported objectives of the Certificates of Control, the decision to stop granting such documents for periods of time has served as an instrument for administering trade.

7.130 Considering the immediate context of the term "discretionary import licensing", we note that it appears as one of the measures in the indicative list of "measures of the kind which have been required to be converted into ordinary customs duties". The object and purpose of Article 4 of the Agreement on Agriculture, "to achieve improved market access conditions for imports of agricultural products by permitting only the application of ordinary customs duties"[437], would be undermined if Members could decide, at their discretion, whether or not to grant permission for the importation of a good, or if they could decide, at their discretion, whether or not to grant a document that is indispensable for such importation.

7.131 This interpretation is consistent with the definition agreed by WTO Members in the context of the Import Licensing Agreement. Article 1.1 of the Import Licensing Agreement and its footnote, when defining import licensing, refer to licensing and "other similar administrative procedures". We note in this regard that the footnote to the Annual Questionnaire on import licensing procedures, adopted by the WTO Committee on Import Licensing,[438] indicates that "similar procedures":

> "[A]re understood to include technical visas, surveillance systems, minimum price arrangements, and *other administrative reviews effected as a prior condition for entry of imports*."[439]

7.132 When considering the decision to deny or fail to grant Certificates of Control to import rice as a "quantitative import restriction", we noted that the challenged measure does not affect the level of duties, but rather whether or not the product can enter the Turkish market. We also noted that the features of "lack of transparency and lack of predictability" that result from Turkey's decision to deny or fail to grant Certificates of Control to import rice outside of the tariff rate quota are similar to those

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[435] *The New Shorter Oxford English Dictionary* (Clarendon Press, 1993), Vol. I, p. 689.

[436] Ibid.

[437] Appellate Body Report on *Chile – Price Band System*, para. 234.

[438] Annex, Questionnaire on Import Licensing Procedures, Notifications under Article 7.3 of the Agreement, Note by the Secretariat, 20 October 1995, G/LIC/2. See also, Annex, Procedures for Notification and Review under the Agreement on Import Licensing Procedures, Note by the Secretariat, 7 November 1995, G/LIC/3.

[439] Annex, Questionnaire on Import Licensing Procedures, Notifications under Article 7.3 of the Agreement, Note by the Secretariat, 20 October 1995, G/LIC/2 (emphasis added). Under this definition, a main element considered by Members to determine whether a measure is to be characterized as an import licensing procedure is whether the measure has been established *as a prior condition to the entry of imports into the territory*.

observed by the Appellate Body Report in the *Chile – Price Band System* case. Such lack of transparency and of predictability of Turkey's issuance of Certificates of Control to import rice is similarly liable to restrict the volume of imports.

7.133 In the light of the above, without necessarily having to articulate a general definition of what constitutes an "import licence" or a practice of "import licensing", we find that the discretionary use by authorities in an importing country of the concession, or refusal to grant, a particular document which is necessary for the importation of a good, as an instrument to administer trade, in this case can be safely characterized as a practice of "discretionary import licensing" under footnote 1 to Article 4.2 of the Agreement on Agriculture.

7.134 In conclusion, we consider that there is sufficient evidence regarding the manner in which, from September 2003 and for different periods of time, Turkey has denied or failed to grant Certificates of Control to import rice outside of the tariff rate quota, to characterize this measure as a discretionary practice by the Turkish authorities to decide whether or not to grant permission to import a particular good. Through this discretionary practice, the Turkish authorities have suspended the concession of Certificates of Control in regard to rice imports for periods of time. Given the fact that importers must produce a Certificate of Control in order to be able to import rice even if they fulfil the criteria required to be certified therein (as confirmed by Turkey[440]), this practice effectively has served as a way to administer trade. This conduct can be considered as a practice of "discretionary import licensing" and, therefore, as a measure of the kind which have been required to be converted into ordinary customs duties under Article 4.2 of the Agreement on Agriculture.

Final considerations

7.135 We have concluded that, from September 2003 and for different periods of time, Turkey has denied or failed to grant Certificates of Control to import rice outside of the tariff rate quota, which can be characterized as a "quantitative import restriction" and as a practice of "discretionary import licensing". In any event, we note that, as clarified by the Appellate Body, the "list of measures [in footnote 1 to Article 4.2 of the Agreement on Agriculture] is illustrative, not exhaustive".[441] Indeed:

> "Footnote 1 also refers to a residual category of 'similar border measures other than ordinary customs duties', which indicates that the drafters of the Agreement did not seek to identify all 'measures which have been required to be converted' during the Uruguay Round negotiations."[442]

7.136 Even if it were not to be considered as a "quantitative import restriction" or as a practice of "discretionary import licensing", we consider that, due to its recognized impact on the administration of rice imports, Turkey's decision to deny or fail to grant Certificates of Control to import rice outside of the tariff rate quota would at least qualify as a measure that has sufficient likeness or resemblance, so as to be similar to quantitative import restrictions or to practices of discretionary import licensing and, therefore, as a measure of the kind which have been required to be converted into ordinary customs duties under Article 4.2 of the Agreement on Agriculture.

7.137 We are aware that a measure enumerated in the list provided in footnote 1 to Article 4.2 of the Agreement on Agriculture may nevertheless not be considered to be a measure "of the kind which have been required to be converted into ordinary customs duties" if it falls under the exceptions contained in the same footnote (i.e., if it is a measure maintained under balance-of-payments provisions or under any other general, non-agriculture-specific, provision of GATT 1994 or of the

[440] See para. 2.47 above.
[441] Appellate Body Report on *Chile – Price Band System*, para. 209.
[442] Ibid., para. 210.

other Multilateral Trade Agreements in Annex 1A to the WTO Agreement) or if it falls under the exceptions contained in Article 5 and Annex 5 of the Agreement on Agriculture. None of the parties, however, has argued that Turkey's decision to deny or fail to grant Certificates of Control to import rice outside of the tariff rate quota was adopted or maintained under any general, non-agriculture-specific, provision of any of the WTO Multilateral Trade Agreements on Trade in Goods, nor that it was adopted or maintained through the Special Safeguard Provisions in Article 5 of the Agreement on Agriculture or under the provisions on Special Treatment contained in Annex 5 of the Agreement on Agriculture.

(vi) Conclusion

7.138 For the reasons indicated above, the Panel concludes that Turkey's decision, from September 2003 and for different periods of time, to deny, or fail to grant, Certificates of Control to import rice outside of the tariff rate quota, constitutes a quantitative import restriction, as well as a practice of discretionary import licensing, within the meaning of footnote 1 to Article 4.2 of the Agreement on Agriculture. Accordingly, it is a measure of the kind which have been required to be converted into ordinary customs duties and is therefore inconsistent with Article 4.2 of the Agreement on Agriculture.

6. Claim under Article XI:1 of the GATT 1994

(a) Arguments of the parties

7.139 The United States has raised the claim that Turkey's denial, or failure to grant, licences to import rice outside of the tariff rate quota, "is inconsistent with Article XI:1 of the GATT 1994 because it prohibits or restricts imports at the over-quota rate".[443] In the United States' view:

> "Turkey's denial of import licenses outside the TRQ is in breach of Article XI of the GATT 1994 because Turkey prohibits or restricts imports at the over-quota rate through the use of import licenses or other measures."[444]

7.140 Turkey has responded that Certificates of Control are not import licences, but rather "administrative forms that are required exclusively for '*customs purposes*'".[445] Turkey has added that "no '*restriction*' or '*prohibition*' of rice importation... was instituted or maintained... by means of a measure (i.e., the alleged '*denial of Certificates of Control to import rice*') which would amount to an '*other measure*' within the meaning of GATT Article XI:1".[446]

(b) The Panel's analysis

7.141 The Panel has already found that Turkey's decision, from September 2003 and for different periods of time, to deny or fail to grant Certificates of Control to import rice outside of the tariff rate quota is inconsistent with Article 4.2 of the Agreement on Agriculture. We do not believe that, having found that this measure is inconsistent with Article 4.2 of the Agreement on Agriculture, an additional finding regarding the same measure under Article XI:1 of the GATT 1994 would be necessary to resolve the matter at issue.

7.142 Accordingly, under the guidance of the principle of judicial economy, the Panel considers it unnecessary for the resolution of this dispute to address the United States' claim that Turkey's

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[443] United States' first submission, paras. 3, 58-73.
[444] United States' opening statement at the first substantive meeting, para. 11.
[445] Turkey's first submission, para. 52 (emphasis in the original).
[446] Ibid., para. 69 (emphasis in the original).

decision, from September 2003 and for different periods of time, to deny or fail to grant Certificates of Control to import rice outside of the tariff rate quota is inconsistent with Article XI:1 of the GATT 1994. Therefore, the Panel refrains from making any findings with respect to this particular claim.

7. Claims concerning the administration of Turkey's decision to deny or fail to grant Certificates of Control to import rice

(a) Arguments of the parties

7.143 The United States has raised the claim that Turkey's failure to publish its decision to deny or fail to grant Certificates of Control to import rice outside of the tariff rate quota is inconsistent with Articles X:1 and X:2 of the GATT 1994. In its view:

> "The Letters of Acceptance, which apply to all importers seeking a Certificate of Control from MARA in order to import rice, are Ministerial Decisions taken by the Turkish Minister of Agriculture and are binding under Turkish law ... Turkey does not publish the Letters of Acceptance in the Official Gazette. This obscures from importers and other WTO Members that MARA is not issuing Certificates of Control, thereby blocking all imports of rice outside the TRQ regime. Turkey's failure to issue Certificates of Control is inconsistent with Articles X:1 and X:2 of the GATT 1994."[447]

7.144 The United States has further made the claim that, for the same reason, this measure is likewise inconsistent with Articles 1.4(a) and 1.4(b) of the Import Licensing Agreement. In its words:

> "Because Turkey does not publish the Letters of Acceptance, it also necessarily breaches Articles 1.4(a) and 1.4(b) of the Import Licensing Agreement."[448]

7.145 The United States has finally claimed that:

> "Turkey also has acted inconsistently with Articles 3.5(e) and (f) of the Import Licensing Agreement [because] Turkey has decided not to process Certificate of Control applications within the periods specified in subparagraph (f) [i.e., no more than 30 days, except when not possible for reasons outside the control of the Member, and no longer than 60 days if all applications are considered simultaneously]... Nor has Turkey ever asserted that it is 'not possible for reasons outside [its] control' to process applications within the periods set out in Article 3.5(f)... Further, although Turkey does not approve any license applications, it does not provide the applicant 'the reason therefor' – that is ... that Turkey has decided not to approve *any* license applications."[449]

7.146 Turkey has rejected these claims as, in its opinion, Articles 1.4 and 3.5 of the Import Licensing Agreement do not apply to this dispute. In Turkey's view:

> "[T]he United States bases its allegations and legal conclusions on the wrong assumption that Certificates of Control are (or function as) import licenses. On the basis of the legal arguments and factual evidence provided, Turkey reaffirms that the Certificates of Control are not import licenses within the meaning of the Agreement on Import Licensing Procedures. Therefore, the claim by the United States that

[447] United States' first submission, para. 80.
[448] Ibid., para. 81.
[449] Ibid., paras. 83-85.

> Turkey has acted inconsistently with these obligations of transparency and due-process must be rejected for the inapplicability, in the case at issue, of the Agreement on Import Licensing Procedures."[450]

(b) The Panel's analysis

7.147 The Panel has already found that Turkey's decision, from September 2003 and for different periods of time, to deny or fail to grant Certificates of Control to import rice outside of the tariff rate quota is a border measure inconsistent with Article 4.2 of the Agreement on Agriculture. In the light of this finding, the question of how this measure has been administered by Turkey becomes irrelevant for the resolution of this dispute.

7.148 Accordingly, the Panel refrains from making any findings with respect to these particular claims.

C. THE DOMESTIC PURCHASE REQUIREMENT

1. The United States' claims

7.149 In its request for the establishment of a panel, the United States stated that:

> "Turkey operate[d] tariff-rate quotas ('TRQs') for rice imports requiring that, in order to import specified quantities of rice at reduced tariff levels, importers... purchase specified quantities of domestic rice, including from the Turkish Grain Board ('TMO'), Turkish producers, or producer associations."[451]

7.150 The United States referred to this particular measure as the "domestic purchase requirement". In its view, the domestic purchase requirement is inconsistent with Article 2.1 and paragraph 1(a) of the Annex to the TRIMs Agreement; with Article III:4 of the GATT 1994; with Article XI:1 of the GATT 1994; and with Article 4.2 of the Agreement on Agriculture.[452] Initially, the United States presented each of these as an independent claim. Later in the proceedings, however, the United States suggested that, "if the Panel [found] that Turkey [had] breached Article III:4 of the GATT 1994 by instituting a domestic purchase requirement, it need not make a finding under Article 2.1 and paragraph 1(a) of Annex 1 of the TRIMs Agreement".[453]

2. Turkey's response

7.151 Turkey has confirmed that the importation of rice under the tariff rate quota (TRQ) system was subject to a domestic purchase requirement.[454] Turkey has argued, however, that its domestic purchase requirement was not a measure which affected the internal sale, offering for sale, purchase or use of imported rice, and that it did not accord less favourable treatment to rice imported from the United States by adversely affecting the conditions of competition in favour of domestic rice.[455] Turkey added that the TRQ regime, and its domestic purchase requirement "never resulted in a

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[450] Turkey's first submission, para. 87. See also Turkey's statement at the first substantive meeting, para. 38.

[451] Request for the Establishment of a Panel by the United States, *Turkey – Rice*, 7 February 2006, WT/DS334/4, p. 1.

[452] Ibid., p. 3.

[453] United States' comments on Turkey's responses to question 151, para. 63.

[454] See, for example, Turkey's first submission, para. 33. The domestic purchase requirement in force at the time when this Panel was established was regulated in Decree 2005/9315 of 10 August 2005 on the *Application of Tariff Quota for the Importation of Some Species of Paddy Rice and Rice*. See para. 2.76 above.

[455] Turkey's first submission, paras. 91-99.

substantial restriction on imports of rice".[456] Turkey also stated that its TRQ regime was administered through "an automatic import licensing system"[457] and could not be considered as a "non-tariff measure maintained through state trading enterprises".[458]

7.152 Turkey has further added that "the legislative framework providing for the TRQ regime, including the domestic purchase requirement, is no longer in force".[459] Therefore, it has requested the Panel "to either refrain from making findings on the measures related to Turkey's TRQ regime as [it is] no longer in force, or, should the Panel consider making these findings necessary for purposes of securing a positive solution to the dispute, not to make any recommendation to the Dispute Settlement Body".[460]

3. Findings on an expired measure

7.153 Before the Panel can consider the United States' claims regarding the so-called domestic purchase requirement, we believe that the Panel must first address Turkey's request that it should refrain from making findings on the measures related to Turkey's TRQ regime, including the domestic purchase requirement, because such measures have expired. In other words, we believe that the Panel must start by verifying at the outset whether it should issue findings on the claims advanced by the United States regarding the domestic purchase requirement.

(a) Arguments of the parties

7.154 As noted above, Turkey has stated that "the legislative framework providing for the TRQ regime, including the domestic purchase requirement, is no longer in force".[461] It has therefore requested the Panel "to either refrain from making findings on the measures related to Turkey's TRQ regime as [it is] no longer in force, or, should the Panel consider making these findings necessary for purposes of securing a positive solution to the dispute, not to make any recommendation to the Dispute Settlement Body".[462] Turkey has added that "it has no intention to renew these measures, neither extending them nor adopting new legislative instruments".[463]

7.155 In support of its request, Turkey recalled the Appellate Body's finding in *US – Certain EC Products* that:

> "[T]here is an obvious inconsistency between the finding of the Panel that '[a specific] Measure is no longer in existence' and the subsequent recommendation of the Panel that the DSB request that the United States bring [that] Measure into conformity with its WTO obligations. The Panel erred in recommending that the

[456] Turkey's first submission, para. 105. See also Turkey's statement at the first substantive meeting, para. 22.
[457] Turkey's first submission, para. 115.
[458] Ibid., para. 116.
[459] Ibid., para. 136.
[460] Ibid., para. 139. See also Turkey's statement at the first substantive meeting, para. 39 and Turkey's rebuttal, para. 37.
[461] Turkey's first submission, para. 136.
[462] Ibid., para. 139. See also Turkey's statement at the first substantive meeting, para. 39 and Turkey's rebuttal, para. 37.
[463] Turkey's rebuttal, para. 44. See also the European Communities' statement at the third party session, para. 4.

> DSB request the United States to bring into conformity with its WTO obligations a measure which the Panel has found no longer exists."[464]

7.156 Turkey has also cited cases in which, based on the Appellate Body's reasoning, subsequent panels issued findings on specific measures that had expired, but abstained from recommending to the DSB that it ask the Member concerned to bring its measure into conformity with the WTO agreements.[465] Additionally, Turkey quoted the statement of the Panel on *EC – Approval and Marketing of Biotech Products* to the effect that:

> "[A] panel is not necessarily required to make use of its authority to make findings in respect of measures which were no longer in existence on the date of establishment of [the] panel [and] that in determining whether to make findings on a measure no longer in existence on the date of establishment of a panel, panels should notably take account of the object and purpose of the dispute settlement system [which is, p]ursuant to Article 3.7 of the DSU ... 'to secure a positive solution to a dispute'."[466]

7.157 Turkey has further quoted a statement by the same Panel on *EC – Approval and Marketing of Biotech Products* regarding the issue of whether it should recommend, as requested by one of the parties, that the Member concerned bring its measure into conformity with the WTO agreements. In that case, one of the complainants had argued that, when a panel finds that a measure is WTO-inconsistent, it must recommend pursuant to Article 19.1 of the DSU that the responding party bring that measure into conformity with its WTO obligations, regardless of whether the measure has ceased to exist after the panel was established. The complainant had gone on to note the Appellate Body's statement in *US – Certain EC Products* quoted above and emphasized that the measure in that case had been terminated shortly before the Panel was established. The Panel on *EC – Approval and Marketing of Biotech Products*, found that this reasoning was correct, but added that "the Appellate Body nowhere suggested that the situation could be different in a case where a measure ceased to exist in the course of panel proceedings[467]".[468]

7.158 Turkey has also quoted the *EC – Approval and Marketing of Biotech Products* Panel as citing another panel report, that of *Dominican Republic – Import and Sale of Cigarettes*, "in support of the view that panels are to avoid making recommendations which would apply to measures that are no longer in existence[469] both in relation to measures expired before or after the commencement of the panel proceedings".[470]

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[464] Appellate Body Report on *US – Certain EC Products*, para. 81, cited in Turkey's first submission, para. 137, and Turkey's rebuttal, para. 38.

[465] See references to Panel Report on *Chile – Price Band System*, para. 7.112, and Panel Report on *Dominican Republic – Import and Sale of Cigarettes*, para. 7.363, in Turkey's first submission, para. 138, and Turkey's rebuttal, para. 38.

[466] Panel Report on *EC – Approval and Marketing of Biotech Products*, para. 7.1651-7.1652, cited in Turkey's rebuttal, para. 41.

[467] (*footnote original*) The Appellate Body stated that "[a]s we have upheld the Panel's finding that [...] the measure at issue in this dispute [...] *is* no longer in existence, we do not make any recommendation to the DSB pursuant to Article 19.1 of the DSU. Appellate Body Report, *US – Certain EC Products*, para. 129 (emphasis added). In our view, if the Appellate Body had intended to distinguish between measures which ceased to exist before a panel was established and measures which ceased to exist in the course of panel proceedings, it would have used a phrase like "the measure at issue in this dispute was no longer in existence when the panel was established".

[468] Panel Report on *EC – Approval and Marketing of Biotech Products*, para. 7.1313, cited in Turkey's rebuttal, para. 42.

[469] (*footnote original*) See *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, paras. 7.1313-7.1316. See also para. 7.1670.

[470] Turkey's rebuttal, para. 42.

7.159 The United States has rejected these arguments. It has stated that the "TRQ regime allegedly 'expired' on July 31, 2006", after consultations had taken place and the Panel had been established.[471] It pointed out that the legislative framework that has provided for the establishment of tariff quotas, namely, Decree No. 95/6814 of 30 April 1995 on *Surveillance and Safeguard Measures for Imports and Administration of Quotas and Tariff Quotas* and Decree No. 2004/7333 of 10 May 2004 on the *Administration of Quotas and Tariff Quotas*, is still in force.[472] The United States added that, "given the number of unpublished documents that the Government of Turkey issues with respect to the rice trade"[473] and the fact that the TRQs have expired before and then been reopened on previous occasions[474], in its view it is "critical for achieving a definitive resolution of this matter", not only that the Panel make findings with regard to the measure, but "that it also issue recommendations that Turkey bring its measures into conformity with its WTO obligations".[475]

7.160 The United States has argued that "the TRQ regime had not 'expired' at the time of consultations and panel establishment, and [therefore] the Panel is charged by [its] terms of reference and Article 3.3 of the DSU to issue findings with respect to the consistency of the measures comprising Turkey's TRQ regime with the relevant provisions of the covered agreements and [to] make recommendations in order to resolve the dispute".[476]

7.161 The United States has further argued that "[t]he reports cited by Turkey respect the distinction between measures that expire prior to consultations and panel establishment and measures that expire after panel establishment".[477] In its opinion, the Panel on *US – Certain EC Products* and the *Chile – Price Band System* was faced with measures that had expired prior to the establishment of that Panel.[478] As for the Panel on *Dominican Republic – Import and Sale of Cigarettes*, the United States has argued that:

> "[T]he Appellate Body later disagreed with [that] panel and, contrary to what the panel did [i.e., not consider it necessary to issue findings with respect to a measure that had expired during the course of panel proceedings], recommended that the Dominican Republic bring its measure into conformity with its WTO obligations to the extent that it [had] not already done so".[479]

7.162 The United States has also noted that:

> "[T]he reports cited by Turkey support the U.S. position that the Panel should make findings on the measures at issue, and if the panel finds the TRQ regime to be inconsistent with provisions of the covered agreement, [that it should] make the recommendations required under the DSU".[480]

7.163 The United States has also pointed out that the Panel on *EC – Approval and Marketing of Biotech Products* recalled:

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[471] United States' opening statement at the first substantive meeting, paras. 43-44.
[472] United States' response to question 22, para. 46.
[473] Ibid., para. 47.
[474] United States' response to question 18, para. 37.
[475] Ibid., para. 47. See also Thailand's statement at the third party session, para. 8. But see Egpyt's statement at the third party session, para. 13.
[476] United States' opening statement at the first substantive meeting, para. 44.
[477] Ibid., para. 45.
[478] Ibid.
[479] Ibid. (emphasis in the original).
[480] Ibid., para. 46 (emphasis in the original).

> "[T]he informal, *de facto* nature of [the challenged measure] which means that it can be re-imposed just as soon as it can be ended. In these circumstances, [the Panel agreed] that even if the [measure] ceased to exist after August 2003 [date of the establishment of the panel], if [the Panel was] to find that the European Communities acted inconsistently with its WTO obligations by applying a general moratorium in August 2003 [at that same date], this could help prevent a WTO-inconsistent general moratorium from being reintroduced and, in this way, secure a positive solution to this dispute".[481]

7.164 The United States added that the same Panel pointed out in a footnote to the paragraph quoted above that:

> "[I]f we were not to make findings on the [measure], 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."[482]

(b) The Panel's analysis

7.165 This Panel was established by the DSB in its meeting of 17 March 2006.[483] It is an uncontested fact that the most recent TRQ for the importation of rice was opened by Turkey from 1 November 2005 to 31 July 2006. This TRQ was regulated through Decree 2005/9315 of 10 August 2005 on the *Application of Tariff Quota for the Importation of Some Species of Paddy Rice and Rice* and was therefore in force at the time this Panel was established.[484]

7.166 The challenged measure was properly brought before the Panel and is within its terms of reference. Indeed, Turkey has not disputed this: it has only requested that the Panel, based on the subsequent expiration of the most recent tariff quota for the importation of rice, refrain from making findings on the measures related to Turkey's tariff quota regime or otherwise abstain from making recommendations to the DSB.

7.167 The initial issue is thus whether the Panel should refrain from making findings on a measure that has been properly brought to the Panel's attention by the complainant and that is within the Panel's terms of reference, but terminated after the Panel was established. This is not a novel issue. Previous panels and the Appellate Body have been faced with similar situations. Only if the Panel decides to make such findings, and if they consist in the determination of one or more violations of the covered agreements, does the issue arise of whether the Panel should proceed to make specific recommendations to the DSB with respect to that measure.

7.168 As pointed out by Turkey, previous panels have refrained from making findings on measures that had terminated *before* those panels had been established.[485] In *Argentina – Textiles and Apparel*, the Panel declined to rule on a measure that was "revoked before the Panel was established and its term of reference set, i.e. before the Panel started its adjudication process"[486], even though the measure was included in that Panel's terms of reference. In arriving at its decision, the *Argentina –*

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[481] Panel Report on *EC – Approval and Marketing of Biotech Products*, para. 7.1311, cited in United States' response to question 152, para. 60.

[482] Ibid., footnote 1194 to para. 7.1311, cited in United States' response to question 152, para. 60.

[483] Constitution of the Panel Established at the Request of the United States (Note by the Secretariat), *Turkey – Rice*, 1 September 2006, WT/DS334/5/Rev.1, para. 1.

[484] See para. 2.76 above.

[485] See, for example, Panel Report on *US – Gasoline*, and Panel Report on *Argentina – Textiles and Apparel*.

[486] Panel Report on *Argentina – Textiles and Apparel*, para. 6.13.

Textiles and Apparel Panel cited the statement of the Appellate Body in an earlier case that the aim of dispute settlement:

> "[Is not] to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute."[487]

7.169 However, in the dispute before us, the termination of the TRQ, and of the corresponding domestic purchase requirement, occurred on 31 July 2006. That date is more than four months *after* the establishment of the Panel and the approval of its terms of reference by the DSB.

7.170 The Panel notes the United States' argument that, given the fact that the TRQs have expired before and then been reopened on previous occasions, a finding on this matter is "critical for achieving a definitive resolution".[488] The Panel also notes that the legislative framework which has allowed for the establishment of the earlier TRQs (Decree No. 2004/7333 of 10 May 2004 on the *Administration of Quotas and Tariff Quotas*) is still in force.[489]

7.171 There is no reason, however, for the Panel to doubt Turkey's statement that "it has no intention to renew these measures, neither extending them nor adopting new legislative instruments".[490] This is notwithstanding the fact that, when asked by the Panel after the first substantive meeting about its statement that the TRQ would not be reintroduced in the future, Turkey linked such commitment to the assumption of an uncertain factor, i.e., that current domestic and international economic conditions would not change. In Turkey's words:

> "The domestic and international economic indicators also lead Turkey to the assumption that there will not be, at least for the foreseeable future, needs for market intervention and stabilization of the types that the TRQ helped address. In particular, the Turkish Lira is no longer weak and unstable, plenty of rice is available internationally, and domestic rice remains competitive with predictable production forecasts."[491]

7.172 Turkey has nevertheless added that:

> "In any event... it will no longer have recourse to the TRQ system, if anything to lower its administrative costs and to avoid misunderstandings of the type that may have triggered this dispute settlement proceeding. The only real market stabilization instruments will remain the action of the TMO coupled with the use of appropriate MFN actual rates of duty."[492]

7.173 Turkey's earlier statement led the Panel, after the second substantive meeting, to ask Turkey whether it would re-evaluate the convenience of reintroducing a TRQ regime for the importation of rice, if any of the domestic and international economic indicators that it had originally considered were to change. In response to this question, Turkey declared that:

> "[D]espite the theoretical possibility that 'domestic and international economic indicators' may change in the future, the TRQ system is an instrument that Turkey

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[487] Appellate Body Report on *US – Wool Shirts and Blouses*, p. 19.
[488] United States' response to question 18, paras. 37 and 47.
[489] Turkey's response to question 148(e).
[490] Turkey's rebuttal, para. 44.
[491] Turkey's response to question 82.
[492] Ibid.

> considers too costly and administrative burdensome to achieve the intended objectives of market intervention and stabilization. Other less complicated trade policies (i.e., the action of the TMO as an intervention agency, the appropriate and legitimate use of MFN and applied rates of duty) stand-out as sufficient mechanisms to manage the market in a WTO consistent fashion."[493]

7.174 Accordingly, and despite the United States' arguments on the likelihood of Turkey reintroducing a TRQ regime for the importation of rice, and with it a domestic purchase requirement, the Panel must not lightly assume that Turkey will not abide by its stated intentions and its WTO commitments. Indeed, as stated by the Panel on *Argentina – Textiles and Apparel*, panels "must assume that WTO Members will perform their treaty obligations in good faith, as they are required to do by the WTO Agreement and by international law."[494]

7.175 Notwithstanding these considerations, and regardless of whether Turkey reintroduces a domestic purchase requirement in the future in the context of a new TRQ, the Panel notes that it is confined to the mandate it has received from the WTO Members, through the DSB and in accordance with the DSU. That mandate consists of performing the tasks defined in Article 11 of the DSU:

> "[T]o assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, [to] make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements..."

7.176 More specifically, in the present case, the Panel has been given the following terms of reference by the DSB:

> "To examine, in the light of the relevant provisions of the covered agreements cited by the United States in document WT/DS334/4, the matter referred to the DSB by the United States in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."[495]

7.177 The "matter before the Panel", i.e., "the matter referred to the DSB by the United States in" document WT/DS334/4, consists "of two elements: the specific *measures* at issue and the *legal basis of the complaint* (or the *claims*)".[496]

7.178 The mandate of the Panel is therefore to undertake a careful and objective consideration of the matter that has been referred to it by the DSB. This mandate does not necessarily require examination of each and every legal claim made by the complaining party. Indeed, panels may exercise judicial economy as long as they consider "those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members'."[497]

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[493] Turkey's response to question 148(c).
[494] Panel Report on *Argentina – Textiles and Apparel*, para. 6.14.
[495] Constitution of the Panel Established at the Request of the United States (Note by the Secretariat), *Turkey – Rice*, 1 September 2006, WT/DS334/5/Rev.1, para. 2.
[496] See, for example, Appellate Body Report on *Guatemala – Cement I*, para. 72.
[497] Appellate Body Report on *Australia – Salmon*, para. 223.

7.179 The Panel does not believe that, given the circumstances of this dispute, it should refrain from making any legal finding with regard to the domestic purchase requirement, a measure that has been properly brought before it, merely because the measure expired after the establishment of the Panel. To refrain from making such legal findings would, in the Panel's opinion, be inconsistent with the duties assigned to it by the DSB.

(c) Conclusion

7.180 In the light of the above, and in particular of its terms of reference as approved by the DSB, the requirements set out in Article 11 of the DSU, and in the absence of an agreement by the parties to terminate the proceedings as regards this contested measure, the Panel concludes that, it would be inappropriate to abstain from making findings with respect to the domestic purchase requirement, a measure that has been properly brought before it. In addition, the Panel notes at this stage that it would be appropriate for it to consider the subsidiary request made by Turkey (i.e., that it abstain from making any recommendation to the DSB regarding this measure), only if the Panel determines that the domestic purchase requirement is inconsistent with any of the provisions cited by the United States.

4. Order of analysis

7.181 Regarding the proper order of analysis to be undertaken by the Panel in considering the different claims advanced by the United States, we begin by noting the first provisions cited by the United States in its claims against the domestic purchase requirement, i.e., those contained in the TRIMs Agreement.

7.182 Article 2.1 of the TRIMs Agreement states that:

> "Without prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994".

7.183 In turn, paragraph 1(a) of the Annex to the TRIMs Agreement provides that:

> "TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which require:
>
> > the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production".

7.184 Both provisions of the TRIMs Agreement, Article 2.1 and paragraph 1(a) of the Annex, refer to the obligation of Members not to apply trade-related investment measures in a manner that is inconsistent with specific rules contained in the GATT 1994, notably in Article III and in Article XI. Consequently, consideration of the United States' claims regarding the provisions of the GATT should precede that of the cited provisions of the TRIMs Agreement. This would also be consistent with the United States' statement that, if the Panel found that the domestic purchase requirement is inconsistent

with Article III:4 of the GATT 1994, the Panel need not make a finding under the TRIMs Agreement.[498]

7.185 The Panel thus needs to consider whether it should start its analysis of the domestic purchase requirement in relation to Article III:4 of the GATT 1994, Article XI:1 of the GATT 1994, or Article 4.2 of the Agreement on Agriculture.

7.186 In its relevant section, Article III:4 of the GATT 1994 states that:

> "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."

7.187 Article XI:1 of the GATT 1994 provides:

> "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 or on the exportation or sale for export of any product destined for the territory of any other contracting party."

7.188 In turn, Article 4.2 of the Agreement on Agriculture states that:

> "Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties[1], except as otherwise provided for in Article 5 and Annex 5.
>
> ———————
>
> [1] These measures include quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties, whether or not the measures are maintained under country-specific derogations from the provisions of GATT 1947, but not measures maintained under balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement."

7.189 The challenged measure is a specific requirement that was part of Turkey's TRQ system for the importation of rice. The Panel notes that Article III:4 of the GATT 1994, on one hand, and, on the other, Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture, have distinct scopes of application. The former deals with measures affecting imported products inside domestic markets, whereas the latter two provisions deal with border measures that prohibit or restrict imports. As stated by the GATT Panel on *Canada – FIRA*, in words that were quoted by the WTO Panel on *India - Autos*:

> "[T]he General Agreement distinguishes between measures affecting the 'importation' of products, which are regulated in Article XI:1, and those affecting 'imported

[498] United States' comments on Turkey's responses to question 151, para. 63. See also para 7.150 above.

> products', which are dealt with in Article III. If Article XI:1 were interpreted broadly to cover also internal requirements, Article III would be partly superfluous".[499]

7.190 Like Article XI:1 of the GATT 1994, Article 4.2 of the Agreement on Agriculture also deals with border measures. Article 4.2 refers to "measures of the kind which have been required to be converted into ordinary customs duties". As noted by the Appellate Body in *Chile – Price Band System*, the footnote to Article 4.2 "imparts meaning to [this provision] by enumerating examples of 'measures of the kind which have been required to be converted', and which Members must not maintain, revert to, or resort to, from the date of the entry into force of the *WTO Agreement*."[500] These are generally referred to in the footnote as "border measures other than ordinary customs duties".

7.191 Having said that, the Panel also bears in mind that, as noted by the Panel on *India - Autos*:

> "[I]t... cannot be excluded *a priori* that different aspects of a measure may affect the competitive opportunities of imports in different ways, making them fall within the scope either of Article III (where competitive opportunities on the domestic market are affected) or of Article XI (where the opportunities for importation itself, i.e. entering the market, are affected), or even that there may be, in perhaps exceptional circumstances, a potential for overlap between the two provisions ..."[501]

7.192 In this particular dispute, the United States' main claim against the domestic purchase requirement is that it is a measure that "treats imported rice less favorably than domestic rice and adversely affects the conditions of competition for imported rice in the Turkish market".[502] The United States' other claims against that same measure – that it is a border measure that restricts imports – have only been presented in the alternative. As argued by the United States: "To the extent Turkey's domestic purchase requirement is not viewed as a 'law, regulation or requirement' within the meaning of Article III, this requirement breaches Article XI:1 of the GATT 1994, because it is a 'restriction... on importation' within the meaning of Article XI:1".[503]

7.193 In other words, the United States made its claim against the domestic purchase requirement as a violation of Article XI:1 of the GATT 1994 contingent on a finding by the Panel that such requirement was not a "law, regulation or requirement" within the meaning of Article III:4 of the GATT 1994. As the measure has been challenged first because of its alleged effects on the competitive position between imported and domestic rice, the Panel finds it reasonable to begin its analysis by focusing on the claim brought under Article III:4 of the GATT 1994.

7.194 Only after the Panel considers the consistency of the domestic purchase requirement with Article III:4 of the GATT 1994, will it turn to the issue of whether the same measure should also, or alternatively, be viewed as a border measure and thus properly analysed under Article XI:1 of the GATT 1994 or Article 4.2 of the Agreement on Agriculture, or both. In this regard, the Panel has already noted that Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture have similar scopes of application as they both apply to border measures.[504] Article XI:1 of the GATT 1994, however, is generally applicable to import prohibitions or restrictions imposed on any

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[499] GATT Panel Report on *Canada – FIRA*, L/5504, adopted on 7 February 1984, para. 5.14, as quoted in the Panel Report on *India - Autos*, para. 7.220.

[500] Appellate Body Report on *Chile – Price Band System*, para. 209.

[501] Panel Report on *India - Autos*, para. 7.224.

[502] United States' first submission, para. 86.

[503] Ibid., para. 103.

[504] See paras. 7.48 and 7.189 above.

product, while Article 4.2 of the Agreement on Agriculture is limited to measures imposed on products that fall within the scope of the Agreement of Agriculture.

7.195 In this particular case, and with regard to the domestic purchase requirement, the United States' claims under both Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture may be considered to be equivalent. Following the same approach used before[505], if the Panel decides that it should also, or alternatively, consider the domestic purchase requirement as a border measure, it will start by examining the claims presented by the United States under Article 4.2 of the Agreement on Agriculture, since this Agreement may be considered more specific in respect of border measures imposed on agricultural products.

7.196 In conclusion, the Panel will begin its analysis of the claims advanced by the United States regarding the domestic purchase requirement, by considering first the claim brought under Article III:4 of the GATT 1994. After the domestic purchase requirement has been considered under Article III:4 of the GATT 1994, the Panel will then consider whether the same measure should also, or alternatively, be viewed as a border measure and thus analysed under Article XI:1 of the GATT 1994 or Article 4.2 of the Agreement on Agriculture, or both. In this part of its analysis, should it be necessary, the Panel would start by examining the claims presented by the United States under Article 4.2 of the Agreement on Agriculture, since this Agreement may be considered more specific in respect of border measures imposed on agricultural products. If the Panel were to make findings under Article 4.2 of the Agreement on Agriculture, it would then consider whether it should also make findings under Article XI:1 of the GATT 1994. Finally, if the Panel were to determine that the domestic purchase requirement was inconsistent with any or all of the above-cited GATT provisions, it would then consider whether it is also necessary to issue findings under the TRIMs Agreement.

5. Claim under Article III:4 of the GATT 1994

(a) Arguments of the parties

7.197 The United States claims that:

> "Turkey's imposition of a domestic purchase requirement under the TRQ regime on potential importers of rice into Turkey is inconsistent with Article III:4 of the GATT 1994, because the measure treats imported rice less favorably than domestic rice and adversely affects the conditions of competition for imported rice in the Turkish market.[506]

7.198 Recalling the Appellate Body's statement in *Korea – Various Measures on Beef*, the United States has stated that:

> "[T]here are three elements that must be satisfied to establish that a measure is in breach of Article III:4: (1) the imported and domestic products must be 'like' products; (2) the measure is a law, regulation, or requirement 'affecting their internal sale, offering for sale, purchase, transportation, distribution or use'; and (3) the imported products are treated less favorably than domestic products."[507]

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[505] See para. 7.48 above.

[506] United States' first submission, para. 86. See also United States' rebuttal, para. 65. See also China's third party submission, para. 9. See also Australia's statement at the third party session, para. 22, China's statement at the third party session, para. 3, Korea's statement at the third party session, pp. 3-4, and Thailand's statement at the third party session, para. 4.

[507] United States' first submission, para. 87.

7.199 The United States has argued that Turkish rice and United States rice are like products. Firstly, because the difference in treatment between domestic and imported rice accorded by the challenged measure is based exclusively on the origin of the products.[508] Secondly, based on the terms of their tariff classification; their properties, nature and quality; their end uses; and the consumer preferences.[509]

7.200 The United States has added that the domestic purchase requirement can be characterized as a "requirement", in terms of Article III:4 of the GATT 1994, inasmuch as the measure is tantamount to an obligation which importers voluntarily accept in order to obtain an advantage from the government, i.e., the ability to pay a reduced rate of duty to import rice.[510] It would "affect the internal sale, offering for sale, purchase, and use of the like products", because compliance with the domestic purchase requirement provides the only way to import rice into Turkey[511] and, more generally, because "[o]nly domestic rice satisfies the purchase requirement in order to import rice into Turkey under the TRQ, whereas imported rice does not".[512]

7.201 The United States has also stated that "Turkey's domestic purchase requirement accords less favorable treatment to imported rice", because "imported rice cannot be sold in the domestic market under any circumstance unless the importer first purchases, at inflated prices, domestic rice" and because "the domestic purchase requirement creates a disincentive to purchase and import foreign rice"[513]:

> "Consequently, by making the sourcing of imported rice less desirable, the domestic purchase requirement alters the decision-making calculus of domestic entities when making purchasing decisions regarding rice. And by making imported rice ineligible to satisfy the purchase requirement, the conditions of competition are altered in favor of domestic rice."[514]

7.202 The United States has also argued that:

> "[D]omestic rice has an advantage in the marketplace that imported rice does not have, and domestic rice is more attractive as a result. A purchaser considering a purchase of domestic or imported rice knows that only the domestic rice can be used to facilitate importation under the TRQ and so that advantage accrues only to the domestic rice."[515]

7.203 The United States has indicated that early GATT panels, as well as WTO panels and the Appellate Body, have found that "a Member's requiring the sourcing of domestic goods as a condition to receive a benefit [is] inconsistent with Article III:4 of the GATT".[516] The United States specifically referred to the GATT Panel report in *Italy – Agricultural Machinery* and to the WTO Panel report in *India – Autos*.[517]

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[508] United States' first submission, paras. 89-90.
[509] Ibid., paras. 91-92.
[510] Ibid., paras. 93-94.
[511] Ibid., paras. 95-96.
[512] United States' opening statement at the first substantive meeting, para. 29. See also United States' opening statement at the second substantive meeting, para. 16.
[513] United States' first submission, paras. 97-98.
[514] Ibid., para. 98.
[515] United States' opening statement at the first substantive meeting, para. 29.
[516] Ibid., paras. 30-31.
[517] Ibid.

7.204 Turkey has agreed with the United States regarding the three elements that must be determined in order to find a violation of Article III:4 of the GATT 1994.[518]

7.205 Turkey has also agreed with the United States that "the imported and domestic products in the case at stake [imported and domestic rice] are, in fact, '*like products*'."[519]

7.206 Turkey has also agreed that its domestic purchase requirement "can be considered as either a '*law, regulation or requirement*' within the meaning of [Article III:4 of the GATT 1994]."[520] Turkey, however, has stated that this measure "does not '*affect the internal sale, offering for sale, purchase (…) or use*' of imported rice".[521] In this respect, Turkey has argued that:

> "[I]t is wrong and misleading to state that the fulfilment of the [domestic purchase requirement] by importers '*provides the only way to import rice into Turkey*'. In fact, as widely known and as effectively evidenced in the factual background, any importer is free to import whatever quantity of rice into Turkey from whatever country at the MFN or applied rate of duty." [522]

7.207 In Turkey's view, "[t]he regime of importation which was applied within the TRQ was meant to provide an advantage to importers of foreign rice to adequately supply the Turkish rice market."[523]

7.208 Turkey has argued that "the opening... of its TRQ... resulted in the modification of the conditions of competition between domestic and imported products *in favour of imported products*", by making imported rice "purchased through the TRQ regime" cheaper than like domestic rice.[524]

7.209 Turkey has finally argued that "the conditions of competition [between imported and domestic rice] have not been adversely affected by the [domestic purchase requirement] in favour of domestic rice and no less favourable treatment [has been] accorded by Turkey to rice imported from the United States".[525]

7.210 Therefore, Turkey has concluded that the Panel should reject the claim by the United States that the domestic purchase requirement is inconsistent with Article III:4 of the GATT 1994.[526]

(b) Article III:4 of the GATT 1994

7.211 Under Article III:4 of the GATT 1994:

> "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use..."

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[518] Turkey's first submission, para. 89.
[519] Ibid, para. 90 (emphasis in the original).
[520] Ibid., para. 91 (emphasis in the original).
[521] Ibid. (emphasis in the original).
[522] Ibid., para. 93 (emphasis in the original). See also Turkey's statement at the first substantive meeting, paras. 25 and 30, and Turkey's rebuttal, para. 47.
[523] Turkey's first submission, para. 93. See also Turkey's statement at the first substantive meeting, paras. 22-23 and 25, and Turkey's rebuttal, paras. 46-47.
[524] Turkey's first submission, paras. 94-97. See also Turkey's statement at the first substantive meeting, paras. 26 and 30, and Turkey's rebuttal, para. 48.
[525] Turkey's first submission, para. 98.
[526] Ibid., para. 99.

(c) The Panel's analysis

7.212 As recalled by both parties, the Appellate Body has said that:

> "For a violation of Article III:4 to be established, three elements must be satisfied: that the imported and domestic products at issue are 'like products'; that the measure at issue is a 'law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use'; and that the imported products are accorded 'less favourable' treatment than that accorded to like domestic products."[527]

(i) Likeness of products

7.213 There is no disagreement between the parties that the relevant imported and domestic products (imported and domestic rice) are "like products".[528]

7.214 In any event, a number of panels have held the view that where a difference in treatment between domestic and imported products is based exclusively on the products' origin, it is correct to treat products as "alike" within the meaning of Article III:4. In that case, there is no need to establish the likeness between imported and domestic products in terms of the traditional criteria – that is, their physical properties, end-uses and consumers' tastes and habits.[529]

7.215 The measure under consideration, the domestic purchase requirement, created a distinction between different categories of rice, based solely on the criterion of their respective origin. Under the rules contained in Decree 2005/9315 of 10 August 2005 on the *Application of Tariff Quota for the Importation of Some Species of Paddy Rice and Rice*, the purchase of paddy rice from domestic producers and the purchase of domestic paddy rice or milled rice from the TMO granted the purchaser the benefit of access to the importation of rice at reduced tariff levels. In contrast, the purchase of imported rice did not grant the same benefit. Turkey has not disputed this fact.[530]

7.216 Accordingly, imported and domestic rice can be considered as "like products", within the meaning of Article III:4 of the GATT 1994, and for the purpose of considering the United States' claims regarding the domestic purchase requirement.

(ii) Law, regulation or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution or use

7.217 There is no disagreement between the parties that the domestic purchase requirement can be considered as a "law, regulation or requirement".[531] In any event, we recall that the Panel on *India – Autos*, when considering the notion of "requirement" within the meaning of Article III:4 of the GATT 1994, first noted that:

> "An ordinary meaning of the term 'requirement', as articulated in the New Shorter Oxford Dictionary, is 'Something called for or demanded; a condition which must be complied with'."[532]

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[527] Appellate Body Report on *Korea – Various Measures on Beef*, para. 133.
[528] Turkey's first submission, para. 90. United States' first submission, paras. 89-92.
[529] See, for example, Panel Report on *India - Autos*, para. 7.174, and Panel Report on *Canada – Wheat Exports and Grain Imports,* para. 6.164 and footnote 246.
[530] See, for example, Turkey's first submission, para. 33.
[531] Ibid., para. 91. United States' first submission, paras. 93-94.
[532] Panel Report on *India - Autos*, para. 7.181.

7.218 The same Panel then noted that GATT jurisprudence "suggests two distinct situations which would satisfy the term 'requirement' in Article III:4: (i) obligations which an enterprise is 'legally bound to carry out'; [and (ii)] those which an enterprise voluntarily accepts in order to obtain an advantage from the government."[533]

7.219 The domestic purchase requirement can clearly be considered as a "requirement", within the meaning of Article III:4 of the GATT 1994, as it is a condition that importers may voluntarily accept in order to obtain an advantage from the Turkish government, i.e., the ability to import rice at reduced tariff rates.

7.220 Turkey argues, however, that this measure does not affect the internal sale, offering for sale, purchase or use of imported rice.[534] In Turkey's view, the domestic purchase requirement was part of a regime that provided an advantage to importers of foreign rice to adequately supply the Turkish rice market, but did not prevent them from otherwise importing rice into Turkey from any origin at the MFN or applied rate of duty.[535]

7.221 We note that the term "affecting" in the expression "laws, regulations and requirements affecting [the] internal sale, offering for sale, purchase, transportation, distribution or use" in Article III:4 of the GATT 1994 has been found to have a broad scope. As articulated in WTO and GATT jurisprudence, it "cover[s] not only laws and regulations which directly govern the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between domestic and imported products[536]."[537]

7.222 In *US – FSC (Article 21.5 – EC)*, the Appellate Body also discussed the use of the word "affecting" in Article III:4 of the GATT 1994, and noted that:

> "The word 'affecting' serves a similar function in Article I:1 of the *General Agreement on Trade in Services* (the 'GATS'), where it also defines the types of measure that are subject to the disciplines set forth elsewhere in the GATS but does not, in itself, impose any obligation.[538] In *EC – Bananas III*, we considered the meaning of the word 'affecting' in that provision of GATS. We stated:
>
> > [t]he ordinary meaning of the word 'affecting' implies a measure that has 'an effect on', which indicates a *broad scope of application*. This interpretation is further reinforced by the conclusions of previous panels that the term 'affecting' in the context of Article III of the GATT is wider in scope than such terms as 'regulating' or 'governing'.[539] (emphasis added, footnote omitted)."[540]

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[533] Panel Report on *India - Autos*, para. 7.184.

[534] Turkey's first submission, para. 91.

[535] Ibid., para. 93.

[536] (*footnote original*) Panel Report on *Italian Agricultural Machinery*, *supra* note 390, para. 12.

[537] Panel Report on *Canada – Autos*, para. 10.80. See also, for example, Panel Report on *Mexico – Taxes on Soft Drinks*, para. 8.108.

[538] *(footnote original)* Article I:1 of the GATS provides that "[t]his Agreement applies to measures by Members *affecting* trade in services." (emphasis added)

[539] *(footnote original)* Appellate Body Report, *supra*, footnote 47, para. 220. We made the same statement regarding the word "affecting" in Article I:1 of the GATS in our Report in *Canada – Autos, supra*, footnote 56, para. 150.

[540] Appellate Body Report on *US – FSC (Article 21.5 – EC)*, para. 209.

7.223 Turkey has admitted that the domestic purchase requirement was established:

> "To partially compensate against [a] shift of competitive conditions solely towards imported rice, while at the same time pursuing the objectives of greater market supply (through the TRQ) and market stabilization (which also carried obvious consequences in terms of the viability and affordability, within the committed AMS levels, of Turkey's market intervention mechanisms)".[541]

7.224 As Turkey has stated in other words:

> "[I]ts domestic purchase requirement was introduced within the TRQ in order to partly moderate the advantageous effects of the preferential rates (i.e., advantages which were totally in favour of imported products)."[542]

7.225 The Panel believes that, if the domestic purchase requirement had the effect of altering the competitive relationship between imported and domestic rice, even for the purpose of partially compensating for the benefits granted through the TRQs, it is difficult to see how this requirement did not affect the internal sale, offering for sale, purchase, and use of imported rice. The domestic purchase requirement certainly "had an effect on" the competitive relationship between imported and domestic rice, and thus affected the decisions of operators on the purchase of imported and domestic rice.

7.226 Accordingly, we conclude that the domestic purchase requirement can be considered as a requirement affecting the internal sale, offering for sale, purchase and use of imported rice, within the meaning of Article III:4 of the GATT 1994.

(iii) Less favourable treatment

7.227 The United States has argued that the domestic purchase requirement results in less favourable treatment for imported rice than for like domestic rice. In its view:

> "Under the applicable regulations, imported rice cannot be sold in the domestic market under any circumstance unless the importer first purchases... domestic rice. Domestic rice producers are not subject to the same requirement in order to bring their product to market, which provides them a tremendous advantage in the market. Further, because the domestic purchase requirement makes procuring imported rice more costly ... the domestic purchase requirement creates a disincentive to purchase and import foreign rice. Consequently, by making the sourcing of imported rice less desirable, the domestic purchase requirement alters the decision-making calculus of domestic entities when making purchasing decisions regarding rice. And by making imported rice ineligible to satisfy the purchase requirement, the conditions of competition are altered in favor of domestic rice."[543]

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[541] Turkey's first submission, para. 96.
[542] Turkey's opening statement at the second substantive meeting, para. 32.
[543] United States' first submission, para. 98.

7.228 Turkey has rejected this argument. It has stated instead that:

> "The [domestic purchase requirement], in substance, was altering the conditions of competition between domestic and imported products *in favour of imported products*."[544]

7.229 Turkey has argued further that the domestic purchase requirement should not be seen in isolation, but as a component of the TRQ:

> "The domestic purchase requirement must be seen as a fundamental of the TRQ system itself, just like the in-quota and the preferential rates of duty. Turkey maintains that it was fully entitled to decide, in line with its economic policies, the characteristics of the TRQ. For those importers that did not consider TRQ trade advantageous, MFN always remained an option."[545]

7.230 In Turkey's view, "a TRQ system without the domestic purchase requirement would have resulted in too great an advantage in favour of imported products".[546]

7.231 In order to determine whether the domestic purchase requirement resulted in treatment for imported rice that is less favourable than that accorded to like domestic products, the Panel is guided by the statement from the Appellate Body that such an assessment should focus on examining "whether a measure modifies the conditions of competition in the relevant market to the detriment of imported products".[547]

7.232 Indeed, when considering the issue of "less favourable treatment" under Article III:4 of the GATT 1994, previous panels have highlighted the importance of ensuring the "equality of competitive conditions between imported products and like domestic products". As noted by the Panel on *Japan – Film*:

> "Recalling the statement of the Appellate Body in *Japan – Alcoholic Beverages* that 'Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products'[548], we consider that this standard of effective equality of competitive conditions on the internal market is the standard of national treatment that is required, not only with regard to Article III generally, but also more particularly with regard to the "no less favourable treatment" standard in Article III:4. We note in this regard that the interpretation of equal treatment in terms of effective equality of competitive opportunities, first clearly enunciated by the panel on *US – Section 337*[549], has been followed consistently in subsequent GATT and WTO panel reports.[550],[551]

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[544] Turkey's first submission, para. 96.
[545] Turkey's statement at the first substantive meeting, para. 30.
[546] Turkey's rebuttal, para. 50.
[547] Appellate Body Report on *Korea –Various Measures on Beef*, para. 137.
[548] *(footnote original) Japan – Alcoholic Beverages*, p. 16, citing *US – Taxes on Petroleum Products and Certain Imported Substances*, BISD 34S/136, para. 5.1.9 and *Japan – Liquor Taxes*, BISD 34S/83, para. 5.5(b).
[549] (*footnote original*) *US – Section 337*, BISD 36S/345, 386-387, para. 5.11.
[550] *(footnote original)* See e.g. *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, adopted on 18 February 1992, BISD 39S/27, paras. 5.12-5.14 and 5.30-5.31; *US – Malt Beverages*, BISD 39S/206, para. 5.30; *US – Gasoline*, WT/DS2/R, para. 6.10; *Canada – Periodicals*, WT/DS31/R, adopted on 20 July 1997, p. 75; *Bananas III*, WT/DS27/R, paras. 7.179-7.180.
[551] Panel Report on *Japan – Film*, para. 10.379.

7.233 There is no disagreement between the parties that, pursuant to Decree 2005/9315 of 10 August 2005 on the *Application of Tariff Quota for the Importation of Some Species of Paddy Rice and Rice*[552], which was in force at the time of establishment of this Panel, only importers who purchased domestic paddy rice from local producers or who purchased domestic paddy rice or milled rice from the TMO were eligible to benefit from the tariff quotas for the importation of rice. In other words, compliance with the domestic purchase requirement was a necessary condition to benefit from access to the TRQ. Purchase of like imported rice did not grant the same benefit.

7.234 In our view, as mentioned above, the domestic purchase requirement modified the conditions of competition in the Turkish market to the detriment of imported rice. The purchase of domestic rice accorded an advantage that the purchase of the like imported product did not, i.e., the option to buy imported rice at reduced tariff rates.

7.235 We note that its 1958 report on *Italy – Agricultural Machinery*, a GATT Panel found that the provision by the Italian government of certain facilities (special and more favourable credit terms) to the purchasers of Italian tractors and other agricultural machinery, facilities that were not available to the purchasers of imported agricultural machinery was inconsistent with Article III:4 of the GATT. The Panel added that:

> "The selection of the word 'affecting' [in Article III:4] would imply... that the drafters of the Article intended to cover in paragraph 4 not only the laws and regulations which directly governed the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products on the internal market..."[553]

7.236 The Panel notes that the parties hold contrasting views on the economic attractiveness for an operator in Turkey to import rice under the TRQs. The United States has argued that, because of the high prices of the domestic rice that had to be bought in order to opt for an import licence under the TRQs, "the large cost associated with domestic purchase more than offsets any alleged cost savings resulting from the preferential rates of duty realized by importers under the TRQ".[554] In its opinion, the only reason why Turkish operators opted for importing rice under the TRQs was because the Turkish government was not allowing the importation of rice at MFN rates.

7.237 Turkey has rejected this argument and contended that "the [tariff quota] system was voluntary and conferred an advantage to the importers meeting the requirements stipulated in the legislation... [T]he high volumes of in-quota imports and the high numbers of licences which [were] issued are testimony to the attractiveness and appeal that the tariff advantage has had in the business determinations made by individual rice importers. This in-quota advantage has always existed in parallel to the ability to import at the less advantageous MFN rates of duty."[555]

7.238 In our view, however, the most important consideration is that, through the contested measure (the domestic purchase requirement), the purchase of Turkish domestic rice granted to operators in Turkey an option that the purchase of like imported rice did not, i.e., the option to import rice at reduced tariff rates. The fact that purchase of domestic rice gave that option to operators in Turkey, an option that would not accrue from the purchase of like imported rice, is in itself a benefit that

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[552] *Application of Tariff Quota for the Importation of Some Species of Paddy Rice and Rice*, Decree No. 2005/9315, published in Turkey's Official Gazette No. 25,935, dated 13 September 2005, in exhibits TR-9 and US-10.

[553] GATT Panel Report on *Italy – Agricultural Machinery*, para. 12.

[554] United States' opening statement at the first substantive meeting, para. 32.

[555] Turkey's statement at the first substantive meeting, paras. 22-23. See also Ibid., para. 30, and Turkey's first submission, para. 97.

modified the conditions of competition in the Turkish market to the detriment of imported rice. This is irrespective of whether operators ultimately found it economically advantageous or not to import rice under the TRQs.

7.239 Turkey's repeated argument that the TRQs provided a significant advantage to operators, by allowing them to purchase imported rice at lower costs does not alter our conclusion. If anything, it confirms that the domestic purchase requirement altered the competitive conditions between domestic and imported rice by making this advantage conditional on the purchase of domestic rice.

7.240 Accordingly, we conclude that the domestic purchase requirement resulted in less favourable treatment for imported rice than for like domestic rice, within the meaning of Article III:4 of the GATT 1994.

(iv) Conclusion

7.241 For the reasons indicated, the Panel concludes that, through the requirement that importers must purchase domestic rice, in order to be allowed to import rice at reduced-tariff levels under the tariff quotas, Turkey accorded less favourable treatment to imported rice than that accorded to like domestic rice. This measure was therefore inconsistent with Article III:4 of the GATT 1994.

6. Claim under Articles XI:1 of the GATT 1994 and 4.2 of the Agreement on Agriculture

(a) Arguments of the parties

7.242 In addition to its claim that the domestic purchase requirement was an internal measure that accorded less favourable treatment to imported rice than to the like domestic product, the United States has also made the claim that this measure was "an additional import restriction... inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agriculture Agreement".[556]

7.243 With respect to Article XI:1 of the GATT 1994, the United States has argued that:

> "To the extent Turkey's domestic purchase requirement is not viewed as a 'law, regulation or requirement' within the meaning of Article III, this requirement breaches Article XI:1 of the GATT 1994, because it is a 'restriction... on importation' within the meaning of Article XI:1."[557]

7.244 In the United States' view:

> "[T]he domestic purchase requirement, on its face, imposes a substantial restriction on imports of rice. Importation under the TRQ regime cannot be realized unless an importer purchases large quantities of domestic rice and presents proof of such purchases from TMO to FTU. The TRQ regime constitutes a discretionary import licensing system, because receiving a license to import under the TRQ is non-automatic; rather, importation under the TRQ is conditioned on domestic purchase. Further, the Turkish regulations have not always specified the amount of rice that would need to be procured in order to receive a portion of the quota, which has rendered importers completely unable to ship at times, or at best, has left them in a state of considerable uncertainty as to how much domestic rice they would need to procure from TMO, Turkish producers, or Turkish producer associations in order to

[556] United States' rebuttal, para. 4.
[557] United States' first submission, para. 103.

bring their shipments of foreign rice into the country.[558] All of these features of the system make the importation process more burdensome and create serious disincentives to importation."[559]

7.245 Turkey has responded that:

"[T]he allegation that its domestic purchase requirement imposes, on its face, a substantial restriction on imports of rice is legally incorrect and not based on convincing factual evidence. In fact, the TRQ regime, and its DPR system, only restricted imports in relation to the TRQ trade volumes (i.e., those imported at preferential rates) and in a strict non-discriminatory fashion, but never altered or removed the ability of importers to import unlimited quantities or rice from any origin at the applied or MFN bound rate. Therefore, it never resulted in a substantial restriction on imports of rice."[560]

7.246 In Turkey's opinion:

"[T]he allegation by the United States that Turkey's TRQ regime is based on non-automatic import licensing conditioned upon domestic purchase is legally incorrect [because] the import licensing regime used to administer the TRQ regime was an automatic import licensing system and, therefore, not falling within the scope of GATT Article XI."[561]

7.247 The United States has also argued that Turkey's domestic purchase requirement is inconsistent with Article 4.2 of the Agreement on Agriculture. In its opinion, the domestic purchase requirement constitutes:

"[A] discretionary import licensing system and [a] non-tariff [measure] maintained through [a] state-trading [enterprise]. FTU will only grant a license to import rice under the TRQ to those importers who procure large quantities of domestic rice from TMO, Turkish producers, or Turkish producer associations and who present to FTU proof of such purchase. As the issuance of licenses is not automatic but contingent on domestic purchase, Turkey's maintenance of a domestic purchase requirement to import under the TRQ constitutes discretionary import licensing.

The domestic purchase requirement is also a non-tariff measure maintained through a state-trading enterprise, because TMO administers the domestic purchase requirement aspect of the TRQ. An importer may only import rice under the TRQ if it purchases rice domestically, including from TMO, which sells rice at prices it announces. In addition, the importer must obtain proof of such purchase from TMO, which must be presented to FTU. If an importer does not present that documentation, FTU will not grant a license to import under the TRQ. Lastly, under the regulations TMO is permitted to import 50,000 metric tons of milled rice in order to help stabilize the domestic market in the event that prices increase."[562]

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[558] *(footnote original) See* the April 2004 Decree (Exhibit US-2) and the April 2004 Notification (Exhibit US-3).

[559] United States' first submission, para. 104. See also United States' rebuttal, para. 66.

[560] Turkey's first submission, para. 105. See also Turkey's statement at the first substantive meeting, para. 31, and Turkey's rebuttal, para. 47.

[561] Turkey's first submission, para. 106.

[562] United States' first submission, paras. 114-115.

7.248 Turkey has responded that these allegations "must be rejected in that its TRQ regime was not based on discretionary import licensing and it is not correct to state that non-tariff measures were maintained through state trading enterprises".[563] In Turkey's view, its import licensing system for purposes of allocating the TRQ to traders:

> "has always been an automatic import licensing system where approval of import licenses would be granted in all cases, provided that all application requirements were met by importers, as provided by Articles 2.1 and 2.2(a)(i) of the Agreement on Import Licensing Procedures. Since one of the Turkish legal requirements that '*any person, firm or institution*' had to fulfil in order to be issued a license for TRQ importation was to be in compliance with the domestic purchase requirements..., the United States has failed to demonstrate its claim that Turkey maintained or resorted to discretionary import licensing".[564]

7.249 In relation to the claim that the domestic purchase requirement is also a non-tariff measure maintained through a state-trading enterprise, Turkey has argued that:

> "[T]he TMO was only one of the possible providers of domestic rice under the three categories of the DPR (i.e., paddy producers having permission to plant paddy rice, their cooperatives and unions or the TMO). Therefore, the United States fails to prove how the TMO could be in a position to operate non-tariff measures on imports of TRQ rice."[565]

(b) Articles XI:1 of the GATT 1994 and 4.2 of the Agreement on Agriculture

7.250 Article XI:1 of the GATT 1994 provides 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 or on the exportation or sale for export of any product destined for the territory of any other contracting party."

7.251 In turn, Article 4.2 of the Agreement on Agriculture states that:

> "Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties[1], except as otherwise provided for in Article 5 and Annex 5.

[1] These measures include quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties, whether or not the measures are maintained under country-specific derogations from the provisions of GATT 1947, but not measures maintained under balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement."

[563] Turkey's first submission, para. 115.
[564] Turkey's first submission, para. 115.
[565] Ibid., para. 116.

(c) The Panel's analysis

7.252 The Panel has already determined that the domestic purchase requirement was inconsistent with Article III:4 of the GATT 1994. In that regard, the Panel has considered the effect that the measure had on the competitive opportunities between imported rice and the like domestic products.

7.253 Having said that, the Panel agrees that, as noted by the Panel on *India – Autos*, there may be cases when a measure can affect both the conditions of competition between imported rice and domestic products *after* importation, as well the opportunities *for* importation:

> "[I]t ... cannot be excluded *a priori* that different aspects of a measure may affect the competitive opportunities of imports in different ways, making them fall within the scope either of Article III (where competitive opportunities on the domestic market are affected) or of Article XI (where the opportunities for importation itself, i.e. entering the market, are affected), or even that there may be, in perhaps exceptional circumstances, a potential for overlap between the two provisions...
>
> … [T]here may be circumstances in which specific measures may have a range of effects. In appropriate circumstances they may have an impact both in relation to the conditions of importation of a product and in respect of the competitive conditions of imported products on the internal market within the meaning of Article III:4.[566] This is also in keeping with the well established notion that different aspects of the same measure may be covered by different provisions of the covered Agreements "[567]

7.254 In any event, the Panel does not believe that, having found that the domestic purchase requirement was inconsistent with Article III:4 of the GATT 1994, an additional finding regarding the same measure as a possible import restriction would be necessary to resolve the matter at issue with regard to this particular measure.

7.255 Accordingly, under the guidance of the principle of judicial economy, the Panel considers it unnecessary for the resolution of this dispute to address the United States' claim that the domestic purchase requirement is an import restriction inconsistent with Article 4.2 of the Agreement on Agriculture and Article XI:1 of the GATT 1994. Therefore, the Panel refrains from making any findings with respect to these two provisions.

7. Claim under the TRIMs Agreement

(a) Arguments of the parties

7.256 In its request for the establishment of the Panel, the United States advanced the claim that the domestic purchase requirement was also inconsistent with Article 2.1 and paragraph 1(a) of the Annex to the TRIMs Agreement.[568] Throughout the proceedings, the United States presented its claim under the TRIMs Agreement independently from its claims against the same measure under other agreements (most notably, under Articles III:4 and XI:1 of the GATT 1994).

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[566] *(footnote original)* The Panel notes that the TRIMS Agreement Illustrative List envisages measures relating to export requirements both in the context of Article XI:1, as noted above in the context of our analysis under Article XI:1, and in the context of Article III:4 of the GATT 1994, by listing as inconsistent with that provision measures which require "that an enterprise's purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports" TRIMS Illustrative List, Item 1 (b).

[567] Panel Report on *India - Autos*, paras. 7.224 and 7.296. See also the European Communities' third party submission, para. 28, and the European Communities' statement at the third party session, para. 4.

[568] Request for the Establishment of a Panel by the United States, *Turkey – Rice*, 7 February 2006, WT/DS334/4, page 3.

7.257 Turkey has responded that, inasmuch as the United States' claim under the TRIMs Agreement was based on the assumption that the domestic purchase requirement was in breach of Article III:4 of the GATT 1994 and, since in Turkey's view that breach had not been demonstrated, the claim under the TRIMs Agreement should likewise be rejected.[569] Turkey added that "the correct methodology for interpretation of the TRIMs Agreement should require a preliminary assessment of the existence of both the trade and the investment elements of an alleged TRIM".[570] In its view, its "domestic purchase requirement is not ... a trade-related investment measure ... [since] nothing in its expired TRQ legislation revealed or even implied 'investment objectives' and it had no relation with investment".[571]

7.258 At a late stage in the proceedings, when under the Panel's working procedures parties were invited to comment on each other's responses to questions after the second substantive meeting, the United States suggested that, "if the Panel [found] that Turkey has breached Article III:4 of the GATT 1994 by instituting a domestic purchase requirement, it need not make a finding under Article 2.1 and paragraph 1(a) of Annex 1 of the TRIMs Agreement".[572]

(b) The Panel's analysis

7.259 The Panel has already determined that the domestic purchase requirement was inconsistent with Article III:4 of the GATT 1994. Since the United States suggested that, if the Panel were to make such a finding, it need not make an additional finding under Article 2.1 and paragraph 1(a) of Annex to the TRIMs Agreement, the Panel will not address this claim.

8. Recommendations

(a) Arguments of the parties

7.260 Turkey has stated that "the legislative framework providing for the TRQ regime, including the domestic purchase requirement, is no longer in force".[573] Based on this statement, it has requested that, "should this Panel consider [it] necessary for the positive solution of the dispute [to make any finding on the TRQ regime and its domestic purchase requirement, that it] refrain from making any recommendations on this matter".[574]

7.261 In response, the United States has disagreed that the measure is no longer in force and has argued that, in any event, the Panel should not refrain from making recommendations. It has stated that the legislative framework that provided for the establishment of tariff quotas, namely, Decree No. 95/6814 of 30 April 1995 on *Surveillance and Safeguard Measures for Imports and Administration of Quotas and Tariff Quotas* and Decree No. 2004/7333 of 10 May 2004 on the *Administration of Quotas and Tariff Quotas*, is still in force.[575] The United States added that, "given the number of unpublished documents that the Government of Turkey issues with respect to the rice trade"[576] and the fact that the TRQs have expired before and then been reopened on previous occasions[577], in its view it is "critical for achieving a definitive resolution of this matter", not only that

[569] Turkey's first submission, paras. 112-113.
[570] Turkey's response to question 75.
[571] Turkey's response to question 75.
[572] United States' comments on Turkey's responses to question 151, para. 63.
[573] Turkey's first submission, para. 136.
[574] Turkey's rebuttal, para. 37. See also Turkey's first submission, paras. 6 and 139, Turkey's statement at the first substantive meeting, para. 39, and Turkey's rebuttal, paras. 40, 44 and 45. See also European Communities' third party submission, para. 32.
[575] United States' response to question 22, para. 46.
[576] Ibid., para. 47.
[577] United States' response to question 18, para. 37.

the Panel make findings with regard to the measure, but "that it also issue recommendations that Turkey bring its measures into conformity with its WTO obligations".[578]

7.262 The United States has argued that:

> "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... 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 (*sic*) of the DSU... [W]ould such a development be helpful for resolving the dispute between the parties? [T]he United States... submits that the answer is 'no'."[579]

7.263 In the United States' view, the Panel's mandate is, not only to make findings, but also recommendations "with respect to the measures as they existed when this Panel was established".[580] The United States argues that:

> "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*."[581]

7.264 Asked by the Panel, the United States subsequently stated that, in *Dominican Republic – Import and Sale of Cigarettes*, the Appellate Body had disagreed with the Panel's determination to:

> "[make] 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 [but to decide] *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".[582]

(b) The Panel's analysis

7.265 Article 19.1 of the DSU states that:

> "Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned[583] bring the measure into conformity with that agreement.[Footnote omitted] In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations."

7.266 This general rule may be inapplicable when a measure has ceased to exist by the time the panel issues its recommendation to the DSB. The Panel recalls in this regard the words of the Appellate Body in *US – Certain EC Products*:

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[578] Ibid., para. 47.

[579] United States' opening statement at the second substantive meeting, para. 22. See also United States' response to question 152(a), para. 55.

[580] United States' opening statement at the second substantive meeting, para. 20.

[581] Ibid.

[582] United States' response to question 152(b), paras. 57-58.

[583] *(footnote original)* The "Member concerned" is the party to the dispute to which the panel or Appellate Body recommendations are directed.

> "[T]here is an obvious inconsistency between the finding of the Panel that 'the 3 March Measure is no longer in existence' and the subsequent recommendation of the Panel that the DSB request that the United States bring its 3 March Measure into conformity with its WTO obligations. The Panel erred in recommending that the DSB request the United States to bring into conformity with its WTO obligations a measure which the Panel has found no longer exists."[584]

7.267 The measure challenged by the United States is the requirement, in force at the time of the establishment of this Panel, contained in Decree 2005/9315 of 10 August 2005 on the *Application of Tariff Quota for the Importation of Some Species of Paddy Rice and Rice*[585], by which, in order to import specified quantities of rice at reduced tariff levels under the TRQs, importers had to purchase specified quantities of domestic rice, from the TMO, from Turkish producers, or from producer associations.

7.268 In accordance with the terms of Decree 2005/9315, the most recent tariff quota for the importation of rice was in force from 1 November 2005 to 31 July 2006. The Panel has already noted that, despite the United States' arguments about the likelihood that Turkey may reintroduce a TRQ regime for the importation of rice, and with it a domestic purchase requirement, the Panel must not lightly assume that Turkey will not abide by its declaration that "it will no longer have recourse to the TRQ system".[586] Indeed, as stated by the Panel on *Argentina – Textiles and Apparel*, panels "must assume that WTO Members will perform their treaty obligations in good faith, as they are required to do by the WTO Agreement and by international law."[587]

7.269 We do not find, from the Appellate Body's report in *Dominican Republic – Import and Sale of Cigarettes*, support for the United States' request that we make a specific recommendation regarding an expired measure. In that case, the Panel noted that the amendments introduced by the Dominican Republic to its Selective Consumption Tax, in the course of the panel's proceedings, had changed the essence of the measure.[588] The Panel had found that, in several aspects, the measures challenged in that case, related to the Selective Consumption Tax, were inconsistent with obligations in the covered agreements, but did "not find it appropriate to recommend to the WTO Dispute Settlement Body that it make any request to the Dominican Republic regarding this [amended] measure".[589]

7.270 In its report, the Appellate Body did not reverse any of the Panel's conclusions.[590] With regard to a particular measure that had been modified during the appellate review, and *not* in the course of the panel's proceedings, the Appellate Body noted that both participants had agreed that the measure had been altered through a new decree in October 2004.[591] The Appellate Body then went on to note that both participants had nevertheless asked for it "to rule on the WTO-consistency of the *original* measure". In view of the above, in its report, the Appellate Body:

> "*[R]ecommend[ed]* that the Dispute Settlement Body request the Dominican Republic to bring the tax stamp requirement, found in [that] Report and in the Panel Report as modified by [that] Report to be inconsistent with the GATT 1994, into

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[584] Appellate Body Report on *US – Certain EC Products*, para. 81.

[585] *Application of Tariff Quota for the Importation of Some Species of Paddy Rice and Rice*, Decree No. 2005/9315, published in Turkey's Official Gazette No. 25,935, dated 13 September 2005, in exhibits TR-9 and US-10.

[586] Turkey's response to question 82.

[587] Panel Report on *Argentina – Textiles and Apparel*, para. 6.14.

[588] Panel Report on *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.361 and 7.362. See also Ibid., paras. 7.391 and 7.417.

[589] Ibid., para. 7.363. See also Ibid., paras. 7.393 and 7.419.

[590] Appellate Body Report on *Dominican Republic – Import and Sale of Cigarettes*, para. 128.

[591] Ibid., para. 129.

> 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.*"[592]

7.271 In other words, and contrary to what the United States has argued, in its report, the Appellate Body did not reverse the Panel's decision to refrain from making a recommendation to the DSB regarding an expired measure. Rather, the Appellate Body modified a recommendation that the Panel had made concerning a *different* measure, because this measure had been modified during the appellate review. If anything, we find support in that case to the proposition that there is generally no need for a panel to recommend that the DSB request the responding party to bring into conformity with its WTO obligations a measure which the panel has found no longer exists and which that party has declared does not have the intention to reintroduce.

7.272 For the reasons cited above, we note that the domestic purchase requirement challenged by the United States has expired and that Turkey has declared its intention not to reintroduce the measure. Accordingly, we do not believe that there is any need for the Panel to recommend to the DSB that it make any request to Turkey in this regard.

D. CLAIMS AGAINST THE DOMESTIC PURCHASE REQUIREMENT *IN CONJUNCTION WITH* THE DENIAL OR FAILURE TO GRANT LICENCES TO IMPORT RICE AT OR BELOW THE BOUND RATE OF DUTY

1. The United States' claims

7.273 In addition to its claims against the domestic purchase requirement and against the denial or failure to grant licences to import rice at or below the bound rate of duty, considered individually, in its request for the establishment of a Panel, the United States also raised claims against both measures considered jointly. The United States stated that these measures are inconsistent with:

> "Article XI:1 of the GATT 1994 because Turkey's domestic purchase requirements, in conjunction with its denial of, or failure to grant, import licenses for rice at or below the bound rate of duty, constitute restrictions on imports other than in the form of duties, taxes, or other charges;
>
> Article 4.2 of the Agriculture Agreement because Turkey's domestic purchase requirements, in conjunction with its denial of, or failure to grant, import licenses for rice at or below the bound rate of duty, are 'measures of the kind which have been required to be converted into ordinary customs duties,' such as quantitative import restrictions, discretionary import licensing, and non-tariff measures maintained through a state-trading enterprise, which Members may not resort to or maintain under that Agreement... [and]
>
> Article 1.6 of the Import Licensing Agreement because applicants are not provided a reasonable period of time for submitting applications and because applicants have to approach more than one administrative body in connection with their applications".[593]

7.274 In the course of the proceedings, the United States stated that:

> "Turkey's TRQ regime, under which it requires that importers purchase significant quantities of domestic rice as a condition for receiving a license to import rice,

[592] Ibid. (emphasis added).
[593] Request for the Establishment of a Panel by the United States, *Turkey – Rice*, 7 February 2006, WT/DS334/4, page 4.

> coupled with Turkey's denial of Certificates of Control at the rates of duty set out in Turkey's domestic schedule or in its WTO Schedule constitutes a prohibition or restriction for purposes of Article XI:1. Each component of Turkey's import licensing system – the TRQ regime and the denial of Certificates of Control outside that regime – is inconsistent with Article XI:1 operating independently, as previously described. In addition, the two components also give rise to a breach of Article XI:1 acting in conjunction...
>
> Turkey's import licensing regime, comprised of (1) the TRQ requiring domestic purchase for under-quota imports and (2) the denial of import licenses for any imports at the rates of duty set out in Turkey's domestic schedule or even in its WTO Schedule, also constitutes a breach of Article 4.2 of the Agriculture Agreement. The United States already has established that both aspects of Turkey's import licensing regime are inconsistent with Article 4.2 of the Agriculture Agreement. The domestic purchase requirements under the TRQ constitute discretionary import licensing and non-tariff measures maintained through state-trading enterprises, which are measures set out in footnote 1 to Article 4.2. And Turkey's denial of Certificates of Control outside the TRQ constitutes a quantitative import restriction and discretionary import licensing, which also are measures set forth in footnote 1. Furthermore... Turkey's import licensing regime *as a whole* is inconsistent with GATT Article XI:1's ban regarding prohibitions or restrictions on importation. Because Article 4.2 of the Agriculture Agreement prohibits Members from employing quantitative import restrictions and discretionary import licensing in place of ordinary customs duties, the two measures operating in conjunction are necessarily in breach of Article 4.2."[594]

7.275 Throughout the Panel's proceedings, the United States made only one mention to its claim under Article 1.6 of the Import Licensing Agreement. In response to a question from the Panel after the second substantive meeting, the United States stated that:

> "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."[595]

[594] United States' first submission, paras. 120-125.
[595] United States' response to question 131(b), para. 21.

2. Response from Turkey

7.276 In response to the United States' claim, Turkey has stated that:

> "[T]here is no *de jure* or *de facto* 'denial' of approval of Certificates of Control in breach of GATT Article XI... Certificates of Control are not 'import licenses' but administrative forms relevant for '*customs purposes*', which are aimed at ensuring compliance with legitimate objectives ... MFN trade in rice has effectively occurred throughout the operation of the TRQ regime.
>
> It does not correspond to the reality of facts to claim... that importers of rice were forced to import through the TRQ regime. In addition, it is also misleading to affirm... that the TRQ regime was less advantageous for importers and that 'no economically rational importer' would have chosen it if given the option to import at the MFN rates... [E]ven for an importer of rice coming from the United States, the TRQ did provide a substantial advantage, in spite of the domestic purchase requirement...
>
> Turkey rejects the claim by the United States that a legal or operational link between the legislative framework that provides for the TRQ regime and the one regulating MFN trade would aim at seriously restricting market access. There is no prohibition or restriction connected with either the Certificates of Control or Turkey's TRQ regime. There are no discretionary import licensing procedures. There are no seasonal bans. Therefore, none of these instruments has ever acted, either individually or in combination with one another, to deter full utilization of the quotas opened within the TRQ regime or to prohibit or restrict MFN trade ...
>
> [For the reasons above], there cannot be '*discretionary import licensing*' and/or '*quantitative import restrictions*' within the meaning of Article 4.2 of the Agreement on Agriculture and footnote 1 thereof ...
>
> Turkey rejects the claim by the United States that the 'TRQ requiring domestic purchase for under-quota imports' and the 'denial of import license for any imports' at the applied or MFN rates of duty constitute a breach of Article 4.2 of the Agreement on Agriculture. This never occurred both in relation to the individual instruments and what the United States claim was their joint operation."[596]

3. Provisions invoked by the United States

7.277 As noted above[597], in its claims raised jointly against the domestic purchase requirement and against the denial or failure to grant licences to import rice at or below the bound rate of duty, the United States has invoked the following three provisions of the WTO covered agreements: Article XI:1 of the GATT 1994, Article 4.2 of the Agreement on Agriculture and Article 1.6 of the Import Licensing Agreement. The first two provisions have been cited extensively throughout this report.[598] In turn, Article 1.6 of the Import Licensing Agreement states that:

> "Application procedures and, where applicable, renewal procedures shall be as simple as possible. Applicants shall be allowed a reasonable period for the submission of

[596] Turkey's first written submission, paras. 125-127 and 130-131. See also Turkey's oral statement during the first substantive meeting with the Panel, para. 37, and Turkey's response to question 19.

[597] See para. 7.273 above.

[598] See, for example, paras. 7.51 to 7.138, 7.139 to 7.142, and 7.242 to 7.255 above.

> licence applications. Where there is a closing date, this period should be at least 21 days with provision for extension in circumstances where insufficient applications have been received within this period. Applicants 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."

4. Panel's analysis

7.278 As a preliminary matter, we note that in its request for the establishment of a Panel the United States stated its claim under Article 1.6 of the Import Licensing Agreement as one of its "Other Claims Relating to Turkey's Import Regime".[599] The United States did not explicitly state, as it had done with its claims under Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture, that the claim under Article 1.6 of the Import Licensing Agreement was directed at Turkey's domestic purchase requirements, considered *in conjunction with* its denial of, or failure to grant, import licences for rice at or below the bound rate of duty.[600] In any event, the United States articulated this claim in the course of the Panel's proceedings as directed against both "the domestic purchase and [the] Control Certificate requirements".[601] In its comments on the descriptive sections of the draft report sent to the parties, the United States further confirmed that this claim should be considered by the Panel as one against Turkey's domestic purchase requirements, considered *in conjunction with* its denial of, or failure to grant, import licences for rice at or below the bound rate of duty.[602]

7.279 The Panel is aware that, as stated by the Panel in *Japan – Film*:

> "[I]t is not implausible that individual measures which do not impair benefits when considered in isolation, could nonetheless have an adverse impact on conditions of competition when considered collectively."[603]

7.280 The situation in the present case is different, however, from that analyzed by the Panel in *Japan – Film* in the section quoted above. The United States has not argued that certain individual measures, which when individually considered might not have constituted a breach of obligations under the WTO agreements, yet give rise to such a breach when considered in conjunction. The claim is rather that these measures are in violation of the covered agreements, both considered separately and in conjunction.

7.281 The Panel has already found that the two measures challenged in conjunction by the United States (namely, the denial or failure to grant licences to import rice at or below the bound rate of duty and the domestic purchase requirement) are each individually inconsistent with Turkey's obligations under covered agreements.[604] In the light of these findings, and under the guidance of the principle of judicial economy, we do not see the need to reach a separate conclusion on these measures considered jointly, for the resolution of this dispute.

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[599] Request for the Establishment of a Panel by the United States, *Turkey – Rice*, 7 February 2006, WT/DS334/4, page 4.

[600] Ibid.

[601] United States' response to question 131(b), para. 21.

[602] Comments of the United States concerning the draft descriptive part of the Panel's Report, 20 March 2007, page 4.

[603] Panel Report on *Japan – Film*, para. 10.353. Cf. GATT Panel Report on *US – Taxes on Automobiles*, para. 5.70.

[604] See paras. 7.138 and 7.241 above.

E. THE UNITED STATES' CLAIMS CONCERNING ARTICLES 3.5(A) AND 5.1, 5.2, 5.3, AND 5.4 OF THE IMPORT LICENSING AGREEMENT

1. The United States' claims

7.282 In its request for the establishment of a panel, under the heading "Other Claims Relating to Turkey's Import Regime"[605], the United States made *inter alia* two separate claims concerning Articles 3.5(a) and 5.1, 5.2, 5.3, and 5.4 of the Import Licensing Agreement. In particular, the United States claimed the inconsistency of Turkey's measures listed in the request for establishment of a panel[606] with:

(a) "Article 3.5(a) of the Import Licensing Agreement because Turkey has failed to provide, upon the request of the United States, all relevant information concerning the administration of Turkey's import licensing regime and the import licenses granted over a recent period[607]; and

(b) Articles 5.1, 5.2, 5.3, and 5.4 of the Import Licensing Agreement because Turkey has failed to notify its import licensing regime for rice"[608].

7.283 In its first written submission, the United States linked these two claims, articulating them jointly in the following way:

> "During the consultations, the United States requested that Turkey provide information concerning the issuance of Certificates of Control at the over-quota rates of duty and the number of Certificates that had been granted over the last year. Turkey has not provided this information. Further, in July 2005, the United States requested that Turkey notify its non-automatic import licensing regime for rice to the Import Licensing Committee.[609] Turkey has not done so. Accordingly, Turkey is in breach of Articles 3.5(a), 5.1, 5.2(a), (b), (c), (d), (e), (g), and (h), 5.3, and 5.4 of the Import Licensing Agreement."[610]

2. Turkey's response

7.284 In response, Turkey addressed these two claims jointly under the same heading in its first written submission. Turkey did not explicitly refute the claims advanced by the United States concerning non-compliance with the relevant requirements of the Import Licensing Agreement; rather, Turkey disputed the applicability of those requirements in the case at hand.

7.285 In regard to the claim by the United States concerning Article 3.5(a) of the Import Licensing Agreement, Turkey argued that:

> "Certificates of Control are not 'import licenses' within the meaning of the Agreement on Import Licensing Procedures. Therefore, the obligation under Article 3.5(a) of the

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[605] Request for the Establishment of a Panel by the United States, *Turkey – Rice*, 7 February 2006, WT/DS334/4, page 4.

[606] Request for the Establishment of a Panel by the United States, *Turkey – Rice*, 7 February 2006, WT/DS334/4, pages 1-2.

[607] Claim 20 in Ibid., page 4.

[608] Claim 21 in Ibid., page 4.

[609] (*footnote original*) G/LIC/Q/TUR/3 (25 July 2005).

[610] United States' first submission, para. 127. See also Ibid., para. 5, and Turkey's rebuttal, paras. 5 and 82, and United States' response to question 139, para. 32.

> Agreement on Import Licensing Procedures does not apply to its Certificates of Control."[611]

7.286 As to the claim by the United States concerning Article 5 of the Import Licensing Agreement, Turkey maintained that:

> "Similarly, ... the licensing procedures envisaged under the TRQ regime belong to an automatic import licensing system within the meaning of the Agreement on Import Licensing Procedures. Therefore, Turkey's import licensing system within the TRQ regime is not subject to the notification requirements under Article 5 of the Agreement on Import Licensing Procedures."[612]

3. The Panel's analysis

7.287 The Panel notes that the Panel on *Canada – Dairy* refrained from assessing the United States' claims under Article 3 of the Import Licensing Agreement, stating that:

> "Since we have found above that the two access restrictions imposed by Canada with respect to its tariff-rate quota for fluid milk are contrary to Canada's obligations under Article II:1(b) of GATT 1994, we see no need to examine whether in so doing Canada also violates Article 3 of the Licensing Agreement."[613]

7.288 The Panel notes the similarities of *Canada – Dairy* with the present case. The Panel in the case at hand has already found that Turkey's denial or failure to grant Certificates of Control to import rice outside of the tariff rate quota substantively violated Article 4.2 of the Agreement on Agriculture. Further, in *Canada – Dairy* one of the arguments the United States made under the Import Licensing Agreement related to a transparency obligation in Article 3.5(a)(iv) of that Agreement. In that regard, in *Canada – Dairy* the United States argued, similar to the case at hand, that the respondent:

> "[H]ad failed in its obligation under Article 3.5(iv) to provide information respecting the value and volume of fluid milk within the tariff-rate quota. This data was requested by the United States during consultations in November 1997, and [the respondent] advised that such information had not been developed despite assurances in earlier consultations that the data would be made available.[Footnote omitted]"[614]

7.289 The Panel notes, in this context, that the Panel on *Canada – Dairy* exercised judicial economy through the above-cited passage in regard to all claims of the United States under the Import Licensing Agreement, including the transparency claim of the United States pursuant to Article 3.5(iv) of that Agreement.[615] Further, the Panel notes that both sets of relevant provisions invoked jointly by the United States in the case at hand, namely Article 3.5(a) of the Import Licensing Agreement, on the one hand, and Articles 5.1, 5.2(a), (b), (c), (d), (e), (g), and (h), 5.3, and 5.4 of the same Agreement, on the other hand, set out transparency obligations, which – similar to Article 3.5(a) of the Import Licensing Agreement – ultimately serve to provide information to other Members.

7.290 Indeed, Article 3.5(a) of the Import Licensing Agreement stipulates that:

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[611] Turkey's first submission, para. 133.
[612] Turkey's first submission, para. 134.
[613] Panel Report on *Canada – Dairy*, para. 7.157.
[614] Ibid., para. 4.514.
[615] See in particular the heading above para. 7.157. of the Panel Report on *Canada – Dairy*: "The Licensing Agreement".

"(a) Members shall provide, upon the request of any Member having an interest in the trade in the product concerned, all relevant information concerning:

(i) the administration of the restrictions;

(ii) the import licences granted over a recent period;

(iii) the distribution of such licences among supplying countries;

(iv) where practicable, import statistics (i.e. value and/or volume) with respect to the products subject to import licensing. Developing country Members would not be expected to take additional administrative or financial burdens on this account".

7.291 In turn, Articles 5.1, 5.2(a), (b), (c), (d), (e), (g), and (h), 5.3, and 5.4 of the Import Licensing Agreement provide that:

"1. Members which institute licensing procedures or changes in these procedures shall notify the Committee of such within 60 days of publication.

2. Notifications of the institution of import licensing procedures shall include the following information:

(a) list of products subject to licensing procedures;

(b) contact point for information on eligibility;

(c) administrative body(ies) for submission of applications;

(d) date and name of publication where licensing procedures are published;

(e) indication of whether the licensing procedure is automatic or non-automatic according to definitions contained in Articles 2 and 3;

[...]

(g) in the case of non-automatic import licensing procedures, indication of the measure being implemented through the licensing procedure; and

(h) expected duration of the licensing procedure if this can be estimated with some probability, and if not, reason why this information cannot be provided.

3. Notifications of changes in import licensing procedures shall indicate the elements mentioned above, if changes in such occur.

4. Members shall notify the Committee of the publication(s) in which the information required in paragraph 4 of Article 1 will be published."

7.292 In the light of the above, like the Panel on *Canada – Dairy*, this Panel sees no need to examine whether, through its decision, from September 2003 and for different periods of time, to

deny or fail to grant licences to import rice at or below the bound rate of duty, Turkey also violates Article 3.5(a) of the Import Licensing Agreement and, following a similar and related logic, there is no need to examine whether Turkey also violates Articles 5.1, 5.2(a), (b), (c), (d), (e), (g), and (h), 5.3, and 5.4 of the Import Licensing Agreement.

F. THE ADMINISTRATION OF TARIFF RATE QUOTAS

1. The United States' claim

7.293 In its request for the establishment of a Panel, in addition to other claims, the United States stated that Turkey was acting inconsistently with:

> "Article 3.5(h) of the Import Licensing Agreement because Turkey administers its [tariff-rate quotas on rice] in such a way as to discourage the full utilization of quotas".[616]

7.294 In its first submission, the United States articulated this claim in the following manner:

> "Turkey ensures that the full amount of the quotas cannot be reached by setting the domestic purchase requirement so high that the entire Turkish domestic production of rice would be purchased by importers before the in-quota amount was reached. For example, Turkish paddy rice production was 415,000 metric tons in 2004 and 500,000 metric tons in 2005.[617] The maximum amount of paddy rice that could be imported under the TRQ was 500,000 metric tons.[618] Yet, in almost every instance, an importer seeking to import rice under the TRQ is required to purchase a larger quantity of domestic rice than the amount of rice it wants to import. Put simply, even if importers purchased every grain of rice in Turkey, they would not approach the 500,000 metric ton limit on paddy rice imports.
>
> Further, the high cost of domestic purchase makes importing under the TRQ much more expensive to the importer, who is likely a miller, than simply procuring rice domestically, and hence discourages the full utilization of the TRQ."[619]

2. Response from Turkey

7.295 In response to the United States' claim, Turkey has stated that:

> "Article 3.5(h) of the Agreement on Import Licensing Procedures applies to '*non-automatic import licensing*'...
>
> Turkey's import licensing system for purposes of allocating the TRQ to traders has always been, while it was in force, an automatic import licensing system...
>
> [O]n the basis of these legal considerations and factual evidence, it appears clear that Turkey's import licensing system for purposes of allocating the TRQ to traders was automatic and has never resulted in the discouragement of full utilization of quotas.

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[616] Request for the Establishment of a Panel by the United States, *Turkey – Rice*, 7 February 2006, WT/DS334/4, page 3.

[617] (*footnote original*) Exhibit US-45.

[618] *(footnote original)* Exhibits US-5 and US-10.

[619] United States' first submission, paras. 118-119. See also Ibid., para. 123, United States' response to questions 72 and 77(a), paras. 110-112 and 121, United States' oral statement during the first substantive meeting, paras. 32-37, and Exhibit US-52.

> In any event, it should be noted that, rather than discouraging full utilization of quotas, Turkey extended twice in 2005 the deadlines for application of import license within the TRQ opened between 1 November 2004 and 31 July 2005. This appears to be clear and convincing evidence that Turkey did not intend to discourage full utilization of the quotas.
>
> For these reasons, the claim by the United States under Article 3.5(h) of the Agreement on Import Licensing Procedures must be rejected."[620]

7.296 In response to the United States' assertion that Turkey allegedly ensured that the full amount of the quotas could not be reached by setting the domestic purchase requirement so high that the entire Turkish domestic production of rice would have to be purchased by importers before the in-quota amount was reached, Turkey submitted that:

> "[T]he total amount of the tariff quota was determined on the basis of the production projections of each year and the conversion coefficients indicated in related Communiqués."[621]

7.297 In addition, as a claim linked to the domestic purchase requirement imposed by Turkey with respect to the tariff rate quotas for the importation of rice, the United States' claim regarding the alleged discouragement of the full utilization of quotas falls under the request advanced by Turkey that, since its "TRQ regime and its related import licensing procedures are no longer in force":[622]

> "[T]he Panel [should] either refrain from making findings on the measures related to Turkey's TRQ regime as no longer in force, or, should the Panel consider making these findings necessary for purposes of securing a positive solution to the dispute, not to make any recommendation to the Dispute Settlement Body."[623]

3. Article 3.5(h) of the Import Licensing Agreement

7.298 Article 3.5(h) of the Import Licensing Agreement reads:

> "[W]hen administering quotas, Members shall not prevent importation from being effected in accordance with the issued licences, and shall not discourage the full utilization of quotas".

4. Panel's analysis

7.299 The United States' claim under Article 3.5(h) of the Import Licensing Agreement is linked to the operation of the domestic purchase requirement imposed by Turkey with respect to the tariff rate quotas for the importation of rice. As articulated by the United States, the alleged discouragement of the full utilization of quotas would occur through the determination of the ratio of the domestic rice which had to be purchased and rice which could be imported, under the domestic purchase requirement, depending on Turkey's estimated domestic production of rice.

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[620] Turkey's first written submission, paras. 119-123. See also Ibid., paras. 2, 106 and 108, Turkey's oral statement during the first substantive meeting with the Panel, para. 38, and Turkey's response to question 16.

[621] Turkey's response to question 72.

[622] Turkey's first written submission, para. 4.

[623] Ibid., para. 139.

7.300 It follows that the domestic purchase requirement is a necessary element of the measure that has been challenged by the United States under this specific claim. Without this requirement, the alleged discouragement of the full utilization of quotas claimed by the United States would disappear.

7.301 The Panel recalls that the domestic purchase requirement has already been found to be inconsistent with Article III:4 of the GATT 1994, because it resulted in less favourable treatment to imported rice than that accorded to like domestic rice.[624] Therefore, under the guidance of the principle of judicial economy, the Panel considers that addressing the claim under Article 3.5(h) of the Import Licensing Agreement would be unnecessary for the resolution of this dispute.

G. SPECIAL AND DIFFERENTIAL TREATMENT

7.302 Pursuant to Article 12.11 of the DSU:

> "[W]here one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures."

7.303 In addition, the DSU provides in Article 12.10 that:

> "[I]n examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation."

7.304 The Panel notes that, in the course of these Panel proceedings Turkey did not raise any specific provisions on differential and more-favourable treatment for developing country Members that require particular consideration, nor do we find these specialized provisions relevant for the resolution of the specific matter brought before this Panel.

7.305 In any event, during the Panel proceedings, the Panel took into account the respondent's status as a developing country Member, a fact not contested by the complainant, when preparing and revising the timetable for the process. The Panel attempted, *inter alia*, to accommodate, to the extent possible, Turkey's requests for extensions of deadlines to submit responses to the questions posed by the Panel both after the first and second substantive meetings, as well as Turkey's request for time to submit comments on the United States comments to the Panel's interim report.

VIII. CONCLUSIONS AND RECOMMENDATION

8.1 The Panel concludes that Turkey's decision, from September 2003 and for different periods of time, to deny, or fail to grant, Certificates of Control to import rice outside of the tariff rate quota, constitutes a quantitative import restriction, as well as a practice of discretionary import licensing, within the meaning of footnote 1 to Article 4.2 of the Agreement on Agriculture. Accordingly, it is a measure of the kind which have been required to be converted into ordinary customs duties and is therefore inconsistent with Article 4.2 of the Agreement on Agriculture.

8.2 The Panel recommends that the Dispute Settlement Body request Turkey to bring the inconsistent measures as listed above into conformity with its obligations under the WTO agreements.

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[624] See para. 7.241 above.

8.3 The Panel also concludes that Turkey's requirement that importers must purchase domestic rice, in order to be allowed to import rice at reduced-tariff levels under the tariff quotas, accorded less favourable treatment to imported rice than that accorded to like domestic rice, in a manner inconsistent with Article III:4 of the GATT 1994.

8.4 As we have noted that the requirement that importers must purchase domestic rice, in order to be allowed to import rice at reduced-tariff levels under the tariff quotas has expired and that Turkey has declared its intention not to reintroduce the measure, we abstain from making any specific recommendation to the DSB in this regard.

8.5 Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment. The Panel concludes that, to the extent that the measures listed above are inconsistent with the WTO agreements, they have nullified or impaired benefits accruing to the United States under those agreements.

ANNEX A

EXECUTIVE SUMMARIES OF THE FIRST WRITTEN SUBMISSIONS BY THE PARTIES AND WRITTEN SUBMISSIONS BY THE THIRD PARTIES

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ANNEX A-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION BY THE UNITED STATES

(27 September 2006)

1. Simply put, this dispute is about market access. During the Uruguay Round, Turkey committed itself to permit imports of rice at a bound rate of 45 percent. Instead, Turkey has instituted a non-transparent, discretionary import licensing system to restrict and, at times, eliminate imports of rice. Specifically, since 2003, Turkey has applied a tariff-rate quota ("TRQ") for rice and has required licenses in order to import rice both at the in-quota and over-quota rates. With respect to the over-quota rate, Turkey's Ministry of Agriculture and Rural Affairs ("MARA") simply fails to issue licenses in accordance with a series of unpublished "Letters of Acceptance", in which the Minister of Agriculture agrees to "delay" the start date for the issuance of import licenses, or "Certificates of Control". **Importers who have applied for licenses often wait for months or even years for a response to their applications, and if they do receive a response, their license applications are denied with little reason (e.g., spelling errors) or denied with no reason provided at all. One importer went to court in October 2004 seeking a court order for the government to grant him an import license after his application forms were returned and ultimately denied: as of December 2005, his rice was <u>still</u> sitting in a warehouse while the litigation remained pending.**

2. With respect to the in-quota quantities, Turkey has made the receipt of licenses from the Turkish Foreign Trade Undersecretariat ("FTU") contingent upon the purchase of large quantities of domestic rice. The amount of rice that importers are required to purchase in order to import under the TRQ is contingent on three factors: (1) the type of rice to be imported (paddy, brown, or milled); (2) the source of the purchased domestic rice (the Turkish Grain Board ("TMO"), on the one hand, or Turkish producers or producer associations on the other); and (3) if purchased from Turkish paddy rice producers or producer associations, the region where the rice originates. As a result of this complicated system, the ratio of imported-to-purchased domestic rice varies greatly, depending on the interaction among the three variables, and in most cases, an importer has to purchase a <u>larger</u> quantity of domestic rice than the quantity of rice it wishes to import.

3. Because Turkey fails to issue licenses at the over-quota rate and Turkey closes the TRQ during the annual Turkish rice harvest, there is a complete ban on imports of rice during the August-October time period. Turkey relaxes and strengthens these import licensing measures at will, often with no advance written notice to importers, and frequently in contravention of what has been published in Turkey's Official Gazette. In taking these measures, Turkey has acted inconsistently with several provisions of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), *the Agreement on Import Licensing Procedures* ("Import Licensing Agreement"), the *Agreement on Agriculture* ("Agriculture Agreement"), and *the Agreement on Trade-Related Investment Measures* ("TRIMs Agreement").

4. The United States has sought to avoid dispute settlement on this issue and instead reach a mutually acceptable solution with Turkey. However, US attempts to resolve this issue have thus far been unsuccessful. Therefore, on November 2, 2005, the United States requested consultations with the Government of Turkey pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXII:1 of the GATT 1994, Article 6 of the Import Licensing Agreement, Article 8 of the TRIMs Agreement, and Article 19 of the Agriculture Agreement regarding Turkey's import restrictions on US rice. Pursuant to this request, the United States and Turkey held consultations on December 1, 2005. These consultations failed to reach a mutually satisfactory resolution to this dispute. On February 6, 2006, the United States requested the establishment of a panel pursuant to Article 6 of the DSU, Article 6 of the Import

Licensing Agreement, Article 8 of the TRIMs Agreement, and Article 19 of the Agriculture Agreement. The Dispute Settlement Body ("DSB") established the Panel on March 17 with standard terms of reference. Despite the ongoing Panel proceedings, the United States remains willing to reach a solution to this matter with Turkey.

5. In its first written submission, the United States advanced claims regarding (1) Turkey's denial of licenses to import rice at the over-quota rates (or Turkey's WTO bound rate of duty); (2) Turkey's TRQ regime, coupled with a domestic purchase requirement, which regulates in-quota trade; (3) Turkey's overall import licensing regime, that is, the denial of import licenses and the TRQ, acting in conjunction to restrict rice imports and distort the Turkish rice market; as well as other claims related to Turkey's import regime or restrictions on imports of rice.

US Claims Relating to Turkey's Denial of Import Licenses

6. Turkey's denial of licenses to import rice at or below the bound rate of duty is inconsistent with Article XI:1 of the GATT 1994 because it prohibits or restricts imports at the over-quota rate, and when the TRQ is closed, it acts as a complete ban on rice imports. Turkey's denial of import licenses also constitutes discretionary import licensing: under Turkish law, MARA is supposed to grant import licenses automatically but in fact it does not issue any licenses at all. In addition, the Certificate of Control is an import license for purposes of Article XI:1, because MARA requires importers to complete an application for a Certificate, and that application must be granted in order for the importation to take place. The Certificate of Control would in any event be a prohibition or restriction on importation that is made effective by an "other measure" because, as the panel in *India – Autos* found, Article XI:1 conveys "an intention to cover any type of measures restricting the entry of goods into the territory of a Member, other than those specifically excluded, namely, duties, taxes or other charges". Turkey's failure to issue Certificates of Control not only restricts the entry of rice into Turkey: in fact, it *prohibits* entry other than the in-quota quantity of the TRQ.

7. The range of measures that Members may not institute or maintain under Article XI:1 is quite broad. The provision encompasses all prohibitions or restrictions on importation other than those enumerated, regardless of whether a Member utilizes a quota, an import or export licensing regime, "or other measures" to effect the prohibition or restriction. Several panels have characterized the scope of this provision as "broad" and "comprehensive".

8. Turkey's denial of import licenses except for the in-quota quantity under the TRQ constitutes a "prohibition" on importation for purposes of Article XI:1 of the GATT 1994. A "prohibition" exists when it is legally impermissible to trade or bring in a particular good from another country. Turkey's ban on the importation of rice outside its TRQ regime is effected through MARA's denial of Certificates of Control to importers. An importer who wants to import rice outside the TRQ regime is required to obtain a Certificate of Control from MARA as a condition of importation. However, through a series of unpublished Letters of Acceptance, the Minister of Agriculture decided, starting in September 2003, that MARA would "delay" the issuance of Certificates of Control.

9. The wording of the Letters demonstrates that Turkey imposes a "prohibition" on imports of rice within the meaning of Article XI:1 as it is clear on their face that the Minister of Agriculture instructs officials in his Ministry not to issue the Certificate of Control document to importers, and without such documents, importation cannot occur (unless Turkey has re-opened its distortive TRQ). Specifically, in each Letter, the General Directorate recommends that there be a "delay" in the issuance of such Certificates over a certain period of time, and the Minister of Agriculture signs the Letter to indicate his acceptance of the recommendation. When the time period covered by a Letter is about to expire, the General Directorate issues a new Letter in which it recommends a further "delay" in the start date for issuing Certificates. Without a Certificate of Control, an importer cannot import rice into Turkey, unless Turkey has re-opened its TRQ and the importer purchases domestic rice. In

sum, Turkey, through its decision not to issue Certificates of Control, effectively prohibits all imports of rice at its WTO bound rate (the minimum market access to which it has committed). It is only when Turkey decides to re-open its distortive TRQ that imports may occur at all. During the times when that TRQ is closed – generally from August through October, a period which tracks the Turkish rice harvest – there is no mechanism to import rice into Turkey at all, a total ban on imports of rice. Minister Tuzmen confirmed that Certificates of Control were not being granted in a letter to Ambassador Portman when he stated that "the control certificate will be issued *as of April 1, 2006*".

10. This situation is not unlike that in *Turkey – Textiles*, in which the panel found that India had made out a *prima facie* case that Article XI:1 had been breached by showing that Turkey's measures, "on their face", imposed quantitative restrictions on imports. Similarly, in the instant dispute, the wording of the Letters of Acceptance is clear: the Minister of Agriculture gave a series of orders that no Certificates of Control shall be granted. Without such Certificates, no importation can occur. And that is exactly how MARA officials interpreted those documents, as evidenced by a May 1, 2006 letter from a Provincial Agriculture Directorate to a Turkish importer of US rice. The Directorate denied the importer's April 25, 2006 request for a Certificate of Control to import medium grain milled rice from the United States "since it is not possible to prepare a control certificate according to our laws and regulations".

11. Turkey's ban on the issuance of Certificates of Control, which ensured that importation of rice could not take place outside the TRQ regime, also constitutes a "restriction ... on importation" contrary to Article XI:1. The ordinary meaning of the word "restriction" is a "limitation on action, a limiting condition or regulation". The *India – Autos* panel, citing with approval this definition of "restriction" and recalling the broad reach of Article XI:1, stated that "any form of *limitation* imposed on, or in relation to importation constitutes a restriction on importation within the meaning of Article XI:1". Turkey's failure to grant Certificates of Control to importers clearly places a limitation on imports. Turkey's decision not to issue Certificates of Control also demonstrates that it maintains discretionary, or non-automatic, import licensing, through which it makes effective restrictions on importation. In *India – Quantitative Restrictions*, the panel found that two aspects of India's import licensing system constituted discretionary import licensing, because licenses were granted in some, but not in all cases, and as a result, found Article XI:1 breaches in both instances. Here, Turkey fails to grant Certificates of Control 100 per cent of the time, demonstrating that Turkey utilizes its discretion to impose restrictions on importation.

12. Because Turkey's denial of import licenses outside the TRQ is a WTO-inconsistent quantitative import restriction and also constitutes discretionary import licensing, Turkey also has breached Article 4.2 of the Agriculture Agreement. Other panels have found, in similar circumstances, that where a measure with respect to agricultural products is inconsistent with Article XI:1 of the GATT 1994, it is necessarily inconsistent with Article 4.2, which provides in footnote 1 that, *inter alia*, "quantitative import restrictions" and "discretionary import licensing" are measures that Members may not maintain, resort to, or revert to. In this dispute, the United States has demonstrated that Turkey's denial of import licenses constitutes a prohibition and restriction on importation and that, as a result, Turkey has acted inconsistently with Article XI:1. Similarly, Turkey is acting inconsistently with Article 4.2 of the Agriculture Agreement. In the Uruguay Round, Turkey committed to permit imports of rice automatically at a rate no greater than 45 per cent *ad valorem*. As previously described, MARA has refused to grant import licenses to importers. This total ban on imports outside the TRQ constitutes a quantitative import restriction. Further, Turkey's denial of import licenses also amounts to discretionary import licensing, because MARA does not grant licenses automatically. That is, the denial of licenses demonstrates that Turkey has the discretion to grant or not to grant them, and without these licenses, importation cannot occur. These are measures set out in footnote 1 to Article 4.2 as measures "of the kind" that Turkey may not maintain, resort to, or revert to.

13. Additionally, Turkey's import licensing regime for imports outside the TRQ is non-transparent. For example, Turkey does not specify a time frame within which import license applications will be approved or rejected and does not provide applicants with the reasons for rejection. Further, Turkey has failed to notify its import licensing regime for rice to the WTO, despite a US request that it do so. Its regime therefore is inconsistent with additional WTO provisions, including Articles 1.4(a) and (b) and 3.5(e) and (f) of the Import Licensing Agreement and Articles X:1 and X:2 of the GATT 1994.

US Claims Relating to Turkey's TRQ Regime Requiring Domestic Purchase

14. Turkey's imposition of a domestic purchase requirement under its TRQ regime on importers of rice into Turkey is inconsistent with Article III:4 of the GATT 1994 because the measure treats imported rice less favorably than domestic rice and adversely affects the conditions of competition for imported rice in the Turkish market. There are three elements that must be satisfied to establish that a measure is in breach of Article III:4: (1) the imported and domestic products must be "like" products; (2) the measure is a law, regulation, or requirement "affecting their internal sale, offering for sale, purchase, transportation, distribution or use"; and (3) the imported products are treated less favorably than domestic products.

15. The first prong of the Article III:4 test is whether the domestic and imported products are "like" products. In general, "like" products are products that have the same or similar properties. In examining whether products are "like" for purposes of Article III, several panels have found significant the fact that a measure distinguishes between a domestic and an imported product solely on the basis of origin. Moreover, one panel, noting that the statute at issue made a distinction between foreign and imported articles solely on the basis of origin, found that "there is no need to demonstrate the existence of actually traded like products in order to establish a violation of Article III:4". In this instance, Turkey's measures, on their face, make distinctions with respect to rice based on whether the origin of rice is foreign or domestic. The Letters of Acceptance bar the importation of foreign rice into Turkey, plainly stating that Certificates of Control will not be issued in order to protect producers of domestic rice. The domestic purchase requirement ensures that importers of foreign rice procure domestic rice as a condition upon importation. It is clear from the face of these measures that *Turkey* considers that foreign and domestic rice compete with each other; therefore, it is difficult to avoid the conclusion that at least *some* imported rice is "like" Turkish rice.

16. Even if Turkey's measures did not distinguish between foreign and imported rice on the basis of origin, US and Turkish rice also constitute "like" products with respect to a more detailed examination. The Appellate Body, which has found a "relatively broad product scope" for finding that products are "like" for purposes of Article III:4, narrowed down the non-exhaustive list of factors that might be considered in such an examination to four: tariff classification; the "properties, nature and quality" of a product; a product's end-uses; and consumer preferences. Under this test, US and Turkish rice are "like" products for purposes of Article III:4. Both products are classified under HS 1006. Turkey and the United States both produce the same two varieties of rice: medium-grain and long-grain. Their end use is the same: paddy rice and brown rice is destined for milling, and milled rice is destined for human consumption. Further, US Calrose rice is directly competitive with the Turkish Osmancik variety: in March 2005, they were selling in retail outlets in Ankara at roughly the same price.

17. The second element that must be demonstrated to prove that a Member has failed to observe its Article III:4 obligations is that a measure (1) is a law, regulation, or requirement (2) "affecting [the] internal sale, offering for sale, purchase, ... or use" of the like products at issue. The TRQ regime is comprised of several legal instruments, including decrees and notifications, that were promulgated by FTU and published in Turkey's Official Gazette. It is unclear to the United States whether Turkey's individual instruments should be characterized as "laws" or "regulations" but it is

clear that all of these instruments are legally binding under Turkish law. Regarding whether the domestic purchase requirement could be characterized as a "requirement", the *India – Autos* panel found that the term "requirement" encompassed obligations which "an enterprise voluntarily accepts in order to obtain an advantage from the government". In *US – FSC (Article 21.5 – EC)*, the panel found that a measure containing conditions that a person must satisfy to obtain an advantage from the government is a "requirement" for purposes of Article III:4. Here, Turkey imposes a "requirement" that importers purchase domestic rice as a condition of importation if they want to pay a reduced rate of duty to import rice. Thus, the domestic purchase requirement under the TRQ satisfies the "law, regulation or requirement" standard.

18. The domestic purchase requirement also clearly affects the internal sale, offering for sale, purchase, and use of the like products. The use of the word "affecting" in Article III:4 implies that a measure would not have to deal directly with the internal sale, offering for sale, purchase or use of a product, but encompasses a much broader range of potential interaction with those elements. The Appellate Body has noted that the term "affecting" should be interpreted as having a "broad scope of application". In the instant dispute, there can be no doubt that the domestic purchase requirement is "affecting" the internal sale, offering for sale, purchase, and use of rice. It provides *the only way* to import rice into Turkey. Turkey does not produce sufficient quantities of rice to meet its domestic needs so it must import, and imports comprise a substantial portion of the Turkish rice market. Without documentary proof from TMO that an importer has purchased a specific quantity of domestic rice, FTU will not grant that importer an import license to bring foreign rice into Turkey. Therefore, the domestic purchase requirement directly affects the internal sale, offering for sale, purchase, and use of rice in Turkey. Because domestic producers, unlike their foreign competitors, are not required to procure large quantities of rice from their competitors in order to sell rice in Turkey and, unlike their foreign competitors, are not limited in regard to whom they may sell their rice, the domestic purchase requirement has a seriously adverse effect on the conditions of competition between imported and domestic rice. Furthermore, only domestic rice can satisfy the purchase requirement – imported rice is excluded from eligibility.

19. The third element that must be demonstrated to prove that a Member has failed to observe its Article III:4 obligations is that a measure accords imported products less favorable treatment than like domestic products. Previous panels have found that measures are inconsistent with Article III:4 if they impose requirements on foreign products that are not imposed on domestic products; create an incentive to purchase and use domestic products or a disincentive to utilize imported products; or "adversely affect ... the equality of competitive opportunities of imported products in relation to like domestic products". Significantly, the Appellate Body in *US – FSC (Article 21.5 – EC)* noted that a measure could still be inconsistent with Article III:4 even if unfavorable treatment did not arise in every instance. On its face and by design, Turkey's TRQ regime treats imported rice less favorably than domestic rice *in every instance*. Imported rice cannot be sold in the domestic market under any circumstance unless the importer first purchases, at inflated prices, domestic rice. Domestic rice producers are not subject to the same requirement in order to bring their product to market, which provides them a tremendous advantage in the market. Further, because the domestic purchase requirement makes procuring imported rice more costly – oftentimes requiring an importer to purchase three or four times the quantity of domestic rice as the quantity of foreign rice an importer wants to import – the domestic purchase requirement creates a disincentive to purchase and import foreign rice. Consequently, by making the sourcing of imported rice less desirable, the domestic purchase requirement alters the decision-making calculus of domestic entities when making purchasing decisions regarding rice. And by making imported rice ineligible to satisfy the purchase requirement, the conditions of competition are altered in favor of domestic rice. For these reasons, Turkey's domestic purchase requirement accords less favorable treatment to imported rice and hence, Turkey has acted inconsistently with Article III:4 of the GATT 1994.

20. To the extent Turkey's domestic purchase requirement is not viewed as a "law, regulation or requirement" within the meaning of Article III, this requirement breaches Article XI:1 of the GATT 1994, because it is a "restriction ... on importation" within the meaning of Article XI:1. The domestic purchase requirement clearly falls within the scope of the phrase "whether made effective through quotas, import or export licences or other measures" because FTU will not issue an import license under the TRQ without proof of domestic purchase and the term "other measures" is broad enough to encompass a domestic purchase requirement. As noted by the *India – Autos* panel, "any form of *limitation* imposed on, or in relation to importation constitutes a restriction on importation within the meaning of Article XI:1". In this case, the domestic purchase requirement, on its face, imposes a substantial restriction on imports of rice. Importation under the TRQ cannot be realized unless an importer purchases large quantities of domestic rice and presents proof of such purchases to FTU. The TRQ regime constitutes discretionary import licensing because receiving a license to import under the TRQ is non-automatic. Rather, importation under the TRQ is conditioned on domestic purchase. Further, the Turkish regulations have not always specified the amount of rice that would need to be procured in order to receive a portion of the quota, which has rendered importers completely unable to ship at times, or at best, has left them in a state of considerable uncertainty as to how much domestic rice they would need to procure in order to bring their shipments of foreign rice into the country.

21. Another aspect of the domestic purchase requirement – the eligibility criteria – accords less favorable treatment to US rice and thus, is inconsistent with Article III:4 of the GATT 1994. Turkish regulations restrict the issuance of import licenses under the TRQ to certain categories of persons, namely (1) domestic producers who have a permit to grow paddy rice; (2) domestic producers who purchase paddy rice from Turkish producer associations of which they are members; or (3) those who procure rice from TMO, which will undoubtedly be domestic producers as well. As a result of these criteria, only domestic rice producers, principally those with milling capacity, will be eligible to import rice. This state of affairs negatively affects competitive conditions for imported rice in the Turkish marketplace. The Turkish millers primarily want to import paddy rice to send to their milling facilities, increase their milling capacity, and keep out imported milled rice which competes with Turkish milled rice and reduces the domestic price. Whereas domestic producers can sell their rice to anyone along the production chain, from the paddy producer to the ultimate consumer, US producers do not have that choice. They are not permitted to sell rice directly to consumers. Instead, they are forced to market their rice through their Turkish competitors.

22. To the extent that the eligibility criteria to purchase rice are not viewed as a "law, regulation or requirement" within the meaning of Article III, these criteria breach Article XI:1 of the GATT 1994, because they constitute a "restriction ... on importation" within the meaning of Article XI:1. The eligibility criteria for importing under the TRQ fall within the ambit of the phrase "whether made effective through quotas, import or export licences or other measures" because FTU will not issue an import license under the TRQ to a person who has not met the eligibility criteria, and the term "other measures" is broad enough in scope to encompass eligibility criteria. The eligibility criteria for purchasing domestic rice under the TRQ act as a restriction on importation because they limit the range of entities that may import rice into Turkey to certain categories of persons described above. As a result of these criteria, only domestic rice producers, principally those with milling capacity, will be eligible to import rice. Consumers would not have a permit to grow paddy rice or be members of a Turkish rice producer association, and because consumers do not have milling capacity, they would never be interested in purchasing domestic paddy rice from TMO.

23. In addition, Turkey is in breach of Article 2.1 and Paragraph 1(a) of the Annex 1 of the TRIMs Agreement because it has instituted a domestic purchase requirement, which importers must fulfill in order to obtain the advantage of importing rice at duty rates below the bound rates. To prove that a measure is inconsistent with Article 2.1, the United States must demonstrate that the domestic purchase requirement is a measure with the characteristics set forth in paragraph 1(a) of the Annex,

namely that such a measure (1) is mandatory or enforceable under domestic law or under administrative rulings, or compliance with the measure is necessary to obtain an advantage; and (2) requires the purchase or use by a company of domestic products (e.g., based on the type, volume, or value of products). Turkey's domestic purchase requirement satisfies both of these elements, and hence, is within the ambit of paragraph 1(a). Turkey requires importers to purchase domestic rice in certain specified quantities, and fulfilling (and documenting to FTU) the domestic purchase requirement is necessary to obtain an advantage, namely importing rice under the lower rates of duty under the TRQ regime.

24. Turkey's domestic purchase requirement also is inconsistent with Article 4.2 of the Agriculture Agreement because it constitutes a measure listed in footnote 1 to Article 4.2 of the kind which should have been converted into ordinary customs duties – namely, discretionary import licensing and non-tariff measures maintained through state-trading enterprises. FTU will only grant a license to import rice under the TRQ to those importers who procure large quantities of domestic rice from TMO, Turkish producers, or Turkish producer associations and who present to FTU proof of such purchase. As the issuance of licenses is not automatic but contingent on domestic purchase, Turkey's maintenance of a domestic purchase requirement to import under the TRQ constitutes discretionary import licensing. The domestic purchase requirement is also a non-tariff measure maintained through a state-trading enterprise because TMO administers the domestic purchase requirement aspect of the TRQ. An importer may only import rice under the TRQ if it purchases rice domestically, including from TMO, which sells rice at prices it announces. In addition, the importer must obtain proof of such purchase from TMO, which must be presented to FTU. If an importer does not present that documentation, FTU will not grant a license to import under the TRQ. Lastly, TMO is permitted to import 50,000 metric tons of milled rice in order to help stabilize the domestic market in the event that prices increase.

25. Turkey also has acted inconsistently with Article 3.5(h) of the Import Licensing Agreement because it administers the TRQ in such a way that the full amount of the quotas cannot be reached. Specifically, Turkey sets the domestic purchase requirement so high that the entire Turkish domestic production of rice would be purchased by importers before the in-quota amount was reached. Further, the high cost of domestic purchase makes importing under the TRQ much more expensive to the importer, who is likely a miller, than simply procuring rice domestically, and hence discourages the full utilization of the TRQ.

26. Turkey first opened the TRQ in April 2004, making it retroactive to September 1, 2003, and has closed and re-opened the TRQ several times since then. Turkey most recently opened the TRQ on November 1, 2005, while MARA was continuing to deny import licenses at the over-quota rates. This most recent opening is likewise inconsistent with the provisions of the covered agreements previously discussed.

US Claims Relating to Turkey's Import Licensing Regime As a Whole

27. Moreover, Turkey's overall import licensing regime – the TRQ, licenses for which are contingent on domestic purchase, acting in conjunction with the denial of any licenses to import at the over-quota rates – is inconsistent with Article XI:1 of the GATT 1994. Each component of Turkey's import licensing system – the TRQ regime and the denial of Certificates of Control outside that regime – is inconsistent with Article XI:1 operating independently, as previously described. In addition, the two components also give rise to a breach of Article XI:1 acting in conjunction. Turkey's denial of Certificates of Control outside the TRQ is what forces importers to utilize the TRQ: no economically rational importer would import under the TRQ given the choice, because the domestic purchase requirement is so large and therefore importing under the TRQ is so costly. As a consequence of the interaction between the two components, however, all importation of rice into Turkey takes place through the TRQ, which is a discretionary import licensing system: FTU only

grants import licenses if importers agree to purchase large quantities of domestic rice from TMO, domestic producers, or domestic producer associations. Turkey's import licensing regime for rice constitutes a serious market access restriction under Article XI:1, but it also frequently amounts to a prohibition on imports. Turkey has completely banned imports of rice outside the TRQ by denying the issuance of import licenses. Consequently, when Turkey temporarily closes the TRQ each year during the Turkish rice harvest, there is a total ban on imports of rice into Turkey. This "seasonal ban" was in place during the domestic rice harvest in 2003, 2004, and 2005. Moreover, Turkey ensures that the full amount of the quotas cannot be reached by setting the domestic purchase requirement so high that the entire Turkish domestic production of rice would be purchased by importers before the in-quota amount was reached.

28. Turkey's import licensing regime also constitutes a breach of Article 4.2 of the Agriculture Agreement. The United States already has established that both aspects of Turkey's import licensing regime are inconsistent with Article 4.2 of the Agriculture Agreement: the domestic purchase requirements under the TRQ constitute discretionary import licensing and non-tariff measures maintained through state-trading enterprises, which are measures set forth in footnote 1 to Article 4.2; and Turkey's denial of Certificates of Control outside the TRQ constitutes a quantitative import restriction and discretionary import licensing, which also are measures set forth in footnote 1. Furthermore, the United States previously demonstrated that Turkey's import licensing regime as a whole is inconsistent with GATT Article XI:1's ban regarding prohibitions or restrictions on importation. Because Article 4.2 of the Agriculture Agreement prohibits Members from employing quantitative import restrictions and discretionary import licensing in place of ordinary customs duties, the two measures operating in conjunction are necessarily in breach of Article 4.2.

29. Turkey's import licensing regime is also inconsistent with Articles 3.5(a), 5.1, 5.2(a), (b), (c), (d), (e), (g), and (h), 5.3, and 5.4 of the Import Licensing Agreement because Turkey has not provided information concerning the issuance of Certificates of Control at the over-quota rates of duty and the number of Certificates that had been granted over the last year, nor has it notified its non-automatic import licensing regime for rice to the WTO Import Licensing Committee.

30. For the reasons set out above, the United States respectfully requests the Panel to find that Turkey's import licensing regime for rice, including the most recent opening of the TRQ, is inconsistent with Articles III:4, X:1, X:2, and XI:1 of the GATT 1994; Article 4.2 of the Agriculture Agreement; Articles 1.4(a) and (b), 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; and Article 2.1 and paragraph 1(a) of Annex 1 of the TRIMs Agreement, and recommend that Turkey bring its measures into conformity with its WTO obligations.

ANNEX A-2

**EXECUTIVE SUMMARY OF THE
FIRST WRITTEN SUBMISSION BY TURKEY**
(18 October 2006)

Introduction

1. This dispute relates to a number of laws and procedures regulating the importation of rice into Turkey. In particular, the United States claims that Turkey's regime for rice importation results in a restriction of market access which is inconsistent with a number of provisions under the GATT 1994, the Agreement on Agriculture, the Agreement on Import Licensing Procedures, and the Agreement on Trade-Related Investment Measures. Turkey categorically rejects all the allegations made by the United States and maintains that it is in full compliance with its obligations under the WTO.

2. As a result of the Uruguay Round negotiations, Turkey committed to reduce its MFN bound rate of duty applicable to rice imports to 45% *ad valorem*. However, the applied rates of duty currently levied on rice imports are, respectively, 34%, 36% and 45% *ad valorem* for paddy, brown and white rice. In addition, Turkey has offered, between 2004 and 2005, preferential rates for imports of rice within predetermined tariff rate quotas (TRQs). These annual TRQs have been opened by Decree. The TRQ system was administered on the basis of automatic import licensing procedures and certain legal requirements which were applied in a non-discriminatory, predictable and transparent fashion. The TRQ regime is no longer in force.

3. With respect to both MFN trade and (in the past) TRQ trade, rice importation occurs on the basis of compliance, by traders, with the traditional and legitimate customs formalities and legal requirements that Turkey, like all other WTO Members, applies to trade. Essentially, all that it is required for rice to be customs-cleared is that the applicable MFN rate of duty has been paid and that the specific consignment complies with the relevant Turkish requirements on, *inter alia*, food safety, fitness for use, and standards or specifications provided in technical regulations or implementing recognized international standards. In order to facilitate the process of customs clearance, traders must submit at importation a document, known as Certificate of Control, which contains all the information required for customs purposes. This document must be approved by the Ministry of Agriculture and Rural Affairs. Contrary to what is claimed by the United States, the Certificate of Control is not an import license and it is not meant to serve the traditional purposes of import licenses, both *de jure* and *de facto*. No import license has ever been applied in relation to MFN trade.

4. With respect to rice imports within the TRQ, in order to benefit from the preferential tariff rates available within the quotas, traders were required to comply, in addition to the legal requirements applicable to all rice importation (i.e., payment of applicable duties and compliance with the general customs formalities, including the submission of approved Certificates of Control), with legal requirements peculiar only to TRQ importation. In particular, they had to apply for an import license which was automatically issued if all legal requirements had been duly fulfilled. These legal requirements included a domestic purchase requirement. Turkey's automatic import licensing procedures for imports of rice within the TRQ were always administered in a non-discriminatory, transparent, predictable, and non-trade-distortive fashion which provided a considerable tariff advantage and enhanced conditions of competition to imported rice. In any event, Turkey's TRQ regime and its related import licensing procedures are no longer in force.

5. Turkey has systematically sought to avoid dispute settlement on this issue and reach a mutually acceptable solution with the United States. These efforts have been made both during the relevant WTO committees' meetings and during the dispute settlement consultations. Turkey remains

willing to address the United States' specific trade concerns, but is not willing to forego its legitimate WTO rights.

6. In its first written submission, Turkey has addressed all factual and legal issues advanced by the United States in its claims. Turkey respectfully requested the Panel to find that its measures, both in relation to MFN and TRQ trade, are not inconsistent with its WTO obligations and the covered agreements. With respect to TRQ trade, Turkey also respectfully requested the Panel not to make, in any event, any finding or recommendation as the related measures are no longer in force.

Factual Background

7. Under the Harmonized System, rice is classified under tariff item 1006. Within item 1006, rice is classified according to the three stages of its production process: rice in the husk, otherwise known as paddy or rough rice (HS 1006.10); husked rice, otherwise known as brown rice (HS 1006.20); and semi-milled or wholly-milled rice, otherwise known as white rice (HS 1006.30). Paddy, or rough, rice is rice as it is harvested from the field. It consists of kernels of rice having a portion or portions of the protective husk (or hull) remaining. Paddy rice can be milled into either brown rice or, if the milling process continues, white rice. Brown rice consists of kernels of rice where the husk has been removed, but the brown layer remains. Milled, or white, rice consists of kernels of rice where the husk and at least the outer bran layers have been removed. Turkey's bound MFN rate for rice is 45% *ad valorem*. Currently, however, the applied rates for imports of paddy, brown and white rice are, respectively, 34%, 36% and 45% *ad valorem*. In addition, Turkey has also been offering preferential rates for imports within predetermined tariff rate quotas opened by Decree between 2004 and 2005.

8. The importation into Turkey of certain goods such as processed foodstuffs, agricultural, animal and veterinary products is subject to the levying of the applicable rates of duties and to the common types of customs control and certification that all countries and WTO Members conduct when foreign products cross their borders. In Turkey, these control requirements, and the related authority for enforcement, are currently conferred, by the relevant legislation, to the Ministry of Agriculture and Rural Affairs (MARA). It is MARA which holds the competence to certify compliance of the imported goods with the applicable requirements. While most of these requirements are for trade monitoring and information purposes only, others aim at ensuring that imported products meet the legitimate standards for the protection of human health and safety, animal or plant life or health, and the environment.

9. In particular, MARA determines the "*fitness and compatibility*" of certain products with respect to human health and safety and in relation other concerns. Rice falls within the list of products which are covered by the control requirements applicable at time of importation. In essence, this means that rice importers must present a duly completed "*Certificate of Control*", which has been checked and approved by MARA, to Turkish Customs as a condition for importation. No quantitative restriction is foreseen under Turkish law and this requirement is applicable to all covered products, independently from their country of origin and the tariff rate that they benefit from when imported into Turkey. The Certificate of Control is not, nor should it be interpreted as, an import license or an instrument of allocation of imports to origins or traders.

10. The Certificate of Control is an official document through which the importer submits certain information to MARA in relation to the particular product that it wishes to import into Turkey. It is a reference document needed to process the customs clearance of any particular consignment of produce and, most importantly, to verify the product safety and fitness for use of the imported items with respect to human consumption. The Control Certificate allows customs authorities to verify, on a single document, all required customs information, including the product's compliance with relevant standards and technical regulations. The application form to be used as a Certificate of Control is

readily available free of charge to all importers and does not need to be issued by MARA. After the importer duly fills in the form and MARA approves it, it becomes an official certificate (i.e., the Certificate of Control), and can be submitted to the competent customs authorities at point of entry into the customs territory of Turkey.

11. *Inter alia*, the Certificate of Control contains information on: the tariff heading applicable to the product being imported, the description of the product or products which will be in the consignment, information on the importer (i.e., business title, address, telephone, etc.), the importer's tax registration number, information on the exporter (i.e., business title, address, telephone, etc.), the intended use of the commodity, the purpose of importation of the commodity (to be specified for live aquatic products), the quantity of the product being imported, the batch number of the commodity (only for agricultural veterinary drugs and related active substances), the country of origin of the commodity, the country in which the commodity is to be loaded for transportation to Turkey, the customs point of entry of the commodity into Turkey, information on the firm which will use the imported commodity (i.e., business title, address, telephone, etc.), and the applicable information indicating compliance of the imported commodity with the relevant Turkish technical regulations or specifications implementing recognized international standards (i.e., EC, WHO or FAO Codex) for the specific imported commodity. MARA may require additional documents and certificates to be provided when importation is sought. Some of these documents are required for all products being imported (the *pro-forma* invoice and other documents such as the nutritional specifications which may be requested by law), while others only for certain types of products. These latter documents may differ in relation to the type of product and the relevant legislation in force. However, they all establish specific information obligations and requirements to ensure that human health and safety, and animal or plant life or health are protected.

12. When all required information has been duly provided and attached to the Certificate of Control, MARA approves it and it becomes a valid document for purposes of customs control. In essence, it is only when the commodity to be imported is found to be "*proper*" (i.e., in line with all Turkish requirements for marketability, product safety and fitness for use) that MARA will approve a Certificate of Control. MARA will then have exhausted its customs certification mandate and it will simply retain later powers of market surveillance. Certificates of Control have always been systematically and regularly approved on a non-discriminatory basis both in relation to rice imports occurring at the "over-quota" MFN or applied rate level and, most importantly for purposes of the allegations by the United States, within the "in-quota" volumes established each year since 2004. In particular, from 2003 to date, Turkey has approved a total of 2,223 Certificates of Control, allowing a total importation of 2,264,857 tonnes of foreign rice (paddy, brown and milled). Of this total volume, 497,469 tonnes of rice equivalent have been allocated under the TRQ system since January 2004.

13. This clear and undisputable factual evidence is the single most powerful proof that the Certificate of Control used by Turkey is an instrument of customs control that has not discriminated between exporting countries, that it has not been used differently on the basis of whether it related to TRQ or MFN rice import applications, and that both *de jure* and *de facto* it is not intended to act as an import license. It is not an import license, but an administrative form that, when duly filled and approved by MARA, can be shown at point of entry into Turkey, therefore fulfilling its customs purposes.

14. Turkish law does provide for the use of import licenses. These were required for imports of rice within the TRQ, and were separate and distinct forms from the Certificates of Control in that they did not serve a customs purpose, but rather aimed at allocating the available quota among traders and guaranteeing predictability of the market supply. These dedicated import license forms had the distinctive traits that import licenses have in all countries where they are utilized: the issue number; the quota period; the authority responsible for issue; the last day of validity; the quantity expressed in

quota unit; and the security (as applicable). All these information requirements are not present on Certificates of Control.

15. The tariff rate quota (TRQ) system, introduced in April 2004, created a preferential access regime for importation of rice into Turkey. The TRQ was not introduced as an instrument to protect or distort trade, but rather as a tool to achieve the necessary supply of rice to Turkey and to stabilize the domestic market. Very simply, the TRQ provided a tariff advantage to import rice up to predetermined quantities. Any interested importer of foreign rice could apply if there was compliance with the requirements and conditions set out by relevant Turkish legislation. In particular, to take advantage of this system, any interested importer needed to take the following steps: apply for an import license to the Undersecretariat of Foreign Trade (UFT), indicate compliance with the domestic purchase requirement, receive approval by UFT, fill-out the Certificate of Control and receive approval from MARA, lodge the required security to guarantee actual importation, pay the applicable customs duties at point of entry, and place the imported rice on the Turkish market.

16. The TRQ has systematically been allocated on a "*first-come-first-served*" basis and has never discriminated on the basis of country of origin of the rice or nationality/affiliation of the importer applying for a license. The requirements for the application and evaluation procedures of the import licenses have always been clear, transparent and easy to implement for all importers. Similarly, the administrative procedures for licensing have always been simple and user-friendly. All documents required for application have always been published in the relevant legislation. When all application requirements were met, the import licenses have systematically been issued with an average administrative delay of 5 days. In addition to the import licenses obtained for purposes of quota allocation, of course, importers also had to comply with all other customs obligations and requirements, in particular the presentation and approval by MARA of the required Certificates of Control. The tariff quota system was never meant to act as and never had any restrictive or discriminatory effects on trade and rice imports. Rather, the system was voluntary and conferred an advantage to the importers meeting the requirements stipulated in the legislation, including the domestic purchase requirement. Importers have always been free to make use of the system or not. Evidence clearly indicates that the high volumes of in-quota imports and the high numbers of licences and Certificates of Control which have been issued and approved (respectively) are testimony to the attractiveness and appeal that the tariff advantage has had in the business determinations made by importers.

On the US Claims Relating to Turkey's Alleged Denial of Import Licences

Certificates of Control are not Import Licences within the Meaning of Article 1.1 of the Agreement on Import Licensing Procedures

17. Turkey does not operate (and never did) an import licensing system in relation to the importation of rice at the MFN or applied rates of duty (hereinafter, the MFN trade). On the other hand, an import licensing system has been operated for purposes of administering the allocation of the rice quotas which have been opened between 2004 and 2006 at preferential rates of duty (hereinafter, the TRQ trade). There is a clear and distinctive difference between the administrative forms to be used in connection with the customs procedures (i.e., the Certificates of Control required to facilitate customs clearance of rice imports in relation to both MFN and TRQ trade) and those needed to apply for a license in order to be allocated part of the quota and benefit from the tariff advantage (i.e., the import licenses which are required for importation of rice in relation to TRQ trade).

18. GATT Article XI:1 does not define the concept of "*import license*". Neither is this concept defined by the Agreement on Agriculture when, in footnote 1 to Article 4.2 thereof, it refers to "*discretionary import licenses*" as being quantitative restrictions. According to the panel report in *EC – Bananas*, "*the notion of 'import licensing' is limited to procedures requiring the submission of*

an application or other documentation (other than that required for customs purposes) to the relevant administrative body". Turkey's Certificates of Control have not been adopted, and are not required by Turkey, in order to comply with the "*administrative procedures used for the operation of import licensing regimes"* in the meaning of Article 1 of the Agreement on Import Licensing Procedures. In fact, there is no import licensing regime applicable to imports of rice into Turkey under MFN trade. There is an import licensing regime only in relation to rice imports under TRQ trade.

19. Turkey's Certificates of Control amount to administrative forms that are required exclusively for "*customs purposes*". If all informative data is duly provided by the importers, and MARA determines compliance with all relevant specifications, standards and technical regulations (i.e., human health and safety, animal or plant life or health, environmental protection, fitness for use, product safety, public policies, etc.), the Certificates of Control are automatically approved. At that point, importers may use them as official documents for "*customs purposes*", when seeking customs clearance at point of entry into Turkey. With respect to MFN trade, there is no 'administrative procedure' or 'licensing requirement' provided by law other than the mere approval by MARA of Certificates of Control for "*customs purposes*".

20. It appears clear that Turkey's Certificates of Control are not "*administrative procedures used for the operation of import licensing regimes*", but are "*required for customs purposes*" within the meaning of Article 1.1 of the Agreement on Import Licensing Procedures. Therefore, the claim by the United States that the Certificate of Control is an import license must be rejected.

The Lack of Approval of Certain Individual Certificates of Control does not Amount to a Prohibition or Restriction of Rice Imports within the Meaning of Article XI:1 of the GATT 1994

21. Having established that the Certificate of Control is not an import license within the meaning of the Agreement on Import Licensing Procedures, Turkey considers that the Certificate of Control cannot be considered an import license under GATT Article XI:1. The United States fails to indicate in its pleading on what grounds Turkey's Certificate of Control (and the alleged denial thereof) can or should be considered an "*other measure*" for purposes of the application of GATT Article XI. Because of the *de jure* and *de facto* operation of the Certificate of Control, it is clear that no "*prohibition*" or "*restriction*" of rice importation through any "*other measure*", falling within the meaning of GATT Article XI:1, has occurred through the alleged 'denial of Certificates of Control to import rice'.

22. The United States has failed to show that Turkey's alleged 'denial of Certificates of Control to import rice' constitute an "*other measure*" within the meaning of GATT Article XI:1 and a *de jure* and/or *de facto* "*prohibition*" or "*restriction*" of the type that GATT Article XI considers a quantitative measure that should not be "*instituted or maintained*". As there is no "*restriction*" or "*prohibition*", the nature of the "*measure*" is of no relevance. For this reason, the claim by the United States under GATT Article XI must be rejected.

The Lack of Approval of Certain Individual Certificates of Control does not Constitute a Measure within the Meaning of Article 4.2 of the Agreement on Agriculture

23. Having indicated that the Certificates of Control are not import licenses within the meaning of the Agreement on Import Licensing Procedures, that there is clearly no 'denial' of Certificates of Control, and that there is no *de jure* or *de facto* import prohibition or restriction within the meaning of GATT Article XI:1, Turkey maintains that there cannot be "*discretionary import licensing*" and/or "*quantitative import restrictions*" within the meaning of Article 4.2 of the Agreement on Agriculture and footnote 1 thereof. Having conclusively demonstrated that there is no violation of GATT Article XI, Turkey believes that no further scrutiny should be conducted under the Agreement on

Agriculture. For this reason, the claim by the United States under Article 4.2 of the Agreement on Agriculture must be rejected.

The Publication and Administration of Turkey's Trade Regulations Complies with the Relevant Obligations under Article X of the GATT 1994

24. Turkey considers that its trade regulations are in full compliance with the transparency obligations under Article X of the GATT, as all relevant laws, regulations and administrative rulings with respect to Turkey's import regime for products, and in particular for rice, were always promptly published. All requirements connected to the Certificates of Control, including the accompanying documentation that must be provided for customs purposes, have systematically been published as indicated in the factual background. Incidentally, Turkey believes that the documents referred to by the United States as 'Letters of Acceptance', do not fall within the letter and the scope of GATT Article X in that they are mere instruments of internal communication among Turkish administrators and public officials.

25. Finally, the obligation under GATT Article X:2 does not appear to be pertinent to the case at issue in that the 'Letters of Acceptance' are not "*measures of general application*" that need to be published ahead of enforcement. Again, as indicated by the Appellate Body in *EC Poultry*, the transparency obligation of Article X relates to the *publication* and *administration* of 'laws, regulations, judicial decisions and administrative rulings of general application', rather than to the *substantive content* of such measures. The 'Letters of Acceptance' are never enforced and, in fact, cannot be legally enforced by any party (i.e., the importers, the administration, or the courts). Therefore, the related claim by the United States must be rejected.

Articles 1.4 and 3.5 of the Agreement on Import Licensing Procedures do not Apply

26. Along the same lines, Turkey reaffirms that the Certificates of Control are not import licenses within the meaning of the Agreement on Import Licensing Procedures. Therefore, the claim by the United States that Turkey has acted inconsistently with the obligations of transparency and due-process of Articles 1.4(a) and 1.4(b) of the Agreement on Import Licensing Procedures must be rejected for the inapplicability, in the case at issue, of the Agreement on Import Licensing Procedures.

On the US Claims Relating to Turkey's Tariff Rate Quotas Regime Requiring Domestic Purchase

The Domestic Purchase Requirement within Turkey's TRQ Regime is not Inconsistent with Article III:4 of the GATT 1994 in That it does not Accord Imported Rice Treatment Less Favourable Than Domestic Rice

27. Turkey believes that its domestic purchase requirement (DPR) does not '*affect the internal sale, offering for sale, purchase (…) or use*' of imported rice. In relevant part, the key issue with respect to the operation of Turkey's DPR and the allegations made by the United States under GATT Article III:4 appear to rest on the circumstance that the DPR would '*affect the internal sale, offering for sale, purchase (…) or use*' of imported rice by "adversely modifying the conditions of competition between domestic and imported products". The United States has failed to prove this allegation.

28. In particular, it is wrong and misleading to state that the fulfilment of the DPR by importers "*provides the only way to import rice into Turkey*". In fact, as widely known and as effectively evidenced by the trade-flows, any importer is free to import whatever quantity of rice into Turkey from whatever country at the MFN or applied rate of duty. The regime of importation which was applied within the TRQ was meant to provide an advantage to importers of foreign rice to adequately supply the Turkish rice market. In fact, it is well known that Turkey is a net importer of rice and that

imports are essential to stabilize the market (both in terms of price and quantities available). Turkey maintains that the opening itself of its TRQ was a trade policy that, while being necessary to stabilize the domestic market, resulted in the modification of the conditions of competition between domestic and imported products *in favour of imported products*.

29. The success rate in terms of applications for import licenses and volumes of imported rice within the TRQ clearly indicates that, despite the allegations of the United States, a considerable degree of appeal and competitive advantage was retained by the TRQ system, albeit "*affected by the DPR system*", in the eyes and business determinations of importers of foreign rice, independently of the country of origin. Had this element of competitive advantage not been there, the importers could still have imported rice at the MFN or applied rate of duty. In relation to the eligibility criteria, Turkish regulations never restricted the issuance of import licenses for rice imports under the TRQ system only to domestic rice producers. In fact, one of the categories eligible to receive import licenses were "*those who make purchase of paddy rice or rice from Turkish Grain Board*" (TMO). The United States maintains in its submission that this category would 'undoubtedly be domestic producers as well', but fails to argue or prove the validity of this assertion. The United States has also failed to prove that, '(t)his state of affairs negatively affects competitive conditions of imported rice in the Turkish marketplace'. For all these reasons, the claims by the United States that Turkey has acted inconsistently with GATT Article III:4 must be rejected.

Turkey has not Acted Inconsistently with Article XI:1 of the GATT 1994 Because its Domestic Purchase Requirement and the Eligibility Criteria do not Constitute Restrictions on Imports Other Than in the Form of Duties, Taxes or Other Charges

30. The TRQ regime, and its DPR system, only restricted imports in relation to the TRQ trade volumes (i.e., those imported at preferential rates) and in a strict non-discriminatory fashion, but never altered or removed the ability of importers to import unlimited quantities or rice from any origin at the applied or MFN bound rate. Therefore, it never resulted in a substantial restriction on imports of rice. Furthermore, the import licensing regime used to administer the TRQ regime was an automatic import licensing system and, therefore, not falling within the scope of GATT Article XI. There was never any *de jure* restriction of rice importation into Turkey since nothing in the relevant laws and regulations ever diminished the ability to import at the applied or MFN bound rates of duty. Furthermore, the TRQ regime acted to confer an advantage to importers of rice at preferential rates which available data show to have been largely used by importers, independently of the country of origin and despite the eligibility criteria of the DPR. Therefore, the claim that Turkey has acted inconsistently with GATT Article XI:1 in relation to the domestic purchase requirement and eligibility criteria of its TRQ regime must be rejected.

Other Claims

31. Turkey indicated that no violation Article 2.1 of the Agreement on Trade-Related Investment Measures can be argued given that no violation of GATT Article III:4 was maintained when the TRQ system was in force. The DPR instituted by Turkey under the TRQ regime did not amount to a measure in violation of GATT Article III:4 since it did not accord treatment less favourable to imported products nor did it adversely affect the conditions of competition to the detriment of imported products.

32. Turkey also showed that its TRQ regime was not based on discretionary import licensing and it is not correct to state that non-tariff measures were maintained through state trading enterprises in a way which made the DPR inconsistent with Article 4.2 of the Agreement on Agriculture. In particular, Turkey's import licensing system for purposes of allocating the TRQ to traders has never been a tool of discretionary import licensing. On the contrary, this system has always been an automatic import licensing system where approval of import licenses would be granted in all cases,

provided that all application requirements were met by importers. Furthermore, Turkey recalls that the TMO was only one of the possible providers of domestic rice under the three categories of the DPR (i.e., paddy producers having permission to plant paddy rice, their cooperatives and unions or the TMO). Therefore, the United States failed to prove how the TMO could be in a position to operate non-tariff measures on imports of TRQ rice.

33. For these reasons, all the related claims by the United States that Turkey has acted inconsistently with its WTO obligations under the covered agreements must be rejected.

US Claims Relating to Turkey's Import Licensing Regime as a Whole

34. Turkey indicated that there is no *de jure* or *de facto* 'denial' of approval of Certificates of Control in breach of GATT Article XI. The Certificates of Control are not 'import licenses' but administrative forms relevant for "*customs purposes*", which are aimed at ensuring compliance with legitimate objectives. Turkey has also provided relevant data and trade statistics clearly indicating that MFN trade in rice has effectively occurred throughout the operation of the TRQ regime. There is no legal or operational link between the legislative framework that provides for the TRQ regime and the one regulating MFN trade would aim at seriously restricting market access. There is no prohibition or restriction connected with either the Certificates of Control or Turkey's TRQ regime. There are no discretionary import licensing procedures. There are no seasonal bans. Therefore, none of these instruments has ever acted, either individually or in combination with one another, to deter full utilization of the quotas opened within the TRQ regime or to prohibit or restrict MFN trade. Turkey also maintained that its system of rice importation as a whole was never inconsistent with the Agreement on Agriculture and the Agreement on Import Licensing Procedures.

35. Finally, Turkey emphasized that the legislative framework providing for the TRQ regime, including the domestic purchase requirement, is no longer in force. The legal validity of all relevant legislation expired before the commencement of the Panel proceedings. Turkey has not renewed these measures, neither extending them nor adopting new legislative instruments. Turkey submitted that certain Panels and the Appellate Body have found it "*inconsistent*" to make recommendations on measures which were no longer in force. In particular, in *Dominican Republic – Cigarettes*, the Panel did not find it appropriate to recommend to the Dispute Settlement Body that it make any request to the Dominican Republic regarding this measure since it was no longer in force. For these reasons, Turkey respectfully requested the Panel to either refrain from making findings on the measures related to Turkey's TRQ regime as no longer in force, or, should the Panel consider making these findings necessary for purposes of securing a positive solution to the dispute, not to make any recommendation to the Dispute Settlement Body.

Conclusion

36. For all the reasons set out above, Turkey respectfully requested the Panel to reject all claims made by the United States and find that Turkey's relevant laws, regulations and procedures, both in relation to MFN and TRQ rice imports, are not inconsistent with Articles III:4, X:1, X:2, and XI:1 of the GATT 1994; Article 4.2 of the Agriculture Agreement; Articles 1.4(a) and (b), 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 Agreement on Import Licensing Procedures; and Article 2.1 and paragraph 1(a) of Annex 1 of the Agreement on Trade-Related Investment Measures.

ANNEX A-3

THIRD PARTY WRITTEN SUBMISSION BY CHINA
(18 October 2006)

I. INTRODUCTION

1. The People's Republic of China (hereafter "China") makes this third party submission because of its systemic interests in the correct interpretation and application of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994") , and the *Agreement on Trade-Related Investment Measures* (the "TRIMs Agreement") in relation to the present dispute.

2. In this written submission, firstly we will discuss the proper interpretation of Article XI:1 and Article III:4 of GATT 1994. Then, we will address the question of application of the TRIMs Agreement and the measures at issue.

II. ARTICLE XI:1 OF GATT 1994

3. The US alleges that, Certificates of Control is an import license, and since September 2003, the competent authority of Turkey has not issued Certificates of Control for rice to be imported at the bound tariff rates, thereby effectively preventing any out-of-quota imports.[1] However, Turkey disputes this fact and by claiming that it serves the purpose of customs, argues that Certificates of Control is not an import license, and has been approved all the time.[2]

4. On this point, China is of the view that, the essence of the issue under GATT Article XI:1 is that whether the Certificate of Control prohibits or restricts trade of rice in practice. Even assuming, *arguendo*, that the Certificate of Control is not an import license, if it prohibits or restricts the import of rice, it may still constitute an "other measure" which is inconsistent with GATT Article XI:1.

5. As to the interpretation of the term "restriction" in GATT Article XI:1, the panel of the case *India-QRs* held that the scope of the term "restriction" in Article XI:1 was also broad, as seen in its ordinary meaning, which was "a limitation on action, a limiting condition or regulation".[3] Another panel endorsed this finding and noted that, "[o]n a plain reading, it is clear that a 'restriction' need not be a blanket prohibition or a precise numerical limit."[4]

6. To give a clearer interpretation of restriction or limitation, China considers that the following elaboration of the panel in *India – Quantitative Restrictions* is illuminating:

> "[After examining several GATT panel reports, the panel stated that] These reports are consistent with the ordinary meaning noted above, as discretionary or non-automatic licensing systems by their very nature operate as limitations on action since certain imports may not be permitted. Thus, in light of the terms of Article XI:1 and these adopted panel reports, we conclude that a discretionary or non-automatic import licensing requirement is a restriction prohibited by Article XI:1."

7. Although this statement was made towards import license, the rationale is applicable to "other measures" under GATT Article XI:1. In other words, if an "other measure" subject to the discretion of

[1] The US first written submission, paras. 59-73.
[2] Turkey's first written submission, paras. 47-69.
[3] Panel Report, *India – Quantitative Restrictions*, para. 5.128.
[4] Panel Report, *India – Autos*, para. 7.270.

a government agency and may block certain imports, such measure should be deemed to operate as limitations on imports and is not permitted by Article XI:1. Specific to this case, if the Certificates of Control has effect of prohibition or limitation on importation of rise, such Certificate probably constitutes restrictions on imports and violates Article XI:1.

III. ARTICLE III OF GATT 1994

8. With respect to domestic purchase requirement, the US claims that it violates GATT Article III:4, whereas Turkey denies such claim. Specifically, Turkey argues that with the benefit of lower tariff rate, the domestic purchase requirement actually altered the conditions of competition in favour of imported product, and therefore was consistent with Article III:4.[5]

9. However, in China's view, such line of reasoning seems questionable. Article III deals with the comparison of treatments between the products imported and national products, and has no relation to the level of tariff. If domestic purchase requirement alters the competition conditions to the detriment of imported products and thus violates Article III:4, the violation could not be redressed or offset by the benefit of lower tariff rate. Accordingly, Turkey can not invoke the beneficial tariff under the TRQ as the excuse from violation of Article III:4, if such violation is found by the panel.

IV. THE APPLICATION OF TRIMS AGREEMENT

10. The US claims that Turkey is in breach of Article 2.1 and Paragraph 1(a) of the Annex 1 of the TRIMs Agreement. On this point, the United States argues that the TRIMs Agreement does not define what is a "trade-related investment measure" that would breach Article III:4, and Turkey's domestic purchase requirement satisfies both of the two elements contained in paragraph 1(a) of Annex 1 of the TRIMs Agreement; thus, the measure at issue is inconsistent with Article 2.1 and Paragraph 1(a) of Annex 1 of the TRIMs Agreement. [6]

11. Turkey argues that the subject measure is consistent with GATT Article III:4, and therefore does not violate Article 2.1 of the TRIMs Agreement.[7] It seems that Turkey ignores the fact that the US fails to define what is a "trade-related investment measure" and prove Turkey's measure constitutes a TRIM[8]. China wishes to raise its observation in this regard.

12. Article 2 of the TRIMs Agreement provides:

> 1. Without prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994.
>
> 2. An illustrative list of TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 and the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 is contained in the Annex to this Agreement.

13. Concerning the claim made under Article 2 of the TRIMs Agreement, the panel in *Indonesia – Autos* spelt out that "[b]y its terms, Article 2.1 requires two elements to be shown to

[5] Turkey's first written submission, paras. 95-99.
[6] The US first written submission, paras. 110-112.
[7] Turkey's first written submission, paras. 110-113.
[8] TRIM is the abbreviation of "trade-related investment measure", note added by China.

establish a violation thereof: first, the existence of a TRIM; second, that TRIM is inconsistent with Article III or Article XI of GATT. "[9]

14. China wishes to stress that the TRIMs Agreement is a fully fledged treaty with autonomous legal existence, and it must have its own application scope. In fact, Article 1 of the TRIMs Agreement which is entitled "*Coverage*," expressly provides:

> This Agreement applies to investment measures related to trade in goods only (referred to in this Agreement as "TRIMs").

15. Although the TRIMs Agreement does not define what a TRIM is, this term could be interpreted properly according to the principle set forth in Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Dispute* (the "DSU"). In no case it is proper to bring a measure out of the coverage of TRIMs Agreement under the jurisdiction of it.

16. Furthermore, the chapeau of paragraph 1 of Annex 1 of the TRIMs Agreement states that:

> *TRIMs* that are inconsistent with the obligation of national treatment provide for in paragraph 4 of Article III of GATT 1994 include those […](Emphasis added.)

17. This provision, corresponding with the provision of Article 1, clearly shows that, before the examination of paragraph 1(a) of Annex 1 of the TRIMs Agreement, a measure must firstly be found to be a TRIM.

18. According to above-mentioned principles, the United States, as the complaining party, should establish *prima facie* cases for the two elements before the Panel proceeds to consider its claim under Article 2.1 of the TRIMs Agreement, but it failed to do so.

19. If the reasoning put forward by the United States prevailed, a measure could jump over Article 1 and the chapeau of paragraph 1 of Annex 1, be considered directly under Paragraph 1(a) of Annex 1 of the TRIMs Agreement. In such case, Article 1 and the chapeau of paragraph 1 of Annex 1of the TRIMs Agreement would be turned superfluous and meaningless.

V. THE MEASURES AT ISSUE

20. China notices that claims made by the United States are divided into three groups, namely, Turkey's denial of import licenses, Turkey's TRQ regime requiring domestic purchase, and Turkey's import licensing regime as a whole. The United States did not define "Turkey's import licensing regime as a whole". According to the context of the US's first written submission, this term seems to refer to the joint operation of Turkey's TRQ regime and Certificate of Control system, which have already been challenged separately.

21. Although Turkey does not disagree with the identification and categorization of subject measures, China is concerned about such kind of approach of challenging a regime "as a whole". Generally speaking, the scope of the measures challenged under the title of "regime as a whole" tends to be vague and can not meet the requirement of specificity in Article 6.2 of the DSU. As to the present dispute, the "as a whole" claim did not appear in the US's panel's request and should not be included in the panel's terms of reference.

[9] Panel Report, *Indonesia – Autos*, para. 14.64.

VI. CONCLUSION

22. In the light of the relevant WTO/GATT jurisprudence and the analytical approach with regard to the measures in question set forth above, China hopes the viewpoints and various issues raised in this submission may assist the Panel in its decision.

ANNEX A-4

THIRD PARTY WRITTEN SUBMISSION BY EGYPT
(18 October 2006)

I. INTRODUCTION

1. The Arab Republic of Egypt (hereinafter, "Egypt") welcomes this opportunity to provide the Panel with its views on the legal claims raised by the United States of America (hereinafter, the "United States") with respect to the measures set up by Turkey to regulate imports of rice.

2. Egypt has decided to intervene as a third party in this dispute since it is an important producer of rice and has, traditionally, been amongst the main exporters of rice to Turkey. Also, Egypt has a systemic interest in the correct interpretation of the WTO Agreements and, in particular, the General Agreement on Tariff and Trade 1994 (hereinafter, the "GATT 1994"), the Agreement on Agriculture and the Agreement on Import Licensing Procedures (hereinafter, the "Import Licensing Agreement").

3. Egypt has essentially limited this submission to questions related to the proper interpretation of Articles III:4 and XI:1 of GATT 1994 and Article 4.2 of the Agreement on Agriculture. Its conclusions are as follows:

- prohibitions or restrictions on the importation of rice are inconsistent with Article XI:1 of the GATT 1994;
- restrictions on imports of rice are not permitted under Article 4.2 of the Agreement on Agriculture; and,
- domestic purchase requirements affecting imports of rice are inconsistent with Article III:4 of the GATT 1994.

4. Egypt recognizes that many of the issues raised in this dispute are solely or primarily factual in nature.

5. Given the short period between the deadline for the first written submission of Turkey and the deadline for the third party submission, Egypt has been unable to incorporate in this submission a response to all the arguments brought by Turkey. Consequently, Egypt reserves it right to address new arguments and further develop the arguments set out hereinbelow at the third party session of the first substantive meeting of the Panel. It will also be available to answer any questions the Panel may have on this occasion.

II. IMPORT PROHIBITIONS OR RESTRICTIONS OF RICE ARE INCONSISTENT WITH ARTICLE XI:1 OF THE GATT 1994

1. Any General Denial of Certificates of Control for Imports of Rice is to be Considered as a Prohibition or Restriction under Article XI:1

6. The United States claims that Turkey's denial to issue Certificates of Control to importers actually restricts or prohibits the importation of rice at the over-quota rate and is thus, inconsistent with Article XI:I of the GATT 1994. The United Stated argues that the Certificate of Control is an "import license" or an "other measure" within the meaning of Article XI:1 because Turkey's Ministry of Agriculture and Rural Affairs (hereinafter, "MARA") requires importers to submit an application

for a Certificate and that application must be granted in order for the importation to take place[1]. It is further contended that the Certificates would, in any event, be a prohibition or restriction on importation for the purposes of Article XI:1.

7. In response to the claims raised by the United States, Turkey contends that the Certificates of Control are not import licenses within the meaning of Article 1.1 of the Import Licensing Agreement since they are required exclusively for customs purposes and the lack of approval of certain individual Certificates cannot be considered to amount to a prohibition or restriction on rice imports within the meaning of Article XI:1[2].

8. Article XI:1 of the GATT 1994 provides:

> "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses 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 or on the exportation or sale for export of any product destined for the territory of any other contracting party."

9. In *Dominican Republic – Import and Sale of Cigarettes*, the Panel stated that "Article XI:1 of the GATT covers prohibitions and restrictions, other than duties, taxes or other charges, on the importation or the exportation of products"[3]. Previously, in *India – Quantitative Restrictions,* the Panel had found that "[T]he text of Article XI:1 is very broad in scope, providing for a general ban on import or export restrictions or prohibitions 'other than duties, taxes or other charges'." Referring to the findings of *Japan – Semi-conductors*, the Panel then noted that "the wording of Article XI:1 is comprehensive: it applies 'to all measures instituted or maintained by a [Member] prohibiting or restricting the importation, exportation, or sale for export of products other than measures that take the form of duties, taxes or other charges. The scope of the term 'restriction' is also broad, as seen in its ordinary meaning, which is 'a limitation on action, a limiting condition or regulation'"[4]. In *India – Autos*, the Panel confirmed that the expression "other measures" in Article XI implies a "broad scope" as to the types of measures that are covered. It is the "nature of the measure as a restriction in relation to importation which is the key factor to consider in determining whether a measure may properly fall within the scope of Article XI:1"[5].

10. Considering the above-mentioned precedents, Egypt submits that regardless of the form that a quantitative import restriction or prohibition takes, it is inconsistent with Article XI:1. If, as claimed by the United States, the Certificates of Control actually restricted or prevented the importation of rice into Turkey they should be considered as measures falling within the scope of Article XI:1.

11. The fact that the Certificates of Control may be administrative forms that are required exclusively for customs purposes, within the meaning of Article 1.1 of the Import Licensing Agreement, does not confirm the consistency of the Turkish rice import regime with Article XI:1. Certificates of Control, if not considered as import licenses, must be considered as measures covered by Article X1:1, since they are not duties, taxes or other charges.

12. As indicated by Turkey, the essential element with respect to the consistency of its system of Certificates of Control with Article XI:1 is whether it resulted in a quantitative restriction[6]. In order

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[1] First written submission of the United States, paras. 59-63.
[2] First written submission of Turkey, paras. 47-69.
[3] *Dominican Republic – Import and Sale of Cigarettes*, para. 7.248.
[4] *India – Quantitative Restrictions*, para. 5.128.
[5] *India – Autos*, para. 7.261.
[6] First written submission of Turkey, para. 62.

to determine this element, Egypt submits that all the elements before the Panel should be considered. The fact that the unpublished Letters of Acceptance issued by the Turkish Minister of Agriculture to MARA to delay the issuance of Certificates of Control may not be considered as "laws, regulations, judicial decisions or administrative rulings" is irrelevant in determining whether the system of Certificates of Control is consistent with Article XI:1. In *Korea – Various Measures on Beef,* in order to establish that the Korean beef import regime imposed restrictions within the meaning of Article XI:1, the Panel considered the lack and delays of the tendering authority in calling for tenders and its discharge practices[7]. Consequently, to determine whether the alleged denial of Certificates of Control constitutes a prohibition or restriction under Article XI:1, the Letters of Acceptance issued by the Minister of Agriculture should be considered, amongst other elements.

2. The Joint Operation of a TRQ Regime and a General Import Regime Restricting or Preventing Imports of Rice into Turkey is Inconsistent with Article XI:1

13. The United States argues that the eligibility criteria to purchase rice under the TRQ are in breach of Article XI:1 because they limit the range of entities that may import rice into Turkey and, therefore constitute a restriction on importation within the meaning of that Article[8]. Also, the United States claims that the TRQ system, operating in conjunction with the failure of MARA to grant Certificates of Control is inconsistent with Article XI:1[9].

14. In response to these arguments, Turkey contends that since the TRQ regime, and its domestic purchase requirement obligation, only cover imports made under the TRQ regime, and the latter does not prevent importers from importing rice outside the TRQ, the TRQ eligibility criteria do not restrict the importation of rice into Turkey[10]. For the same reason, Turkey argues that the TRQ regime, in conjunction with the general import regime, i.e., concerning imports outside the TRQ, is consistent with Article XI:1[11].

15. Egypt considers that in order to determine whether or not the TRQ eligibility criteria constitute a restriction to the importation of rice under Article XI:1, the Panel must examine the general import regime together with the TRQ. Indeed, both the general import regime and the TRQ regime actually govern the importation of rice into Turkey.

16. The joint examination of both the TRQ and general regime is particularly pertinent if the Panel was to concur with the United States in finding that the denial to issue Certificates of Control outside the TRQ regime has forced importers to import under the TRQ regime. If this was the case, the Panel should determine whether the TRQ eligibility criteria has restricted or prevented imports of rice into Turkey within the meaning of Article XI:1. In line with the conclusions of the Panel in *India – Quantitative Restrictions*[12], if it is found that the TRQ regime is a discretionary or non-automatic import licensing regime, it should be considered as a restriction prohibited by Article XI:1. Also, if it is established that no imports of rice were possible during the periods where access to the TRQ was suspended, the resulting ban should be considered as a prohibition within the meaning of Article XI:1.

[7] *Korea – Various Measures on Beef*, para. 767.
[8] First written submission of the United States, paras. 106-109.
[9] First written submission of the United States, paras. 120-124.
[10] First written submission of Turkey, paras. 104-109.
[11] First written submission of Turkey, paras. 124-128.
[12] *India – Quantitative Restrictions*, paras. 5.130-131.

III. RESTRICTIONS ON IMPORTS OF AGRICULTURAL PRODUCTS ARE NOT PERMITTED UNDER ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE

17. The United States claims that Turkey's denial to issue Certificates of Control to importers of rice is inconsistent with Article 4.2 of the Agreement on Agriculture since it constitutes a measure of the kind required to be converted into ordinary customs duties[13]. Also, the United States argues that the domestic purchase requirement provided for under the TRQ regime, considered independently or with the denial of Certificates of Control under the general import regime, are breaching Article 4.2[14].

18. Turkey considers that it has complied with Article 4.2 since its Certificates of Control are not import licenses, their issuance has not been denied, and there is no prohibition or restriction on imports of rice within the meaning of Article XI:1 of the GATT 1994[15]. With respect to its TRQ regime, Turkey contends that it is also consistent with Article 4.2 since it rests on an automatic import licensing system[16].

19. Article 4.2 of the Agreement on Agriculture prevents Members from maintaining, resorting to or reverting "to any measures of the kind which have been required to be converted into ordinary customs duties, except as otherwise provided for in Article 4.2". Footnote 1 to Article 4.2 provides that the measures covered include, amongst others: "quantitative import restrictions", "discretionary import licensing" and "similar border measures other than ordinary customs duties".

20. In *Chile – Price Band System*, the Appellate Body found that "Article 4.2 was drafted in the present perfect tense to ensure that measures that were required to be converted as a result of the Uruguay Round -- but were not converted -- could not be maintained, by virtue of that Article, from the date of the entry into force of the WTO Agreement on 1 January 1995"[17]. The Appellate Body also considered that the reference to the residual category of "similar border measures other than ordinary customs duties", indicates that "the drafters of the Agreement did not seek to identify all 'measures which have been required to be converted' during the Uruguay Round negotiations"[18].

21. In the light of the interpretation of Article 4.2 given by the Appellate Body in *Chile – Price Band System*, Egypt considers that all measures that should have been converted into ordinary customs duties are inconsistent with this Article. These measures include "discretionary import licensing" regimes but also all measures generally preventing or restricting importation of agricultural products. Consequently, if the Panel was to find that the denial of Certificates of Control and the TRQ regime, either independently or in conjunction, prohibit or restrict imports of rice into Turkey, it should establish a violation of Article 4.2 has occurred. Whether or not the Certificates of Control and the TRQ regime are a "discretionary import licensing systems" or "quantitative import restrictions" within the meaning of Article 4.2 ,should not limit the Panel in its analysis of the consistency of the measures at issue.

22. It should also be noted that panels have found that restrictions on agricultural products that were found to be inconsistent with Article XI:1 of the GATT 1994 constituted violations of Article 4.2. In *Korea – Various Measures on Beef*, the Panel, after having reached the conclusion that the measures considered were inconsistent with Article XI, came to the conclusion that the same measures were necessarily inconsistent with Article 4.2 of the Agreement on Agriculture and its

[13] First written submission of the United States, paras. 74-78.
[14] Paras. 113-115 and 125.
[15] First written submission of Turkey, para. 71.
[16] Para. 115.
[17] *Chile – Price Band System*, para. 207.
[18] Para 210.

footnote referring to non-tariff measures maintained through state-trading[19]. Similarly, in *India – Quantitative Restrictions*, the Panel, after having found that the measures at issue were violating Article XI:1, considered that these measures violated Article 4.2[20].

IV. DOMESTIC PURCHASE REQUIREMENTS AFFECTING ALL IMPORTS OF RICE ARE INCONSISTENT WITH ARTICLE III:4 OF THE GATT 1994

23. The United States alleges that the domestic purchase requirement imposed under the TRQ regime is inconsistent with Article III:4 of the GATT 1994. In support of its allegation, the United States considers that imported and domestic products are "like products"; that the measures governing the TRQ regimes are to be considered as laws, regulations or requirements "affecting their internal sale, offering for sale, purchase, transportation or use"; and that imported rice is treated less favourably than domestic rice and that the conditions for imported rice in the Turkish market are being affected[21].

24. Turkey expresses the opinion that the domestic purchase requirement of its TRQ regime does not affect the "internal sale, offering for sale, purchase, transportation or use" of imported rice, neither does it adversely modify "the conditions of competition between domestic and imported products". Therefore, Turkey claims that it has not acted inconsistently with Article III:4[22].

25. Article III:4 of the GATT 1994 provides:

> "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product."

26. In the event that the denial of the Certificates of Control by MARA is established and it is found that importers had no other option than to import rice under the TRQ regime, the consistency of this regime with Article III:4 must be considered. Indeed, Egypt submits that a violation of Article III:4 can only be established if importers were deprived of their right to import without any conditions, regarding the origin of the imported rice or the imported volumes in particular, at the MFN or applied rates.

27. Since neither the United States nor Turkey dispute that the imported and domestic products are "like" products and that the measures governing the TRQ regime are "laws, regulations or requirements" within the meaning of Article III:4, one must examine whether these measures affect the "internal sale, offering for sale, purchase, transportation, distribution or use" of imported rice and whether imported products are treated less favourably then domestic products.

28. In *Canada – Autos*, the Panel noted that the word "affecting" in Article III:4 "has been interpreted to cover not only laws and regulations which directly govern the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition

[19] *Korea – Various Measures on Beef*, para. 768.
[20] *India – Quantitative Restrictions*, paras. 5.238-242.
[21] First written submission of the United States, paras. 86-87.
[22] First written submission of Turkey, paras. 88-99.

between domestic and imported products"[23]. In the framework of the *US – FSC* Article 21.5 proceedings, the Appellate Body interpreted "affecting" as having a "broad scope of application". Further, in *India – Autos*, the Panel considered that the term "affecting" "goes beyond laws and regulations which directly govern the conditions of sale or purchase to cover also any laws or regulations which might adversely modify the conditions of competition between domestic and imported products.[24] In the case at hand, Egypt considers that the TRQ regime criteria, and more particularly the domestic purchase requirement, should be considered as affecting the internal sale, offering for sale purchase and use of imported rice, since importers must comply with these criteria when importing rice under the TRQ.

29. The text of the first sentence of Article III:4, in addition to past panel reports, clearly provides that imported products shall be accorded treatment no less favourable than the like domestic products once they have been cleared through customs. This is in line with the broader objective of Article III "to provide equal conditions of competition"[25]. The words "treatment no less favourable" call for "effective equality of opportunities for imported products in respect of the application of laws, regulations or requirements affecting the sale, offering for sale, purchase, transportation, distribution or use of products"[26]. In *India – Autos*, having noted that the measures at issue requirement generated "an incentive to purchase and use domestic products and hence creates a disincentive to use like imported products", the Panel considered that they were modifying the conditions of competition in favour of the domestic products[27].

30. If the TRQ regime was the only option available to importers to import rice into Turkey, it is submitted that the domestic purchase requirement adversely modified the conditions of competition between imported and domestic rice to the benefit of the latter. Regardless of the eventual unit cost of rice imported under the TRQ regime compared to domestic rice, the obligation for importers to purchase domestic rice as a pre-condition for the importation of rice accords less favourable treatment to imported rice since domestic producers were not subject to a similar requirement and should, thus, be considered contrary to Article III:4.

V. CONCLUSION

31. Egypt thanks the Panel for providing it with an opportunity to comment on the issues at stake in these legal proceedings and hopes that's its comments will prove to be useful.

[23] *Canada – Autos*, para. 10.80.
[24] *India – Autos*, para. 7.196.
[25] *US – FSC (Article 21.5 – EC)*, para.210.
[26] *US – Section 337*, para. 5.11.
[27] *India – Autos*, paras. 7. 201-202.

ANNEX A-5

**THIRD PARTY WRITTEN SUBMISSION
OF THE EUROPEAN COMMUNITIES**
(18 October 2006)

I. INTRODUCTION

1. The European Communities (hereafter "the EC") makes this third party submission because of its systemic interest in the correct interpretation of Articles III:4, XI:1 of the *GATT 1994*, Article 4.2. of the *Agreement on Agriculture*, Article 2.1 and Paragraph 1(a) of the Annex 1 of the *Agreement on Trade-Related Investment Measures* (TRIMs Agreement), the *Agreement on Import Licensing Procedures* and Articles 3.3 and 11 of the *Dispute Settlement Understanding* (DSU).

2. Many of the issues in dispute involve questions of fact on which the EC does not comment. It appears that on most if not all aspects of facts US and Turkey have directly opposing views. This submission will therefore address only a limited number of issues of legal interpretation which are of particular interest to the EC. The EC reserves its right to comment on other matters in its oral statement.

3. The EC notes that the US first submission appears to include some ambiguities on how the alleged Turkish system should be examined under the different relevant agreements. In particular, the US first separates the alleged denial of import licenses from the allegations concerning the Turkish tariff rate quota ('TRQ') on rice but then in the third part it examines these two issues in conjunction. However, the US does not clarify whether the separate analysis of the two parts of the alleged system is its primary position and whether the third part i.e. analysis of the parts of the alleged system in conjunction is an alternative position.

4. Section II of this written submission addresses considerations on whether the US first submission alleges an "as such" finding of the Turkish measures or rather a series of "as applied" measures. Section III in turn examines the definition of an import licence. Sections IV and V then examine some issues relating to the borderline between Article XI *GATT* and Article 4.2. of the Agreement on Agriculture and Article III:4 of the *GATT* respectively. Finally, Section VI contains some considerations due to the fact that the Turkish TRQ regime has ceased to exist. Section VII summarises the main conclusions.

II. DOES THE US MAKE AN "AS SUCH" OR AN "AS APPLIED" CLAIM?

5. The EC considers that the way in which the claims are put forward by the United States raises systemic issues that the Panel should consider with particular care.

6. In the introduction to its first written submission, the United States states that "Turkey has instituted a non-transparent, discretionary import licensing system to restrict and, at times, eliminate imports of rice".[1] Although not stated explicitly, the reference to a "system" could be understood to refer to an "as such" claim instead of an "as applied" claim. In other words, the US appears to consider that the Turkish system concerning imports of rice violates the relevant agreements and not just its application in specific instances.

[1] First written submission of the United States, para. 1.

7. Subsequently in its first written submission the United States describes the alleged denial of import licenses *inter alia* as "an unofficial ban".[2] It appears that in particular with respect to the alleged denial of import licenses the US case relies on internal documents of the Turkish administration and reference is also made to oral instructions given to Turkish officials. In the view of the EC these arguments appear to make rather an "as applied" claim than an "as such" claim. In other words, the US appears to be attacking the way the system is applied in practice.

8. The European Communities would also like to draw the attention of the Panel to the fact that the United States is claiming that the alleged *practice* of denial i.e. the *omission* to grant the Certificates of Control is a *measure* that falls within the category of a prohibited measure *inter alia* under Article XI:1 of the *GATT* and Article 4.2. of the *Agreement on Agriculture*.

9. The EC respectfully submits that before violation of these provisions can be established on the basis of the alleged practice not to grant import licenses i.e. an alleged omission, the US has the burden of making a *prima facie* case by asserting relevant fact, adducing probative evidence in support of such assertions of fact, and making and developing relevant legal argument.

10. The EC considers that a useful starting point is the definitions provided by the Appellate Body in *US – Zeroing (EC)*. In this case the Appellate Body clarified that any act or omission attributable to a WTO Member can be a measure of that Member for the purposes of dispute settlement proceedings, within the meaning of Article 3.3 of the DSU. This includes not only acts applying a law in a specific situation, but also acts setting forth rules or norms that are intended to have general and prospective application, irrespective of how or whether they are applied in a particular instance.[3] This is so even if such rules or norms are not expressed in the form of a written instrument.[4]

11. The Appellate Body has repeatedly emphasised the seriousness of "as such" claims, since they seek to prevent Members *ex ante* from engaging in certain conduct. Thus, the implications of such claims are obviously more far-reaching than "as applied" claims since "as such" claims potentially cover all instances of application of the measure and not only the ones identified by the complaint. Consequently, a panel must not lightly assume the existence of a "rule or norm" constituting a measure of general and prospective application. If a panel were to do so, it would act inconsistently with its obligations under Article 11 of the DSU to make an objective assessment of the matter before it.[5]

12. When an "as such" challenge is brought against a measure that is expressed in the form of a written document, such as a law or regulation, there would, in most cases, be no uncertainty as to the existence or content of the measure that has been challenged. The situation is different, however, when a challenge is brought against an alleged rule or norm that is said not to be expressed in the form of a written document. In such cases, the very existence of the challenged rule or norm may be uncertain. Accordingly, particular rigour is required on the part of a panel to support a conclusion as to the existence of a rule or norm. A panel must carefully examine all concrete evidence regarding the existence of the purported rule or norm in order to determine whether or not it can be challenged as such.[6]

[2] First written submission of the United States, para. 14.
[3] Appellate Body Report, *US – Zeroing (EC)*, paras. 187-188.
[4] Appellate Body Report, *US – Zeroing (EC)*, paras. 190-193.
[5] Appellate Body Report, *US – Zeroing (EC)*, paras. 189 and 196.
[6] Appellate Body Report, *US – Zeroing (EC)*, paras. 197-198.

13. There is thus a distinction between the *existence* of a measure and the *content* of a measure.[7] An enquiry into whether or not a measure *exists* should include all the evidence: Obvious matters to consider are the author, nomenclature, date of adoption, procedure of adoption, place of adoption, method of record and method of publication of the alleged measure.

14. Without prejudice to the question as to whether there is a violation of the relevant agreements, the EC is not necessarily convinced that the allegations of the United States in its first written submission could lead to an "as such" finding. This is particularly the case with the US argumentation concerning or relating to the alleged "denial of or failure to grant import licenses" (US claims A, B, C, and part of K and L). The foundation of these claims is an alleged practice of the Turkish administration not to issue the Certificates of Control. This practice is allegedly proven by the "Letters of Acceptance", which apparently are not publicly available documents but rather internal documents of the Turkish administration. Reference is also made to oral instructions given to officials.[8] It would seem to the EC that on the basis of the facts before the Panel, there may rather be a series of "as applied" measures (or a practice), which the US is inviting the Panel to construe as a measure and condemn in "as such" terms.

III. THE DEFINITION OF AN IMPORT LICENSE

15. Article XI:1 of the *GATT* does not define what is an import license. Neither does the *Agreement on Agriculture* define this notion. The EC considers that Turkey rightly draws the attention of the Panel to Article 1.1 of the *Agreement on Import Licensing Procedures*, where import licensing is defined as

> administrative procedures[1] used for the operation of import licensing regimes requiring the submission of an application or other documentation (other than that required for customs purposes) to the relevant administrative body as a prior condition for importation into the customs territory of the importing Member.

[1] Those procedures referred to as "licensing" as well as other similar administrative procedures.

16. Although the definition is given for the purposes of that agreement, the EC considers that it provides useful context for the interpretation of the same notion under the *GATT* and the *Agreement on Agriculture*. This definition makes an important distinction between administrative procedures for the operation of import licensing regimes and those of exclusively customs purposes. As the footnote to Article 1.1 of the *Agreement on Import Licensing* demonstrates, the formal name or title of the procedure and/or document is not determinative. It is the purpose of the procedure that one has to examine in order to ascertain whether it amounts to an import licensing regime or not.

17. In order to definitely escape being considered an import licensing regime a given administrative procedure required to be followed prior to importation should be confined to "customs purposes". This in turn requires an analysis of what "customs purposes" means. Without trying to define the concept in an exhaustive way, the EC considers that it would *a priori* be difficult to

[7] Appellate Body Report, *US – Zeroing (EC)*, para. 203: "… the Panel did not, in its analysis, clearly distinguish between the issue of ascertaining the ***existence*** of the challenged measure, which is especially important when unwritten measures are at issue, ***and the separate examination*** of its consistency with the relevant provisions of the covered agreements."

[8] First written submission of the United States, para. 36.

consider a procedure that involves e.g. product safety checks or SPS measures within the notion of "customs purposes".

18. The EC draws the attention of the Panel to the fact that the US is also claiming violation of the *Agreement on Import Licensing.* It is arguable that the *Agreement on Import Licensing* relates more specifically to the matter before this Panel than the *GATT* and the *Agreement on Agriculture.* Therefore in accordance with the Appellate Body report in *EC – Bananas*[9] the EC invites the Panel to consider whether the alleged violations of the *Agreement on Import Licensing* should be considered first before the alleged violations of Article 4.2. of the *Agreement on Agriculture* and the *GATT*.

IV. THE RELATIONSHIP BETWEEN ARTICLE XI OF GATT AND ARTICLE 4.2. OF THE AGREEMENT ON AGRICULTURE

19. Referring to findings of previous panels, the United States submits that where a measure with respect to agricultural products is inconsistent with Article XI:1 of the *GATT*, it is necessarily inconsistent with Article 4.2 of the *Agreement on Agriculture*.[10] This argument is advanced under all three main sections of the US written submission i.e. in relation to the alleged denial of import licenses, the claims relating to Turkey's tariff rate quota requiring domestic purchase and the two parts of the alleged system read in conjunction.

20. The EC agrees with the US that there is a general systemic link between the two provisions. However, the EC would like to point out that, apart from the footnote in Article 4.2 of the *Agreement on Agriculture* in which reference is made to quantitative import restrictions, no automatic link has been made in the text of these provisions. The EC therefore considers that caution should be exercised in concluding that the violation of Article XI:1 of the *GATT* would necessarily and in all circumstances lead to the violation of Article 4.2. of the *Agreement on Agriculture*.

21. If the Panel were to conclude that the Turkish Certificate of Control is an import license and that the matter would consequently be examined first under the *Agreement on Import Licensing*, there is a further systemic question on the order of analysis of the Turkish measures under the relevant agreements. It is arguable that the *Agreement on Agriculture* should be considered more specific in relation to the *GATT* in a situation where the import of a particular agricultural product is at stake. Consequently, in accordance with the Appellate Body report in *EC – Bananas III*[11] it is arguable that the alleged violation of Article 4.2. of the *Agreement on Agriculture* should be considered first before the alleged violations of the *GATT*.

V. ARTICLE III:4 VS. ARTICLE XI:1 OF THE GATT

22. In respect of the Turkish TRQ system the US considers that it violates Article III:4 of the *GATT*. In the alternative, the US submits that the system violates Article XI:1 of the *GATT*.

23. Article XI:1 of the *GATT* 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 <u>on the importation</u> of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party. [emphasis added]

[9] Appellate Body Report, *EC – Bananas III*, paras. 202-204.
[10] First written submission of the United States, claims B, I and L.
[11] Appellate Body Report, *EC – Bananas III*, paras. 202-204.

24. Article III:4 of the *GATT* in turn states that

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product. [emphasis added]

25. In principle these two provisions regulate two distinct situations i.e. prohibitions or restrictions on importation i.e. "border measures" (Article XI:I) on the one hand and, prohibition of discrimination once the product has been imported into the territory of a WTO member country i.e. "internal measures" (Article III:4) on the other hand. Therefore, in principle Article III only applies to internal measures, not border measures and, *vice versa*, Article XI:1 only applies to border measures but not internal measures.

26. However, it is not always easy to distinguish an internal measure from a border measure. The Ad Note to Article III aims at clarifying this borderline:

> Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.

27. Consequently, a prohibition or a restriction of the import of a given product that fails e.g. to meet an intended public health or consumer protection requirement which also applies to domestic products is to be examined under Article III, not under Article XI.

28. However, in certain circumstances the same measures can be found to fall within the scope of both Article III:4 and XI and, therefore, they may be examined as both border measures and internal measures at the same time depending on which aspects of the measures are emphasised. This is illustrated by the Panel ruling in *India – Autos*, where the Panel considered that India had acted inconsistently with Article III:4 by imposing an obligation on automotive manufacturers to use a certain proportion of local parts and components in the manufacture of cars and by imposing an obligation to offset the amount of their purchases of previously imported kits and components, already on the Indian market, by exports of equivalent value. However, the Panel also found a violation of Article XI:1 due to India imposing an obligation on automotive manufacturers to balance their importation of kits and components with exports of equivalent value.[12] Consequently, where a border measure inconsistent with Article XI:1 is used to favour domestic production, it may also violate Article III of the *GATT*.

29. The EC would also like to point out that an illustrative list of trade-related investment measures (TRIMs) that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of *GATT* and the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of *GATT* is contained in the Annex to the *TRIMs Agreement*.

[12] Panel Report, *India – Autos*, para. 8.1.

30. The EC considers that *a priori* the domestic purchase requirement of the TRQ system would seem to fall within the scope of Paragraph 1(a) of Annex 1 of the *TRIMs Agreement*.

VI. THE ABOLITION OF TURKEY'S TRQ REGIME

31. In its defence Turkey states that the legislative framework providing for the TRQ regime is no longer in force. Consequently Turkey has made a request that the Panel refrain from making findings on the measures related to Turkey's TRQ regime as no longer in force. Or, should the Panel consider making findings necessary for purposes of securing a positive solution to the dispute, not to make any recommendation to the Dispute Settlement Body (DSB).

32. In these circumstances the EC does not consider it necessary to examine more in detail the expired Turkish TRQ regime. The EC only notes that should the Panel consider it necessary to make findings on the TRQ regime to secure a positive solution to the dispute, the EC agrees with the Turkish alternative position that there would not be a need to make any recommendation to the DSB.

VII. CONCLUSION

33. In the light of the foregoing considerations, the European Communities invites the Panel to:

- carefully examine the existence of a "rule or norm" constituting a measure of general and prospective application
- consider the order of analysis of the relevant agreements in the light of the Appellate Body Report in *EC – Bananas III*
- consider that where a border measure is used to favour domestic production, it violates also Article III of the GATT
- refrain from making any recommendations to the DSB on the Turkish TRQ regime.

34. The European Communities hopes that the preceding observations will prove useful in the deliberations of the Panel and reserves its right to make further observations in the oral hearing.

ANNEX B

ORAL STATEMENTS BY THE PARTIES AND THIRD PARTIES AT THE FIRST SUBSTANTIVE MEETING

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ANNEX B-1

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT BY THE UNITED STATES AT THE FIRST SUBSTANTIVE MEETING
(17 November 2006)

1. In its first submission, the United States made out a *prima facie* case that Turkey has breached several provisions of the GATT 1994 and the WTO Agreements, including with respect to barriers to importation as well as to discrimination against imported rice. For example, the United States demonstrated that Turkey has maintained a WTO-inconsistent domestic purchase requirement (DPR) as part of its tariff rate quota (TRQ) system. To import rice under the TRQ and obtain a lower rate of duty, an importer must purchase substantial quantities of rice from the Turkish Grain Board (TMO) or Turkish producers and producer associations in order to obtain an import permit from Turkey's Foreign Trade Undersecretariat (FTU). And only domestic rice qualifies an importer to obtain this advantage – imported rice does not receive this advantage. Turkey's domestic purchase requirement treats imported rice less favorably than domestic rice, thereby breaching Article III:4 of the GATT 1994.

2. Although the DPR makes it very expensive to import rice, importers have no alternative but to import rice under the TRQ because Turkey's Ministry of Agriculture and Rural Affairs (MARA) fails to grant licenses to import rice at the over-quota rates of duty. Through the unpublished "Letters of Acceptance," Turkey's Minister of Agriculture repeatedly accepts recommendations from his staff to "delay" the start date of the period in which such licenses, or "Certificates of Control," will be granted, thereby ensuring that rice trade occurs under the TRQ. When even the TRQ is closed during Turkey's annual rice harvest, no rice importation can occur. Turkey's denial of Certificates of Control outside the TRQ regime is a prohibition or restriction on importation that breaches Article XI:1 of the GATT 1994.

3. Turkey has denied the US claims but has essentially ignored the extensive factual evidence presented by the United States and, despite all evidence to the contrary, has asserted that Turkey's rice regime actually provides an *advantage* to foreign rice producers over Turkish rice producers. Turkey has failed to rebut the *prima facie* case made by the United States.

Definition of Import License

4. First, Turkey claims that the Certificate of Control is not an import license and hence is not subject to the provisions of the Import Licensing Agreement and other provisions, because the Certificate "amount[s] to administrative forms that are required exclusively for '*customs purposes*'." In its first submission, Turkey sets forth its proposed criteria for when a document is exclusively for customs purposes (and hence should not be considered an import license). Turkey then asserts that, since the Certificates of Control may be used for customs purposes, they are not licenses but rather official documents for customs purposes.

5. This argument is unpersuasive. The fact that a document is necessary to clear customs does not mean it is not an import license. Indeed, import licenses will be used for customs purposes – that is the very nature of an import license since importation cannot occur without it. The real question is what else is the document used for. Here, the Certificate of Control is used to control importation – not just in the customs sense, but in the sense of a restriction or ban on importation. The Certificate of Control is not even a customs document in the most basic sense – it is very revealing that the Certificate of Control is approved by MARA, not by Turkish Customs.

6. Second, the Certificate of Control is an import license even under Turkey's standard. In its submission, Turkey acknowledges that the import permit required by FTU for importation under the TRQ is an import license. Yet a side-by-side comparison of the elements required by MARA for the Certificate of Control and those required by FTU for the import permit reveal a remarkable degree of similarity. Accordingly, under Turkey's own logic, there would be no reason to exclude the Certificate of Control from Import Licensing Agreement disciplines on the basis that it contains customs-related information.

7. Third, a Member cannot shield a measure from coverage under the Import Licensing Agreement or other provisions by including customs-related information in the license application and then claiming it is no longer an import license. The footnote to the definition of "import licensing" in the Import Licensing Agreement makes clear that, regardless of how a Member characterizes particular administrative procedures, such procedures are still considered "import licensing" if they satisfy the criteria in Article 1 of the Import Licensing Agreement.

8. The addition of customs-related information in the Certificate of Control does not change the fact that the Certificate is part of Turkey's requirement for the submission of an application or other documentation as a prior condition for importation, and approval constitutes formal permission from MARA (not Customs) to import rice into Turkey. In other words, the Certificate is an import license within the definition in Article I of the Import Licensing Agreement.

Over-Quota Imports and the Issuance of Certificates of Control

9, In its first submission, the United States made a *prima facie* case that Turkey's denial of import licenses outside the TRQ is in breach of Article XI of the GATT 1994 because Turkey prohibits or restricts imports at the over-quota rate through the use of import licenses or other measures. In making its case, the United States presented a large amount of documentary evidence demonstrating that Turkey does not issue Certificates of Control, which are necessary to import rice outside the TRQ. The United States presented examples of "Letters of Acceptance" signed by Turkey's Minister of Agriculture. Through these documents, the Minister directs MARA officials not to grant Certificates to protect the domestic rice industry. The United States presented examples of correspondence between Turkish importers and MARA, including several letters from MARA rejecting importer requests for Certificates. In one letter, dated May 1, 2006, a Turkish government official admitted that the government did not have authority under Turkish law to grant Certificates. And the United States presented Minister Tuzmen's March 24, 2006 letter to USTR Portman, which was issued just after the DSB established the panel in this dispute and which promised that Turkey would issue Certificates "as of April 1, 2006." Apparently, MARA was not in agreement with the contents of Minister Tuzmen's letter, as evidenced by the May 1 rejection letter referenced above. The rejection letter was completely consistent with the guidance provided in the unpublished Letter of Acceptance that was operative at the time.

10. As the United States has met its burden to make out a *prima facie* case that Turkey is in breach of Article XI:1 of the GATT 1994, it is now up to Turkey to rebut the US case. Turkey has not done so. Turkey has not contested the authenticity of any of the documents submitted by the United States. Moreover, Turkey has not provided any documentary evidence to rebut their contents. Instead, Turkey merely asserts, without any substantiation, that contrary to the express terms of the Letters of Acceptance, it has been granting Control Certificates at the over-quota rates of duty. In the *US – Wool Shirts and Blouses* dispute, the Appellate Body noted it was "difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof."

11. Instead of attempting to rebut the US arguments directly, Turkey attempts to dismiss the Letters of Acceptance as "informal internal documents," documents that are "never enforced" and

cannot be enforced by the courts, "unreliable evidence of the real intention and trade policies of Turkey in relation to rice importation", and "inadmissible evidence" that cannot be reviewed by this panel. In addition, Turkey dismisses the rejection letters sent to importers by MARA and the court documents as nothing more than "a natural component of the interaction between any WTO Member's administration and its business community." While the United States certainly understands why Turkey would like the Panel to ignore these documents, the fact is they are evidence that cannot be ignored. And whether they are leaked or internal or enforced by the courts is irrelevant. The simple fact is they show that Turkey decided not to issue Certificates of Control, thus demonstrating that the Certificates are discretionary import licenses (and therefore an import restriction as such) and that Turkey is using them in practice to restrict imports.

12. Turkey's arguments that the Letters of Acceptance are confidential, unenforceable and disregarded by the judiciary are contradicted by the fact that Turkey tried to use these documents in Turkish court to justify its denial of Control Certificates to an importer and, in fact, relied upon the documents in court as its sole source of legal authority for the denial. It is difficult to understand how the Letters are an unreliable source of the intentions of Turkish trade policy when counsel for MARA argued before the court that MARA did not have authority under Turkish law to grant Certificates to the importer under the terms of those Letters, and that the Letters were adopted in order to protect domestic rice producers against foreign competition.

13. In lieu of documentary evidence, Turkey has produced a chart which purports to show that Turkey is granting Certificates of Control outside the TRQ, but which raises additional questions. US export data and Turkish data on Control Certificates with respect to US rice imports vary significantly. For example, Turkey claims that through September 21, 2006, MARA has granted Certificates covering the importation of over 400,000 tons of US rice, whereas US trade data puts the volume of US rice exports to Turkey in 2006 at just under 18,000 tons through October 26. Further, even under Turkey's own chart, at least 96 per cent of rice approved in 2004 and 90 per cent of rice approved in 2005 was for entry under the TRQ, for which domestic purchase is required. As it is much more expensive to import under the TRQ, it is clear that such an overwhelming majority of importers would only "choose" to import rice under the TRQ if there were severe restrictions or a ban on importing at the over-quota rates.

14. Turkey also claims that the Letters of Acceptance are not being enforced, as evidenced by the fact that MARA is granting Certificates of Control to importers who purchase domestic rice under the TRQ regime. If Turkey is requiring the Certificates to import under the TRQ regime, the United States thanks Turkey for that clarification. However, that information is irrelevant to the question of whether Turkey is granting the Certificates, and therefore blocking importation, outside the TRQ. The Letters only purport to suspend the granting of Certificates to importers who want to import at the over-quota rates without domestic purchase. They do not address whether the Certificates are granted under the TRQ regime. In addition, this clarification only deepens our concern with respect to the WTO-inconsistency of the DPR because, if what Turkey says is correct, an importer that wants to import rice under the TRQ will have to approach four different Turkish government agencies – TMO, FTU, MARA, and Turkish Customs – and obtain two different import licenses in order to effectuate the importation.

15. With respect to the ban on the issuance of Control Certificates at the over-quota rates, even if Turkey could substantiate that it is not enforcing the Letters of Acceptance, that is not a bar to this panel making a finding of WTO-inconsistency concerning them. A measure may still be found WTO-inconsistent even if it is not being enforced, as was the case in the *US – 1916 Act* dispute. Furthermore, even if Turkey were issuing some Certificates, that would not alter the fact that they constitute discretionary import licensing and an import restriction contrary to Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

Domestic Purchase Requirement

16. With respect to the DPR, Turkey contests that (1) the DPR is a measure "affecting [the] . . . internal sale, offering for sale, purchase, transportation, distribution or use" of domestic and imported rice, and (2) that the DPR treats imported rice less favorably than domestic rice. Turkey's rationale is that importers can freely import rice outside the TRQ and that the TRQ modifies conditions of competition so that imported products are actually treated more favorably than domestic products. Turkey has failed to rebut the US *prima facie* case on both issues.

17. With respect to the first issue, the DPR directly affects the conditions of competition between domestic and imported rice. Only domestic rice satisfies the purchase requirement in order to import rice into Turkey under the TRQ. Thus, domestic rice has an advantage in the marketplace that imported rice does not have, and is more attractive as a result. Turkey claims that the United States has not satisfied the "affecting" standard because importers can import rice into Turkey outside the TRQ where domestic purchase is not required. Even if that were true, it does not erase the discrimination against imported rice.

18. In this respect, a Member's requiring the sourcing of domestic goods as a condition to receive a benefit has long been recognized as inconsistent with Article III:4 of the GATT 1994. In 1958, the GATT panel in *Italian Discrimination Against Imported Agriculture Machinery* found an Italian law that conditioned the receipt of special credit terms for farmers on the purchase of domestic agricultural machinery to be in breach of Article III:4. And the *India – Autos* panel found an Article III:4 breach where India's local content requirement for automobile manufacturers created an incentive to purchase and use Indian-origin parts and components and, thus, a disincentive to use like imported parts and components.

19. On the issue of whether the DPR treats imported rice less favorably than domestic rice, Turkey argues that the TRQ system actually provides foreign rice producers with an advantage over Turkish rice producers in selling their rice in Turkey. However, Turkey completely ignores the costs stemming from the DPR in its analysis. The large cost from domestic purchase more than offsets any alleged cost savings resulting from the preferential rates of duty realized by importers under the TRQ. It hardly matters that one ton of US rice will allegedly be a few dollars cheaper than one ton of Turkish rice if one fails to account for the fact that, in order to import that one ton of US rice into Turkey, the importer needs to purchase two tons of Turkish rice at a cost of several hundred additional dollars.

Restrictions on Who May Import Rice Under the TRQ Regime

20. Turkey claims that anyone can import rice under the TRQ. While it is true on the face of the regulation that this is a theoretical possibility, Letter of Acceptance 1795 confirmed that Turkey only permits entities that purchase paddy rice to import rice under the TRQ. Practically speaking, only millers or those with milling capacity would purchase paddy rice. Consumers, wholesalers, retailers, and other distributors are unlikely to have milling capacity and, thus, would not be able to "take advantage" of being able to import under the TRQ. Even if TMO would allow entities to purchase milled rice in order to satisfy the DPR, the TRQ regime would still exclude much, if not all, of the non-milling community from importing rice under the TRQ, as restaurants and retailers that might be interested in importing milled rice would be dissuaded by the high purchase and storage costs. For these reasons, the eligibility criteria for domestic purchase under the TRQ also are inconsistent with Article XI of the GATT 1994.

Measures That Have Allegedly Expired

21. Lastly, Turkey argues that the measures comprising its TRQ regime are no longer in force and, thus, the panel should refrain from making findings with respect to that regime or, if it does make such findings, should not make any recommendations to the DSB regarding those measures. The United States disagrees that the Panel should refrain from making findings and recommendations and further disagrees that the measure is no longer in force.

22. The text of the DSU, as clarified by past panel and Appellate Body reports, makes clear that if a measure exists at the time of consultations and panel establishment, it has not expired for purposes of WTO dispute settlement. In this dispute, the DSB established this panel with standard terms of reference to examine the matter raised by the United States on March 17, 2006. The TRQ regime allegedly "expired" more than four months later. Therefore, the TRQ regime had not "expired" at the time of consultations and panel establishment, and the Panel is charged by the terms of reference and Article 3.3 of the DSU to issue findings with respect to the consistency of the measures comprising Turkey's TRQ regime with the relevant provisions of the covered agreements and make recommendations in order to resolve the dispute.

23. The reports cited by Turkey respect the distinction between measures that expire prior to consultations and panel establishment and measures that expire after panel establishment. In *US – Certain EC Products* and *Chile – Price Band System*, the panels declined to make findings on measures that expired prior to panel establishment. With respect to *Dominican Republic – Import and Sale of Cigarettes*, Turkey states that the panel did not find it necessary to make finding with respect to a measure that expired during the course of panel proceedings, but failed to note that the Appellate Body disagreed with the panel and recommended that the Dominican Republic bring its measure into conformity with its WTO obligations to the extent that it had not already done so.

24. Further, it is not clear to the United States that the TRQ regime ceased to exist on July 31, as Turkey claims, given the number of unpublished documents that Turkey issues with respect to the rice trade. Moreover, Turkey claimed that the TRQ regime "expired" in 2003, 2004, and 2005 and yet the measure resurfaced a few months later. Therefore, the United States believes that it is critical for achieving a definitive resolution of this matter that, if the Panel were to make adverse findings in this dispute, it also issue recommendations that Turkey bring its measures into conformity with its WTO obligations.

ANNEX B-2

**CLOSING ORAL STATEMENT BY THE UNITED STATES
AT THE FIRST SUBSTANTIVE MEETING**
(9 November 2006)

1. Thank you, Madam Chair, members of the Panel, and members of the Secretariat. We would like to thank you for your attention and work on this dispute, as demonstrated over the past two days. As we conclude this first panel meeting, I do not intend to re-state the arguments we made yesterday, but would like to highlight a few additional points that we observed over the past two days.

2. First, the United States believes that the discussion has further clarified that the Certificate of Control is not a document for customs purposes. An importer makes its application for a Certificate of Control to Turkey's Ministry of Agriculture (MARA), not Turkish Customs. Second, an importer needs to apply for a Certificate from MARA, and receive approval, well before the shipment is presented to Turkish Customs. Turkey clarified that this was the case in paragraph 6 of its oral statement when it stated that "[o]nce approved, the Certificate of Control is a guarantee for the importer that all elements and requirements needed to clear customs are present and will allow importation ... *The importer will then feel confident to conclude all necessary business engagements for purposes of importation*." In other words, the Certificate of Control is a document that the importer needs to ensure it can obtain before it finalizes any contracts for the importation of rice. Third, when an importer has not received MARA's approval of a Certificate of Control, the shipment will not be cleared through Customs. This is apparent from the experience of Torunlar, a Turkish rice importer which signed rice purchasing contracts prior to receiving MARA's approval of a Control Certificate, and had to file suit in Turkish court to force MARA to issue the Certificate so it could move the rice out of bonded warehouses.

3. Turkey has argued that anyone can import rice under the TRQ but, until yesterday, ignored the fact that, as a practical matter, only millers or packers would have the ability or desire to purchase paddy rice. At yesterday's panel meeting, Turkey conceded that it was unaware of any restaurants or retailers that would want to purchase paddy rice. We agree with Turkey's assessment. Given that purchasing paddy rice is a condition for importing under the TRQ, it follows that no restaurant or retailer would utilize the TRQ. Narrowing the eligibility criterion from purchasing *rice* to purchasing *paddy rice* was thus used by Turkey to limit the class of persons or firms that would be able to import, thereby demonstrating an additional restriction on importation for purposes of Article XI:1.

4. The United States understands that Turkey intends to provide information that it has been granting Certificates of Control outside the TRQ. In this regard, the United States notes that, under the terms of a bilateral agreement between the European Union and Turkey, the European Union has an annual quota of 28,000 tons of milled rice. Under the quota, importers are permitted to import milled rice from the EU, primarily from Italy, on a duty free basis throughout the year without being subject to any of the prohibitions and restrictions that the United States has raised in this dispute. We realized that this was the case after discussing this matter with EU rice traders, who were unaware of the problems that exporters from the United States, Egypt, and other WTO Members were experiencing in shipping rice to Turkey. The United States is uncertain whether Turkey requires importers of EU rice to obtain Certificates of Control since EU rice imports are "green-lighted" under the terms of the bilateral agreement. If Turkey does require importers of EU rice to obtain such Certificates, this raises further questions about the data presented by Turkey in Annex 20.

5. According to Turkish import data, Turkey imported approximately 25,000 and 32,000 tons of rice from the European Union in 2004 and 2005, respectively. Yet according to Annex 20, Turkey only granted Certificates of Control for approximately 7,000 tons of out of quota rice in 2004 and

approximately 24,000 tons of out of quota rice in 2005. If Turkey is correct that Certificates of Control are only valid for one year – so Certificates obtained in prior years could not account for much of this apparent shortfall – this raises the question as to where EU rice imports can be found in Turkey's chart and, if not, whether importers of EU rice need to obtain Control Certificates. The United States looks forward to Turkey's clarification of this issue.

6. The United States would conclude by stating that, for the reasons above as well as the arguments the United States has raised in its first submission and at this week's meeting of the panel, Turkey has not produced evidence and argument to rebut the evidence and argument of the United States. As clarified by the Appellate Body in its report in *US – Wool Shirts and Blouses*, Turkey has therefore failed to rebut the US *prima facie* case.

7. Madam Chair, this concludes our closing statement. Again, we would like to thank you, the members of the Panel, and the Secretariat for your efforts. We look forward to answering your questions in writing and seeing you at the next meeting of the panel in January.

ANNEX B-3

OPENING AND CLOSING ORAL STATEMENTS BY TURKEY AT THE FIRST SUBSTANTIVE MEETING
(8-9 November 2006)

Ms. Chairwoman, distinguished Members of the Panel,

1. Turkey would like to express its gratitude to all three panellists for having accepted to serve on this Panel and to assist in the resolution of this dispute.

2. Turkey welcomes the opportunity to submit orally its views at this first meeting of the Panel. Turkey has already provided a comprehensive rebuttal to the claims made by the United States. In this statement, Turkey wishes merely to outline its legal arguments, its submission on the facts and its conclusion that the regime for the importation of rice into Turkey is fully compatible with WTO rules.

3. This oral statement addresses a number of factual and legal considerations related to: the Certificates of Control; the expired Tariff Rate Quota (TRQ); the TRQ domestic purchase requirement; and a number of systemic and general considerations related to trade in rice.

4. Turkey's Certificates of Control are not import licenses. They have never been applied as an import licensing instrument. The Certificates of Control have never functioned as import restrictions or prohibitions in relation to the importation of rice whether at the MFN rates, the applied rates of duty, or within the TRQ.

5. The Certificate of Control is a reference document needed to process the customs clearance of specific consignments of a variety of goods, including rice. The Certificate of Control allows customs authorities to verify, on a single document, all required customs information, including the product's compliance with relevant standards and technical regulations.

6. The Certificate of Control acts as an element of trade facilitation. It provides legal certainty and commercial predictability to importers engaged in rice importation. In fact, once approved, the Certificate of Control is a guarantee for the importer that all elements and requirements needed to clear customs are present and will allow importation (provided, of course, that the consignment imported corresponds to the information supplied and passes the phytosanitary and food safety inspections). The importer will then feel confident to conclude all necessary business engagements for purposes of importation. This element of legal certainty must be seen as a tool of trade facilitation. It provides administrative certainty for importers and avoids possible time consuming and costly procedures at border control.

7. GATT Article XI:1 does not define the concept of "*import license*". Neither is this concept defined by Article 4.2 of the Agreement on Agriculture or by any previous GATT or WTO panel or Appellate Body decision. An element of interpretative guidance appears to be available under Article 1.1 of the Agreement on Import Licensing Procedures, where it is clearly indicated that the submission of an application or other documentation required for "*customs purposes*" falls outside of the definition of import licensing.

8. The "*customs purposes*" of Certificates of Control are evident both *de jure* and *de facto*. In Turkey, as in all WTO Members, the process of importation and customs clearance is more than just compliance with the obligation to pay the applicable duty and other charges. Customs clearance also includes the compliance with all administrative requirements and the fulfilment of "*customs purposes*" such as, *inter alia*: the 'gathering of relevant administrative information by customs

authorities'; the 'customs valuation determination'; the 'origin determination'; the 'monitoring of trade and collection of statistics'; the application and certification of 'quarantine, sanitation and fumigation requirements'; and the 'analysis, inspection and certification'.

9. If all the required information is provided by the importers, and it is shown that the goods comply with all relevant specifications and technical regulations, the Certificates of Control are automatically approved. Individual instances of administrative delay, rejection, or even domestic litigation in relation to the approval (or non approval) of a particular application for a specific Certificate of Control, cannot be used to claim or imply that Turkey adopted and/or applied this instrument as an intentional barrier to trade.

10. The fact that Certificates of Control are used for both MFN and TRQ rice importation stands out as a clear testimony that they are exclusively for "*customs purposes*". In fact, contrary to what the United States argues, imports under the TRQ can only occur if an importer obtains both an import license and a Certificate of Control.

11. Certificates of Control are not import licenses and, therefore, do not fall within the meaning and the scope of the Agreement on Import Licensing Procedures.

12. With respect to the claimed violation of GATT Article XI:1, Turkey believes that the Certificate of Control does not amount to a prohibition or restriction made effective through, in relevant part, "*import licences*" or "*other measures*". Turkey has shown that the Certificate of Control is not an import license.

13. Nor are Certificates of Control *"other measures"*. The United States has failed to show on what grounds Turkey's Certificates of Control can or even should be considered as "*other measures*" for purposes of the application of GATT Article XI. The United States has not shown that there is either *de jure* or *de facto* a "*prohibition*" or "*restriction*" in relation to the alleged 'denial of Certificates of Control to import rice'. As there is no "*restriction*" or "*prohibition*", the nature of the "*measure*" is of no relevance. Measures are only prohibited if they are restrictions or prohibitions.

14. Furthermore, individual rejections in the approval of Certificates of Control have never been instances of restriction (both *de jure* or *de facto*) within the meaning of GATT Article XI:1. The reasons for rejection of individual importers' applications have always been provided and, in general terms, were most often due to missing or wrong information supplied by the importers such as the introduction of the wrong customs code classification, the lack of indication of the chosen customs points of entry, or the wrong origin information.

15. Turkey can provide the approval rates of the applications for Certificates of Control made by rice importers during the period 2003-2006 (for both MFN and TRQ trade volumes). In 2003, 96.73% of the importers' applications were approved. In 2004, this approval rate was 94.37%, in 2005 it was 98.45%, and in 2006 (to date) the approval rate stands at 90.80% of the applications lodged. These figures are clear evidence of the lack of any *de facto* restriction to rice imports obtained through the administration of the Certificates of Control system.

16. With respect to the *de jure* scrutiny, the relevant Turkish law does not impose any 'denial' and does not aim at imposing directly or indirectly any import prohibition and/or restriction. The United States wrongly assumes that the so-called 'Letters of Acceptance' are to be considered as "*laws, regulations, judicial decisions or administrative rulings*" of the kind that can prove an instance of *de jure* "*prohibition*" or "*restriction*".

17. As for the *de facto* scrutiny, Turkey has shown that, in relation to both MFN and TRQ trade, a high number of Certificates of Control were approved (i.e., 2,223 between 2003 and 2006, which

amounts to 2,264,858 tonnes of paddy, brown and milled rice) and large amounts of rice were imported (i.e., 939,013 tonnes of milled rice equivalent between 2003 and 2006). This is convincing and irrefutable evidence that there has never been a general *de facto* '*denial of Certificates of Control to import rice*'. In addition, the claim by the United States that Turkey failed "*to grant Certificates of Control to importers 'at all' for a period of over 2 ½ years and is still not granting them*" is not correct. Turkey has provided clear evidence to the contrary. And, in any event, this *de facto* scrutiny cannot be merely quantitative in nature (i.e., carried-out solely on the basis of the number of approved Certificates of Control). In relation to the data provided, an updated version of Annex 20 to Turkey's First Submission is provided today. While the total figures do not change, the attention of the Panel is drawn to the 2005 'In Quota' and 'Out of Quota' data.

18. Certificates of Control are automatically approved in all instances when importers show full compliance with legal requirements established for "*customs purposes*". Individual instances of non-approval of particular rice importers' applications must be seen as a natural component of the interaction between any WTO Member's administration and its business community and cannot be generalized into a general '*denial of Certificates of Control to import rice*' to show the existence of an "*import restriction*".

19. The TRQ is no longer in force. TRQs were opened in 2004 and 2005, not to protect or distort trade, but rather to achieve the necessary supply of rice into Turkey and to stabilize the domestic market. Very simply, the TRQ provided a tariff advantage to imported rice up to predetermined quantities. Any interested importer could apply for a TRQ licence which was granted if there was compliance with the requirements and conditions set out in relevant Turkish legislation.

20. The TRQ has systematically been allocated on a "*first-come-first-served*" basis and has never discriminated on the basis of country of origin of the rice or nationality/affiliation of the importer applying for a license. The requirements for the application and evaluation procedures of the import licenses have always been clear, transparent and easy to implement for all importers. Similarly, the administrative procedures for licensing have always been simple and user-friendly. All documents required for application have always been published in the relevant legislation. When all application requirements were met, the import licenses have systematically been issued within 5 days.

21. In addition to the import licenses obtained for purposes of in-quota allocation, of course, importers also had to comply with all other customs obligations and requirements, in particular the presentation and approval of the required Certificates of Control. Turkey wishes to emphasize that there is a clear difference between the TRQ import licence and the Certificate of Control. The first instrument is used to facilitate the allocation of the TRQ among importers, while the other is to facilitate customs clearance.

22. The tariff quota system was never meant to act as, and never had, any restrictive or discriminatory effects on trade and rice imports. Rather, the system was voluntary and conferred an advantage to the importers meeting the requirements stipulated in the legislation. Importers have always been free to make use of the system or not.

23. Turkey has shown that the high volumes of in-quota imports and the high numbers of licences which have been issued are testimony to the attractiveness and appeal that the tariff advantage has had in the business determinations made by individual rice importers. This in-quota advantage has always existed in parallel to the ability to import at the less advantageous MFN rates of duty. Again, Turkey has shown that MFN trade has never been prohibited or restricted, both *de jure* and *de facto*.

24. The claim put forward by the United States alleges that the domestic purchase requirement and the eligibility criteria of Turkey's TRQ system '*affect the internal sale, offering for sale, purchase (…) or use*' of imported rice by "*adversely modifying the conditions of competition between domestic*

and imported products" within the meaning of GATT Article III:4. The arguments made by the United States are somewhat misleading and not supported by convincing evidence.

25. In particular, it is wrong and misleading to state that the fulfilment of the domestic purchase requirement by importers "*provides the only way to import rice into Turkey*". Turkey maintains that any importer has always been free to import whatever quantity of rice into Turkey from whatever country at the MFN or applied rate of duty. The regime of importation which was applied within the TRQ was meant to provide an advantage to importers of foreign rice to adequately supply the Turkish rice market. In fact, it is well known that Turkey is a net importer of rice and that imports are essential to stabilize the market (both in terms of price and quantities available).

26. Turkey has shown that the opening of the TRQ always resulted in the modification of the conditions of competition between domestic and imported products *in favour of imported products*. With particular regard to Paragraph 52 of the First Submission by the United States, Turkey maintains that the scenario set out is flawed by the use of the following two wrong assumptions: 1) The cost to the importer cannot be the FOB price, but rather the CIF price; 2) The figure of US$ 1,654 per tonne used by the United States does not represent a correct benchmark of comparison since it should refer to three metric tonnes of paddy rice (i.e., two of domestic produce and one of imported rice). In addition, the TMO price of US$ 650 per tonne cannot represent the actual market price since the share of total domestic production purchased by TMO amounts only to a mere 2.4%, which corresponds to a negligible volume and does not allow TMO to influence the domestic market price. A simple review of the average price dynamics of the Turkish rice market in 2005 shows something completely different from that claimed by the United States.

27. In particular, the calculations carried-out by Turkey indicate that, in the event that paddy rice from the United States was imported at the MFN rate of 34% *ad valorem* (i.e., at the applied rate already set at a much lower level than the bound MFN rate of 45% *ad valorem*, in order to attract imports), its cost amounted to US$ 495 per tonne. If the same type of rice was imported from the United States at the preferential tariff rate of 20% *ad valorem* (i.e., the rate offered for rice imports within the TRQ), it would have cost US$ 444 per tonne. At the same time, the cost of purchase of domestic rice from local producers (based on the average domestic prices for the year 2005) would have been 640 New Turkish Liras, equivalent to US$ 457 per tonne. Therefore, when an importer purchased 1 tonne of Turkish rice under the domestic purchase requirement (on the basis of its coefficients) in order to be allowed, for purposes of benefiting of the TRQ preferential rates, to import 800 kg of paddy rice from the United States, the average cost per tonne would have equalled US$ 451. The domestic purchase requirement, in substance, was altering the conditions of competition between domestic and imported products *in favour of imported products*. What could have been bought domestically at US$ 457 per tonne had become, all of a sudden, cheaper to be purchased through the TRQ regime at a mere US$ 444 per tonne. The competitive advantage for imported rice would have been US$ 13 per tonne.

28. As a further example to that set out in Turkey's First Submission, the data compiled in relation to milled rice imports during the years 2004 and 2005 provide an even better and more compelling overview of the price dynamics. In particular, in 2004, rice imports from the United States at the MFN rate of duty (i.e., 45%) would have cost importers US$ 1,008 per tonne. The cost of importation within the TRQ (i.e., at the 43% rate of duty) would have been, in the absence of any domestic purchase requirements, US$ 994 per tonne. Taking into consideration an average cost of domestic rice of US$ 822 per tonne, the application of the domestic purchase requirement (taking into consideration the applicable coefficients) would have resulted in an average cost of US$ 908 per tonne. This figure is much lower than the average cost of rice imported from the United States at the MFN rate (i.e., US$ 1,008 per tonne) and, most importantly for this case, even lower than the average cost of the TRQ imports, had they occurred without the application of the domestic purchase requirement (i.e., US$ 994 per tonne). In 2004, as well as in 2005, it is clear that the shift in the

conditions of competition was *totally in favour of imported products* and to the detriment of domestically produced rice. This is a further indication that an advantage to imported rice has always been conferred by the TRQ system and its domestic purchase requirement. The extent of the advantage changed due to a number of factors such as US$-Turkish Lira exchange rates, consumers' preferences and/or foreign countries' competitive positions vis-à-vis the various types of imported rice. However, Turkey's objective has always been that of market stabilization, never a "hidden agenda" to distort the market in favour of domestic rice.

29. In fact, Turkey had to pursue, at the same time, two legitimate objectives: the one of greater market supply (through the TRQ) and that of market stabilization (through the domestic purchase requirement). It is clear that a TRQ system without the domestic purchase requirement would have resulted in too great an advantage *in favour of imported products.* This outcome would have also carried negative consequences in terms of the viability and affordability of Turkey's market intervention mechanisms and its ability to comply with WTO obligations in relation to its committed levels of Aggregate Measurement of Support.

30. The domestic purchase requirement partly moderated (or even magnified, as the data for 2004 and 2005 milled rice imports indicate) the advantageous effects, and not the adverse effects as claimed by the United States, that the TRQ had conferred to imported rice. The TRQ did confer an advantage. Its success, in terms of quota utilization, is clear evidence of this. The domestic purchase requirement did not take away this advantage. The domestic purchase requirement must be seen as a fundamental of the TRQ system itself, just like the in-quota and the preferential rates of duty. Turkey maintains that it was fully entitled to decide, in line with its economic policies, the characteristics of the TRQ. For those importers that did not consider TRQ trade advantageous, MFN always remained an option. Turkey has shown that, contrary to what is claimed by the United States, TRQ and MFN rice importation always co-existed.

31. The allegations that the domestic purchase requirement and the eligibility criteria should, in the alternative, be considered a restriction on imports of rice within the meaning of GATT Article XI:1, are legally incorrect and not based on convincing factual evidence. There was never a *de jure* restriction of rice importation into Turkey since nothing in the relevant laws and regulations ever diminished the ability to import at the applied or MFN bound rates of duty. The TRQ regime, and its domestic purchase requirement, never altered or removed the ability of importers to import unlimited quantities of rice from any origin at the applied or MFN bound rates of duty. Furthermore, the TRQ regime acted to confer an advantage to importers of rice at preferential rates which available data show to have been largely used by importers, independently of the country of origin and despite the domestic purchase requirement.

32. The United States alleged that certain requirements, referred as the eligibility criteria, would restrict the categories of importers/traders able to purchase domestic rice for the purpose of importing under the TRQ. Such requirements, according to the United States, constitute an autonomous violation of GATT Articles III:4 and XI:1. Turkey submits that the allegation is wrong and largely based on the erroneous translation and interpretation of Turkey's relevant legislation. Turkey recalls that there is no eligibility requirement in order to be able to purchase domestic rice. On the contrary, any restriction of the categories of eligible purchasers would defeat the purpose and objectives of the TRQ system in that it would diminish the chances that the entire TRQ be allocated and that the market be adequately supplied and, consequently, stabilized. Therefore, Turkey wishes to clarify that the relevant legislation simply provides that domestic rice may only be *purchased* from paddy producers having permission to plant paddy rice, their cooperatives and unions, or from the TMO (as indicated in Turkey's First Submission at Annex 9, Article 5 and Annex 16, Article 5).

33. Turkey also wishes to emphasize that, contrary to the allegations of the United States, the TRQ regime was based on an automatic import licensing system and, therefore, does not fall within

the scope of GATT Article XI. In addition, Turkey maintains that, in the context of an automatic import licensing regime, legal requirements such as the eligibility criteria of the TRQ system must be deemed not to have trade-restrictive effects so long as any person, firm, or institution which fulfils them is equally eligible to apply for and to obtain an import license. This has always been the case in Turkey during the existence of the TRQ system.

34. Turkey turns now to the claims made by the United States in relation to a number of general and systemic considerations related to trade in rice.

35. First, Turkey wishes to recall that, in order to establish the existence of a violation of the TRIMs Agreement, a measure must be inconsistent with the provisions of GATT Article III (or GATT Article XI). The United States has not established that the domestic purchase requirement is inconsistent with GATT Article III:4. Therefore, even if the domestic purchase requirement were to be considered an investment measure related to trade in goods within the meaning of the TRIMs Agreement, the United States has not established that the domestic purchase requirement is, as such, inconsistent with Article 2.1 of the TRIMs Agreement.

36. Second, Turkey rejects the claim that a legal or operational link between the legislative framework for the TRQ regime and MFN trade could aim at seriously restricting market access or even at imposing a seasonal ban and therefore constitute, autonomously, a violation of GATT Article XI:1. The United States bases its argument on the assumption that both the Certificate of Control requirement and the TRQ regime individually breached the obligations set forth in GATT Article XI. However, Turkey has already provided legal arguments and factual evidence showing that there is no *de jure* or *de facto* prohibition or restriction connected with either the Certificates of Control or Turkey's expired TRQ regime. Turkey submits that none of these instruments has ever acted, either individually or in combination with one another, to deter full utilization of the quotas opened within the TRQ regime or to prohibit or restrict MFN trade. In fact, Turkey has shown that, rather than being "economically irrational", the TRQ system generated a substantial advantage to importers of rice, even of rice of US origin and in spite of the domestic purchase requirement.

37. Third, Turkey considers that the United States has failed to properly establish a violation of Article 4.2 of the Agreement on Agriculture. In particular, Turkey has shown that the Certificates of Control are not 'import licenses' within the meaning of the Agreement on Import Licensing Procedures, and that there has never been any 'denial' of 'import licenses' or any *de jure* or *de facto* import prohibition or restriction within the meaning of GATT Article XI:1. Turkey has also shown that its TRQ regime was not based on discretionary import licensing and that it is not correct to claim that non-tariff measures were maintained through state trading enterprises. Turkey therefore believes that the claim put forward by the United States under Article 4.2 of the Agreement on Agriculture should be rejected, both in relation to the individual instruments and in their joint operation. In addition, Turkey wishes to recall that it is well aware of the objectives of Article 4.2 of the Agreement on Agriculture and of the special relation between this article and GATT Article XI:1. However, Turkey does not consider that any automatic link between the two provisions has yet been established. A violation of GATT Article XI:1 does not constitute automatically a violation of Article 4.2 unless it is positively established that the measure at stake falls within and is inconsistent with footnote 1 of Article 4.2 of the Agreement on Agriculture.

38. Fourth, in relation to the alleged violations of certain provisions of the Import Licensing Agreement, Turkey again notes that the United States has based its claims on the incorrect assumptions that (i) the Certificates of Control are, or function as, import licenses and that (ii) the TRQ regime is based on a non-automatic import licensing system. Turkey has shown that the Certificates of Control are not 'import licenses' and the TRQ licences were automatic while the TRQs were in force. These claims should be rejected entirely.

39. Finally, Turkey wishes to draw the attention to the fact that the legislative framework for the TRQ regime, including the domestic purchase requirement, is no longer in force. The measures under consideration were of short legal validity and have expired. In this respect, Turkey notes that it has been previous Panels' and Appellate Body's practice to either refrain from making findings or, when a finding was considered necessary for the positive resolution of a dispute, to refrain from making recommendations on expired measures. On the basis of, *inter alia*, the consideration that Turkey has not renewed the measures in question and has no intention to do so, Turkey considers that further examination of the TRQ regime is not necessary for the successful resolution of the dispute. Turkey recognizes this Panel's full discretion to decide on the specific matter at stake. However, should this Panel consider it necessary to make a finding, Turkey respectfully requests the Panel not to make any recommendation.

40. In conclusion, the United States has not shown either in law or in fact that the regime for the import of rice into Turkey is incompatible with Turkey's obligations under the WTO Agreements.

41. As a result of the discussions entertained during the oral hearing, it has become clear that a greater amount of evidence is needed to adequately understand the various issues at stake. Turkey believes that the further documents which it will submit will clearly show to the Panel and the United States that there has been no distortion of rice imports through the Certificates of Control or through the operation of the domestic purchase requirement in the TRQ.

42. Turkey has shown that Certificates of Control have been approved regularly by MARA during the whole 2003-2006 period (i.e., the period during which the United States claims that no Certificates of Control were approved because of the "Letters of Acceptance"). These Certificates have been approved for both in-quota and over-quota volumes of trade and even to the benefit of the individual trader (Torunlar) who took legal action against MARA and referred to by the United States in its Submission at paragraphs 28 to 31.

43. Turkey also believes that the oral hearing has been able to address misunderstandings on the duration of validity of approved Certificates of Control as well as the possibility for the multiple use of a single Certificate of Control up to the full amount for which it was approved. The law clearly shows that the length of validity of an approved Certificate of Control for rice imports is, and always has been, 12 months from the date of approval. The law also shows that, for rice importation, multiple uses of a single approved Certificate of Control are allowed.

44. This fundamental misunderstanding of Turkish law underlies much of the claim by the United States. If a Certificate of Control is valid for 12 months from the date of approval, the issue before this Panel is not a question of when the Certificates of Control were approved. As they can be used anytime within the 12 month period, at any one time there is an abundance of Certificates of Control available to importers. So the core claim made by the United States, that only a limited number of Certificates of Control was approved in any one period and that the Certificates of Control were import licenses, is not relevant. The real issue is how many valid Certificates of Control were in circulation at any one time as, if there were plenty available, they could not have acted as an import restraint.

45. In any event, the United States has not proved to Turkey or to this Panel that there were periods where applications for approval of Certificates of Control were not approved. The United States has merely referred to three specific cases where Certificates of Control were not approved. This is not evidence of a systematic denial of approvals let alone evidence of an import prohibition or even of an import restriction. In fact, the United States has not even made a *prima facie* case.

46. Turkey, on the other hand, has already shown and will further clarify that the volumes for which Certificates of Control were approved far exceeded actual trade. This means that traders

maintained in their possession valid Certificates of Control for larger volumes that they needed for use at anytime during the 12 month period of their validity.

47. The Certificates of Control are not import licenses. They are documents used for trade facilitation and customs purposes. To the extent that they are agricultural products, they are approved by MARA. The information provided on the Certificate of Control is customary information which is required by MARA to fulfil its domestic obligations. However, MARA does work closely with customs authorities for purposes of administering the process of inspection and customs clearance at point of entry.

48. The scope of the information requested by MARA for approval of the Certificate of Control does not change an administrative document used for customs purposes into an import license, as the United States argues. If we were to follow the line of argument put forward by the United States, any document used in relation to importation would be an import license. This is patently not the case. For example: SPS certificates are not import licenses; Certificates of origin are not import licenses; Certificates of compliance with technical regulations are not import licenses. The bringing together of all these individual 'non-import-licenses' into a single document does not suddenly turn that single document into an import license. The United States has not shown which element of the Certificate of Control turns this administrative document into an import license. It has merely asserted that it is an import license. The United States has not made a *prima facie* case and it certainly has not brought any proof before this Panel.

49. The fact that there are similarities in the information required on both Certificates of Control and TRQ Import Licenses is not proof that the Certificate of Control is an import license. An examination of Exhibit 51 of the United States, which lists the similarities, shows nothing sinister. The similarities cited include: a requirement that the customs classification code must be provided, that the product must be described, that the importer must be named, that the importer's tax number must be provided, that the quantity is to be filled in, that the country of origin must be cited, that an indication of where the product was loaded is needed, and finally that the point of entry into Turkey must be indicated. The requesting of this type of information in relation to two different documents for two different purposes is perfectly normal. It even shows that the documents were separate and served different purposes. If they served the same purpose, why repeat all information on both?

50. The United States relies heavily, and ultimately only, on the so-called "Letters of Acceptance". Turkey accepts that "Letters of Acceptance" were written and were in circulation. However, these letters were internal communications aimed at developing policies. These administrative communications never resulted in the adoption of laws or regulations. They were never used to systematically deny the approval of applications for Certificates of Control. And even if, hypothetically, they had been used to limit the approval of Certificates of Control, which Turkey vehemently denies, this is not evidence that there was a measure prohibiting or restricting imports. The same traders had other certificates of control for volumes greater than they needed usable over a 12 month period.

51. The record shows that, despite the "Letters of Acceptance", Certificates of Control were approved. And not only that, Certificates of Control were approved for Torunlar, the domestic litigant relied upon by the United States to show that the Letters did operate as a general restriction. They did not operate as a general restriction. They did not operate as a systematic scheme of import prohibition or restriction, whatever the text of this internal administrative communication actually states. The import statistics clearly confirm this and this will be specifically addressed in Turkey's next submission.

52. The fact that these "Letters of Acceptance" have been used in open court proceedings by MARA in their defence in relation to an individual rejection of an application for a specific Certificate

of Control cannot be considered as evidence of a systemic denial of approval of Certificates of Control or, more importantly, for the purposes of the case by the United States in WTO law, a systemic prohibition or restriction on imports under GATT Article XI.

53. In the course of the oral hearing, the United States has tried to suggest that import licenses for the TRQ were only being issued, in fact, to a limited number of specific traders. The United States has shown no evidence of this, nor has it shown that the alleged limited group of importers that benefited from the TRQ had any specific characteristics. Turkey does not understand the purpose of these suggestions. If, however, the United States is trying to hint at, or suggest, some sort of discrimination on the basis of nationality, Turkey strongly rejects this allegation.

54. As Turkey has stated, a substantial number of traders benefited from the TRQ and were allocated part of the quota. Furthermore, Turkey notes that this allegation is not an allegation in relation to the GATT. It is an allegation in relation to services, namely distribution services, and the United States has not pleaded the GATS in this case. Again, the exact details will be provided in further submissions.

55. The United States has shown figures according to which the cost of import of a single tonne of rice within the TRQ amounts to US$ 1,654. This calculation beggars belief. The fact is that the amount of US$ 1,654 must be divided by three since the importer now holds three tonnes of rice. In addition, Turkey asks the Panel to review in some detail the prices that the United States has submitted to you. For example, in its First Submission, the United States claims that the FOB price for paddy rice is US$ 295 per tonne. In its oral statement, the United States claimed that the CIF price for paddy rice is US$ 260 per tonne. Turkey has not had time to fully examine this issue, but the figures obviously seem to be, at best, inconsistent and, at worst, randomly chosen. As a general point, Turkey observes that the United States is only using extreme examples and does not build its case on general trade statistics, policies or laws.

56. The United States has argued that the deadlines and the re-openings of the TRQ are in and of themselves breaches of GATT Article XI. Turkey fails to understand this argument. Time limits are an inherent part of the management of any TRQ. If time limits are a breach of GATT Article XI, then all TRQs administered by all WTO Members would be incompatible with WTO law.

57. In addition, the very fact that the deadlines of the TRQ were re-opened or extended cannot be a breach of GATT Article XI. Turkey is under the obligation to ensure full utilization of TRQs, if and when it chooses to open them. In any event, the United States has not shown how the extension of the TRQ could have inhibited full utilization. It is a mere assertion not backed up by fact or by law. This leads to the issue of the domestic purchase requirement.

58. The United States again misunderstands the domestic purchase requirements for eligibility to benefit from the TRQ. Turkish law provides that an applicant for a TRQ import license must show that it has purchased a specific quantity of domestic rice. Any operator, domestic or foreign, that has a tax registration number, is entitled to purchase domestic rice from three categories of domestic sellers. These are the paddy producers, the unions and cooperatives of paddy producers, and the TMO. If the operator chooses to purchase from the TMO, the quantity is different from the quantity required if the purchase is from the other two categories. These quantities are clearly set out in the law in a transparent fashion.

59. Once an operator has purchased the required quantity of domestic rice, that operator becomes eligible to apply for an import license under the TRQ. Contrary to what has been alleged by the United States, there are no eligibility criteria in relation to who can be an operator for the purposes of purchasing domestic rice. And thus benefit from the TRQ advantages.

60. Turkey would now like to ask the United States what concerns it has arising from the fact that restaurants and individual consumers are not acting as operators for the purposes of importation of rice into Turkey (who, by the way, were perfectly entitled to purchase domestic rice and, therefore, import within the TRQ). The approach being taken by the United States, and the arguments being used in relation to individual consumers and restaurants, raise questions for Turkey as to the ultimate objective of the United States in making this complaint. Is the complaint designed to cut out a normal and regular part of the value chain in relation to the production, processing and sale of rice? The United States seems to think that the fact that operators are mainly traders and millers is evidence of a breach of WTO law. This is patently not the case.

61. Or is the objective of the United States to get the benefit of the TRQ's lower duty rates without the burden of the domestic purchase requirement? The TRQ is, as Turkey has emphasised, a market stabilization mechanism and the domestic purchase requirement is an integral part of it. The TRQ was a concession which Turkey granted in addition to its bound commitments under its GATT Article II Country Schedule. Turkey has shown that, despite the domestic purchase requirement, the advantage conferred by the TRQ was considerable. It has been quantified in Turkey's pleadings. In fact, evidence shows that traders chose to import through the TRQ system rather than at the MFN or applied rates while both remained available.

62. There is a wide range of other issues that have been raised during this hearing. Turkey will address them in its subsequent pleadings. Turkey looks forward to the written questions from the Panel and thanks the Panel for its contribution to the clarification of the law and the facts underlying this case.

ANNEX B-4

**ORAL STATEMENT BY AUSTRALIA
AT THE THIRD PARTY SESSION**
(9 November 2006)

Introduction

1. In this statement, Australia will canvass a number of issues of legal interpretation.

2. First, the Panel should address the arguments relating to the correct order of analysis before considering whether, for reasons of judicial economy, it is no longer necessary to address some or all of the claims raised.

3. Second, Australia submits that Turkey's alleged denial of Certificates of Control, if established, is inconsistent with the prohibition on non-tariff measures in Article 4.2 of the *Agreement on Agriculture*.

4. Third, Australia will make submissions on the term 'import licence' used in the *Agreement on Import Licensing Procedures* (*Import Licensing Agreement*) and Article XI:1 of GATT 1994.

5. Fourth, if Turkey's Tariff Rate Quota (TRQ) is no longer in existence and there are no continuing measures being applied, the Panel should consider whether it is necessary to make a finding in respect of the claims relating to the TRQ in order to resolve the dispute. Should the Panel decide to make findings on the TRQ, Australia argues that the domestic purchasing requirement is inconsistent with Article III:4 of GATT 1994.

6. Fifth, if the Panel finds that Turkey has adopted a practice of denying Certificates of Control altogether, this would constitute a 'measure of general application' for the purposes of Article X:2 of GATT 1994 and a failure to publish this measure would be inconsistent with Article X:2.

7. Sixth, in relation to Turkey's arguments about the admissibility of certain evidence, Australia notes that all evidence is admissible, but it is for the Panel to determine the weight it is to be given.

Order of Analysis

8. The Appellate Body in *EC – Bananas III* found that the Panel should have applied Article 1.3 of the *Import Licensing Agreement* before considering Article X:3(a) of GATT 1994 since the *Import Licensing Agreement* deals specifically, and in detail, with the administration of import licensing procedures. The Appellate Body noted that if the Panel had adopted this order of analysis, there would have been no need for it to address the alleged inconsistency with Article X:3(a).[1]

9. Australia agrees that, as a general principle, provisions of a more specific agreement should be considered before provisions of a more general agreement where, as in *EC – Bananas III*, the provisions are, "for all practical purposes, interchangeable", being identical in coverage and effect. It is for the Panel to determine whether these criteria are met and, if they are, whether to exercise judicial economy with respect to claims made under the more general agreement. Where claims are based on provisions which are not identical in coverage and effect, each claim should, in principle, be considered.

[1] Appellate Body Report, *EC – Bananas III*, paras. 202-204.

Inconsistency of Turkish measure with Article 4.2 of the *Agreement on Agriculture*

10. Australia submits that Article 4.2 of the *Agreement on Agriculture* and Article XI of GATT 1994 are not identical in coverage and effect, so claims made pursuant to these provisions should be analysed separately.

11. Australia agrees with the EC that, apart from the footnote to Article 4.2 of the *Agreement on Agriculture*, there is no automatic link between the texts of Article 4.2 and Article XI of GATT 1994.[2]

12. Having expressed this caution, Australia considers that under a separate analysis pursuant to Article 4.2 of the *Agreement on Agriculture*, it would be open to the Panel to find that Turkey's alleged denial of the Certificates of Control, if established by the facts, prevents or restricts imports outside the TRQ.

13. Australia agrees with the US[3] that if Turkey has refused to grant Certificates of Control, that would constitute a quantitative import restriction or discretionary import licensing, or fall within the broad category of 'similar border measures other than ordinary customs duties' in footnote 1 to Article 4.2 of the *Agreement on Agriculture*. The measure is therefore 'of the kind' that Turkey may not maintain, resort to, or revert to, and is inconsistent with the prohibition on non-tariff measures in Article 4.2.

Article XI:1 of GATT 1994 – import licence/other measure

14. Australia considers that the Panel should clarify the term 'import licence' under Article XI:1 of GATT 1994, considering its ordinary meaning and in the context of the *Import Licensing Agreement*.

15. Neither Article 1.1 of the *Import Licensing Agreement* nor GATT 1994 defines the term 'import licence'. However, Article 1.1 of the *Import Licensing Agreement* identifies the scope of the Agreement as being concerned with the administrative procedures that are used to implement import licensing. The phrase 'prior condition for importation' in Article 1.1 provides guidance on the meaning of the term 'import licence'. It indicates that the term covers the control of imports.

16. The footnote to Article 1.1 also provides guidance in considering the meaning of 'import licence'. As stated by the Panel in *EC – Bananas III*, the footnote "further defines 'administrative procedures' to include 'those procedures referred to as "licensing" as well as other similar procedures'. Accordingly, irrespective of whether the term 'licensing' is used … administrative procedures are covered by the Licensing Agreement provided that they have a purpose similar to licensing."[4]

17. Turkey's submission[5] that its Certificates of Control deal solely with customs matters - and so are not import licences – gives too great a scope to the carve out for 'customs purposes' and restricts the meaning of 'import licences' beyond that intended by either Article XI of GATT 1994 or the *Import Licensing Agreement*. Australia considers that it would be difficult to consider a procedure that involves product safety checks or SPS measures within the concept of 'customs purposes' under Article 1.1 of the *Import Licensing Agreement* or GATT 1994. The fact that there are elements of a regime which are required for customs purposes does not mean, in and of itself, that the regime falls outside the term 'import licence'. The structure and operation of the regime in practice need to be examined to determine if it has a 'purpose similar to licensing'.

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[2] Third Party Written Submission by the European Communities, 18 October 2006, para. 20.
[3] First Submission of the United States, 20 September 2006, paras. 76-78.
[4] Panel Report, *EC – Bananas III*, para. 7.147.
[5] First Submission by Turkey, 11 October 2006, paras. 47-54.

18. Australia further contends that if the Panel finds that the Certificate of Control is not an 'import licence', as referred to in the *WTO Agreements*, the Panel should consider whether either the Certificate of Control or Turkey's alleged denial of the Certificates is an 'other measure' within the meaning of Article XI of GATT 1994. Such a finding will depend on the Panel's view as to whether the evidence supports the US submission that Turkey has, through use of its Certificates of Control, either acted to prohibit or restrict the entry of rice into Turkey.

Domestic support under Turkey's TRQ

19. Turkey argues that it is not necessary to examine the expired Turkish TRQ regime.[6]

20. Australia notes that the Panel has authority to make findings on measures which are properly within its terms of reference, even where those measures have ceased to exist.[7] However, it is established jurisprudence that a panel only needs to address those claims which must be addressed to resolve the matter in issue in the dispute.[8]

21. Where a measure has been withdrawn, it may often be unnecessary to make a finding on the measure's consistency with the *WTO Agreements*, and panels in the past have generally found it inappropriate to make recommendations on measures which no longer exist.[9] If the TRQ regime has indeed expired, the Panel should consider whether, based on the particular facts of the case, it is necessary to make findings or recommendations on the measure in order to resolve the dispute.

22. If the Panel concludes that elements of the TRQ continue to exist or otherwise decides to make findings on the TRQ, Australia submits that Turkey's imposition of a domestic purchasing requirement under its TRQ regime is inconsistent with Article III:4 of GATT 1994. The only issue between the parties in this regard is whether imported rice is accorded less favourable treatment than domestic rice.

23. Australia notes that WTO jurisprudence supports the view that the imposition of an 'additional requirement' or an 'extra hurdle' on imported products, when compared to like domestic products, constitutes less favourable treatment.[10] In *Canada – Wheat Exports and Grain Imports*, the Panel considered that these 'extra hurdles' need not be onerous in commercial and/or practical terms to be inconsistent with Article III:4 of GATT 1994.[11]

24. Under Turkey's TRQ regime, imported rice cannot be sold in the domestic market unless that importer first purchases a specified quantity of domestic rice. Domestic rice producers are not subject to any such additional requirement. Australia argues that this is an 'extra hurdle' which alters the conditions of competition in favour of domestic rice, and constitutes less favourable treatment for imported products.

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[6] First Submission by Turkey, 11 October 2006, paras. 137-139; Third Party Written Submission by the European Communities, 18 October 2006, para. 32.

[7] Panel Report, *India – Autos*, para. 7.26; Panel Report, *Indonesia – Autos*, para. 14.9.

[8] Appellate Body Report, *US – Wool Shirts and Blouses*, page 19; Appellate Body Report, *US – Lead and Bismuth II*, para. 71.

[9] For example, Appellate Body Report, *US – Certain EC Products*, para. 81; Panel Report, *Chile – Price Band System*, para. 7.112.

[10] Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.185.

[11] Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.190.

Interpretation of "measures of general application" under Article X:2 of GATT 1994

25. Turkey argues that Article X:2 of GATT 1994 does not apply to the dispute as the Letters of Acceptance are not 'measures of general application' and, because they cannot be enforced, they are not subject to the publication requirement under Article X:2.[12]

26. As the US submission makes clear, the measure at issue is Turkey's alleged blanket denial of Certificates of Control.[13] In Australia's view, this is the 'measure of general application' which is allegedly being enforced, and which, if found to exist, constitutes a 'restriction or prohibition on imports' under Article X:2.

27. If the Panel finds that Turkey has in fact adopted a practice of denying Certificates of Control altogether, Australia argues this could constitute a 'measure of general application' for the purposes of Article X:2, whether or not the Letters of Acceptance themselves can be enforced. Turkey's failure to publish its denial of the Certificates, whether through publication of the Letters of Acceptance or some other instrument, would be inconsistent with Article X:2.

Evidentiary Status of the Letters of Acceptance

28. Turkey submits that the Letters of Acceptance are inadmissible or partial and unreliable evidence of Turkey's intention and trade policies.[14]

29. The *Dispute Settlement Understanding* contains no rules on the admissibility of evidence. As clarified in the Panel report in *EC – Bed Linen*, WTO panels "are generally free to admit and evaluate evidence of every kind and to ascribe to it the weight that they see fit."[15]

30. Australia therefore contends that the Letters of Acceptance are admissible and it is for the Panel to determine the weight to be accorded to such evidence.

Conclusion

31. In conclusion, Australia thanks the Panel for its consideration of the points we have raised.

[12] First Submission by Turkey, 11 October 2006, para. 84.
[13] First Submission of the United States, 20 September 2006, paras. 79-80.
[14] First Submission by Turkey, 11 October 2006, para. 81.
[15] Panel Report, *EC – Bed Linen*, para. 6.34.

ANNEX B-5

**ORAL STATEMENT BY CHINA
AT THE THIRD PARTY SESSION**
(9 November 2006)

1. Madam Chair, distinguished members of the Panel, thank you for providing China with the opportunity to make a statement at this meeting. In this statement, I will focus on three issues.

I. ARTICLE XI:1 OF GATT 1994

2. From the first submissions of the US and Turkey, it's apparent that they have different viewpoints concerning whether Turkey's Certificates of Control is an import license. On this point, China is of the view that, even assuming that the Certificate of Control is not an import license, if it prohibits or restricts the import of rice in practice, it may still constitute an "other measure" which is inconsistent with GATT Article XI:1. Based on the interpretations developed by the panel of the case *India – Quantitative Restrictions*,[1] if an "other measure" subject to the discretion of a government agency and may block certain imports, such measure should be deemed to operate as limitations on imports and is not permitted by Article XI:1.

II. ARTICLE III OF GATT 1994

3. With respect to domestic purchase requirement, the US claims that it violates GATT Article III:4, whereas Turkey denies such claim. Specifically, Turkey argues that with the benefit of lower tariff rate, the domestic purchase requirement actually altered the conditions of competition in favour of imported product, and therefore was consistent with Article III:4.[2] However, in China's view, such line of reasoning seems questionable. Article III deals with the comparison of treatments between the products imported and national products, and has no relation to the level of tariff. If domestic purchase requirement alters the competition conditions to the detriment of imported products and thus violates Article III:4, the violation could not be redressed or offset by the benefit of lower tariff rate.

III. THE APPLICATION OF TRIMS AGREEMENT

4. The US claims that Turkey is in breach of Article 2.1 and Paragraph 1(a) of the Annex 1 of the TRIMs Agreement. Turkey argues that the subject measure is consistent with GATT Article III:4, and therefore does not violate Article 2.1 of the TRIMs Agreement.[3] It seems that Turkey ignores the fact that the US fails to define what a "trade-related investment measure" is and to prove Turkey's measure constitutes a TRIM[4].

5. China wishes to raise its observation in this regard. The TRIMs Agreement is a fully fledged treaty with autonomous legal existence, and it must have its own application scope. Although the TRIMs Agreement does not define what a TRIM is, this term could be interpreted properly according

[1] Panel Report, *India – Quantitative Restrictions*, para. 5.129.
[2] Turkey's first written submission, paras. 95-99.
[3] Turkey's first written submission, paras. 110-113.
[4] TRIM is the abbreviation of "trade-related investment measure", note added by China.

to the principle set forth in Article 3.2 of the DSU. In no case it is proper to bring a measure out of the coverage of TRIMs Agreement under the jurisdiction of it.

IV. CONCLUSION

6. This concludes my presentation. I thank you for your patience.

ANNEX B-6

**ORAL STATEMENT BY EGYPT
AT THE THIRD PARTY SESSION**
(9 November 2006)

Mrs. Chairperson, members of the Panel,

1. I am pleased to appear before you today to present the views of the Arab Republic of Egypt as a third party to this proceeding.

2. As an important producer and exporter of rice, Egypt has a substantial interest in this proceeding. Also, as stated in its third party submission, Egypt is particularly concerned with the interpretation of Article III:4 and XI:1 of the GATT 1994 and of Article 4.2 of the Agreement on Agriculture.

3. In today's statement, Egypt will elaborate on some of the elements raised in its third party submission and discuss certain of the issues raised by other third parties to this proceeding.

Measures at issue

4. In its third party submission, the People's Republic of China submits that the measures challenged by the United States (US) under the title of "regime as a whole" are too broad to meet the specificity requirement of Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

5. Egypt notes that in its request for the establishment of a panel, the US, after having identified the measures at issue and having referred separately to the denial of, or failure to grant import licenses and domestic purchase requirements, submits claims concerning Turkey's domestic purchase requirements, in conjunction with its denial of, or failure to grant import licenses. Also, in its first written submission, under claims K, L and M, the US refers to the denial of Certificates of Control and the domestic purchase requirements imposed under Turkey's TRQ regime. Under claim L, in particular, the US indicates that Turkey's import licensing regime comprises the TRQ requiring domestic purchase for under-quota imports and the denial of import licenses for any imports at the rate of duty set out in Turkey's domestic schedule.

Measures within the meaning of Article XI:1

6. The US, in its first submission, primarily considers that Certificates of Control are import licenses within the meaning of Article XI:1 of the GATT 1994 even though it also states that they may be considered as "other measures" under this Article. Arguing that Certificates of Control are exclusively used for customs purposes, Turkey contends that they cannot be considered as import licences within the meaning of Article 1.1 of the Agreement on Import Licensing Procedures.

7. Since Article XI:1 does not define the notion of import license, Egypt considers that Turkey is right to refer to the definition set forth in Article 1.1 of the Agreement on Import Licensing Procedures when examining if Certificates of Control should be considered as import licenses under Article XI:1. Egypt is of the opinion that one of the central questions that must be addressed with respect to this issue is whether or not Certificates of Control amount to administrative forms that are required exclusively for customs purposes. In line with the considerations invoked by the European Communities (EC) in its third party submission, Egypt believes that the requirements that must be

satisfied by importers in order to obtain Certificates of Control cannot be considered as exclusively for customs purposes.

8. In the event that Certificates of Control where found not to be import licenses within the meaning of Article XI:1, Egypt considers that it should be examined whether they can be classified as "other measures". Egypt wishes to recall that, in previous dispute settlement proceedings concerning Article XI:1, panels have considered that its reach is very wide and that the expression "other measures" implies a broad scope as to the types of measures that are covered.

"As such" or "as applied" claim

9. The EC, in its third party submission, raises the question of whether the US has raised an "as such" or an "as applied" claim. In light of the findings of the Appellate Body in *US – Zeroing (EC)*, the EC considers that "on the basis of the facts before the Panel, there may be a series of "as applied" measures (or a practice), which the US is inviting the Panel to construe as a measure and condemn in "as such" terms.

10. Egypt wishes to indicate that the distinction between "as such" and "as applied" claims referred to by the EC in its third party submission all concern the Agreement on Implementation of Article VI of the GATT 1994 (Anti-Dumping Agreement). While the findings of the Appellate Body and panels rendered within the framework of proceedings concerning the Anti-Dumping Agreement in relation to "as such" and "as applied" cases may be considered by the Panel in this proceeding, Egypt submits that the wording and nature of the provisions referred to by the US in the present proceeding should be borne in mind.

11. Egypt respectfully submits that if the Panel was to determine whether the US claims concern measures within the meaning of Article 3.3 of the DSU, it should examine how they are classified under the Articles referred to in support of their claims by the US. For example, with respect to US claim A, the Panel should determine whether the Certificates of Control are import licenses or other measures within the meaning of Article XI:1.

Expiry of the TRQ regime

12. In its first submission, Turkey indicates that the legislative framework providing for the TRQ regime expired and requested the Panel to refrain from making findings on the measures related to its TRQ regime or, should the Panel consider it necessary to make findings necessary for the purpose of a positive solution to the dispute, not to make any recommendation to the Dispute Settlement Body (DSB). In its third party submission, the EC states that it does not consider it necessary to examine more in detail the TRQ regime.

13. Considering the claims raised by the US with respect to the joint operation of the TRQ regime and the general import regime, Egypt considers it important for the Panel to take into consideration the TRQ regime for its findings to secure a positive solution to the dispute. However, if the TRQ regime is no longer in force, Egypt also considers that no recommendation should be made to the DSB with respect to it.

14. Mrs. Chairperson, members of the Panel, this concludes the third party statement of Egypt. Thank you for your attention.

ANNEX B-7

ORAL STATEMENT BY THE EUROPEAN COMMUNITIES AT THE THIRD PARTY SESSION
(9 November 2006)

Ms. Chairperson, distinguished members of the Panel,

1. The European Communities thanks the Panel for this opportunity to present its views today.

2. In its written submission, the EC invited the Panel to conclude on four points of law:

- carefully examine the existence of a "rule or norm" constituting a measure of general and prospective application
- consider the order of analysis of the relevant agreements in the light of the Appellate Body Report in *EC – Bananas III*
- consider that where an import restriction that falls foul of Article XI has a simultaneous element of favouring the internal sale of domestic, rather than imported, products, it violates also Article III of the GATT
- refrain from making any recommendations to the DSB on the Turkish TRQ regime.

3. In this third party session, we will not develop these arguments much further. However, for the sake of clarity, we will highlight again our main points.

4. This is a very fact intensive case where the parties appear to disagree on many of the facts at stake. The EC does not wish to add to this complication by building any theories based on assumptions of facts. What seems to be clear is that Turkey's TRQ regime has ceased to exist. Under these circumstances, the EC does not consider it necessary to examine more in detail the expired Turkish TRQ regime.

5. The measures still in force, that is, the alleged import licensing system brings forward a very important systemic issue in the light of the arguments presented by the United States. The US in its first written submission refers to the Turkish measures as "an unofficial ban". It appears also that the US case relies at least partially on internal documents of the Turkish administration and reference is also made to oral instructions given to Turkish officials. Egypt in its third party submission considers it irrelevant that the unpublished Letters of Acceptance may not be "laws, regulations, judicial decisions or administrative rulings" within the meaning of Article XI:1 of the GATT. The EC is of the view that the issue is more subtle than as expressed by Egypt as it is important to establish whether a measure exists in the first place. In this respect the fact that a given document has not been published is relevant.

6. As the EC has made clear in its written submission, this is a familiar systemic issue on which the Panel should be particularly vigilant: Is it truly so that there is a system or a regime that is in place or could it be that the system as it stands has possibly been applied in a certain way in certain instances? This subtle but fundamentally important question may make a significant difference.

7. There is also another systemic issue before the Panel, namely the order of analysis of overlapping pleas in law under different provisions of different relevant agreements. The Appellate Body has considered this question in *EC – Bananas III*, where it stated that the agreement more specific to the matter at stake should be examined first.

8. It is of course often a question of judgement as to which agreement might be more specific in each case as that may depend on the emphasis of argument and the context of the measure. However, it would seem to the EC that due to the importance of the US argument on import licensing, the arguments relating to the import licensing agreement should be considered first. It would also seem correct to follow with the analysis under Article 4.2 of the Agreement on Agriculture as the case concerns a specific agricultural product. It is only after these agreements that the more general rules of the GATT should be examined although one could also put forward an argument that the TRIMs Agreement should be examined before the provisions of the GATT. In view of the very close link between the latter agreements this choice is perhaps more a matter of presentation than genuine specificity.

9. In this respect the EC would like to note that the third party intervention of China does not appear to take account of the systemic link between Articles III:4 and XI:1 of the GATT on the one hand and the TRIMs Agreement on the other hand. Although it is true that the TRIMs Agreement does not define exhaustively the notion of a trade related investment measure, it is clear that through the annex to the TRIMs Agreement certain specific TRIMs are considered *ipso jure* inconsistent with these provisions of the GATT. The EC also considers that as illustrated by the General Interpretative Note to Annex 1A of the WTO Agreement, and underlined by the Appellate Body in *Brazil – Desiccated Coconut*, the authors of the WTO regime intended to put an end to the fragmentation that had characterised the previous system.

10. Finally, should the Panel consider it necessary to examine in detail the TRQ system, the EC would like to point to the possibility that both Article III:4 and Article XI of the GATT might need to be examined at the same time. Some arguments presented in the written submissions suggest that depending on the emphasis of argument, the same measures might be considered both as border measures and internal measures.

Ms. Chairperson, distinguished members of the Panel,

11. In view of the disagreement on the facts of the case between the parties, the EC does not wish to make further observations on the matter before us today. However, since the Turkish TRQ system has been abolished, we feel that in any event there would not be a need to issue recommendations to the DSB on that side of the alleged Turkish measures.

ANNEX B-8

**ORAL STATEMENT BY KOREA
AT THE THIRD PARTY SESSION**
(9 November 2006)

Madame Chair and members of the Panel,

Thank for inviting Korea to present its views on this case. Korea would like to comment on the following four issues:

(i) whether there has been either a prohibition or a restriction on the import of rice in Turkey during the period of September 2003 to July 2006;

(ii) if the import of rice was either prohibited or restricted by the operation of a system of certificates of control, whether such certificates constitute import licenses;

(iii) whether imported rice has been less favourably treated by the requirement of domestic rice purchases; and

(iv) whether the requirement of domestic rice purchases constitutes a trade related investment measure.

First, before deciding whether the certificate of control is discretionary import license or not, Korea believes that the panel should decide whether importation of rice has been really prohibited or restricted. As Turkey pointed out, if there is no "*restriction*" or "*prohibition*", the nature of the "*measure*" is of no relevance.[1] If the statistics provided by Turkey in its annexes 8 and 20 are true, the US may be wrong in arguing that Turkey institutes or maintains a prohibition on imports through its failure to issue Certificates of Control[2], and that Turkey did not grant them at all for a period of over 2 1/2 years.[3] However, it seems imperative that the panel critically analyze this statistical information in order to decide whether the out-quota import of rice has been at least restricted or hampered by the way of managing the certificates of control. With respect to annex 8 which shows that out-quota imports amounted to 71,181 tons between January 2004 and August 2006, this annex does not demonstrate the out-quota imports were made each year, since the data in the Annex only shows the total imports throughout the above period, not a year by year picture. Korea believes that Turkey should be requested to provide yearly data on out-quota imports in order to prove their claim that out-quota import has never been restricted. With regard to annex 20, the disproportionate number of certificates for out-quota imports should be explained by Turkey in order to avoid the suspicion that the issuance of out-quota certificates have been deliberately controlled. Since Turkey argued that the Certificates are issued automatically within a matter of days, it needs to be confirmed that similar approval rates and processing times have been applied equally on both in-quota and out-quota certificate applications. Korea notices that the proportion of out-quota certificates to in-quota certificates in 2006 is much higher than it is for the years 2004 and 2005. An explanation for this should be sought so as to avoid the assumption that Turkey loosened its grip on out-quota certificates only after having been challenged in the WTO. With all those critical queries, the panel should decide whether out-quota imports have been de facto restricted, if not totally prohibited.

[1] Turkey submission para. 69.
[2] US submission para. 58
[3] US submission para. 71

Second, on the question of whether certificates of control could be import licenses, Korea is of the view that a licensing requirement should be distinguished from a license itself. As the US rightly defined, a license is a formal, usually printed or written, permission from an authority to do something.[4] Korea believes that all licenses, as long as they carry the word "license", must have explicit permission of acts to be licensed. On the bottom of the certificate of control form submitted by Turkey as annex 4, it is written that the [i]mportation of the related Commodity has been found to be proper, provided that said commodity is found to be proper and satisfactory in terms of human health and safety, etc. It is also mentioned that [t]he present Certificate of Control has been issued … for presentation to the relevant customs office. Korea is sceptical that such an expression could be interpreted as a formal permission of importation. It seems more appropriate to view the certificate as one of the licensing requirements, rather than a license itself. It should also be noted that an import license is issued separately in the in-quota importation of rice in Turkey after reviewing the certificates, whereas no license is granted in the case of an out-quota importation which also requests the certificates. The mere absence of a license does not convert a license requirement into a license itself. However, Korea recognizes the possibility that rice importation in Turkey could be effectively restricted by manipulation of the Certificates of control. If the panel found that the importation has been so restricted by Turkey, the way of managing the Certificates has to be condemned as a violation of Article XI:1 of GATT.

Third, when it comes to the issue of less favorable treatment caused by the domestic purchase requirement, Korea simply does not understand Turkey's logic that the import price of rice per ton was lower due to the domestic purchase requirement than it otherwise would have been in the absence of such a requirement. No matter how much the cost of buying domestic rice was lowered by virtue of the so called domestic purchase requirement, it can not be denied that importers had to resource additional funds to purchase domestic rice, and foreign rice could be imported more if such funds were not forced to be used to buy domestic rice. The main focus in this issue is not the price of domestic rice but the additional obligation imposed on the importers.

Fourth, Korea believes that the measure at issue has to be a trade related investment measure in order for the TRIMs Agreement to be applied. Even though there is no legal definition for trade related investment measures, it seems clear that the measure ought to have at least two elements, one is trade and the other is an investment element. The domestic purchase requirement at hand clearly possesses a trade aspect because the requirement is imposed on the importation of foreign rice. However, there does not appear to be an investment element. As mentioned in the preamble of the TRIMs Agreement, WTO members desire to facilitate investment across international frontiers and to take into account the financial needs of developing country members. In this regard, the financial movement across the border can be understood as an essential element of any investment measure. If there is no investment aspect in the domestic purchase requirement of Turkey, it can not be an investment measure, therefore the TRIMs Agreement could not be applied.

Madame Chair

These are the comments that Korea wishes to be considered in your deliberation of the case at hand.

Thank you very much.

[4] US submission para. 60

ANNEX B-9

**ORAL STATEMENT BY THAILAND
AT THE THIRD PARTY SESSION**
(9 November 2006)

1. Madame Chair and Members of the Panel: Thailand appreciates the opportunity to participate in this proceeding and to present its views on this matter to the Panel today.

2. Thailand reserved its right to participate as a third party in this proceeding under Article 10.2 of the *Dispute Settlement Understanding* due to our systemic interest as one of the top global exporters of rice.

3. In general, Thailand recognizes the concerns set forth by the United States in its first written submission regarding the inconsistency of Turkey's rice tariff rate quota (TRQ) regime and domestic purchase requirement with its obligations under the *GATT 1994*, the *Agreement on Import Licensing Procedures*, the *Agreement on Agriculture*, and the *Agreement on Trade-Related Investment Measures* (TRIMs).[1]

4. We view in particular that Turkey's domestic purchase requirement is inconsistent with its obligations under Article III of the *GATT 1994* and the TRIMs Agreement. However, we will not make specific comments on these concerns today.

5. Instead, Thailand would like to raise an issue not discussed by the parties and other third parties to date, that is, the inconsistency of Turkey's rice TRQ regime with its obligations under Article II of the *GATT 1994* with respect to its Schedule of Concessions. Specifically, Article II:1(a) requires all WTO Members to accord to the commerce of other Members "treatment no less favourable" than that provided for in the relevant part of their annexed Schedules. In this proceeding, Turkey does not dispute that it has bound its MFN duty on rice imports at 45 per cent *ad valorem* in its Schedule, without any quantitative limitations.[2] However, according to the factual evidence submitted by the United States, the treatment actually accorded by Turkey under its TRQ regime is "less favourable" than that provided for in its Schedule. In fact, Turkey does not provide the treatment it has provided in its Schedule to all Members. Rather, Turkey restricts rice imports so that they may enter only in limited and unpredictable quantities (albeit at a tariff rate lower than 45 per cent), under a non-automatic import licensing regime, and only when coupled with the purchase of domestic rice quantitatively greater than the intended import amount.[3] Thailand therefore considers Turkey's TRQ regime to be inconsistent with its obligations under *GATT* Article II, in addition to its domestic purchase requirement being inconsistent with *GATT* Article III and the TRIMs Agreement.

6. In its defense, Turkey states that the measures relating to its TRQ regime, including the legislative framework and the domestic purchase requirement, are no longer in force.[4] As a result, Turkey has requested the Panel to refrain from making findings on these measures, or alternatively, if the Panel considers making such findings necessary, to not make recommendations to the Dispute Settlement Body (DSB).[5] In support of its request, Turkey refers to the Appellate Body Report in *United States – Import Measures on Certain Products from the European Communities*, which states

[1] First Written Submission of the United States, 20 September 2006.
[2] First Written Submission of Turkey, 11 October 2006.
[3] First Written Submission of the United States, paras. 41, 45 and 49.
[4] First Written Submission of Turkey, para. 136.
[5] *Ibid.* para. 139.

that the Panel erred in making recommendations to the DSB on a measure that the Panel had found to "no longer exist."[6]

7. Thailand considers that the Panel must examine the measures challenged by the United States in its request for the establishment of this Panel. There is consistent WTO jurisprudence stating that the relevant time to assess whether a measure is within a panel's terms of reference is the time at which the panel is established, which in this case is 17 March 2006.[7]

8. While Thailand welcomes Turkey's statement that the TRQ regime and coupled domestic purchase requirement are no longer in force, Thailand notes that the relevant measures may be re-introduced at any time in the future. As the United States has shown, Turkey has in the past instituted seasonal import bans,[8] and more recently, opened or applied the TRQ regime with the domestic purchase requirement intermittently throughout a span of one year.[9] Therefore, to preclude the possibility that Turkey may re-instigate these measures, Thailand is of the view that this Panel should make findings with respect to the inconsistency of Turkey's rice TRQ regime and domestic purchase requirement with its WTO obligations. The Panel in *European Communities – Measures Affecting the Approval and Marketing of Biotech Products* considered that making a finding to prevent a WTO-inconsistent measure from being re-introduced would help secure a positive solution to the dispute.[10]

9. Thailand hopes that these views will assist the Panel in considering the issues that have been brought before it. Again, we thank you for this opportunity to appear before you today.

[6] *Ibid*. para. 138.

[7] Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002, para. 7.26, and Panel Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R, adopted 22 April 1998, paras. 6.7 and 6.11.

[8] First Written Submission of the United States, paras. 14 and 15.

[9] *Ibid*. para. 38.

[10] Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, and WT/DS293/R, circulated 29 September 2006, para. 7.1311.

ANNEX C

REPLIES BY THE PARTIES AND THIRD PARTIES TO THE QUESTIONS POSED BY THE PANEL AFTER THE FIRST SUBSTANTIVE MEETING

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ANNEX C-1

REPLIES BY THE UNITED STATES TO QUESTIONS POSED BY THE PANEL AFTER THE FIRST SUBSTANTIVE MEETING

(30 November 2006)

Q1. (Both Parties) The United States has provided statistics on, *inter alia*, Turkish production, consumption and imports of milled rice in Exhibit US-45 attached to its first submission. Could the United States confirm the source of this data. The statistics provided by the United States go from 2001/2002 to 2006/2007. Can the United States confirm which of these figures correspond to actual events and which are projections.

1. The United States Department of Agriculture (USDA) official production, supply, and demand (PSD) is the source for the data provided in Exhibit US-45. For production numbers, USDA takes into account official Turkish production estimates; satellite imagery; weather (precipitation and temperatures) information and models; analysis from USDA personnel who travel to production areas within Turkey; and other sources of crop information. For trade numbers, USDA analyzes, evaluates, and cross-checks a variety of data sources, including customs data from the Turkish Statistics Corporation (TUIK) and independent trade specialists. For consumption and stocks numbers, USDA utilizes a network of assessments from specialists in the Office of Agricultural Affairs at the US Embassy in Ankara, agricultural economists in Washington, and international organizations (i.e. FAO, International Grains Council). The USDA official PSD numbers are reviewed and updated monthly by a US interagency committee chaired by USDA's World Agricultural Outlook Board (WAOB), and consisting of: the Foreign Agricultural Service (FAS), the Economic Research Service (ERS), the Farm Service Agency (FSA), and the Agricultural Marketing Service (AMS).

2. The data provided by the United States for 2001/2002 through 2005/2006 is based on actual historical events. The data provided for 2006/2007 are projected forecasts. Most of the data correspond to the Turkish marketing year (MY), which is September/August. The data provided in the seventh and eighth rows of the chart, however, correspond to the International Trade Year (TY), which is January/December. In cases where TY data is used, the data corresponds to the second year of the split year listed at the top of each column.

Q3. (Both Parties) Can the Parties also provide monthly information on imports into Turkey of, separately, paddy, brown and milled rice, for the period from July 2003 to the end of 2006 (including estimates, as appropriate), by country of origin.

3. The United States provides monthly import data from the Turkish Statistics Corporation (formerly the Turkish State Institute of Statistics) in Exhibit US-53. The data, which is provided in both numerical and graphical formats, covers imports up to and including September 2006. For USDA's estimates of total Turkish imports in 2006, please see the seventh row of the last column of the chart provided by the United States in Exhibit US-45 (300,000 metric tons on a milled rice equivalent basis). The United States provides an analysis of the data, which confirms the existence of an import ban covering MFN trade, in the answer to Question 26(b).

Q4. (Both Parties) In paragraph 26 of its first submission, Turkey asserts that "from 2003 to date, Turkey has approved a total of 2,223 Certificates of Control, allowing a total importation of 2,264,857 tonnes of foreign rice (paddy, brown and milled). Of the aforementioned quantity, 497.469 tonnes of rice equivalent have been allocated under the TRQ system since January 2004." In paragraph 65, Turkey asserts that "a high number of Certificates of Control (i.e., 2,223 between 2003 and 2006) were approved by MARA, corresponding to large amounts of

imported rice (i.e., 939.013 tonnes of rice equivalent between 2003 and 2006), both in relation to MFN and TRQ trade."

(a) Could the United States comment on the figures provided by Turkey. Can the United States also contrast these figures with the assertion contained in paragraph 1 of the United States' first submission that "[w]ith respect to the over-quota rate, Turkey's Ministry of Agriculture and Rural Affairs ('MARA') simply fails to issue licenses."

4. The figures provided by Turkey in its first submission asserting that Turkey's Ministry of Agriculture and Rural Affairs (MARA) issues Control Certificates for MFN trade have not been substantiated and are contradicted by the extensive documentary evidence presented by the United States. MARA fails to issue Certificates of Control at the over-quota rates of duty through the use of Letters of Acceptance. Letters of Acceptance are instruments in which the Turkish Grain Board's General Directorate of Protection and Control recommends to the Minister of Agriculture that MARA "delay" the start date for issuing Certificates of Control for rice to importers who do not purchase domestic paddy rice. Thus, the only way an importer may import rice into Turkey is through the TRQ system, under which the importer is obliged to purchase domestic paddy rice as a condition upon importation. The Letters often differentiate between Certificates of Control for paddy rice and Certificates of Control for "rice," which refers to milled rice.

5. The Minister's signature at the bottom of the document indicates that the Minister has "accepted" the Turkish Grain Board's recommendation. At this juncture, the United States is aware of Letters of Acceptance that cover the period September 1, 2003 through August 1, 2006:

- In Letter 964, dated September 10, 2003, the Minister of Agriculture accepted a recommendation to delay the start date for issuing Certificates to import rice until March 1, 2004;
- In Letter 107, dated January 23, 2004 (Exhibit US-12), Minister Guclu accepted a recommendation to delay the start date for issuing Certificates until July 1, 2004;
- In Letter 905, dated June 28, 2004 (Exhibit US-13), Minister Guclu again accepted a recommendation to delay the start date for issuing Certificates until January 1, 2005;
- In Letter 1795, dated December 30, 2004 (Exhibit US-14), Minister Guclu again accepted a recommendation to delay the start date for issuing Control Certificates until July 30, 2005;
- In Letter 1304, dated July 29, 2005, the Minister of Agriculture accepted a recommendation to delay the start date for issuing Certificates "until a new policy is in place;" and
- In Letter 390, dated March 24, 2006 (Exhibit US-36), Minister Eker accepted a recommendation to delay the start date for issuing Certificates until April 1, 2006. The panel in this dispute was established on March 17, 2006.[1]

[1] Despite this Letter, MARA apparently has continued to deny Certificates to importers who apply for them (*see* Exhibits US-22, US-39, US-40, US-41, US-42, and US-44). The continued denial of Control Certificates is likely due to the objections of Turkish producers (*see* Exhibits US-21 and US-24) decrying the intended change in policy announced by Minister Tuzmen in his March 24, 2006 letter to USTR Portman (Exhibit US-35). Further, Letter 390 asserts that MARA would continue denying the issuance of Certificates during the Turkish rice harvest (Exhibit US-36).

Thus, under the plain terms of the Letters of Acceptance, MARA officials are unable to grant Certificates of Control outside the TRQ regime, which was confirmed by a legal brief submitted by MARA's counsel in Turkish court.[2]

6. Turkey has asserted that this is not the case and that it does grant Certificates of Control, but it has not provided any documentary evidence to substantiate its claim. Further, as discussed in the US first submission and oral statement, Turkey has failed to rebut the documentary evidence presented by the United States in this regard, including the Letters of Acceptance, rejection letters to importers issued by MARA officials, and MARA's brief to the 1st Administrative Court of Ankara, in which MARA relied on the Letters of Acceptance as the sole legal basis for denying a Certificate of Control to a petitioning importer. Instead of providing documentary evidence of Certificates of Control granted for imports outside of the TRQ, Turkey has provided the chart contained in Annex 20. This chart raises several questions.

7. As an initial matter, the Letters of Acceptance only provide that MARA will not grant Control Certificates to importers who do not purchase domestic paddy rice. So, if MARA grants Control Certificates for importation under the TRQ, that fact would not rebut the US evidence that Turkey has imposed a ban on MFN trade.

8. Second, there is a vast discrepancy between the amount of Control Certificates Turkey claims it granted this year through September 21, 2006, for imports of US rice (400,000 metric tons) and the amount of US rice that US trade data shows has actually been shipped to Turkey in 2006 (about 18,000 tons through October 26, 2006). The United States cannot explain this discrepancy. It is notable that Turkey's chart shows a surge in Control Certificates in 2006, that is, when the DSB established the Panel. In addition, Turkey's chart shows that the vast majority of Control Certificates that Turkey allegedly granted in 2004 and 2005 were under the TRQ. Given that Turkey has alleged that the TRQ (with a domestic purchase requirement) provides a *benefit* to imported rice, it is unclear why importers would have suddenly decided in 2006 that the TRQ (with domestic purchase) no longer provided them an advantage, such that importers switched en masse from importing under the TRQ to importing at the MFN rates. It is also unclear from Turkey's chart whether the Control Certificates that MARA allegedly granted in 2006 were for outstanding applications that had been made in previous years or for new applications that were made after Minister Tuzmen's announced change in policy on Control Certificates "as of April 1, 2006." The chart also fails to indicate *when* the Certificates allegedly were granted – prior to April 1, 2006, which is when the alleged change in Turkish policy on Control Certificates began and which post-dates panel establishment, or after that date.

9. Third, even under Turkey's own revised chart, at least 96 per cent of the approved Control Certificates in 2004 and 83 per cent of the approved Control Certificates in 2005 were for entry under the TRQ, for which domestic purchase is required. Given how much more expensive it is to import rice under the TRQ regime,[3] such an overwhelming majority of importers would only "choose" to import rice under the TRQ if there were severe restrictions or a ban on importing at the over-quota rates.

10. Fourth, Annex 20 does not appear to account for imports of EU-origin rice. According to Turkish import data, Turkey imported approximately 25,000 and 32,000 tons of milled rice from Italy in 2004 and 2005, respectively.[4] Yet according to Annex 20, Turkey only granted Certificates of Control for approximately 7,000 tons of out-of-quota rice in 2004 and approximately 24,000 tons of

[2] Exhibit US-31.
[3] *See* paragraphs 32-37 of the US oral statement and Exhibit US-52.
[4] *See* Exhibit US-53.

out-of-quota rice in 2005. The validity period of Certificates of Control is no longer than twelve months – the Communiqués reserve MARA's right to shorten the validity periods of the Certificates – so Certificates obtained in prior years could not account for much of this apparent shortfall. This raises the question as to where EU rice imports can be found in Turkey's chart, as Turkey has asserted that all rice imports need to obtain Control Certificates.

11. Fifth, as previously noted, Annex 20 does not establish when the Certificates were allegedly granted, which creates particular problems interpreting the data for 2003 because the United States is not aware of any restrictions n importation prior to September 2003. MARA did not implement the import ban until September 10, 2003. That is when Turkey's Minister of Agriculture provided Ministerial approval to stop issuing Control Certificates. It is clear that there were no in-quota imports during the last four months of 2003, even though the first opening of the TRQ technically began on September 1, 2003, because Turkey did not announce the TRQ duty rates and domestic purchase requirement until late-April 2004. But these figures raise the obvious question as to when these Control Certificates for out-of-quota imports were allegedly granted.

12. Lastly, every Turkish importer the United States has spoken with has provided the same information: Turkey does not grant Control Certificates without the purchase of domestic paddy rice. The importers that have applied for Control Certificates outside the TRQ have been rejected or their applications have not been acted upon. Turkey has defended against related lawsuits brought by Torunlar and Mehmetoglu in Turkish court and has argued in court that it is bound by the Letters of Acceptance not to grant Control Certificates. In these circumstances, the figures in Annex 20 do not rebut the US evidence that MARA is not granting Control Certificates outside the TRQs, unless Turkey is willing to make copies of the Control Certificates available to review.

Q5. (Both Parties) Can the Parties provide monthly information on Turkey's domestic production of, separately, paddy, brown and milled rice, for the period from July 2003 to the end of 2006 (including estimates, as appropriate).

13. In Exhibit US-45, the United States provided this data for September 2003/August 2004, September 2004/August 2005, September 2005/August 2006, and a forecast for the current year which began in September 2006. USDA is unable to provide this data on a monthly basis. USDA annual production estimates are based on a Turkish marketing year (MY). Paddy production estimates are converted to milled rice production estimates based on an annual milling rate.

Q6. (Both Parties) Can the Parties provide monthly information on Turkey's domestic consumption of, separately, paddy, brown and milled rice, for the period from July 2003 to the end of 2006 (including estimates, as appropriate).

14. In Exhibit US-45, the United States provided this data for September 2003/August 2004, September 2004/August 2005, September 2005/August 2006, and a forecast for the current year which began in September 2006. USDA was unable to obtain this data on a monthly basis. USDA annual consumption estimates are based on a Turkish marketing year (MY). All consumption estimates are based on a milled equivalent basis since nearly all rice consumed in Turkey is milled white rice.

Q7. (Both Parties) Can the Parties provide the following information regarding Turkey's monthly average domestic prices of, separately, paddy, brown and milled rice, for the period from July 2003 to the end of 2006 (including estimates, as appropriate): (i) average prices for domestic production in the Turkish market; (ii) landed CIF prices; and, (iii) prices quoted by the Turkish Grain Board. Please indicate the source of your estimates and provide evidence, as appropriate.

(i) average prices for domestic production in the Turkish market

15. The United States was able to obtain prices for milled rice in Turkey, wholesale and retail, from Turkish representatives of the USA Rice Federation, the primary association of US producers and exporters, but was unable to obtain such prices for paddy and brown rice. Exhibit US-54 shows prevailing prices of imported rice (U.S. Calrose and Egyptian), as well as Turkish rice (Baldo and Osmancik), in March, July, and November for the four years requested.

(ii) landed CIF prices

16. Please see Exhibit US-55. These prices were obtained from the Turkish Statistics Corporation.

(iii) prices quoted by the Turkish Grain Board

17. Please see Exhibit US-56. The 2003/2004 data was obtained from the Turkish Rice Millers Association. The remainder of the data was obtained from the website of the Turkish Grain Board (TMO). The paddy procurement prices presented in this exhibit are for paddy rice with a milling yield rate of 59-60 per cent whole kernels which is the average milling rate for Turkish rice. The United States was unable to obtain paddy rice sales prices for osmancik for all four years, so that has not been included in the chart. The United States was unable to obtain monthly pricing data, so only annual pricing data is presented, although the United States understands that the prices quoted by TMO do not change on a monthly basis.

Q11. (United States) Can the United States please provide the source of data that it has used to determine relative average import cost of a tonne of rice as set out in paragraph 52 of its submission.

18. The $295 per metric ton price cited in paragraph 52 was a spot price for US Calrose paddy rice in late 2005 in the US market.[5] Upon further reflection, the United States decided it would be more accurate to use average prices for US exports and Turkish domestic rice in 2005, as explained in the US oral statement and presented in Exhibit US-52.

Q13. (Both Parties) In paragraph 4 of its closing statement during the first substantive meeting with the Panel, the United States referred to "a bilateral agreement between the European Union and Turkey [under which] the European Union has an annual quota of 28,000 tons of milled rice".

(a) Please provide the provisions of that agreement, relevant to the importation of rice into Turkey.

19. Please see Exhibit US-58 ("Decision Regarding Tariff Quota Imposition on Import of Certain Agricultural Products of European Community Origin," Official Gazette No. 23225, January 9, 1998). As provided in the EC Quota Arrangement, Turkey permits the duty free importation of 28,000 metric tons of milled rice from the European Communities into Turkey each year. Article 3 provides that Turkey's Foreign Trade Undersecretariat will issue an import permit that an importer must submit to Turkish Customs for the shipment to be admitted into Turkey, but it is unclear whether this is a reference to the Certificates of Control or to some other document.

(b) Explain whether European imports of rice into Turkey are treated differently from other imports.

[5] Exhibit US-57.

20. It is the understanding of the United States that in-quota imports of EC-origin rice are not subject to the restrictions and requirements imposed on imported rice and are permitted entry at any time during the year. The United States spoke with a representative of the Italian Rice Millers Federation this week, who confirmed that there are no restrictions on EC-origin rice that enters under the EC quota but that importers are required to purchase domestic paddy rice with respect to any imports of EC rice over the 28,000 metric ton annual cap. It is clear from Turkish import data that in-quota EC imports are treated differently because imports of EC-origin rice occur during periods when other imports have ceased. For example, during the three periods of time since September 10, 2003 when the TRQ has been closed (and thus only out-of-quota imports are possible) – September 10, 2003 through April 27, 2004, September-October 2004, and September-October 2005 – EC-origin rice has been able to enter Turkey, whereas imports from other major rice exporters, such as Egypt and the United States, suddenly cease completely or, at best, plummet to *de minimis* levels.[6] [7]

(c) More specifically, explain whether importers of European rice are required to obtain Certificates of Control in order to import rice into Turkey.

21. It is unclear to the United States from the terms of the EC Quota Arrangement whether importers of EC-origin rice are required to obtain Certificates of Control in order to import rice into Turkey.

Q14. (Both Parties) Can the Parties describe, in chronological order, the steps that are necessary to import rice into Turkey, in terms of the different documents that must be obtained and other formalities that have to be completed, identifying the authorities involved in each step. Please make reference to the relevant legal instruments and provide evidence where appropriate.

22. ***Imports of Rice Generally:*** An importer must complete a multitude of steps in order to import rice.[8] First, the importer must obtain a Certificate of Control from MARA, specifically from the Provincial Agricultural Directorate office in Ankara. To obtain the Certificate, pursuant to Article 2 of the 2006 Communiqué the importer must submit the Certificate application form, the pro forma invoice or invoice, and "other documents which may be asked for, depending on product, by the Ministry."[9] Further, the FTU website provides that "if the product to be imported is found to meet the criteria required," MARA will grant the Certificate.[10]

23. It is unclear to what specific documents the phrases "other documents which may be asked for, depending on the product" and "the criteria required" refer. Article 3 of the 2006 Communiqué appears to refer to the possibility that MARA may need to determine the compatibility of a product with human health and safety or animal and plant health. However, Article 2 of the Communiqué does not refer specifically to Article 3; rather, it is much broader.[11] As a result, Article 2 provides

[6] Turkish import data shows what appears to be a large shipment of Chinese rice in December 2003, which appears to be the lone instance where significant quantities of non-EC origin rice has entered Turkey while the TRQ was closed.

[7] In addition, Turkish import data reveals that, in September 2006, which was just after the TRQ "expired" and which marks the beginning of the Turkish rice harvest, rice imports once again fell to zero.

[8] This step-by-step outline of the importation process was provided to the United States by Turkish importers.

[9] Annex TR-1.

[10] General Assessment of the Regime Regarding Technical Regulations and Standardisation for Foreign Trade (27 May 2005) (www.dtm.gov.tr) (Exhibit US-43).

[11] And, as discussed below, Turkish importers claim that MARA does not request the phytosanitary certificate at the stage when it decides whether or not to grant the Control Certificate. Rather, MARA does not require the presentation of a phytosanitary certificate until the Provincial Agricultural Directorate that has

Turkey with sufficient flexibility to permit MARA to deny the Certificate if an importer does not provide with its Control Certificate application documentation from MARA demonstrating that the importer has purchased domestic paddy rice.

24. Second, assuming that the importer has actually obtained a Certificate of Control from MARA, it then would present the Certificate to the specific Turkish Customs office at the port where the importation is to take place and complete the required Customs form using the information contained in the Control Certificate.

25. Third, the importer then goes back to MARA a second time – specifically, to the Agricultural Provincial Directorate from the region where the port is located – and presents the Customs form and a phytosanitary certificate. If the Provincial Agricultural Directorate approves the importation (through analysis of product samples), the Directorate writes a letter granting permission for the importation.

26. Fourth, assuming that MARA approves the importation, the importer goes back to Turkish Customs a second time with the following documentation: the approval letter from the Provincial Agricultural Directorate, the invoice, the receipt for payment of the merchandise, a value declaration form from the exporter, the Control Certificate, the phytosanitary certificate, and if the payment for the merchandise has not been made in full, some documentation from the importer that it is acceptable to pay in instalments. All of these documents must be originals. Turkish Customs then gives the importer an invoice for the total duties owed. The importer can pay the duty at that time or through a wire transfer.

27. With the receipt of payment of the duties and the Customs form, the importer can go to the port and secure the release of the product.

28. Importers have informed the United States that Turkish Customs will not let the importer begin the process if it does not present a Control Certificate. If an importer decides to make contractual arrangements for the shipment before obtaining a Certificate of Control, as Torunlar did, the importer is taking a risk. If MARA does not issue a Certificate, the shipment will not be allowed to clear Customs and is destined for a bonded warehouse.

29. ***Imports of Rice under the TRQ Regime:*** Under the TRQ regime, the importation process is even lengthier. First, the importer must purchase domestic paddy rice.[12] This requirement has been tweaked over time but, as a general matter, the importer needs to purchase domestic paddy rice in specified quantities and obtain a receipt from the Turkish Grain Board documenting that the purchase has been made. The domestic purchase requirement has been modified over time in several respects. In the first TRQ opening (April 27, 2004 through August 31, 2004), importers could only purchase domestic paddy rice from TMO, and the amount of domestic paddy rice that was required to be purchased was not specified, at least not in the regulation.[13] In both the second (November 1, 2004

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jurisdiction over the port where the importation is to be realized asks for it. But this step only takes place after MARA has already granted the Control Certificate.

[12] The documents published in the Official Gazette allow importers to purchase domestic rice of any variety, but Letter of Acceptance 1795 confirms that the domestic purchase requirement can only be satisfied through the purchase of domestic paddy rice. Turkey did not appear to dispute this fact at the first substantive meeting. In this regard, the United States is submitting a revised translation of Letter 1795 to replace the current document labeled as Exhibit US-14. The language quoted by the United States in its first written submission was taken from this revised translation, which was done by a translator at the United States Department of State, Division of Translating Services. The United States inadvertently attached a different translation of this document with its first written submission, which is why the language quoted by the United States from Exhibit US-14 did not match the language in the exhibit as originally submitted. The United States regrets the error.

[13] Article 1 of the April 2004 Notification (Exhibit US-3).

through July 31, 2005) and third (November 1, 2005 through July 31, 2006) TRQ openings, importers could purchase domestic paddy from either TMO or Turkish producers and producer associations. While the precise quantities of rice that had to be purchased were specified, those amounts varied depending on the identity of the Turkish province from which the rice was purchased.[14]

30. Second, the importer needs to request that TMO provide a receipt documenting that the importer has purchased domestic paddy rice from either TMO or Turkish producers or producer associations.[15]

31. Third, the importer must apply to Turkey's Foreign Trade Undersecretariat (FTU) for an import permit and attach the TMO receipt to the application.[16] If FTU approves the importation, it will provide an import permit, which the importer must present to MARA when it applies for a Control Certificate.

32. Fourth, the importer must apply to MARA for a Certificate of Control.

33. Fifth, assuming that FTU grants an import permit and MARA issues a Certificate of Control, the importer would need to proceed through all the same steps outlined in the previous section ("Imports of Rice Generally"), with the addition of presenting the import permit to Turkish Customs.[17]

Q16. (Both Parties) Does Turkey's import system for rice affect imports from the United States in particular, or does it apply to all imports in the same way?

34. Turkey's import system for rice appears to affect all non-EC origin rice imports in the same way although, as the largest exporters of rice to Turkey, Egypt and the United States, are primarily affected by Turkey's restrictions on the importation of rice.

Q17. (United States) Please identify the main importers in Turkey of rice originating from the United States. Please also provide information as to the volumes these importers were importing, specifying whether they are importing (or attempting to import) at the MFN rate or under the TRQ and the problems they have faced when accessing the Turkish market.

35. The main importers of U.S.-origin rice are Torunlar, Akel, and Goze, but they may also import rice from other sources. All three of these companies have a large milling capacity, so they prefer to import US paddy rice.[18] Two other Turkish importers, Erdogan and Multigrain, import small quantities of U.S.-origin rice as well, and both companies have milling facilities. The United States was unable to obtain further information regarding ETM. Importers agreed that they would rather import US rice at the MFN rate if Turkey permitted it, which is confirmed by the repeated attempts of Torunlar, Mehmetoglu, and other importers to obtain Control Certificates outside the TRQ. However, the United States is unable to provide further information with respect to the remainder of the question. Please see the US answer to Question 62 for more information in this regard.

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[14] Article 1 of the September 2004 Regulation (Exhibit US-6) and Articles 1 and 2 of the September 2005 Notification (Exhibit US-11).

[15] Application Form Sample In Order to Benefit From the Tariff Quota and Receive Import License for the Imports of Domes Types of Paddy Rice and Rice, Items 8 and 9 (Exhibit US-11).

[16] See Article 2 of the April 2004 Notification (Exhibit US-3), Article 4 of the August 2004 Decision (Exhibit US-5), Article 4 of the September 2005 Decision (Exhibit US-10), and the Application Form (contained in Exhibit US-11).

[17] See Article 3 of the April 2004 Decree (Exhibit US-2), Article 4 of the August 2004 Decision (Exhibit US-5), and Article 4 of the September 2005 Decision (Exhibit US-10).

[18] The United States previously was a large exporter of milled rice to Turkey. It is our understanding that US rice exporters switched their exports from milled rice to paddy rice when Turkey lowered the tariff rate on paddy rice significantly below the tariff rate for milled rice.

Q18. (Both Parties) It would seem that in some respects Turkey's import regime for rice has changed since the initiation of this dispute before the WTO in November 2005. If this is correct, could the Parties specify:

(a) The nature of those changes, including their dates and relevant legal instruments.

(b) The specific reasons for these changes.

(c) The potential effects of these changes.

36. With respect to the TRQ regime, the most recent TRQ opening covered the period November 1, 2005, through July 31, 2006. (The United States requested consultations on November 2, 2005.) The relevant legal instruments for the third TRQ opening are the following:

– Decision of the board of ministers: Decree No. 2005/9315 related to the implementation of a tariff contingent on the import of certain types of paddy rice and rice types (Official Gazette, No. 25935, 13 September 2005);[19] and

– A notification related to the implementation of a tariff contingent on the import of certain paddy rice and rice types, from the Foreign Trade Undersecretariat (Official Gazette, No. 25943, 21 September 2005).[20]

Further, the Decision of the board of ministers: Decree No. 2004/7333 related to the management of quota and tariff contingent on import (Official Gazette, No. 25473, 26 May 2004) provided FTU with the legal authority to make this and earlier openings of the TRQ and is still in force.[21]

37. Turkey claims that the TRQ "expired" on July 31, 2006, and will not be re-opened. Yet the TRQ already has "expired" and been re-opened on two occasions, despite Turkey's statements to the contrary.[22] The advent of these panel proceedings may also help explain why Turkey has not yet re-opened the TRQ with domestic purchase since July 31, 2006.[23] In addition, the United States has been informed by the trade 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.

38. With respect to imports outside the TRQ, the 2006 Communiqué was issued on December 31, 2005 to replace the 2005 Communiqué. According to the trade, the Communiqué is re-published in the Official Gazette every year, and the provisions of the 2005 and 2006 versions of the Communiqué are essentially the same.

39. Re-issuance of the Communiqué did not affect MARA's decision not to grant Control Certificates outside the TRQ. In Letter of Acceptance 1304, dated July 29, 2005, Turkey's Minister of Agriculture accepted a recommendation to delay the start date for issuing Control Certificates "until a new policy is in place."[24] Turkey began to formulate its "new policy" in March 2006. In his March 24, 2006, letter to then-USTR Rob Portman, which was prompted by the establishment of this

[19] Exhibit US-10.
[20] Exhibit US-11.
[21] Exhibit US-4.
[22] *See, e.g.,* G/AG/R/41, para. 23 (February 17, 2005).
[23] *See* Exhibits US-21, 24, and 35-37.
[24] The United States was unable to obtain a copy of this document, but its contents are discussed in Letter of Acceptance 390 (Exhibit US-36).

Panel on March 17, 2006, Turkish Minister of State Kursad Tuzmen stated that "the control certificate will be issued *as of* April 1, 2006."[25] On the same day of Minister Tuzmen's letter to Ambassador Portman, MARA issued Letter of Acceptance 390, in which Minister Bakan accepted a recommendation to delay the start date for issuing Certificates until April 1, 2006 for both paddy and milled rice.[26] Thus, the ban on imports of rice outside the TRQ scheme was still in place on March 17, 2006 – the date the DSB established this Panel.

40. Based on Minister Tuzmen's letter and Letter of Acceptance 390, it appeared that, as of April 1, 2006, MARA would begin issuing Control Certificates without requiring importers to purchase domestic paddy rice under the TRQ. However, MARA apparently has continued to deny Certificates to importers who have applied for them.[27] This is likely due to the objections of Turkish producers decrying the intended change in policy.[28] (Such objections may have been what prompted Turkey's apparent reliance on a reference price system, but the United States is unable to provide the Letter of Acceptance establishing the reference price regime, and importers are apparently being informed orally by MARA of the new reference prices.)

41. Further, Letter 390 states that the "closing date" to issue Control Certificates will be August 1, 2006, and that the ban on issuing Control Certificates to import rice during the harvest season "will be suitable to be kept in place." This is borne out by Turkish import data, which show that in September 2006, rice imports into Turkey ceased.[29]

Q21. (United States) In paragraphs 100 and 101 of its first submission, the United States has argued that Turkish regulations restrict the issuance of import licenses under the tariff-rate quotas (TRQs) to certain categories of persons, with the result that only domestic rice producers, and principally those with milling capacity, are eligible to import rice. The United States has referred to this as the "eligibility criteria". Can the United States clarify whether it views this argument as an additional and separate claim.

42. Turkey's requirement that only those entities who purchase domestic paddy rice may import rice into Turkey is an "other measure" imposing a "restriction . . . on importation" that is inconsistent with Article XI:1 of the GATT 1994. This claim of inconsistency is separate from the US claims regarding the domestic purchase requirement itself, which are concerned with the disparate treatment of imported and domestic products.

43. Specifically, Turkey restricts to the class of persons or entities that may import rice into Turkey; only those importers who purchase domestic paddy rice are eligible to import under the TRQ regime. First, the requirement is an "other measure" under Article XI:1. As noted in paragraph 57 of the US first written submission, the term "other measure" has been interpreted quite broadly by past panel and Appellate Body reports. The *India – Autos* panel called it a "broad residual category" that was reflective of the broad scope of coverage of Article XI:1. The limitation on eligible importers to those who purchase domestic paddy rice acts as a restriction on importation, and it is not a quota, export or import license, duty, tax, or charge.

44. In practice, this limitation on eligibility restricts eligible importers to Turkish rice millers. Paddy rice cannot be eaten. It must be milled before it can be consumed. Packers, retailers, and consumers do not have milling capacity. As they cannot mill the rice, it would be useless for them to purchase it. Only those with milling capacity purchase paddy rice; thus, millers are the only entities

[25] Exhibit US-35 (emphasis added).
[26] Exhibit US-36.
[27] *See* Exhibits US-22, US-39, US-40, US-41, US-42, and US-44.
[28] *See* Exhibits US-21 and US-24.
[29] *See* the chart in Exhibit US-53.

likely to be eligible to import rice, given the domestic purchase eligibility criterion. Not coincidentally, Torunlar, Akel, and Goze, the three largest Turkish importers of US rice, all have large milling facilities, and the United States is unaware of any Turkish importers of US rice that do not have milling facilities. Thus, the limitation on who may import rice into Turkey to those importers who purchase paddy rice acts as a restriction on importation and, as a result, breaches GATT 1994 Article XI:1.

Q22. (United States) For each of the measures that the United States has challenged in the current proceedings, please identify the relevant time periods that the Panel should consider in its analysis.

45. With respect to the measures that the United States has challenged in this proceeding, the key point in time is the state of the measures as they existed on March 17, 2006, when the DSB established this Panel and the Panel's terms of reference. The Panel should consider evidence from any time period that would aid its analysis of the measures as they existed on that date.

46. With respect to Turkey's failure to grant import licenses, or Control Certificates, at the over-quota rates of duty, the United States has presented evidence of Letters of Acceptance covering the period September 10, 2003 through August 1, 2006. With respect to the domestic purchase requirement, the United States has presented evidence that the TRQ regime, which features the domestic purchase requirement, was first instituted on April 20, 2004. The TRQ regime is still in place, as the 1995 Decree and the May 2004 Decree remain in force,[30] and thus far has been opened on three separate occasions, the most recent opening covering the time period November 1, 2005 through July 31, 2006. The United States also has presented evidence in the form of court documents, Control Certificate rejection letters, and press clippings dating from this period, all of which the panel should consider in its analysis of the WTO-consistency of the measures as they existed on March 17, 2006.

Q25. (Both Parties) Can the "letters of acceptance" constitute a valid legal basis to override provisions contained in Decrees and Communiqués issued by the Turkish Foreign Trade Undersecretariat (FTU)?

47. The Letters of Acceptance do not necessarily override the terms of the FTU Communiqués. It is not clear that importation is supposed to be automatic even under the Communiqués. Pursuant to the 2006 Communiqué, an importer wishing to obtain a Certificate of Control from MARA must submit the Certificate application form, the pro forma invoice or invoice, and "other documents which may be asked for, depending on product, by the Ministry."[31] The 2005 Communiqué uses the same language, as noted in paragraph 20 of the US first written submission.[32] Further, the FTU website provides that "if the product to be imported is found to meet the criteria required," MARA will grant the Certificate.[33]

48. This language is broad enough to provide MARA with the flexibility to "ask for" other documents on a product-by-product basis. There is nothing in the FTU Communiqués limiting the type of documents that MARA can request. Letter of Acceptance 1795 makes clear that MARA will not grant Control Certificates to importers who do not purchase domestic paddy rice. Under the TRQ regime, importers need to document such purchases to FTU by presenting proof of purchase issued by the Turkish Grain Board in their applications for an FTU import permit. Receipts documenting the

[30] *See* paragraphs 39 and 42 of the US first written submission and Exhibit US-4.
[31] *See* Article 2 of the 2006 Communiqué (Annex TR-1).
[32] The US translation of this phrase is "other documents that may be required."
[33] General Assessment of the Regime Regarding Technical Regulations and Standardisation for Foreign Trade (27 May 2005) (www.dtm.gov.tr) (Exhibit US-43).

purchase of domestic paddy rice certainly constitute "other documents which may be asked for, depending on product, by the Ministry."

49. Further, paragraph 11 of the 2005 and 2006 Communiqués, which are identical, provide that, "provisions of other applicable ordinances shall prevail on all other matters not treaded [sic] in the present Notification." FTU has no role in the issuance of Control Certificates, which is administered by MARA, or in the mechanics of fulfilling the domestic purchase requirement, which is overseen by the Turkish Grain Board. The Letters of Acceptance are Ministerial approvals that are directly applicable to these matters and, therefore, prevail over the Communiqués.

50. Even if the Letters of Acceptance were in conflict with the Communiqués, the Letters bar the issuance of Control Certificates on their face. Therefore, the Letters constitute a prohibition or restriction on importation under Article XI:1 of the GATT 1994 whether or not Turkey treats the Letters as legally binding and overriding the Communiqués. Moreover, the United States has provided ample evidence that MARA interprets the Letters as overriding the Communiqués. As shown in Exhibit US-31, counsel for MARA argued in Turkish domestic court that the Letters precluded MARA from issuing any Control Certificates for the periods specified and cited the Letters as the sole basis under which MARA could not grant a Certificate to Torunlar. When another importer, Mehmetoglu, requested a Control Certificate in April 2006, a MARA official responded that "it is not possible to prepare a control certificate according to our laws and regulations."[34] This language can be interpreted in no other manner than as a general statement referring to the issuance of Control Certificates as a whole, not to the denial of a Control Certificate in that particular instance.

51. Letters of Acceptance 1304 and 390 confirm that this is the case. Letter 390, the subject of which is "[i]mport of rice and paddy rice," notes that, pursuant to Letter 1304, "it was decided not to issue any control certificate until a new policy is in place." The Letter stated that it was necessary to "finalize the new policy on rice/paddy rice import as soon as possible" and this document, dated March 24, 2006, apparently contained that new policy. The DSB established the panel in this dispute on March 17, 2006, or one week prior to the date that Minister Eker signed the Letter.

Q26. (United States) In paragraph 80 of its first submission, the United States states that the so-called "letters of acceptance", "apply to all importers seeking a Certificate of Control from MARA in order to import rice" and that they are "Ministerial Decisions taken by the Turkish Minister of Agriculture [that] are binding under Turkish law".

(a) Can the United States elaborate on its assertion that the so-called "letters of acceptance" "apply to all importers seeking a Certificate of Control from MARA in order to import rice".

52. At the time of the US first submission, the United States understood that MARA only required importers to obtain a Control Certificate for rice imports outside the TRQ regime. Thus, this statement was made in the context of discussing the import ban with respect to MFN trade. The United States has presented substantial evidence, including the Letters of Acceptance, rejection letters, court documents, and press reports, establishing that such a ban exists, and that there was a conscious decision by Turkey's Minister of Agriculture to implement such a ban. Turkey has not provided any documentary evidence to rebut these documents.

53. In its first written submission, Turkey has asserted that importers also are required to obtain Control Certificates for in-quota imports, and that it is issuing such documents freely. As mentioned in its oral statement at the first substantive meeting, the United States appreciates the clarification from Turkey, but notes that this requirement makes the TRQ regime more discretionary than the

[34] Exhibit US-22.

United States previously had understood, as importers are required to obtain two import licenses and appear before four Turkish government agencies in order to import rice.

54. In any event, Letter of Acceptance 1795 clarifies that MARA will not issue Certificates to importers who do not purchase domestic paddy rice, which is a requirement for in-quota importation, so the Letters only prohibit Control Certificate issuance outside the TRQ regime. And Turkey's Annex 20 confirms that Turkey distinguishes between Certificates issued for MFN trade and Certificates issued under the TRQ regime by laying out raw numbers of Certificates that allegedly have been granted and distinguishing between Certificates granted for in-quota trade and Certificates granted for out-of-quota trade. Therefore, even if Turkey is issuing Control Certificates under the TRQ, this has no bearing on the issue of Control Certificate issuance at the over-quota rates of duty.

55. The United States also is awaiting clarification from Turkey as to whether importers of EC-origin rice need to obtain Control Certificates, as such imports are subject to a separate quota regime established pursuant to a bilateral agreement between Turkey and the European Communities.

(b) Can the United States provide evidence to support its assertion that the so-called "letters of acceptance" "are binding under Turkish law".

56. In the first US written submission, oral statement, and answers to previous questions, the United States has provided evidence that the Letters of Acceptance are binding under Turkish law. The Letters constitute Ministerial approvals of Turkey's Minister of Agriculture, who signs each document to indicate his assent, and are clear on their face that no Control Certificates are to be granted for specified periods of time.

57. MARA's interpretation of these documents has conformed with the plain meaning of the text of these documents. As previously mentioned, MARA's lawyer, arguing in Turkish domestic court to deny a Control Certificate to a petitioning importer, cited the Letters of Acceptance as precluding MARA from issuing any Control Certificates for the periods specified and as the exclusive legal basis under which MARA could not grant a Certificate to the importer. The importer in question, Torunlar, which is one of the primary importers of US rice, petitioned MARA unsuccessfully for a Control Certificate on three separate occasions in 2003 and 2004 before finally taking its case to court. MARA's interpretation of the Letters of Acceptance, as reflected in its arguments before a Turkish tribunal, was not case specific but applied to all importers applying for Control Certificates. MARA confirmed this interpretation in April 2006 when, in responding to another importer's request for a Control Certificate, it stated that "it is not possible to prepare a control certificate according to our laws and regulations."[35] As discussed in the answer to Question 25, Letters of Acceptance 390 and 1304 confirm that the denial of Control Certificates is a blanket prohibition covering all imports of rice.

58. Turkey's own import data confirms the existence of an import ban covering MFN trade. Since September 10, 2003, there have been three periods of time where the TRQ was closed: (1) September 10, 2003 through April 27, 2004; (2) September-October 2004; and (3) September-October 2005. Thus, during those periods of time, the only way to import rice into Turkey would have been at the MFN rates. The import data clearly shows four clear trends:

– With one exception, imports of non-EC origin rice during those periods were either zero or at de minimis levels;

[35] Exhibit US-22.

– Rice imports were at high levels and/or rising in the months immediately preceding these periods, bottomed out during these periods, and resumed immediately following those periods at high levels;

– The TRQ is closed every year over the September/October period. Not coincidentally, these are the first two months of the Turkish rice harvest and, therefore, the time when Turkey would most want to protect its domestic producers by prohibiting importation; and

– During these periods, rice imports from Egypt, the United States, and other countries appeared to be at *de minimis* levels or, more commonly, zero, whereas rice imports from the European Communities continue unabated. EC imports are governed by a separate quota regime and are not subject to the restrictions challenged by the United States in these panel proceedings.

The import data thus also supports that the Letters of Acceptance are binding under Turkish law. To the extent Turkey is claiming that it ignores the Letters of Acceptance, the United States would note that, even if that were accurate (and the evidence indicates that it is not accurate) a failure to enforce a measure does not render that measure consistent with the WTO Agreement.[36] The Letters of Acceptance are on their face import restrictions and as such inconsistent with the WTO Agreement.

Q38. (Both Parties) In paragraph 25 of its first written submission, Turkey asserts that "[a]n approved Certificate of Control for rice importation will be valid, contrary to the claims from the United States, for a period of twelve months on the basis of Article 9(c) of the Communiqué No. 2006/05."

(b) Can the United States comment on this assertion.

59. The United States appreciates Turkey's clarification that "chapters" in Article 9(c) refers to HTS chapters, and not to chapters within the individual Annexes, and thus, that Control Certificates for rice importation can be valid for up to twelve months, not four months. Nevertheless, the validity period – be it twelve months or twelve years – is irrelevant as Turkey's Minister of Agriculture has ordered that Certificates are not to be granted to importers that do not purchase domestic paddy rice. Further, Turkish regulations do not preclude MARA from altering the validity periods for Control Certificates. Article 9 of the Communiqués states that the validity periods "shall not be extended." However, Article 9 is silent on the question of whether MARA can *shorten* the validity periods.

Q42. (United States) In paragraph 62 of its first submission, the United States claims that "the 2005 Communiqué is clear that the Certificate is a document that Turkey's Ministry of Agriculture and Rural Affairs (MARA) requires as a condition for permitting importation; there is no mention of Turkish customs in the Communiqué." Could the United States address the situation before the entry into force of "the 2005 Communiqué" (Communiqué 25687).

60. The United States was unable to obtain a copy of the 2003 Communiqué, but the 2004 Communiqué appears to be essentially the same as the later Communiqués. We are in the process of translating this document, and will provide it with our rebuttal submission.

Q43. (United States) In paragraph 55 of its first submission, the United States asserts that the Turkish Foreign Trade Undersecretariat (FTU) "... will grant an import licence to import under the TRQ ... without requiring that an importer obtain a Certificate of Control". In contrast,

[36] Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted September 26, 2000.

Turkey states in paragraph 33 of its first submission that "[i]n addition to the import licences obtained for purposes of quota allocation, of course, importers also had to comply with all other customs obligations and requirements, in particular the presentation and approval by MARA of the required Certificates of Control".

(a) Can the United States demonstrate that Certificates of Control were not required to import rice inside the TRQ?

(b) Can the United States please provide evidence that imports inside the TRQ did not require a Certificate of Control?

61. In order to answer more fully the panel's questions, the United States has attempted to obtain additional evidence regarding in-quota trade. However, as discussed in the answer to Question 62, importers in Turkey have, for the most part, been unwilling to provide any documentation on this matter since the panel meeting.

62. The United States has not been able to identify provisions in any of the documents comprising the TRQ regime mandating that importers obtain Certificates of Control as a condition upon importation, but Turkey has now clarified that a Control Certificate is required under the TRQ. As previously discussed, this raises additional concerns about the discretionary nature of the TRQ regime because importers need to obtain two import licenses – a Control Certificate from MARA and an import permit from FTU – and obtain approval from four different Turkish government agencies – TMO, FTU, MARA, and Customs – in order to import rice into Turkey. Further, as previously discussed, the fact that importers may be required to present a Certificate of Control for imports within the TRQ does not rebut the US evidence that Turkey does not grant Certificates for imports at the over-quota rates of duty.

Q45. (Both Parties) In paragraph 72 of its first submission, the United States asserts that "Turkey fails to grant Certificates of Control 100 per cent of the time" and, similarly, that "Turkey never grants Certificates of Control."

(a) Can the United States provide arguments to support its assertion and specify the exact period to which it refers.

63. Pursuant to Ministerial approvals known as Letters of Acceptance, Turkey does not grant Control Certificates to import rice outside the TRQ. The cited statements were made in the context of the over-quota rates of duty and under the belief that MARA did not require Control Certificates for in-quota imports. Turkey has stated that it does, in fact, require Control Certificates under the TRQ regime and the EC Quota Arrangement. However, this does not alter the fact that Turkey's Minister of Agriculture repeatedly has ordered MARA personnel not to grant any Control Certificates which, as clarified by Letter of Acceptance 1795, refers to situations where importers attempt to import without purchasing domestic paddy rice, i.e., outside the TRQ.

64. The time period to which the United States refers is September 10, 2003, through the present. The first Letter of Acceptance of which the United States is aware was issued on September 10, 2003. In that Letter, the Minister of Agriculture accepted a recommendation from TMO to delay the start date on which MARA would grant Control Certificates. Following that Letter were at least five additional Letters of Acceptance with similar terms, which ensured that Certificates of Control would not be granted until April 1, 2006, or two weeks after the DSB established the panel in this dispute. The experiences of Mehmetoglu and ETM confirm that Turkey has continued to deny Certificates of Control since April 1.

Q46. (United States) In paragraph 67 of its first submission, the United States notes that a Minister of State from Turkey, in a letter to the US Trade Representative, dated 24 March 2006 pledged that "the control certificate will be issued as of April 1, 2006". Could the United States please elaborate on its related claim according to which, by this phrase, the Minister from Turkey would have "acknowledged that Certificates of Control were not being granted" and would have "confirmed that Turkey had not been issuing Certificates of Control up to that point in time".

65. In his March 24, 2006 letter, Minister Tuzmen stated that Control Certificates "*will be* issued *as of* April 1, 2006" (emphasis added). The logical implication of Minister Tuzmen's statement is that Control Certificates were not being issued at that time, but that Turkey would begin ("will be") issuing such Certificates beginning on ("as of") April 1, 2006. This is confirmed by the context in which this letter was provided to the United States.

66. As discussed in the US first written submission, the United States has been expressing, in bilateral discussions as well as in WTO committee meetings, its concern that MARA did not issue Control Certificates for some years. On November 2, 2005, the United States requested WTO consultations with respect to Turkey's restrictions on the importation of rice, including Turkey's failure to grant import licenses to import rice outside the TRQ. Consultations failed to resolve the dispute. As a result, on February 17, 2006 the United States made its first request to establish a panel to review the matter, which included Turkey's failure to issue licenses outside the TRQ. The DSB established the panel on March 17, 2006. On March 24, 2006 – one week after the DSB established the panel in this dispute – Minister Tuzmen presented Ambassador Portman with the cited letter stating that Turkey would, "as of April 1, 2006," issue Control Certificates.

67. Also on March 24, 2006, Letter of Acceptance 390 was issued. The Letter noted that on July 29, 2005, "it was decided not to issue any control certificate until a new policy is in place." The Letter further noted that it had been necessary to solicit the views of the Turkish Grain Board in order to finalize a new policy as soon as possible. This Letter was apparently that new policy, meaning that control certificates were not being issued as of that date. The last paragraph of the Letter provided the following:

> Taking into account the developments at WTO, I am asking your approval to rearrange the dates to issue control certificates to import rice/paddy rice . <u>The start date to issue certificates will be April 1, 2006</u> ... .[37]

68. This alleged "start date" to issue certificates is consistent with Minister Tuzmen's statement of the same day that "the control certificate will be issued as of April 1, 2006." Moreover, the use of the term "start date" further confirms that MARA was not issuing Control Certificates at the time of Minister Tuzmen's letter. Lastly, an April 28, 2006, letter from Mehmetoglu to MARA requesting a Control Certificate notes that a "letter numbered 14060 and dated 25.04.2006" – perhaps another Letter of Acceptance – noted that the "preparation period of control certificate for rice imports has <u>started</u> ."[38]

69. The United States has presented evidence that, in fact, MARA did not start issuing Certificates as of April 1, 2006, as it had stated it would, perhaps because of intense domestic industry and importer opposition. Nonetheless, MARA's stated intent to "start" issuing Control Certificates as of April 1, 2006, makes clear that MARA was not issuing Control Certificates to import outside the TRQ prior to that date.

[37] Exhibit US-36 (emphasis added).
[38] Exhibit US-42 (emphasis added).

Q47. (United States) In paragraph 72 of its first submission, referring to Turkey's alleged failure to grant Certificates of Control, the United States refers to the case of an importer who attempted to obtain a Certificate of Control back in 2003 and was still waiting for a response from Turkey's Ministry of Agriculture and Rural Affairs (MARA). Could the United States identify other cases in which MARA has denied or not approved importers' applications for Certificates of Control to import rice outside the TRQ?

70. As discussed further in response to Question 63, four Turkish importers – Torunlar, Mehmetoglu, Goze, and Akel – account for approximately 90 per cent of all imported rice into Turkey. The United States and Egypt are the two largest exporters of rice to Turkey.

71. Torunlar is one of the major importers of US rice into Turkey. The case referenced in paragraph 72 of the US first written submission, and elaborated upon in paragraphs 28-31 of that submission, relates to Torunlar. As discussed in the US submission, Torunlar applied to MARA for a Control Certificate to import rice outside the TRQ three times between August 2003 and January 2004, but MARA would not grant the Certificate. Torunlar was forced to file suit in Turkish Court to try to obtain the Certificate.

72. The United States understands that Mehmetoglu is the major importer of Egyptian rice into Turkey. As discussed in paragraphs 35-36 of the US first written submission, Mehmetoglu heard about Minister Tuzmen's announcement that Control Certificates would be issued as of April 1, 2006, and decided to submit an application on April 10, 2006. After not hearing back from the Provincial Agriculture Directorate, Mehmetoglu sent several letters to MARA complaining about the lack of action on its application, noting that provincial officials had informed the company that they had been orally instructed not to provide Certificates, and requesting an explanation for why its application would not be granted. On May 1, 2006, the Provincial Agriculture Directorate provided the explanation that Mehmetoglu had requested, namely that "it is not possible to prepare a control certificate according to our laws and regulations."

73. Subsequent to the first panel meeting in this dispute, the United States has learned that Mehmetoglu had applied to MARA for Control Certificates to import milled rice outside the TRQ on three other occasions in 2005 and 2006. When MARA refused to grant its applications, Mehmetoglu filed three separate lawsuits in Turkish court in order to obtain a Control Certificate. Two of those lawsuits remain pending but, in one case, the court issued a decision in favor of the government's position that it could not issue Control Certificates. The court's opinion cites as grounds for its decision two Letters of Acceptance: Letter of Acceptance 1795, dated December 30, 2004 (Exhibit US-14), and Letter of Acceptance 1304, dated July 29, 2005, which provided that Control Certificates would not be issued during the time periods in which Mehmetoglu requested them. The United States has obtained the relevant court documents, but is still in the process of translating them. We will provide the translated documents and further detail on their contents with the US rebuttal submission.

74. A representative from Akel, another Turkish importer that imports rice mostly from the United States, informed US officials that it also applied for Control Certificates, but its applications were not granted. A representative of Goze, another importer of US rice, informed US officials that it did not apply for a Control Certificate because it knew that MARA was not granting any Control Certificates without domestic purchase. Finally, as discussed in paragraph 37 of the US first written submission, another Turkish importer, ETM, also tried to obtain a Control Certificate in April 2006 after Minister Tuzmen's announcement that it would begin issuing Certificates, with the same result as Mehmetoglu and Akel.

Q48. (United States) In paragraph 2 of its first submission, the United States alleges that "[i]mporters who have applied for licenses often wait for months or even years for a response to their applications, and if they do receive a response, their license applications are denied with

little reason (e.g., spelling errors) or denied with no reason provided at all." Please provide additional information relating to the factual claim that importers who have applied for Certificates of Control often wait for months or even years for a response to their applications, as well as other instances where this treatment has occurred.

75. Torunlar, one of the primary importers of US rice into Turkey, applied for a Control Certificate in August 2003. More than two years later, on December 12, 2005, Torunlar sent a letter to the Provincial Directorate of Agriculture in which it continued to plead is case for a Control Certificate. During the intervening period, Torunlar made three attempts to apply for a Certificate. As discussed in paragraph 28 of the US first submission, MARA rejected the first request because certain documents allegedly were missing. MARA rejected the second request due to alleged spelling errors. MARA rejected the third request in September 2004 – more than eight months after Torunlar first applied for a Certificate – without providing any explanation for the rejection.

76. Mehmetoglu, one of the primary importers of Egyptian rice, has applied for a Control Certificate to import outside the TRQ at least three times in 2005 and 2006, and none of those applications have been granted. MARA rejected one of Mehmetoglu's requests on May 1, 2006, but only after Mehmetoglu sent three letters to MARA demanding an explanation for the delay in the issuance of the Control Certificate. As noted in the US response to Question 47, the United States has obtained additional documentation with respect to Mehmetoglu's other requests for Control Certificates, and subsequent lawsuits, and will provide that information and additional argumentation in the US rebuttal submission.

77. The United States is aware of other instances where MARA has not acted on importer applications for Control Certificates, some of which are discussed in the answer to Question 47. However, as elaborated upon in response to Question 62, most of the importers that the United States has contacted have been unwilling to provide additional documentation since the first panel meeting. Thus, the United States is unable to provide additional documentary evidence with respect to other importers' experiences with the Control Certificate application process. Nevertheless, the general rule appears to be that, if an importer does apply for a Control Certificate, MARA will not respond to the application, either at all, or in a timely fashion, and if it does respond, the application will be rejected.

Q49. (Both Parties) During the first substantive meeting, Turkey asserted that once an importer obtains a Certificate of Control, the actual importation depends on market-related factors, such as relative exchange rates, demand, prices, etc.

(a) Can the United States comment on this point?

78. Turkey's Minister of Agriculture provides that no Control Certificates are to be granted at the over-quota rates of duty. However, assuming that Control Certificates were granted, Turkey's assertion would have been correct. Market-related factors would have been a part of importers' decision making if trade were not restricted. For example:

– The United States had a record high medium grain crop during the August 2004/September 2005 marketing year. These abundant supplies and lower US prices coincided with a continued drought in Australia resulting in nearly record US exports of medium grain rice over this period. The US stocks to use ratio of 22 per cent for medium grain rice during that marketing year indicates that the United States could have exported even larger volumes than it did if importation was not de facto restricted to a small group of importers and if entities in Turkey could have made purchasing decisions based on market-related factors. Turkey showed no import

response to lower prices because importers could not obtain the necessary Control Certificates.

– Australia had been a regular supplier to Turkey prior to the imposition of the import ban in mid-September 2003. In 2005/2006, Australian exports rebounded from drought the previous marketing year. However, Turkey did not return as a customer.

– Egypt also had significantly larger exportable supplies during the time period under examination by the Panel, due to expanded area planted paired with the highest field yields of any rice producing country in the world. Nevertheless, Turkish imports still showed months of zero imports from one of their largest suppliers.

79. The fact that Turkey's Annex 20 shows a wide differential in 2003 and 2006 between Control Certificates granted and actual imports is not reflective of a lack of competitiveness but rather the existence of the import restrictions raised by the United States in these panel proceedings. In Exhibit US-59, the United States has presented the data from Annex 20 in graphical form. In 2003, the pace of Turkish imports was tracking the volume of outstanding Control Certificates at pace – at least in January through early-September 2003 – before imports were halted. The most likely explanation as to why realized imports fell short of Control Certificate volumes in 2003 was Turkey's decision, pursuant to Letter of Acceptance 964, to prohibit the issuance of Control Certificates as of September 10, 2003. Thus, rice imports were prohibited for nearly four months, or one third of the calendar year. In 2004 and 2005, realization rates were very high because, according to Turkey's import data, virtually all imports were within the TRQ regime. By contrast, Control Certificates covering nearly 1 million tons in 2006 are grossly out of line with actual imports through September 2006 and outpace trade-to-date by nearly 500 percent. The United States cannot explain this discrepancy and agrees with Korea that Turkey needs to provide an explanation.

Q50. (Both Parties) Under what circumstances, or on what grounds, if any, would Turkey's Ministry of Agriculture and Rural Affairs (MARA) not issue a Certificate of Control?

80. Pursuant to the Letters of Acceptance, MARA does not have any legal authority to issue Certificates of Control to importers who do not purchase domestic paddy rice. Each Letter spells out explicitly that Turkey's Minister of Agriculture accepts a recommendation from TMO not to grant such Certificates for a particular period of time and provides Ministerial approval to "delay" the start date for issuing such Certificates. MARA considers itself to be bound strictly by these Letters. When Torunlar petitioned the 1st Administrative Court of Ankara to force MARA to issue a Control Certificate, MARA's counsel cited these Letters as the sole legal basis for its failure to issue a Certificate. When Mehmetoglu applied for a Certificate in April 2006, the Provincial Agriculture Directorate replied that it was not possible to issue a Certificate under Turkish laws and regulations. When Mehmetoglu sued MARA in Turkish court to force the Ministry to issue a Control Certificate without domestic purchase, the Court issued an opinion in favor of the government, citing the Letters of Acceptance as the legal basis for rejecting the Control Certificate applications. Letter of Acceptance 1795 confirms that the failure to issue Control Certificates only applies to importers attempting to import rice outside the TRQ regime, i.e., without purchasing domestic paddy rice.

81. Turkey has clarified that it does, in fact, grant Control Certificates under the TRQ regime and to importers of rice from the European Communities, which is governed by a separate quota regime than rice from other sources. Nonetheless, this does not alter the fact that Turkey's Minister of Agriculture has ordered officials of his ministry not to grant any Control Certificates to importers who do not purchase domestic paddy rice, i.e., outside the TRQs. And, as the United States mentioned in paragraph 24 of its oral statement, if Turkey requires importers under the TRQ regime to obtain a Control Certificate, in addition to the import permit already required by FTU, the TRQ regime is even more discretionary than the United States previously understood.

Q51. (United States) In paragraph 71 of its first submission, the United States claims that "Turkey did not grant [Certificates of Control] at all for a period of over 2 ½ years and is still not granting them." Could the United States please specify the exact period(s) during which Turkey allegedly did not grant any Certificates of Control. Please identify the reason provided in each case when there was a formal rejection.

82. The time period referenced in paragraph 71 – "over 2 ½ years" – is September 10, 2003 through April 1, 2006. The first Letter of Acceptance of which the United States is aware was issued on September 10, 2003. In that Letter, the Minister of Agriculture accepted a recommendation from TMO and provided Ministerial approval to delay the start date on which MARA would begin to grant Control Certificates. Following that Letter were at least five additional Letters of Acceptance with similar terms, which ensured that Certificates of Control would not be granted until April 1, 2006, or two weeks after the DSB established the panel in this dispute.

83. The United States has been informed by the trade that importers knew that MARA was not granting Certificates so many did not bother applying for them. Those who did apply for Certificates either had their applications rejected or did not receive a response after waiting months or even years. As elaborated upon in the US response to Question 62, most of the importers that the United States has contacted have been unwilling to provide additional documentation on this matter since the panel meeting. However, the evidence the United States has provided thus far makes clear that Turkey does not, consistent with the plain language of the Letters of Acceptance, grant Certificates of Control for imports outside the TRQ (i.e., without domestic purchase):

- In Torunlar's case, MARA rejected Torunlar's first request because certain documents allegedly were missing, the second request due to alleged spelling errors, and the third request without explanation.

- One of Mehmetoglu's requests was rejected on the grounds that "it is not possible to prepare a control certificate according to our laws and regulations." In the correspondence with MARA, Mehmetoglu makes reference to conversations between the importer and MARA in which MARA officials said that they had been orally instructed not to provide Control Certificates. As previously mentioned, the United States will provide further information on Mehmetoglu's other Control Certificate requests and related court documentation in the rebuttal submission.

- ETM's request for a Control Certificate was not granted, but was never formally rejected. The company says that it was informed orally that no documents were missing, yet "based on the verbal instructions of the Ministry's Undersecretariat, the preparation of documents were stopped."[39]

84. Turkey has clarified that it does, in fact, grant Control Certificates under the TRQ regime and to importers of rice from the European Communities. (Imports of EC-origin rice are governed by a separate quota regime than is rice from other sources, and a representative of the Italian Rice Millers Association has confirmed that in-quota imports are not subject to any of the restrictions and requirements being imposed by Turkey on other imports.) Again, this information does not alter the fact that Turkey's Minister of Agriculture repeatedly has ordered officials of his ministry not to grant any Control Certificates which, as clarified by Letter of Acceptance 1795, applies to importers attempting to import without purchasing domestic paddy rice, i.e., outside the TRQs.

[39] Exhibit US-44.

Q52. (United States) In paragraph 26 of its first written submission, Turkey asserts that "Certificates of Control have been systematically and regularly approved on a non-discriminatory basis since the entering into force of 'The Regime for Technical Regulations and Standardization for Foreign Trade' in 1996." Can the United States comment on this assertion.

85. The United States has only presented documentation concerning this matter from September 10, 2003, to the present. Rice exporters had raised concerns regarding Turkey's seasonal import ban prior to that date, but the United States has not submitted evidence on this point. From September 10, 2003, onward, however, the United States has provided evidence contradicting Turkey's assertion that it is granting Control Certificates. As previously discussed, pursuant to the explicit terms of the Letters of Acceptance, Turkey does not grant Control Certificates to import rice outside the TRQ.[40] It did not grant Certificates from September 10, 2003, through the date of panel establishment and has yet to provide any evidence that it is granting such Certificates now. In fact, the United States presented evidence in the form of correspondence between importers (Mehmetoglu and ETM) and news reports demonstrating that Turkey has continued to deny Certificates of Control since April 1, and the court documents from the Mehmetoglu litigation will provide further confirmation that MARA is not issuing Control Certificates.

Q56. (United States) In paragraph 63 of its first submission, the United States asserts that the Certificates of Control would in any event be a prohibition or restriction on importation that is made effective by an "other measure" within the meaning of Article XI:1 of GATT 1994. Please elaborate on what grounds the United States argues that the Certificates of Control and the alleged denial thereof can be considered an "other measure" for purposes of the application of Article XI:1 of GATT 1994.

86. As noted by the United States in its first submission, the range of measures covered by Article XI:1 of the GATT 1994 is broad.[41] Other than duties, taxes, or other types of charges, WTO Members are not permitted to employ any prohibition or restriction on imports whether through quotas, import licenses, or "other measures." Past panels have also interpreted Article XI:1 as covering a broad scope of measures.

87. Turkey's prohibition on MFN trade in rice is made effective through MARA's decision not to grant import licenses, or Control Certificates, for importers who do not purchase domestic paddy rice. The blanket prohibition on the issuance of Control Certificates is operationalized through the Letters of Acceptance (which are Ministerial approvals to delay the start date for issuance of Control Certificates), substantiated by the court documents, rejection letters, and newspaper articles submitted by the United States, and borne out by Turkey's own import data.

88. If the panel were to find that Control Certificates are not import licenses for purposes of Article XI:1 of the GATT 1994, the United States believes that MARA's failure to issue Control Certificates constitutes an "other measure" for such purposes. On its face, the term "other measures" is extremely broad and covers any measure other than quotas, import or export licenses, duties, taxes, or other charges. Read in context, the term "other measures" covers any other type of measure that a Member could take that would prohibit or restrict imports, other than those measures specifically mentioned in Article XI:1.

89. In order to import rice at the over-quota rates of duty, an importer must obtain a Control Certificate from MARA. Turkey's Minister of Agriculture decided not to issue such Certificates, as

[40] As previously mentioned, Turkey has clarified that Control Certificates are granted under the TRQ regime and the EC Quota Arrangement.

[41] See paragraphs 57 and 63 of the US first written submission.

evidenced by the Letters of Acceptance and the rest of the documentary evidence presented by the United States. MARA's failure to issue such Certificates blocks imports of rice outside the TRQ regime. Accordingly, Turkey's failure to provide importers with Control Certificates outside the TRQ is an "other measure" amounting to a prohibition or restriction on importation, and thereby is in breach of Article XI:1 of the GATT 1994.

Q57. (United States) In footnote 90 to paragraph 58 of its first submission, the United States claims that "even if Turkey did issue Certificates of Control, the conditions of use associated with such Certificates would constitute a 'restriction' on importation for purposes of Article XI:1." Could the United States provide detailed arguments for this claim.

90. Turkey has stated that Control Certificates to import rice – assuming they were granted – are valid for twelve months and can be utilized for more than one shipment. Regardless of whether or not that is the case, as previously discussed, the United States is not planning to pursue this claim further.

Q58. (United States) As noted by the United States in paragraph 19 of its first submission, according to Article 1 of the Turkish Foreign Trade Undersecretariat's (FTU) Communiqué No. 2005/5, Turkey's Ministry of Agriculture and Rural Affairs (MARA) determines the "fitness and compatibility" of certain products, including rice, with respect to human health and safety and other concerns. Accordingly, rice importers must present a Certificate of Control from MARA to Turkish Customs upon importation. Subsequently, in paragraph 62 of its submission, the United States argues that MARA's requirement that importers obtain a Certificate of Control is consistent with the definition of "import licensing" for purposes of Article 1 of the Agreement on Import Licensing. In the United States' view, is verification of the fitness and compatibility of imported agricultural products with relevant human health and safety regulations an administrative procedure that goes beyond what is required for customs purposes?

91. The Import Licensing Agreement covers "administrative procedures *used for the operation of import licensing regimes* requiring the submission of an application or other documentation (other than that required for customs purposes) to the relevant administrative body as a prior condition for importation into the customs territory of the importing Member" (emphasis added). With respect, the United States believes that the relevant inquiry is whether a particular administrative procedure "used for the operation of an import licensing regime" goes beyond what is required for customs purposes.

92. Verification of the fitness and compatibility of agricultural products with the relevant health and safety regulations is a procedure that is sometimes required with respect to both imported and domestic products. So there is not necessarily any linkage between obtaining a phytosanitary certificate and importation. And, in the United States' view, it is unnecessary for the panel to decide, for purposes of resolving this dispute, whether the verification of the fitness and compatibility of agricultural products is an administrative procedure that goes beyond what is required for customs purposes. Rather, what matters is how a measure – whether it be a requirement to obtain a Control Certificate, a receipt for domestic purchase, or a phytosanitary certificate – is "used for the operation of an import licensing regime."

93. Here, Turkey is using the denial of the Control Certificate, which has all of the characteristics of an import license, as a WTO-inconsistent trade barrier. Turkey is not, to our knowledge, using the issue of "fitness and compatibility" to block or restrict rice importation. In fact, importers have informed US officials that MARA's Provincial Agricultural Directorates do not even ask for the phytosanitary certificate until *after* the Provincial Agricultural Directorate in Ankara has granted the Control Certificate. The US claim is that MARA is simply not granting the Certificates as the key factor in its operation of its import licensing regime, and that Turkey is using its failure to issue Control Certificates – irrespective of the individual elements comprising the Certificates – as an

import barrier. Because the United States is not arguing that Turkey is using the verification of the fitness and compatibility of imported rice as an import barrier, the Panel does not need to reach the issue of whether an analysis of fitness and compatibility is an administrative procedure that goes beyond what is required for customs purposes.

Q60. (Both Parties) In paragraph 26 of the provisional version of its oral statement, Australia indicates that "the measure at issue is Turkey's alleged blanket denial of Certificates of Control." Could the Parties comment on this statement. If appropriate, provide evidence to support your statements.

94. To be more precise, one of the measures being challenged by the United States is Turkey's blanket denial of Certificates of Control outside the TRQ regime, which amounts to a prohibition or restriction on importation that is in breach of Article XI:1 of the GATT 1994. As discussed in the answer to Question 4, the instrument used by MARA to effectuate the denial of Control Certificates is the Letter of Acceptance. There are other measures being challenged, including the Control Certificates themselves.

95. Turkey has clarified that it grants Control Certificates under the TRQ regime and to importers of rice from the European Communities under a separate quota regime.

Q61. (Both Parties) In paragraph 27 of the provisional version of its oral statements, Australia indicates that "[i]f the Panel finds that Turkey has in fact adopted a practice of denying Certificates of Control altogether... this could constitute a 'measure of general application' for the purposes of Article X:2 [of the GATT 1994], whether or not the Letters of Acceptance themselves can be enforced". Could the Parties comment on this statement.

96. Turkey's decision not to issue Control Certificates at the over-quota rates of duty, which were operationalized through the Letters of Acceptance, is a "measure of general application" for purposes of Article X:2 of the GATT 1994. In *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, the Appellate Body upheld the panel's finding that a country-specific safeguard was a "measure of general application" under Article X:2 because it "affects an unidentified number of economic operators, including domestic and foreign producers."[42]

97. In this dispute, each Letter of Acceptance applies to all non-TRQ rice trade, with the exception of trade governed by the EC Quota Arrangement, and Letter of Acceptance 390 confirms that the Letters are part of a policy governing all imports of paddy and milled rice outside the TRQ. Thus, the ban on the issuance of Control Certificates applies to all trade outside the TRQ regime, and it affects an unknown number of potential rice exporters from Egypt, the United States, and other WTO Members, as well as Turkish importers, millers, producers, wholesalers, packers, retailers, and consumers.

98. With regard to Australia's second point, the United States has provided ample documentary evidence that the Letters are being enforced – which will be further supplemented by the Mehmetoglu court documents – and that such Letters amount to more than individual instances of denial, but rather to a blanket ban. In any event, the Appellate Body in the *1916 Act* dispute found that mere non-

[42] *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R, adopted February 25, 1997, page 21. The Appellate Body further noted that "[t]he essential implication [of Article X:2] is that Members and other persons affected, or likely to be affected, by governmental measures imposing restraints, requirements and other burdens, should have a reasonable opportunity to acquire authentic information about such measures and accordingly to protect and adjust their activities or alternatively to seek modification of such measures." *See also United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/R, adopted February 25, 1997, para. 7.65.

enforcement of a measure does not preclude a finding of WTO-inconsistency. In that dispute, the measure at issue had never been enforced by the United States. By contrast, in the instant dispute the United States already has provided several instances where MARA has enforced the ban.

Q62. (United States) In its first submission the United States refers to three importers who were allegedly denied Certificates of Control to import rice into Turkey (Torunlar, Mehmetoglu, and ETM). Could the United States indicate additional cases where the importation of rice into Turkey was denied.

99. Prior to the first substantive meeting of the panel with the parties, Turkish importers had been extremely open and helpful in discussing Turkey's import licensing regime for rice and providing illustrative documentation.[43] After the first substantive meeting, the United States contacted several importers to solicit further documentation that would help to answer the panel's questions. Unfortunately, since the panel meeting most of the importers have become unwilling to provide such information. One importer contacted by US officials already had been provided with a copy of the panel's confidential questions from an unknown source. Thus, the United States is not able to provide further elaboration on this question or questions 64 through 66.

Q63. (Both parties) During the first substantive meeting with the Panel, Turkey asserted that the case of the difficulties faced by Torunlar in trying to import rice was exceptional.

(c) Can the United States specify the origins of rice imported by the three importers identified in its first submission (Torunlar, Mehmetoglu, and ETM).

(e) Can the Parties provide information regarding the importance and share of these three importers (Torunlar, Mehmetoglu, and ETM) in total imports of rice into Turkey and, more specifically, in imports of US rice into Turkey during the relevant period.

100. Torunlar, Mehmetoglu, Goze, and Akel are the top Turkish rice importers. Torunlar, Goze, and Akel import paddy rice from the United States, and Mehmetoglu imports Egyptian milled rice. According to officials at the US Embassy in Ankara, these four companies account for approximately 90 per cent of the imported rice in Turkey. The United States is unable to provide more detailed information (see answer to question 62).

Q64. (United States) In paragraph 28 of its first submission, the United States asserts that one importer, Torunlar, has been trying since 2003, without success, to import rice - and to get previously imported rice out of the warehouse - on the strength of a Certificate of Control. Was Torunlar seeking to import rice at the MFN rate of duty, under the tariff quota system, or both?

101. See answer to question 62.

Q65. (United States) In paragraph 30 of its first submission, the United States asserts that Torunlar had previously had no problems obtaining a Certificate of Control to import rice into Turkey. Can the United States clarify when, and how many times, had Torunlar obtained Certificates of Control for the importation of rice.

102. See answer to question 62.

[43] *See, e.g.,* Exhibits US-22, US-23, US-28, US-29, US-30, US-31, US-32, US-33, US-34, US-39, US-40, US-41, US-42, and US-44.

Q66. (Both Parties) In paragraph 31 of its first submission, the United States asserts that Torunlar's lawsuit against the Ministry of Agriculture and Rural Affairs (MARA) "is still pending", making reference to a letter from the Ankara Governorship Province Agriculture Department (Exhibit US-33). What is the current status of the lawsuit to date?

103. See answer to question 62.

Q69. (United States) In paragraph 41 of its first submission, the United States notes that Article 2 of Communiqué No. 25445 ("Application of Tariff Quota for the Importation of Some Species of Paddy Rice and Rice"), concerning the domestic purchase requirement, "... specified that the sources of the rice that had to be purchased in order to benefit from the reduced tariff rates under the TRQ were TMO, Turkish producers, or Turkish producers associations, and rice imports would be allocated according to the amount of rice one wanted to import". Can the United States identify the specific section of Article 2 where this is stated.

104. Article 1, rather than Article 2, of Communiqué No. 25445 provides that rice imports would be allocated according to the amount of rice an importer wished to import. As the United States notes in paragraph 41 of its first written submission, this first opening of the TRQ, as contrasted with the two most recent TRQ openings, does not provide the precise quantities of domestic rice that an importer must purchase in order to import. It appears that the amount of rice that must be purchase domestically is left to the discretion of TMO.

105. Furthermore, the United States was incorrect in asserting that "the sources of the rice that had to be purchased in order to benefit from the reduced tariff rates under the TRQ were TMO, Turkish producers, or Turkish producers associations." Under this first opening of the TRQ, importers were required to purchase domestic rice from TMO. FTU did not provide importers with the option of purchasing rice from Turkish producers or producer associations until the second and third openings of the TRQ.

Q70. (United States) In paragraph 100 of its first submission, the United States asserts that the category of persons who purchase rice from the Turkish Grain Board would "undoubtedly be domestic producers as well". Turkey responds, in paragraph 100 of its first submission, that the United States "fails to argue or prove the validity of this assertion and its factual occurrence". Please provide the basis for asserting that those who purchase rice from the Turkish Grain Board would necessarily be domestic producers.

106. Letter of Acceptance 1795 clarifies that MARA will not grant Control Certificates to importers who do not purchase domestic paddy rice from the Turkish Grain Board or Turkish producers or producer associations. In the most recent opening of the TRQ, an importer wishing to import rice needed to purchase a larger quantity of domestic paddy rice than the amount of rice the importer wanted to import in order to realize the importation. Under this scheme, as a theoretical matter anyone can import rice who purchases paddy rice. The domestic purchase requirement in effect restricts importation to those entities with milling capacity. Thus, for greater precision, the reference to domestic producers in paragraph 100 was meant to refer to producers of rice for consumption (i.e., millers), not to growers.

107. As an initial matter, the domestic purchase requirement is more onerous for importers that are trying to import milled rice than paddy rice. This is most likely by design as Turkey wants to develop its milling capacity so it attempts to discourage imports of milled rice. Turkey's domestic tariff schedule, which provides for a much higher MFN rate for milled rice (45 per cent *ad valorem*) than for paddy rice (34 per cent *ad valorem*), confirms that intention.

108. In any event, non-millers would have no reason or desire to purchase paddy rice, not to mention the large quantities of paddy rice that are necessary to import milled rice under the TRQ. Paddy rice needs to be further processed and would not be sold to consumers in raw form. For an entity without milling capacity, this rice is useless, and milling facilities are not a minor investment. Building and maintaining a rice milling facility requires the investment of several hundred thousand to several million US dollars to engineer a system of sophisticated equipment in an adequate building with storage capacity. It would require the permanent installation of bulky machinery, such as: shellers to remove the husk; destoners to remove small foreign material; millers to remove bran layers; polishers to whiten the kernel; sorters to remove the broken pieces; and a host of conveyers and holding tanks to keep the system running smoothly. As a consequence, Turkish packagers, retailers, and consumers would not have the capacity or the desire to purchase paddy rice and, therefore, it is hardly surprising that the three main importers of US rice – Torunlar, Akel, and Goze – have large milling facilities.

109. Given these factors, it is clear that the requirement to purchase domestic paddy rice imposes a significant impediment to those entities wanting to import rice, thereby ensuring that only importers with milling capacity would actually import rice into Turkey.

Q72. (Both Parties) Can Turkey comment on the United States' assertion contained in paragraph 123 of its first submission, that "Turkey ensures that the full amount of the quotas cannot be reached by setting the domestic purchase requirement so high that the entire Turkish domestic production of rice would be purchased by importers before the in-quota amount was reached" and that, "[b]ased on the levels of domestic purchase set forth thus far, there is no way for importers to be able to import anywhere approaching the 300,000 metric ton limit on milled rice imports." If that were the case, please refer in particular to the reasons Turkey would have, if any, in setting the import quotas above the actual level of possible realisation of imports. Does the United States have any comments on the matter?

110. Turkey's total rice imports in MY 2001/2002 and 2002/2003 were approximately 300,000 metric tons and 325,000 metric tons, respectively. However, the domestic purchase requirement is so large that the alleged 300,000 metric ton (milled rice equivalent) cap (or 500,000 metric tons of paddy rice under the conversion factor) cannot be reached.

111. Total paddy rice production in Turkey was 415,000 metric tons in MY2003/2004, 500,000 metric tons in MY2004/2005, and 600,000 metric tons in MY2005/2006, for an average of 505,000 metric tons per marketing year.[44] The most generous domestic purchase requirement in the most recent TRQ opening was for importers who wanted to import paddy rice and purchased domestic paddy rice from Turkish producers or producer associations in certain designated provinces. Pursuant to the first row of the chart contained in the September 2005 Notification, such importers could import 800 kilograms of paddy rice for every ton of domestic paddy rice they purchased, for a ratio of 1:1.25.[45] Assuming that no milled rice was imported and all paddy rice could be imported using the least onerous ratio available, importers would have to purchase 625,000 metric tons of paddy rice in order to import 500,000 tons of paddy rice. Turkey's average paddy rice production in the past three marketing years is 505,000 metric tons. The 625,000 metric ton figure is not only much larger than the average, but it is larger than the 600,000 metric tons of paddy rice produced in MY2005/2006, Turkey's largest harvest to date.

[44] Turkish paddy rice production was 360,000 metric tons in both MY2001/2002 and MY 2002/2003, before increasing rapidly overt the past three years. This is probably not a coincidence, but the intended effect of Turkey's import licensing system. Because Turkish producers know that their entire crop will be purchased at prices that are significantly higher than the world price, they are encouraged to produce larger quantities of paddy rice each year, thereby diminishing the need for imports over time.

[45] *See* Exhibit US-11.

112. In fact, it is not possible to even approach the cap, because the scenario outlined above is unrealistic. Egypt exports milled rice to Turkey, and the domestic purchase ratio for importing milled rice is much more onerous than the ratio for importing paddy rice: importers need to purchase two or three times the quantity of domestic rice than the amount of milled rice they want to import. Second, there is a footnote to the first row of the chart contained in the September 2005 Notification. The footnote provides that the domestic purchase requirement is much larger with respect to imports from certain other enumerated provinces which, interestingly enough, account for approximately 80-85 per cent of Turkish paddy rice production. For those purchasing paddy rice from these provinces – most likely the majority – importers would need to purchase nearly two times as much domestic paddy rice as the amount of paddy rice they wanted to import, and nearly three times as much domestic paddy rice as the amount of milled rice they wanted to import.

Q73. (Both Parties) In paragraph 23 of the written version of its oral statements, Australia indicates that "... WTO jurisprudence supports the view that the imposition of an 'additional requirement' or an 'extra hurdle' on imported products, when compared to like domestic products, constitutes less favourable treatment ..." Australia adds that "these 'extra hurdles' need not be onerous in commercial and/or practical terms to be inconsistent with Article III:4 of GATT 1994". Could the Parties comment on this statement.

113. The United States agrees with Australia. In paragraph 97 of its first written submission, for example, the United States noted that the *Canada – Wheat* panel found that measures are inconsistent with Article III:4 of the GATT 1994 if they impose requirements on foreign products that are not imposed on domestic products.[46] The panel noted that Article III:4 did not contain a de minimis exception, and the fact that an extra requirement on an imported product might not be onerous in commercial and/or practical terms did not change the fact that it was still an additional requirement to which the like domestic product was not subject and thus was inconsistent with Article III:4.[47]

114. Previous reports lend support to this interpretation of Article III:4. First, the Appellate Body in the *Section 211* dispute found that a provision imposing an additional hurdle on foreign successors-in-interest that was not imposed on domestic successors-in-interest was inconsistent with US national treatment obligations in Article 2(1) of the Paris Convention (1967) and Article 3.1 of the TRIPS Agreement.[48] The panel noted that, although these were not the same provisions as Article III:4 of the GATT 1994, the Appellate Body's reasoning was nevertheless persuasive since the issue was national treatment.[49] Second, the GATT panel in the *Malt Beverages* dispute found a US requirement that only imported beer had to be distributed through an "additional level of distribution" – in that case, in-state wholesalers or other middlemen – constituted less favorable treatment for imports and was in breach of Article III:4 of the GATT.[50]

Q74. (Both Parties) In pages 2 and 3 of the written version of its oral statements, Korea indicates that "[n]o matter how much the cost of buying domestic rice was lowered by virtue of the so called domestic purchase requirement, it can not be denied that importers had to resource additional funds to purchase domestic rice, and foreign rice could be imported more if such funds were not forced to be used to buy domestic rice. The main focus in this issue is not

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[46] *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R, adopted September 27, 2004, para. 6.185 ("*Canada – Wheat (Panel)*").

[47] *Canada – Wheat (Panel)*, para. 6.190.

[48] *Canada – Wheat (Panel)*, para. 6.185, *citing United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted February 1, 2002, para. 268.

[49] *Canada – Wheat (Panel)*, para. 6.185.

[50] *Canada – Wheat (Panel)*, para. 6.185, *citing United States – Measures Affecting Alcoholic and Malt Beverages*, adopted June 19, 1992, BISD 39S/206, paras. 5.32 and 5.35.

the price of domestic rice but the additional obligation imposed on the importers". Could the Parties comment on this statement.

115. Korea is correct that the domestic purchase requirement imposes an additional cost on importers seeking to import rice. Importers cannot purchase as much imported rice as they would like because some of their resources that would have been devoted to purchasing imported rice have to be expended to satisfy the domestic purchase requirement. This requirement is therefore a restriction on imports inconsistent with Article XI:1 of GATT 1994.

116. The United States disagrees with Turkey's argument that the cost of buying domestic rice is lowered by the domestic purchase requirement. In order to reach this conclusion, Turkey completely ignores the domestic purchase requirement and focuses on the average costs of each ton of rice that is part of the transaction. But that misses the point. An importer only cares about the total cost of the transaction, not the average cost of each ton, and no importer, if given the choice, would choose to purchase two tons of rice to import one ton of rice, if it was possible to import that one ton of rice without domestic purchase.

Q75. (Both Parties) Two of the Third Parties in their oral statements have presented views on the applicability of the Agreement on Trade-Related Investment Measures (TRIMs Agreement). China in paragraphs 4 and 5 of the provisional version of its oral statement, asserted that "Turkey ignores the fact that the US fails to define what 'trade-related investment measure' is and to prove Turkey's measure constitutes a TRIM"; and adds that "[i]n no case it is proper to bring a measure out of the coverage of TRIMs Agreement under the jurisdiction of it." Korea, in page 3 of the written version of its oral statement, noted that the TRIMs Agreement can only be applied to investment measures, which must have both a trade and an investment element. In the case of the domestic purchase requirement, it asserted that "there does not appear to be an investment element", and if so, "it can not be an investment measure, therefore the TRIMs Agreement could not be applied." Could the Parties please comment on the assertions made by China and Korea in their oral statements.

117. The proposed interpretation of China and Korea is not consistent with the text of the TRIMs Agreement. As the United States explains in paragraphs 110-112 of its first written submission, the TRIMs Agreement does not define what are "investment measures related to trade in goods" that would breach Article III:4; instead, it provides a non-exhaustive "Illustrative List" of such measures in the Annex to the Agreement. Accordingly China is wrong to claim that the United States has an obligation to define a TRIM. Nor does the TRIMs Agreement impose a separate requirement that a measure must satisfy in addition to the illustrative list in order to be in breach of the TRIMs Agreement. To satisfy the requirements of paragraph 1(a) of the Annex, and thereby prove that a measure is inconsistent with Article 2.1, the United States must demonstrate that the domestic purchase requirement mandates that importers purchase domestic products and that importer compliance with the domestic purchase requirement is necessary to obtain an advantage. Turkey's domestic purchase requirement satisfies both elements: Turkey requires importers to purchase domestic rice in certain specified quantities, and fulfilling the domestic purchase requirement is necessary to obtain an advantage, namely importing rice under the lower rates of duty under the TRQ regime. Thus, Turkey has breached Article 2.1 and paragraph 1(a) of Annex 1 of the TRIMs Agreement.

118. And in any event, the TRIMs Agreement does not limit the type of "investment" at issue in an "investment measure." A definition of the term "invest" is: to "expend (money, effort) in something from which a return or profit is expected, now esp. in the purchase of property, shares, etc., for the sake of interest, dividends, or profits accruing from them."[51] Thus, an investment is an expending of

[51] *The New Shorter Oxford English Dictionary*, Volume I, p. 1410.

money in order to realize a profit. The definition confirms the traditional identification of investing in property or the stock market, but recognizes that such are only examples how one may "invest." Any productive activity will involve investment.

119. Taking the ordinary meaning of the term "trade-related investment measure," Turkey's domestic purchase requirement is a TRIM that is inconsistent with Article 2.1 of the TRIMs Agreement. It requires importers to expend money in Turkey to purchase domestic rice as a condition for importation, which importers must do to make a profit. And the requirement is related to trade because it is a condition that importers must fulfill in order to import rice into Turkey. The domestic purchase requirement is really no different than a local content requirement, where an auto manufacturer is required to source a certain percentage of parts and components domestically as a condition for being able to build automobiles in the host country (and ostensibly turn a profit). Both domestic purchase and local content requirements affect investments in a country's industry and affect trade flows and, therefore, both are subject to the disciplines of the TRIMs Agreement.

Q76. (United States) Can the United States identify which are the trade-related investment measures it is challenging in the current proceedings.

120. As discussed in the answer to Question 75, the domestic purchase requirement is the trade-related investment measure that the United States is challenging in this proceeding.

Q77. (Both Parties) In paragraph 122 of its first submission, Turkey asserts that the deadlines for the submission of applications for import licenses was extended twice in 2005, as "evidence that Turkey did not intend to discourage full utilization of the quotas."

(a) Can the United States comment on this assertion.

121. Turkey's assertion is incorrect. As discussed in the US answer to Question 72, it is not possible for the 300,000 metric ton (milled rice equivalent) cap to be reached, given the current size of Turkey's crop of paddy rice and the large quantities of domestic paddy rice that importers are required to source domestically as a condition for importing rice into Turkey. Turkey claims that the TRQ provides a benefit to imported rice and actually provides an advantage to foreign rice over domestic rice (despite the fact that Turkey requires an importer to purchase a larger quantity of domestic paddy rice than the amount of rice the importer wishes to import). If that were the case, one would expect that importers would use up the quota well before the end of the application period. The fact that Turkey has been forced to extend the deadlines for importers to apply for a portion of the TRQ demonstrates the fallacy of that argument.

Q78. (United States) Can the United States comment on Turkey's assertion contained in paragraph 125 of its first submission, that it has provided "relevant data and trade statistics clearly indicating that MFN trade in rice has effectively occurred throughout the operation of the TRQ regime."

122. The only information that Turkey has provided on MFN trade is the chart contained in Annex 20. The United States noted in its response to Question 4 that the chart raises many more questions than it answers and has not been substantiated with documentary evidence. Further, Turkey has not rebutted any of the documentary evidence provided by the United States, including the Letters of Acceptance, rejection letters, court documents, and newspaper articles, which indicate that MARA has imposed a ban on rice trade outside the TRQ regime.

Q81. (Both Parties) In its oral statement, Thailand has raised the issue of "the inconsistency of Turkey's rice TRQ regime with its obligations under Article II of GATT 1994 with respect to its Schedule of Concessions". Further, in paragraph 5 of the written version of its oral

statement, it based its argument on "the factual evidence submitted by the United States, [according to which] the treatment actually accorded by Turkey under its TRQ regime is 'less favourable' than that provided in its Schedule to all Members." Can the Parties comment on the issue raised by Thailand in its oral statement.

123. The United States did not make an Article II claim in its request for the establishment of a panel. Therefore, this issue is outside the panel's terms of reference.

Q83. (Both Parties) In page 1 of the written version of its oral statements, Korea indicates that "the disproportionate number of certificates for out-quota imports should be explained by Turkey in order to avoid the suspicion that the issuance of out-quota certificates have been deliberately controlled". In page 2, Korea also notes that "the proportion of out-quota certificates to in-quota certificates in 2006 is much higher than it is for the years 2004 and 2005" and states that "[a]n explanation for this should be sought so as to avoid the assumption that Turkey loosened its grip on out-quota certificates only after having been challenged in the WTO". Could the Parties comment on these statements.

124. If Korea's statement on page 1 refers to the disproportionate number of Control Certificates that MARA purportedly granted in 2006, the United States agrees that there is no obvious explanation for why out-of-quota trade in rice would have dramatically increased sometime in 2006, which is when the DSB established this panel, whereas trade in 2004-2005 was largely confined to the TRQ regime. In any event, as noted by the United States in paragraphs 19-21 of its oral statement as well as in its response to Question 4, the numbers provided in Annex 20 for 2006 do not appear to make sense, and no conclusions can be drawn without examining the actual Control Certificates. For instance, Turkey's assertion that it has granted Control Certificates for 400,000 metric tons of US rice as of September 2006 does not correspond with the fact that the United States has thus far exported approximately 18,000 metric tons of rice to Turkey in 2006 and has never exported anywhere close to 400,000 metric tons of rice to Turkey.

Q84. (Both Parties) In the hypothetical case that Certificates of Control do not qualify as import licenses under the Import Licensing Agreement, would it automatically flow that such documents cannot qualify as import licenses under GATT 1994 either?

125. No. The definition of "import licensing" in Article 1 of the Import Licensing Agreement provides relevant context for interpreting the term "import license" in Article XI:1 of the GATT 1994 but Article 1, by its very terms, limits the definition set forth therein to the Import Licensing Agreement. As the United States discussed in paragraphs 59-63 of its first written submission, the ordinary meaning of the term "import license" is formal permission from an authority to bring in goods from another country. A Certificate of Control from MARA constitutes formal written permission from the Government of Turkey to import goods from another country. Thus, a Certificate of Control is an "import license" within the ordinary meaning of those terms.

Q91. (Both Parties) Is the Turkish Grain Board a state trading enterprise as defined in GATT Article XVII and the Understanding on the Interpretation of Article XVII of the GATT 1994?

126. Yes. Paragraph 1 of the Understanding on the Interpretation of Article XVII of the GATT 1994 provides the following "working definition" of a state-trading enterprise:

> Governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports.

127. The Turkish Grain Board (TMO) is an entity of the Turkish government that has been granted exclusive rights and privileges through various Ministerial Decrees. By exercising those rights and privileges, TMO is able to influence directly the importation of rice into Turkey. TMO administers all trade in rice under the TRQ regime and, as MARA has banned MFN trade in rice, TMO administers all trade in rice in the Turkish market.

128. TMO possesses a myriad of tools with which to influence and control the Turkish rice trade. All importers need a receipt from TMO documenting that the domestic purchase requirement under the TRQ has been satisfied. If an importer does not present that documentation to FTU, FTU will not grant a license to import under the TRQ. The domestic purchase requirement can be met by an importer purchasing domestic paddy rice from Turkish producers or producer associations or from TMO itself. TMO determines the procurement prices at which it purchases paddy rice from Turkish producers and also determines the prices at which it sells such rice to importers as a condition upon importation, and the TMO prices influence rice prices in the Turkish market. Additionally, the domestic purchase requirement itself is set each year by TMO officials after TMO holds discussions with Turkish producers on the projected size of the impending rice crop.

129. Lastly, under the TRQ regulations TMO is permitted to import 50,000 metric tons of milled rice in order to help stabilize the domestic market in the event that prices increase.[52] A July 13, 2006, Turkish newspaper article entitled "TMO is given priority to import rice to prevent extra high import prices" discusses TMO's ability to influence domestic prices by, among other things, importing rice. The article, which discusses the possibility that TMO would be given priority by FTU to import the 28,000 metric tons of milled rice under the EC Quota Arrangement, summarizes a conversation with Mr. Sukru Yildiz, the General Manager of TMO. In that conversation, Mr. Yildiz stated that FTU's decision to grant permission to TMO to import duty free rice was expected to stabilize prices in the market. Mr. Yildiz added that TMO did not plan to import at that time since the market appeared to be stable, but it would do so on an expedited basis if prices increased during Ramadan.[53]

[52] Exhibits US-5 and US-10.
[53] Exhibit US-20.

ANNEX C-2

REPLIES BY TURKEY TO QUESTIONS POSED BY THE PANEL AFTER THE FIRST SUBSTANTIVE MEETING
(30 November 2006)

Q1. (Both Parties) The United States has provided statistics on, *inter alia*, Turkish production, consumption and imports of milled rice in Exhibit US-45 attached to its first submission. Could the United States confirm the source of this data. The statistics provided by the United States go from 2001/2002 to 2006/2007. Can the United States confirm which of these figures correspond to actual events and which are projections. Can Turkey confirm the figures provided by the United States.

Turkey does not confirm the import figures provided in Exhibit US-45 to the first submission of the United States. Turkey's actual yearly import figures for milled rice are attached in Annex TR-23. The actual production and consumption figures for milled rice in Turkey are attached in Annex TR-24.

Q2. (Turkey) In paragraph 11 of its first submission, the United States asserts that "Turkey produced 234,000 metric tonnes of milled rice in 2003, 270,000 metric tonnes of milled rice in 2004, and 300,000 metric tonnes of milled rice in 2005". In paragraph 12 of its submission, the United States adds that "Turkish consumption was 545,000 metric tonnes in 2003, 550,000 metric tonnes in 2004, and 560,000 metric tonnes in 2005". Could Turkey comment on the figures provided by the United States.

Turkey draws the attention of the Panel to Annex TR-24. Turkey submits that the difference between the figures is not great. With respect to the increase in production over time, reference should be made to the answer provided by Turkey to question 49(c) below.

Q3. (Both Parties) Can the Parties also provide monthly information on imports into Turkey of, separately, paddy, brown and milled rice, for the period from July 2003 to the end of 2006 (including estimates, as appropriate), by country of origin.

Turkey's rice import figures, by month and organized by country of origin, types of rice, years, quantity and value, are provided in Annex TR-25.

Q4. (Both Parties) In paragraph 26 of its first submission, Turkey asserts that "from 2003 to date, Turkey has approved a total of 2,223 Certificates of Control, allowing a total importation of 2,264,857 tonnes of foreign rice (paddy, brown and milled). Of the aforementioned quantity, 497.469 tonnes of rice equivalent have been allocated under the TRQ system since January 2004." In paragraph 65, Turkey asserts that "a high number of Certificates of Control (i.e., 2,223 between 2003 and 2006) were approved by MARA, corresponding to large amounts of imported rice (i.e., 939.013 tonnes of rice equivalent between 2003 and 2006), both in relation to MFN and TRQ trade."

(b) Could Turkey specify the quantities of each type of imported rice (i.e., milled, paddy and brown) that correspond to the figure of 497,469 tonnes of rice equivalent, which would have been allocated under the TRQ system since January 2004. Could Turkey also specify the corresponding quantities imported under this period outside of the TRQ.

Turkey's in-quota and over-quota importation figures are provided in Annex TR-8.

(c) Could Turkey specify the quantities of each type of imported rice (i.e., milled, paddy and brown), broken-down into MFN and TRQ imports, that correspond to the figure of 939,013 tonnes of rice equivalent imported between 2003 and 2006.

The import data, broken down into types of rice and into MFN and TRQ imports for the years 2004 to 2006, are provided in Annex TR-8. The data for 2003 broken down into types of imported rice are provided in Annex TR-26 herewith.

As shown in Annex TR-8, the total imports of milled rice equivalent between 2004 and 2006 amount to 568,650 tonnes. Since there was no tariff-rate-quota in 2003, adding the 2003 figure of milled rice equivalent import of 370,363 tonnes to the figure for 2004 to 2006 (i.e., 568,650 tonnes), the result is a total milled rice equivalent importation of 939,013 tonnes between the years 2003 and 2006.

Q5. (Both Parties) Can the Parties provide monthly information on Turkey's domestic production of, separately, paddy, brown and milled rice, for the period from July 2003 to the end of 2006 (including estimates, as appropriate).

The Turkish harvest season begins in mid-September and lasts until the end of November each year. Therefore, production figures are available only on a yearly basis. They are provided in Annex TR-24.

Q6. (Both Parties) Can the Parties provide monthly information on Turkey's domestic consumption of, separately, paddy, brown and milled rice, for the period from July 2003 to the end of 2006 (including estimates, as appropriate).

The consumption figures are provided on an annual basis in Annex TR-24. The consumption levels do not change considerably on a monthly basis. Therefore, average monthly consumption can be calculated by total consumption divided by 12.

Q7. (Both Parties) Can the Parties provide the following information regarding Turkey's monthly average domestic prices of, separately, paddy, brown and milled rice, for the period from July 2003 to the end of 2006 (including estimates, as appropriate): (i) average prices for domestic production in the Turkish market; (ii) landed CIF prices; and, (iii) prices quoted by the Turkish Grain Board. Please indicate the source of your estimates and provide evidence, as appropriate.

In relation to point (i) of the question, reference should be made to Annex TR-27.

With respect to point (ii) of the question, the monthly landed CIF prices are provided by Turkey in Annex TR-28. Turkey submits, however, that some recorded CIF prices may not be indicative of the real CIF values due to some importers under-declaring value for purposes of tax avoidance or tax minimization.

Finally, in relation to point (iii) of the question, reference should be made to Annex TR-29. As the TMO functions to regulate the market, the price declared by the TMO is the ceiling price determined for the best quality product. It is not necessarily the purchase price through which the TMO buys rice from the producers. In fact, the average TMO purchase price ends up being close to the commercial market price.

Q8. (Turkey) In addition to the information requested in the previous question, can Turkey also indicate the volume of imports of, separately, paddy, brown and milled rice, for the

indicated period (July 2003 to 2006), by country of origin, which were made within the tariff-rate quota (TRQ) and those that were made outside the TRQ, specifying the periods for which the TRQ was opened in each of these years.

In-tariff quota and over-tariff quota importation figures by volumes, values, and countries of origin are provided by Turkey in Annex TR-8.

Q9. (Turkey) Can Turkey provide detailed data on rice sales and purchase by the Turkish Grain Board since September 2003, in particular the prices and customers involved in the individual transactions, and whether the transactions in question were linked to imports in any way?

Turkey submits that, in this respect, reference should be made to its Annexes TR-29 and TR-30.

Q10. (Turkey) Can Turkey please provide the source of data that it has used to determine relative average import cost of a tonne of rice as set out in paragraph 95 of its submission.

The FOB value of paddy rice is taken as 295 US$/MT from paragraph 51 of the first submission by the United States. To reach the CIF value of 370 US$/MT, the cost of insurance and freight from the USA to Turkey amounting to 75 US$/MT, which is taken from importers' declarations, is added to the FOB value. Moreover, to be able to calculate the average mixed cost of importation and domestic purchase to the importer, the average price (640 YTL/MT or 457 US$/MT) of domestic paddy sales is provided by TMO (reference must be made to Annex TR-27). The relative average import costs for both MFN and TRQ trade have been calculated on the basis of these data.

Q12. (Turkey) In the course of the first substantive meeting, Turkey has indicated that the figures used by the United States in its calculations (*inter alia*, in Exhibit US-52) are not an adequate reflection of Turkey's domestic prices for rice. Can Turkey indicate a source that, in its view, would provide a more adequate estimate of the monthly domestic prices of milled, paddy and brown rice in its market.

Turkey considers that the data provided in its Annex TR-27, which indicates the average price that emerged in the market (i.e., 640 YTL/MT), is a more accurate and reliable source. In fact, although the price that emerged from the domestic purchase involving the TMO is 612 YTL/MT, Turkey submits that the average price of 640 YTL/MT better reflects the actual market price, since the share of TMO only represents 2.4% of purchases.

Q13. (Both Parties) In paragraph 4 of its closing statement during the first substantive meeting with the Panel, the United States referred to "a bilateral agreement between the European Union and Turkey [under which] the European Union has an annual quota of 28,000 tonnes of milled rice".

(a) Please provide the provisions of that agreement, relevant to the importation of rice into Turkey.

Under Article 3 of Decision No: 1/98 of the EC-Turkey Association Council of 25 February 1998 on the trade regime for agricultural products,[1] Turkey commits to open annually a tariff quota for 28,000 tonnes of rice originated in the EC.[2]

[1] Decision No. 1/98 of the EC-Turkey Association Council of 25 February 1998 on the trade regime for agricultural products, Official Journal of the European Communities, 20.3.98, L 86/15.

[2] See Annex TR-31.

(b) Explain whether European imports of rice into Turkey are treated differently from other imports.

Imports of rice from the EC are treated like all other MFN rice imports into Turkey. However, for the volumes of rice imported from the EC under the TRQ provided by the Bilateral Agreement, a preferential tariff applies.

(c) More specifically, explain whether importers of European rice are required to obtain Certificates of Control in order to import rice into Turkey.

Yes. Certificates of Control are required for all rice imports, irrespective of the country of origin, type of rice, MFN or TRQ trade, and nature of importer.

Q14. (Both Parties) Can the Parties describe, in chronological order, the steps that are necessary to import rice into Turkey, in terms of the different documents that must be obtained and other formalities that have to be completed, identifying the authorities involved in each step. Please make reference to the relevant legal instruments and provide evidence where appropriate.

In general Turkey points out that all products set out in Annex VI-A[3] of the Communiqué No. 2006/5 on the Standardization in Foreign Trade[4] are subject to Certificates of Control. The products set out in Annex VI-A of Communiqué No. 2006/5 are products which are considered to be risky from a health and safety or environmental perspective. On the food side, these products include animal products, fresh and dried fruits and vegetables, cereals, processed products, etc. Certificates of Control are not required for products set out in Annex VI-B of the Communiqué on the Standardization in Foreign Trade. The reason for this difference is that, in general, the products indicated in this latter list are not considered to pose a risk for health or the environment. On this point, see in more detail the answers to question 35 below.

Certificates of Control for agricultural and food products are approved by MARA and, subsequently, are required by the Customs Administration for the importation of food and feed products of animal and non-animal origin in accordance with Communiqué No. 2006/5 on Standardization of Foreign Trade.

The steps for the approval of Certificates of Control for products agriculture and food products are outlined in Communiqué No. 31 on the Approval of Control Certification at the Importation of Foodstuffs and Packaging Materials that come into Contact with Foodstuffs and on Control Procedures at Importation Stage. Turkey wishes to emphasize that Certificates of Control are not import licences. These certificates are approved as a part of process of customs control and verification. They pursue, *inter alia*, sanitary and phytosanitary objectives.

According to Communiqué No. 2006/5 on Standardization of Foreign Trade, Certificates of Control approved by MARA should be presented to the Customs Offices at the point and time of importation. Turkey considers that the relevant procedures can be divided into two stages: the "approval of the Certificate of Control" stage and the "importation of the products" stage.

[3] See Annex TR-3.
[4] See Annex TR-1.

(i) Approval of the Certificate of Control

For the products set out in Annex VI-A of the Communiqué No. 2006/5 on the Standardization in Foreign Trade, the procedures requested at the approval stage of the Certificate of Control are the following:

Step 1: The owner/authorized person of the importing company must present the following documents to the Ministry of Agriculture and Rural Affairs (MARA) during the application:

- Form of the Certificate of Control, duly compiled (*i.e.*, properly typed or filled-out by computer), containing no erasures or abrasions, signed and sealed by the authorized person/persons of the company under their name/names and surname/surnames;
- *Proforma* invoice;
- Legal entity form: the company must declare, in its first application after 30 June 2002 and upon the request by MARA, that it is officially carrying-out activities in relation to the product it wishes to import;
- Other documents that must be presented according to the type of the product: no other additional documentation is required at this stage for the approval of the Certificate of Control for importation of rice.

In practice, the form of the Certificate of Control must be filled by the importing company. A *proforma* invoice, together with other eventual additional documents, must be attached therewith. The form, together with the *proforma* must be put forward to MARA for approval.

Step 2: If all information and documentation put forward by the importer to MARA complies with the requirements set by the law (*inter alia*, the product name, the CN code of the product, relevant information about importing and exporting companies, country of origin, etc.), the Certificate of Control is automatically approved by MARA.

Should the form and/or its attachments miss any the required information, the importing company is notified of this shortcoming by MARA. This importing company is then granted additional time to complete and submit again its application (if it so chooses). In these cases, the file and its attachments are inspected again by MARA's officials. If all documentation and information comply with the requirements set by the law, the Certificate of Control is automatically approved. If the documentation and the information required do not comply with the requirements set by the law the application is again rejected.

(ii) Importation of the Product

After the approval of the Certificate of Control, importers must submit to the provincial directorate of MARA the following documents.

- Approved Certificate of Control and the attachments thereof;
- Customs Entry Declaration;
- Sanitary or Phytosanitary Certificate, as applicable (this is the phytosanitary certificate for rice provided by exporters).

For products that are not subject to the Certificates of Control listed in Annex VI-B of the Communiqué on the Standardization in Foreign Trade, when the importation of a product is desired, importers must submit to the provincial directorate of MARA the following documents.

- Customs Entry Declaration;
- List of Ingredients;
- Sanitary or Phytosanitary Certificate
- Legal entity form: the Company establishes, in its first application after the publication of the Communiqué and upon the request of the Ministry that it is officially carrying-out activities in relation to the product it wishes to import.

Control procedures at import stage are conducted in a three-step process for products falling within both Annex VI-A and Annex VI-B. This control is conducted on the basis of Sanitary and Phytosanitary requirements. These steps are:

- Documentation control: Customs authorities will control the documentation required by the legislation, which accompanies the products. However, the control of the documentation is a process which, for the products listed in Annex VI-A, already starts from the approval of the Certificate of Control;
- Identity checks: Customs authorities will compare whether the imported product is identical and corresponds to the customs declaration;
- Physical inspections: MARA's officials will operate controls on the products, including organoleptic controls up to the laboratory analyses.

During the importation stage all products are examined according to a process of risk assessment. Imported products can be subjected to laboratory analyses, on the basis of Turkish food legislation. Furthermore, the safety of products is assessed on the basis of quarantine procedures as provided by Turkey's laws on Plant Protection and Agricultural Quarantine. If the results of the analyses are in compliance with the relevant legislation, the products are released for free circulation.

Importation under the TRQ regime

When an importer wishes to import within the TRQ, the relevant documents (including the document showing purchase of domestic rice) had to be submitted to the Under-Secretariat for Foreign Trade in order to obtain the import licence and import at reduced duty rates. Obviously, importers also had to submit all relevant documentation to MARA for approval of the Certificate of Control. The rest of the import procedure followed what explained in detail above.

Turkey submits that the import procedure which applies for imports at both MFN and TRQ rates is described in the scheme provided in Annex TR-32.

Q15. (Turkey) Regarding the current status of Turkey's import regime for rice,

(a) Can Turkey describe the current status of that import regime.

Communiqué No. 2006/05, which provides the legal basis for the current system, entered into force on 1 January 2006 and repealed Communiqué No. 2005/05. The legal basis of this Communiqué is

Decree No. 2005/9454 on "*The Regime for Technical Regulations and Standardization for Foreign Trade*"[5] (published on 13 October 2005 in the Official Gazette and numbered 25965). Communiqué No. 2006/05 is currently in force.

(b) Are Certificates of Control being issued at present (after September 2006)?

Yes. Certificates of Control have always been approved, including in and after September 2006.

(c) If so, can Turkey provide any evidence of Certificates of Control issued after September 2006.

Reference must be made to Annex TR-33, which contains the available data compiled by MARA in relation to the Certificates of Control that have been approved between 2003 and 9 November 2006. These data have been organized on the basis of country of origin, individual Certificate of Control code, date of application, date of approval, HS code, requested amount of rice for which the Certificate of Control was approved, date of importation, actual amount of imported rice (i.e., realized imports), type of rice, and applicable import regime (i.e., MFN and TRQ).

Turkey submits a "coded" version where the company-specific references are encrypted in order to comply with Turkish legislation protecting privacy and secrecy of sensitive commercial information.

(d) Can Turkey provide any relevant information on whether it has plans to modify its import regime of rice in the future.

Turkey has no plans to modify its import regime for rice. In particular, Turkey wishes to remind the Panel that is has not opened a new tariff rate quota for rice in 2006 and has stated both in consultations and before this Panel that it has no intention to do so in the future.

Q16. (Both Parties) Does Turkey's import system for rice affect imports from the United States in particular, or does it apply to all imports in the same way?

Turkey's import system for rice applies to all imports in the same way. In particular, Turkey's MFN and applied rates of duty apply to imports of rice of any origin in a non-discriminatory fashion. Importers are free to import from any source at the bound and applied rates, and to market the rice into Turkey, provided that a Certificate of Control has been approved. The relevant Turkish law requires importers to obtain a Certificate of Control irrespectively of the country of origin of the rice they wish to import.

With respect to the TRQ regime, Turkey has already pointed out that its automatic import licensing regime, while in force, also applied in a strictly non-discriminatory fashion and that any person, firm or institution importing rice from any source was equally eligible to apply for, and obtain, an import license.

Turkey therefore submits that the relevant legislation (i.e., the one envisaging the MFN and applied rates, the Certificate of Control and the TRQ) applies and/or applied to imports of rice from any origin in a non-discriminatory fashion. In any event, Turkey's import regime for rice, as evidenced by the trade statistics and import data, has not been shown to have been put in place to affect any specific country exports. Trade flows and imports have always been dictated by business considerations and free market choices.

[5] See Annex TR-2.

Q18. (Both Parties) It would seem that in some respects Turkey's import regime for rice has changed since the initiation of this dispute before the WTO in November 2005. If this is correct, could the Parties specify:

(a) The nature of those changes, including their dates and relevant legal instruments.

(b) The specific reasons for these changes.

(c) The potential effects of these changes.

Turkey submits that no change was introduced into its import regime for rice in November 2005 or as a consequence of the initiation of WTO dispute settlement proceedings.

The only aspect of Turkey's import system for rice that has undergone changes between 2006 and the present is that of the TRQ regime. This lapsed on 31 July 2006. The TRQ regime was opened only for a limited amount of time and served a market-stabilization role. The TRQ regime was naturally phased-out. It was not repealed as a consequence of the initiation of WTO dispute settlement proceeding. The validity periods of the TRQ systems were always clearly indicated in the relevant decrees and communiqués.

Q19. (Turkey) Could Turkey specify the reasons for the following statement, formulated in paragraph 72 of its first submission: "Having conclusively demonstrated that there is no violation of GATT Article XI, Turkey believes that no further scrutiny should be conducted under the Agreement on Agriculture."

Turkey believes that the United States has failed to establish a *prima facie* violation of Article 4.2 of the Agreement on Agriculture for two reasons. First, Turkey believes that caution is needed in establishing an automatic violation of Article 4.2 of the Agreement on Agriculture in every instance where a violation of GATT Article XI:1 is found. According to Turkey, a violation of GATT Article XI:1 does not automatically constitute a violation of Article 4.2 of the Agreement on Agriculture, unless it is positively established that the measure at stake falls within the scope of, and is inconsistent with, footnote 1 of Article 4.2 of the Agreement on Agriculture.

Turkey believes that the appropriate legal methodology should require a separate scrutiny of the measures under the Agreement on Agriculture. A violation cannot simply be assumed. Turkey submits that the United States has failed to prove or even adequately argue in which way Turkey's measures would be inconsistent with Article 4.2 of the Agreement on Agriculture, other than by means of an automatic extension of their GATT Article XI arguments.

Turkey is not in violation of Article 4.2 of the Agreement on Agriculture. Turkey noted that the United States' arguments are based on the incorrect assumption that Turkey's alleged denial of Certificates of Control and the operation of its TRQ regime amounted, individually or jointly, to violations of GATT Article XI:1. On this basis, the United States further argued that the measures resulted into quantitative restrictions, discretionary import licensing and non-tariff barriers maintained through state trading enterprises within the meaning of Article 4.2 of the Agreement on Agriculture.

Turkey believes that it has shown that there has never been a denial of Certificate of Controls, that its TRQ regime was not based on discretionary import licensing, and that it is not correct to claim that non-tariff measures were maintained through state trading enterprises. Turkey believes it has shown to the Panel that there is no violation of GATT Article XI:1. Therefore, even following the reasoning put forward by the United States, according to which a violation of Article XI:1 in relation to agricultural products constitutes *ipso facto* a violation of Article 4.2 of the Agreement on Agriculture,

Turkey believes that no further scrutiny of the specific claim should be conducted and that, on the basis of the factual evidence that has been offered, the Panel should reject these claims, both in relation to the individual instruments and in their joint operation.

Q20. (Turkey) In paragraph 62 of its first submission, Turkey states that: "[t]he essential element to establish whether or not any measure introduced by a WTO Member results in a quantitative restriction, is the existence of a 'prohibition' or 'restriction' of imports. This must be analyzed and proved both in terms of the de jure and de facto operation of the measure being reviewed. Only when a de jure and de facto 'prohibition' or 'restriction' of imports can be demonstrated, the specific measure being considered would amount to an 'other measure' of the type that GATT Article XI:1 considers illegal because it institutes or maintains a quantitative restriction." Does Turkey argue that determining the existence of <u>both</u> de jure <u>and</u> de facto "prohibition" or "restriction" is a necessary precondition to find a violation of Article XI:1 of GATT 1994?

Turkey argues that, in order for a measure to be in violation of GATT Article XI:1, it is necessary to establish whether that measure causes a *de jure* or *de facto* "prohibition" or "restriction". Clearly, if there is no *de jure* or *de facto* "prohibition" or "restriction", the nature of the measure is of no relevance and a violation of GATT Article XI:1 cannot be found.

Turkey believes that the test under GATT Article XI:1 is twofold and requires a proper assessment of the existence of either a *de jure* or a *de facto* "prohibition" or "restriction." In particular, Turkey believes that, alternatively, a *de jure* or a *de facto* "prohibition" or "restriction" must be found in order to establish a violation of GATT Article XI:1. Turkey does not believe that the cumulative determination of both *de jure* and *de facto* "prohibition" or "restriction" is necessary.

In any event, Turkey believes to have provided ample evidence showing that neither a *de jure* nor a *de facto* "prohibition" or "restriction" is to be found in relation to the approval of Certificates of Control, or its TRQ regime, or their joint operation. In particular, Turkey rejects the existence of a *de jure* or a *de facto* "prohibition." With respect to the *de jure* scrutiny, Turkey believes that the United States failed to prove that anything in the relevant Turkish law institutes or maintains an import prohibition. With respect to the *de facto* scrutiny, Turkey has provided conclusive evidence in relation to the high number of Certificates of Control that were approved by MARA, both in relation to MFN and TRQ trade. Turkey has also shown that, while the TRQ was providing an advantage to Turkey's trading partners, MFN trade was never impaired.

Similarly, Turkey rejects all claims put forward by the United States in relation to the existence of a *de jure* or *de facto* "restriction." Again, under the *de jure* scrutiny there is nothing in the relevant Turkish legislation which restricts or affects importation of rice. Under a *de facto* perspective, Turkey submits that Certificates of Control were always approved and rejects any instance of inconsistency with GATT Article XI:1. Turkey also wishes to respectfully remind this Panel that the scrutiny with respect to the existence of a *de facto* restriction must be particularly balanced.

The United States has not provided any factual evidence supporting its claims. The number of Certificates of Control approved, together with the lack of any factual evidence provided by the United States in support of its complaint, suggests that the case brought by the United States is largely centred on individual rejections, perfectly compatible with Turkish legislation and with Turkey's obligations under the WTO.

Q23. (Turkey) In paragraphs 22 and 23 of its first submission, the United States has identified the existence of documents that it calls "letters of acceptance", which would "follow a standard template, in which Turkey's Minister of Agriculture accepts recommendations from MARA's General Directorate of Protection and Control to 'delay' the start date for the period in which

Certificates of Control will be granted." Could Turkey explain what is the legal nature of the "letters of acceptance" referred to in the United States' first submission?

As indicated in its First Submission[6], Turkey wishes to reaffirm that these documents are mere instruments of internal communication among Turkish administrators and public officials. These communications often contain confidential positions and/or political statements which are aimed at developing unofficial policy recommendations.

There is no "standard template" through which the so-called "Letters of Acceptance" are recommended or accepted. Nor is there any rule, procedure or hierarchical legal value that, under Turkish law, makes the "Letters of Acceptance" enforceable by any party within the Turkish legal or administrative system. Turkey believes that this is a key aspect which should be given adequate consideration.

The so-called "Letters of Acceptance" are internal communications which are aimed at developing unofficial policy recommendations. They are not the official policy measures and should not even be used to interpret or imply a certain *de facto* attitude by Turkish authorities. The official trade policy measures of the Turkish Government are always duly made public and transparent. The *de facto* attitude of the Turkish Government in relation to trade must be determined and judged on the basis of actual trade figures and volumes. Turkey believes that the trade data and statistics which have been offered[7] clearly indicate that there has never been a *de facto* restriction (let alone a prohibition) to rice imports, which was mandated by the Government. Lower imports may have occurred during certain times, but that was always consequence of private choices made by importers on the basis of their commercial considerations and calculations.

The fact that the existence and alleged legal value of the so-called "Letters of Acceptance" were claimed by certain parts of the Turkish administration during the course of domestic judicial proceedings doesn't change their nature of unofficial, unenforceable and informal communications which are internal to the administration and aimed at developing or debating policy recommendations.

Q24. (Turkey) If Turkey's Ministry of Agriculture and Rural Affairs (MARA) is the competent authority to issue Certificates of Control for the importation of rice,

(a) What purpose do the "letters of acceptance" serve?

Turkey confirms that these documents are mere instruments of internal communication among Turkish administrators and public officials. They are aimed at developing unofficial policy recommendations both at intra-ministerial and inter-ministerial levels.

(b) What is the rationale for the Directorate General of MARA sending such a letter to the Minister?

The rationale is that of an internal administrative communication and policy recommendation which in no way reflects actual policy measures. Internal administrative communications occur predominantly in written form and follow hierarchical and administrative protocol.

(c) What legal consequence, if any, would arise from the fact that the Minister signs such a "letter of acceptance"?

[6] See paragraph 78 of Turkey's First Submission.
[7] See Annex TR-33.

No legal consequence ensues. There is only an administrative consequence, namely that a certain administration has put forward a policy recommendation by means of a ministerial-level communication. This may or may not provide greater strength to the actual communication, but it does not change the nature of the communication from that of an informal, unofficial and unenforceable administrative policy recommendation to that of a binding legal act and enforceable trade measure.

Q25. (Both Parties) Can the "letters of acceptance" constitute a valid legal basis to override provisions contained in Decrees and Communiqués issued by the Turkish Foreign Trade Undersecretariat (FTU)?

No, the so-called "Letters of Acceptance" do not constitute valid legal basis to override any legal act, including the Decrees and Communiqués issued by UFT.

For purposes of this question, Turkey wishes to recall that the legislation regulating foreign trade, which is issued by the Foreign Trade Undersecretariat, sets out the general principles which are applicable. The legislation prepared by MARA in relation to foreign trade sets out specific rules of conduct and control. This legislation is then issued by UFT. Therefore, the two sets of legislation can never "override" each other. In any event, as already indicated, the so-called "Letters of Acceptance" are neither legislation nor regulation, but simply internal communications within the administration.

Q27. (Turkey) In paragraph 78 of its first submission, referring to the documents identified by the United States as "letters of acceptance", Turkey has stated that "[t]hese communications often contain confidential positions and/or political statements which are aimed at developing unofficial policy recommendations".

(a) Can Turkey elaborate on this statement.

Please see reply to question 23.

(b) More specifically, could Turkey elaborate on the reasons why its "letters of acceptance" cited by the United States should qualify as confidential.

The confidential nature of these internal communications derives from their character of informal, unofficial and unenforceable policy recommendations. Any country's administration needs to have the ability to communicate internally on the basis of confidentiality in order to circulate, discuss, question, evaluate and ultimately suggest policy recommendations that the Government may decide to adopt into formal, official and enforceable legislation or executive measures.

These internal communications must remain, as much as possible (and particularly so when politically and/or commercially desirable), outside of the reach of the media, of market speculators, and of powerful commercial lobbies. Only confidentiality may offer this protective shield.

(c) Could Turkey also specify in what sense the policy recommendations contained in the "letters of acceptance cited by the United States would be "unofficial".

These policy recommendations are mere internal communications among MARA or UFT administrators and public officials. As long as they do not become policy decisions or legal acts which are enforceable, they remain "unofficial" communications and policy recommendations.

When (and only if) they become "official", they must be duly and timely published, they must be consistent with domestic law and international commitments, and they can be challenged. The so-

called "Letters of Acceptance" lack this "official" and binding nature both vis-à-vis the public and the other parts of the administration.

Q28. (Turkey) In paragraphs 22 and 23 of its first submission, the United States has asserted that the so-called "letters of acceptance" would "follow a standard template, in which Turkey's Minister of Agriculture accepts recommendations from MARA's General Directorate of Protection and Control to 'delay' the start date for the period in which Certificates of Control will be granted." Turkey has responded that the so-called "letters of acceptance" are only "mere instruments of internal communication among Turkish administrators and public officials".

(a) Can Turkey indicate how many Certificates of Control have been granted despite a contrary recommendation contained in the "letters of acceptance" cited by the United States in its first submission.

(b) Can Turkey provide the dates of the Certificates of Control granted despite a contrary recommendation contained in the "letters of acceptance" cited by the United States in its first submission.

During period of existence of the alleged "contrary recommendation" contained in the first "Letter of Acceptance" referred to by the United States[8] in its submission, 214 Certificates of Control were approved by Turkey. This information can be clearly evidenced by a review of the confidential table provided in Annex TR-33.

In particular, Turkey submits that this information is clear and conclusive testimony to the following three issues:

- Despite the existence of a "contrary recommendation" contained in a so-called "Letter of Acceptance", 214 Certificates of Control were, in fact, approved between 10 September 2003 and 30 June 2004. This is further proof that the so-called "Letters of Acceptance" were (and are) only internal communications suggesting policy recommendations and not formal trade policy measures binding on the administration. The fact that the administration did, in fact, approve 214 Certificates of Control during that period underlines the weak and non-binding value of the policy recommendations contained in the so-called "Letters of Acceptance". This is contrary to the allegations and assumptions made by the United States.

- 214 Certificates of Control were, in fact, approved between 10 September 2003 and 30 June 2004. Evidence shows that their approval always followed, by very minimal delays, the applications for approval of Certificates of Control made by importers. This is contrary to what the United States claimed in its First Submission at paragraph 24 thereof, where it stated that "the letter then recommends that the MARA once again 'delay' the period for issuing Certificates of Control until July 1, 2004".

- The fact that the compiled data show that Certificates of Control were not approved during certain periods (i.e., between 26 December 2003 and 20 May 2004) does not prove that the approval of the Certificates of Control was being delayed (certainly not until 1 July 2004) and does not prove that trade did not take place. It only proves that, during certain periods, Certificates of Control were not approved. This may have been the result of the combination of two factors, namely the absence of

[8] See paragraph 24 and Exhibit US-12.

applications for approval and/or the existence of considerable "left-over" approved volumes in the hands of the importers as a result of the difference between the approved and realized quantities of rice imports. It should be noted, in particular, that the applications for approval of Certificates of Control were, and remain, formal acts made by importers on the basis of business considerations and commercial calculations (i.e., profit margins, competitiveness of imported over domestic rice, speculative positions, currency fluctuations, etc.). These business determinations may have resulted in the lack of requests for approval of Certificates of Control during certain periods, but were never the result of specific policy decisions by the Government of Turkey.

Q29. (Turkey) In paragraph 84 of its first submission, Turkey asserts that the "letters of acceptance" are never enforced, and in fact, cannot be legally enforced by any party (i.e. the importers, the administration, or the courts)." However, the United States, in paragraph 69 of its first submission, asserts that officials from Turkey's Ministry of Agriculture and Rural Affairs (MARA) followed the wording of the letters of acceptance. In support of its assertion, the United States argues that, in a letter to a Turkish importer of US rice (dated 1 May 2005), a Provincial Agriculture Directorate denied the importer's request for a Certificate of Control on the grounds that "... it is not possible to prepare a control certificate according to our laws and regulations" (see, United States' Exhibit US-22).

(a) In Turkey's understanding, which were the laws and regulations the Provincial Directorate was referring to? Was the Directorate referring to the "letters of acceptance"?

The laws and regulations mentioned in US Exhibit 22 refer to the Communiqués stipulating the specifications of rice and paddy rice and those which set the rules and procedures for the approval of the Certificates of Control. The Provincial Agriculture Directorate was not referring to the so-called "Letters of Acceptance" as "law and regulations", but to specific shortcomings and procedural deficiencies that individual importers' applications for approval of Certificates of Control may have shown.

(b) If so, how can this be reconciled with Turkey's statement that the "letters of acceptance" are never enforced by the administration?

This is perfectly in line with the statement that the so-called "Letters of Acceptance" are never enforced by the Administration. It would not be possible (and not legally valid) for the Administration to provide, as a ground for rejection of an application for approval of a Certificate of Control, an internal policy recommendation which is not official, not published, and not enforceable.

Q30. (Turkey) In paragraph 3 of its first submission, Turkey refers to the documents known as "Certificates of Control".

(a) Can Turkey provide the formal definition of the "Certificates of Control" under the relevant Turkish legislation.

No formal definition of the Certificate of Control is provided under Communiqué of Standardization for Foreign Trade No. 2006/5 where the Certificate of Control is introduced and its purpose and approval conditions are clearly stated.[9] According to Communiqué No. 2006/05, the Certificate of

[9] A definition is provided under Article 4(d) of Communiqué No.31, according to which: "Certificates of Control means the model (i.e., a form) which is given in the annex of the relevant Communiqué on Standardization of Foreign Trade in force" (see Annex TR-21).

Control is an official document through which the importer submits certain information to MARA in relation to the particular product that it wishes to import into Turkey. It is a reference document needed to process the customs clearance of any particular consignment of produce and, it is ensuring that imported products will meet the legitimate standards for the protection of human health and safety, animal or plant life or health, and the environment.

(b) Can Turkey identify the appropriate domestic legislation under which Turkey's Ministry of Agriculture and Rural Affairs (MARA) is empowered to issue Certificates of Control.

The relevant legal instrument providing for MARA's competence to issue Certificates of Control is the Communiqué No. 2006/05. In particular, according to Article 1 thereof, "*[…] the conformity of the substances which are on the annex lists of this Communiqué and which are subject to the Entry into The Free Circulation Regime, The Internal Process Regime, The Regime On The Process Under The Customs Control and The Temporary Import Regime, in respect of human health and safety, animal and plant existence and health shall be determined by the Ministry of Agriculture and Rural Affairs*."

(c) Does every import of rice require a separate Certificate of Control? Could more than one shipment of rice be imported under a single Certificate of Control? Could shipments of rice from different origins be imported under a single Certificate of Control? Please make reference to the appropriate legislation to support your response.

The duration of an approved Certificate of Control for imports of rice is 12 months. Once a Certificate of Control is approved by MARA, a trader can import the full quantity of rice in different instalments within that period of time without having to apply for a new Certificate of Control for each instalment. The importation must be realised from the country stated in the Certificate of Control. See Annex TR-33 for evidence of the fact that often Certificates of Control were approved for amounts larger than what the importers later cleared customs with. This is an indication that actual importation (i.e., realised importation) was conducted on the basis of business determinations that belonged solely to the traders and were not imposed or influenced by the Government.

Q31. (Turkey) Once a Certificate of Control has been issued, what additional actions and formalities, if any, would be needed from Turkish authorities, in order to allow the importation of a particular shipment of rice?

The approval procedure of the Certificates of Control is part of process of customs control and verification to be conducted at the stage of importation. Once a commodity is brought to customs for clearance, MARA and the customs authorities are competent for carrying-out certain customs control procedures.

In particular, as Turkey mentioned in its reply to question 14 above, control procedures taking place at the stage of importation are conducted in a three-step process for products falling within both Annex VI-A and Annex VI-B. The control is conducted on the basis of sanitary and phytosanitary requirements. These steps are:

- Documentation control: customs authorities will control the documentation required by legislation, which accompanies the products. However, the control of the documentation is a process which, for the products listed in Annex VI-A, already starts from the approval of the Certificate of Control;

- Identity checks: customs authorities will compare whether the imported product is identical and corresponds to the customs declaration;

- Physical inspections: MARA's officials will operate controls on the products, including organoleptic controls up to the laboratory analyses.

As also mentioned in Turkey's reply to question 14, during the importation stage all products are examined according to a process of risk assessment. Imported products can be subjected to laboratory analyses, on the basis of Turkish food legislation. Furthermore, the safety of products is assessed on the basis of quarantine procedures as provided by Turkey's laws on Plant Protection and Agricultural Quarantine. If the results of the analyses are in compliance with the relevant legislation, the products are released for free circulation.

Q32. (Turkey) If an importer can demonstrate the fulfilment of the separate requisites that are normally verified through a Certificate of Control, would the import be allowed, even in the absence of a Certificate of Control?

No. The relevant Turkish legislation currently in force (i.e., Communiqué No. 2006/05) requires importers to present a valid Certificate of Control approved by MARA in order for the necessary control and inspection procedures to be carried-out at point of entry.

Q33. (Turkey) Could Turkey explain how, on the one hand, Certificates of Control and, on the other hand, what Turkey claims are separate import licenses, interact in relation to rice imports under the tariff-rate quotas? Is obtaining a Certificate of Control a precondition for obtaining an import license?

As Turkey submitted in reply to question 14 above, importers that wish to import under the TRQ must present the relevant documents to the Undersecretariat for Foreign Trade in order to obtain the import licence and import at the reduced duty rates. These importers must also submit all relevant documentation to MARA for approval of the Certificate of Control. As detailed by Turkey in Annex TR-32, importation under the TRQ requires importers to submit an application to the UFT to obtain the import license at reduced rates and then present all the documentation to MARA for the automatic approval of the Certificate of Control.

Q34. (Turkey) What is the difference, in terms of their legal regime (requirements, procedures, etc.) between a Certificate of Control for an agricultural product and a Certificate of Control for a non-agricultural product?

Turkish legislation does not envisage any difference between agricultural and non-agricultural products in terms of the procedures necessary for the automatic approval of a Certificate of Control. In both cases, importers are required to present to the competent authority (i.e., MARA for agricultural products) all necessary documentation before the actual importation of the products.

Q35. (Turkey) In paragraph 8 of its closing statement during the first substantive meeting with the Panel, Turkey asserted that "To the extent that they [relate to] agricultural products, [Certificates of Control] are approved by MARA". Can Turkey identify what agencies would be involved in the approval of Certificates of Control for other products.

Turkey respectfully provides few examples of other Ministries involved in the approval of Certificates of Control for other products.

Under Communiqué of Standardization for Foreign Trade No. 2006/3, the Ministry of Environment and Forestry is the competent authority for the approval of Certificates of Control for the importation of wastes and scrap metal. This Communiqué is based on the Basel Convention on the Control of Trans Boundary Movements of Hazardous Wastes and Their Disposal. Under this Communiqué, the importer is required to present to the Ministry of Environment and Forestry certain documents, such as the certificate of analysis and certificate of radiation, for the importation of the products.

The importation of chemical products, listed at the Annexes of Communiqué on Standardization for Foreign Trade No. 2006/6, requires the Ministry of Environment and Forestry to approve either the Certificate of Control or the Certificate of Control for the Import of Chemical Products, depending on the products. The documents that importers are required to present for approval of the Certificate of Control, *inter alia*, the *pro forma* invoice, the certificate of analyses, the label of the products, are listed under the Communiqué mentioned above. The Certificate of Control or the Certificate for the Import of Chemical Products must be submitted to the customs authorities.

Similarly, importers wishing to import certain (solid) fuels, listed in Annex 1 of Communiqué of Standardization for Foreign Trade No. 2006/7, must obtain approval of the Certificate of Control from the Ministry of Environment and Forestry. The Communiqué specifies which documents, *inter alia*, the *pro forma* invoice and the certificate of analyses, must be presented for the approval of the Certificate of Control. The Certificate of Control should be submitted to the customs authorities.

Finally, under Communiqué of Standardization for Foreign Trade No. 2006/4, the importation of certain goods such as pharmaceutical products, medicines, certain chemicals, etc., requires the approval of Certificates of Control by the Ministry of Health. For the importation of these goods, the importer shall submit certain documents, such as the *pro forma* invoice, or the invoice, the health certificate and the certificate of analysis, to the Ministry of Health before the import stage.

Q36. (Turkey) What are the specificities that justify, in the case of certain products, the requirement for a Certificate of Control, which is not required for other products? Why would the customs authorities not be able to process the same information included in a Certificate of Control for certain agricultural products through the ordinary procedures applicable to other products?

Turkey respectfully notes that the products the importation of which requires approval of the Certificates of Control are determined on the basis of legitimate concerns such as their sanitary and phytosanitary risk potential. These concerns justify the requirement for a Certificate of Control to be approved in relation to specific products.

For the same reasons, and in light of the often complex and time-consuming procedures that these specific products must undergo at time of customs clearance, the early approval by MARA (or by the other competent authorities) of a Certificate of Control acts to facilitate and render uniform the control exercised at customs.

Q37. (Turkey) In paragraph 19 of its first written submission, Turkey asserts that the Certificate of Control "allows customs authorities to verify, on a single document, all required customs information, including the product's compliance with relevant standards and technical regulations". If that is the case, why is it that Turkey's Ministry of Agriculture and Rural Affairs (MARA) "is the competent [authority] to certify compliance of the imported goods [in this case rice] with the applicable requirements" (see paragraph 17 of Turkey's first submission), rather than the Turkish customs authorities?

The Certificate of Control is a document that is meant to ensure that the product being imported is in compliance with the relevant legislation. This document contains all the information which is meant

to provide the basis of the evaluation carried-out by the customs authorities for clearance. Customs authorities work in close cooperation with MARA.

Turkey respectfully submits that the system is designed to centralize the competence and the responsibility of the products' compatibility in the agency (i.e., MARA for agricultural products) which is best suited to verify compliance with all the relevant legislation, and which will ultimately be liable for the products' safety. The approval by MARA of the Certificates of Control is, therefore, meant to grant a safe, uniform and consistent application of the requirements envisaged by the relevant legislation for food products, pursuing, at the same time, trade facilitation objectives through the predictability of customs inspections, at the benefit of the importers. Turkey would like to emphasize that the approval of the Certificates of Control has always been and is automatic in all required information is provided by importers at time of application. As indicated above, this is clearly evidenced in the data compiled in Annex TR-33.

Q38. (Both Parties) In paragraph 25 of its first written submission, Turkey asserts that "[a]n approved Certificate of Control for rice importation will be valid, contrary to the claims from the United States, for a period of twelve months on the basis of Article 9(c) of the Communiqué No. 2006/05".

(a) Can Turkey identify the legal support for this assertion, identifying the relevant domestic legislation.

Turkey submits that Article 9 of Communiqué No. 2006/05[10] provides that:

> "The duration of the control certificate is,
>
> (a) 4 months for the substances within the scope of the annex lists (Annex I, Annex II/A-B),
>
> (b) 6 months for the substances within the scope of the annex lists (Annex III, Annex IV, Annex V/A-B),
>
> (c) 4 months for the substances with 04th and 16th customs code chapter within the scope of the annex list (Annex VI-A); and 12 months for the other substances in the same list."

The reference made by Article 9(c) of Communiqué 2006/5 to the products listed in Annex VI-A thereof, clearly provides that the validity of all Certificates of Control is of 12 months, except for products falling within Chapters 04 and 16 of the Turkish Customs Code. Certificates of Control approved for products falling under Chapters 04 and 16 have a validity period of 4 months.

Therefore, given that rice is classified under Chapter 10 of the Turkish Customs Code, it is legally incorrect and misleading for the United States to allege that the duration of the approved Certificates of Control for rice imports is limited to 4 months. It is also wrong and misleading to allege, as the United States did during the oral hearing, that the 12-month validity rule is the result of a recent amendment transposed into the 2006/5 Communiqué. In reality, the same rule and the same wording are to be found in Article 9(c) of Communiqué No. 2005/5 (i.e., the previous legal instrument).[11]

[10] See Annex TR-1.
[11] See Exhibit US-7 of the First Submission by the United States.

Q39. (Turkey) In paragraph 54 of its first submission, Turkey asserts that, through the Certificates of Control, the domestic authorities determine the compliance of importers with "standards and technical regulations (i.e., human health and safety, animal or plant life or health, environmental protection, fitness for use, product safety, public policies, etc.)". Do any additional procedures take place to verify compliance of importers with the same "standards and technical regulations"? Do physical inspections of imported products take place upon importation, i.e., after the Certificates of Control have been approved? If so, then what is the purpose of the pre-approval of the Certificates of Control, vis-à-vis a later physical inspection?

As already explained by Turkey in its replies to questions 14 and 31 above, the process of customs control procedures includes physical inspections of the products carried-out by customs authorities. The statement that "domestic authorities determine the compliance of importers with standards and technical regulations" can be used to summarize both the initial review carried-out by MARA for purposes of approval of the Certificates of Control and the verifications and inspections conducted at customs point of entry on the physical consignments being imported.

It is not correct, however, to refer to "additional procedures". In fact, the procedures that take place at central level (i.e., with MARA in order to successfully apply for a Certificate of Control) and the ones that are exhausted at border level (i.e., the physical checks on the rice being imported which must show compliance "in practice" with all requirements, standards and technical regulations certified "in theory" by MARA when approving the Certificate of Control on the basis of the information provided by the importers) are all part of the same process of certification, verification, inspection and customs clearance.

Physical inspections of imported products do take place upon importation (i.e., after the Certificates of Control have been approved), but this must be seen as a legitimate and perfectly normal right of any Government. In particular, Turkey would like to emphasize that this is a reasonable process that must not be interpreted as trade distortive or administratively burdensome. On the contrary, this regulatory set-up must be seen against the backdrop of a country where leaner customs procedures for control and inspections cannot yet be administered because a strong system of market surveillance is missing. The process of early certification by MARA and the actual verifications and inspections at customs level are the only effective instruments for Turkey to guarantee that the products placed in free circulation on its market are safe and fit for consumption.

Q40. (Turkey) In paragraph 54 of its first submission, Turkey states that the Certificates of Control serve the purpose of determining "compliance with all relevant specifications, standards and technical regulations (i.e., human health and safety, animal or plant life or health, environmental protection, fitness for use, product safety, public policies, etc.)".

(a) Do domestic rice producers or distributors also need to obtain a Certificate of Control in order to trade rice in the Turkish market, or are Certificates of Control only applicable to imported rice?

Turkish legislation requires domestic producers to obtain from MARA a "permission of production" for the domestically-produced rice before the distribution, marketing and sale of the products. Furthermore, Turkish legislation provides that the products' label must contain "the number of the permission of production" if the marketed rice is domestic rice. For imported rice, the law requires the label to indicate "the date and number of the Certificate of Control." The relevant Turkish legislation is embodied in the Turkish Food Codex Communiqué on Rules for General Labelling and Nutritional Labelling for Foodstuffs.[12] On required labelling information, Article 6 of the Communiqué provides, in relevant part, that:

[12] Communiqué No. 2002/58, Official Gazette, 25.08.2002, No. 24857.

"Compulsory information which must be included in the labelling of the foodstuffs is indicated below:

(a) Name of the foodstuff

(b) List of ingredients

(c) Net quantity

(d) Names, registered mark, addresses of the manufacturer and packager and place of production

(e) Expiry date

(f) Lot number and/or serial number

(g) Date and number of production permission, registration number or date and number of import control certificate

(h) Country of origin

(ı) Instructions for use and / or storage conditions if necessary

(j) Quantity of alcohol for beverages containing more than 1.2 % alcohol by volume

Information covered by subparagraphs (a), (c), (e) and (i) must be on the same place of the labelling of the foodstuffs."

(b) How and under what rules does Turkey ensure that domestically-produced rice fulfils the minimum conditions in regard to the same aspects addressed by the Certificates of Control?

Turkey respectfully submits that Article 13 of the Turkish Food Codex Communiqué of paddy rice No. 2002/11[13] and of brown rice and milled rice No. 2001/10[14] both provide that "*the establishments producing and selling the products covered in this Communiqué are obliged to obey the provisions of this Communiqué during registration, authorization, importation, control and inspection*". Therefore, under Turkish legislation, the same specifications are required for imported and domestically-produced rice and are evaluated in the light of the same requirements.

(c) During the first substantive meeting with the Panel, Turkey asserted that all domestic producers undergo a registration system, which has been in place for the past three years. In this respect, can Turkey: (i) Provide the relevant legal instrument upon which that registration is based; (ii) Detail the requirements domestic producers need to comply with in order to be registered; (iii) Specify the objectives and purpose behind that system of registration; and, (iv) Identify the system in place before the enactment of the registration system.

[13] See Annex TR-6.
[14] See Annex TR-5.

Turkey respectfully submits that, in relation to point (i) of the question, the relevant legal instrument envisaging the registration system for farmers is embodied under Regulation on National Farmers' Registration System[15] and included in Annex TR-34.

In relation to point (ii), reference should be made to Article 6 and 7 of the relevant Regulation included in Annex TR-34.

In relation to point (iii), Turkey submits that the Farmers' Registration System was introduced in 2001 with the purposes of: setting-up the necessary infrastructure in view of harmonization with the relevant EC legislation; establishing a more efficient and effective distribution system for the direct income support payments and other subsidies; and assuring an accurate supply of data to be taken into consideration during the agricultural policy formulation process. The Farmers' Registration System contains information on products; on the land registration; on the land ownership, on the irrigation status of the land; on the farmer; on the village district, city and regions. Turkey submits that 90% of all the farmers and 91% of all the farm areas are registered within the system.

Finally, in relation to point (iv), Turkey submits that all farmers are obliged to be registered with the Union of Turkish Chambers of Agriculture. Before the Farmers' Registration System was in place, the major source of information for MARA was the record kept by the Union of Turkish Chambers of Agriculture.

(d) Can Turkey identify what are some of the "public policies" – different from human health and safety, animal or plant life or health, environmental protection, fitness for use and product safety – for which the Certificates of Control would serve the purpose of determining compliance.

Turkey respectfully submits that there are no other legitimate public policies other than the ones mentioned by the Panel in the question that the Certificate of Control is aimed at pursuing. In general terms, however, as indicated above, the approval of Certificates of Control also aims at guaranteeing consistency and uniformity in the customs clearance procedures, it provides greater commercial predictability and legal certainty to importers (in relation to what they can expect to happen at border control), and it reduces the possibility for goods to be blocked at customs with the potential for costly and time-consuming customs litigation. All these are clearly trade-facilitation benefits that Turkey considers to be provided by the Certificate of Control.

Q41. (Turkey) What is the analysis of "fitness and compatibility" with respect to human health and safety and other concerns that Turkey's Ministry of Agriculture and Rural Affairs (MARA) conducts when deciding to issue a Certificate of Control? Is that analysis limited to the declaration made by the applicant? Otherwise, when does this analysis take place and how is it done? When and where does a physical inspection of the imported products take place, if it does?

MARA's analysis of the "fitness and compatibility" of the product is made on the basis of the documents which must be attached to the Certificate of Control. The documents required for the approval of the Certificate of Control varies according to the specifications required by law for the product. The importer declares that the product is in compliance with legislation by filling out the relevant parts on the form of the Certificate of Control. For example, importers of rice must declare that the product conforms, *inter alia*, to the relevant legislation on Production, Consumption and Inspection of Foodstuffs, to the relevant legislation on Agricultural Pest Control and Agricultural Quarantine, to the specifications of the EC, the World Health Organization and the FAO Codex Alimentarius.

[15] Official Gazette, 16.04.2005, No. 25778.

As already explained in the reply to question 14, the approval of the Certificate of Control is part of a process of customs control and verification. The "documentation control," which represents the first of the three-step process for customs control procedures, already starts from the approval of the Certificate of Control for products which are subject to it.

Once they have verified that the documents presented by the importer comply with the requirements established by the law, customs authorities and MARA's officials will carry-out the identity checks and the physical inspections. As Turkey mentioned above, at the importation stage products are examined according to a process of risk assessment. Imported products can be subjected to laboratory analyses, on the basis of Turkish food legislation. Furthermore, the safety of products is assessed on the basis of quarantine procedures as provided by Turkey's laws on Plant Protection and Agricultural Quarantine. Products will be released for free circulation if the results of the analyses are in compliance with the relevant legislation.

Q44. (Turkey) Turkey has provided information on the 2,223 approved Certificates of Control between 2003 and September 2006 in Exhibit 20 attached to its first submission.

(a) Can Turkey provide information on the number of monthly applications filed for Certificates of Control to import rice, during the same period, by country of origin, indicating for each month the amounts requested and countries of origin.

(b) Can Turkey provide a monthly break-down of the Certificates of Control approved during the same period, indicating for each month the amounts requested and countries of origin.

(c) Can Turkey clarify whether all of the 2,223 approved Certificates of Control were issued for rice.

(d) Can Turkey provide an official list of each of the 2,223 Certificates of Control approved between 2003 and September 2006, indicating the date of request, the date of approval, the beneficiary (indicating whether it is a trader, a miller, a retailer or a final consumer), and the amount and type of rice (paddy, brown and milled).

(e) Can Turkey provide a copy of each of the 2,223 Certificates of Control approved between 2003 and September 2006.

(f) Can Turkey indicate the number of applications for Certificates of Control received between 2003 and September 2006, and how many of those were rejected and approved. Can Turkey identify the reason for rejection in each case. Can Turkey identify the country of origin and the amounts requested in the Certificates of Control that were rejected.

Reply to question 44(a), (b) and (d):

Firstly, Turkey respectfully wishes to clarify to the Panel that the total number of approved Certificates of Control has increased and is therefore higher than the one specified in the previous submissions (i.e., 2,223) due to the fact that the figures presented in the table included in Annex TR-33 have been updated to 9 November 2006. The number of approved Certificates of Control until 9 November 2006 is of 2,244.

In relation to the data requested under questions 44(a), (b) and (d), Turkey refers to Annexes TR-33, 35 and 36, where all the information on Certificates of Control can be found.

Reply to question 44(c):

This is correct. The number of approved Certificates of Control that was indicated refers to consignments of milled, paddy and brown rice.

Reply to question 44(e):

Turkey respectfully confirms to the Panel that photocopies of Certificates of Control are available. The relevant Ministries are not, however, authorized to provide all the copies to the Panel. In any event, Turkey submits that it will be able to provide to the Panel in strict confidence copies of any individual Certificate of Control listed in Annex TR-33 upon request from the Panel.

Reply to question 44(f):

Turkey refers to Annex TR-35 for the percentage of approved and rejected Certificates of Control and to Annex TR-36 for the list of rejected Certificates of Control, including the reasons for denial. Turkey would like to clarify to the Panel that the statistics provided in Annexes 35 and 36 cover the period until 21 September 2006.

Q45. (Both Parties) In paragraph 72 of its first submission, the United States asserts that "Turkey fails to grant Certificates of Control 100 per cent of the time" and, similarly, that "Turkey <u>never</u> grants Certificates of Control."

(b) If Turkey disputes this assertion, can it provide evidence of Certificates of Control granted in the last three years (since July 2003).

Turkey categorically rejects the United States' assertion, and it respectfully refers, for the necessary evidence, to Annex TR-33 and to the available copies of the approved Certificates of Control, as specified in its reply to question 44(e).

Q49. (Both Parties) During the first substantive meeting, Turkey asserted that once an importer obtains a Certificate of Control, the actual importation depends on market-related factors, such as relative exchange rates, demand, prices, etc.

(b) Can Turkey confirm that the discrepancy between the quantity of rice imports addressed in approved Certificates of Control and actual rice imports may be exclusively due to the above market-related factors? Or could an importer holding a valid Certificate of Control still be prevented from importing rice in full compliance with the relevant Certificate for reasons not related to market-related factors, such as not holding some additional document or permission from Turkish administration or not complying with some additional requirement? If that is the case, could Turkey specify the proportion of unrealized imports that can be accounted to such non market-related factors?

Turkey wishes to confirm that the discrepancy between the quantity of rice imports addressed in approved Certificates of Control and actual rice imports is due exclusively to market-related factors. In relation to this, Turkey submits that the system allows importers to use the Certificates of Control for the importation of the total amount indicated therein or just for a part of it. In this latter case, the importers are free to use the same Certificate of Control several times, up to the approved amount of rice, within the period of the duration of the Certificate of Control (i.e., 12 months from approval).

Turkey also confirms that, once the importers show to the customs authorities the Certificate of Control, there is no other additional document or permission required from any other public administration to realize the importation of the remaining part of the quantity stated therein. Importers may also choose not to use the Certificate of Control at all, according to their commercial evaluations, based on the market conditions for rice imports.

Products that fail to be in full conformity with the specifications cited in the Certificate of Control, and products which are found, during the physical inspections conducted at the customs, not to be in compliance with the SPS requirements, are rejected. Therefore, rejection of the consignments at border control can constitute another reason for the discrepancy between the quantity of rice imports addressed in the approved Certificates of Control and actual rice imports.

(c) Can Turkey provide the average monthly exchange rates applicable from July 2003 to September 2006. In addition, can Turkey indicate any other events, which in its opinion affected trading of rice in Turkey during that period.

In relation to the average monthly exchange rate *per* 1 US Dollar, Turkey refers to the Annex TR-37 herewith.

Turkey wishes to explain that the Turkish rice market is shaped by supply and demand, as for any free market economy. The main factors determining the demand side are domestic and world prices of rice, domestic consumption, and exchange rates. On the supply side, the level of domestic and world production and the level of the stocks are the substantial elements. Turkey has always been a net importer of rice. Although these data largely vary in the years depending on market conditions, Turkey submits that, for the last ten years, 33-62% of its total rice supply originated from foreign sources.

Despite the fluctuations in the total supply derived from the domestic production and rice imports, the general trend for total supply shows an increase. In particular, while the total supply in 1997 amounted to 436,092 tonnes, it has increased up to 643,436 tonnes in 2006. The increase in the total supply can be explained by the increase in domestic production and importation. On the other side, since there is no significant export of rice, this figure indicates also an increase in the total demand. The increase in population size and the changes in consumption attitudes have been main reasons behind this increase of the demand.

The increasing demand for imports of rice is not limited to the factors mentioned above. The proximity to the market, consumer choices and raising income levels are also important elements of the demand function. As for the first factor mentioned, the exporting countries closer to Turkey, such as Egypt, are far more advantaged than countries such as the United States and Thailand in terms of delivery. As for the second factor, since rice is not a homogeneous product in taste and quality, certain types of rice are preferred by consumers. Moreover, in Turkish market the domestic types of rice are sold at higher prices. Consumers can pay approximately US$100-US$150 more for higher quality rice. Finally, as *per capita* income has been gradually increasing since the 2001 financial crisis, the demand for importation of goods, including rice, has also increased.

A review of the production figures between 1997 and 2006 reveals a continuous increasing trend. The relatively steeper increase between 2004 and 2006 can be explained by several factors such as the renewal and modernization of farming systems and technologies (*inter alia,* more efficient irrigation systems, the utilization of high-quality seed, rehabilitation of the cultivated lands and seeds) in rice production, the change in the methods of estimation of production because of the new farmers registration system and agricultural policies of MARA. Although there is a continuous increase in the domestic rice production, generally, we also observe an increasing trend in total imports despite the fluctuations occurring in certain years. For instance, in the period between 2004 and 2006, in which

the TRQ regime was in force, rice equivalent imports have increased from 146,458 tonnes to 253,436 tonnes,[16] while the rice equivalent production has increased from 294,000 tonnes to 390,000 tonnes.

As for import fluctuations over the years, they can be partly attributed to the exchange rates of both Turkey and exporting countries, and to the production levels and stocks at the end of the previous year. For example, the decrease of imports in 2004 is to be explained by the increase in imports in year 2003, which amounted to 371,000 tonnes. This amount was the highest level of importation over the last 10 years and resulted in considerable amounts of stocked rice being carried-over to 2004. On the other hand, the 2003 increase of imports was partly due to the appreciation of the Turkish Lira and to the improvement of domestic purchase power after the 2001 financial crisis.

As for the imports by country of origin, while the milled rice imports from the United States continuously decreased, the paddy rice imports from the United States show a pattern relatively similar to that of total imports. Rice imports from Egypt maintained a rather stable and increasing curve. Turkey believes that the competitiveness of Egyptian rice accounts for this general trend. For example, the unit prices of US paddy rice was US$447/ton in 2004 and US$260/ton[17] in 2005, while the unit prices of milled rice in Egypt was US$305/ton in 2004 and US$310/ton in 2005. That's why the market share of rice from the United States has decreased and that of Egyptian rice has increased in recent years. Turkey submits that this has nothing to do with the TRQ. On the contrary, the TRQ boosted the importation of paddy rice (in which the United States maintains 98% of the market share) due to the lower rates of duty.

Q50. (Both Parties) Under what circumstances, or on what grounds, if any, would Turkey's Ministry of Agriculture and Rural Affairs (MARA) not issue a Certificate of Control?

Turkey submits that grounds for non-approval of the Certificates of Control may be found in cases of deficient information in the Certificate of Control form, or deficient documentation, as attached to the Certificate of Control form. Turkey provides below few examples of deficient/incorrect/incompatible information indicated in the Certificate of Control form and in the attached documentation:

Missing and/or wrong information on the Certificate of Control form, such as, *inter alia*:

- The incompatibility of the imported products with the customs code indicated in the Certificate of Control;
- Inappropriate or missing indication of the customs point of entry;
- Missing or inaccurate reference to the country of origin;
- Other missing information which is required on the Certificate of Control form.

Inconsistent information stated on the documents provided such as, *inter alia*:

- Name of the firm;
- Address;
- Indication of the product.

As already mentioned above, the relevant importer is promptly notified of the deficiencies and it is granted the right to remedy in the stated time frame. When the deficiencies notified by MARA to the importer are not addressed or are not properly corrected, the application will be returned to the importer, together with the official rejection. Other reasons for rejection are, obviously, the non

[16] Expected values.

[17] Although this price is not realistic because of the low declarations lodged by importers for tax-avoidance or tax-minimization purposes.

compliance of the product with the relevant legislation and the importer's withdrawal of its application for approval of the Certificate of Control.

Q53. (Turkey) In the case of rejected applications for a Certificate of Control:

(a) Does the importer have an opportunity to request some administrative or judicial review of the rejection?

Turkey submits that the importer can at any time request the administration (i.e. MARA) to review the application which was rejected. Turkey also submits that in Turkey all the acts of the public administration are subject to judicial review. In particular, this principle is set out in Article 125 of the Turkish Constitution, which also states that "*[t]he Administration shall be liable for damages caused by its own acts and actions.*" In addition, Article 138 of the Turkish Constitution, also provides that "*legislative and executive organs and the administration shall comply with court decisions; these organs and the administration shall neither alter them in any respect, nor delay their execution*."

(b) If a process for an administrative or judicial review is in fact available to the importer, please explain the procedure and provide the relevant legal basis.

The administration is obliged to redress the act which has been found in breach of the relevant legislation as a result of the litigation process initiated by the importer. The administration must comply with Court decisions and take all necessary and proper steps and actions within 30 days. (Article 28/1 of the 2577 numbered Law on the Administrative Procedure Law).

(c) Under what circumstances and on what grounds can an importer request an administrative or judicial review of the rejection of a Certificate of Control.

Turkey submits that under Turkish law the importer may always initiate the litigation process against any act of the administration.

(d) Can an importer resubmit its application for the same Certificate of Control, after having corrected the alleged failings? If so, under what circumstances would an importer choose to resubmit its application instead of requesting an administrative or judicial review of the rejection of the first application?

Turkey submits that the importer has the right to apply again for the Certificate of Control after having corrected its failings and/or having filled the requirements missing in the first application. If, however, the importer claims that the first application was in line with the requirements set in the legislation, it may choose to resort to litigation.

(e) Please provide statistics to illustrate the results of the administrative or judicial review and of the submission of new applications of rejected Certificates of Control.

Turkey submits that since 2003, 14 importers have resorted to litigation against MARA. Five of these trials were concluded with decisions in favour of MARA. For the remaining 9, the litigation before the Courts is currently ongoing.

Q54. (Turkey) In paragraph 67 of its first submission, Turkey states that "nothing in the relevant Turkish law imposes any 'denial' of the approval of Certificates of Control, with the exceptions of those legitimate instances in which the necessary customs purposes requirements have not been met by importers." Could Turkey specify which necessary customs purposes

were not met by the importers in the specific instances referenced by the United States in its first submission.

Turkey submits that reasons for the denial of the Certificates of Control have been, *inter alia*, incomplete administrative requirements, multiple usages of the invoices and failure to present all the necessary documentation.

For greater detail on the reasons for rejection, Turkey respectfully refers to Annex TR-36, which illustrates the specific reasons for denial of the single rejections of the Certificates of Control.

Q55. (Turkey) Do the Turkish customs authorities have the legal authority to reject the importation of a shipment of goods even if a Certificate of Control has been issued and approved by Turkey's Ministry of Agriculture and Rural Affairs (MARA)? Please explain.

Yes, Turkish customs authorities have the legal authority to reject the importation of a shipment of goods, even if a Certificate of Control has been issued and approved by MARA. In particular and as explained above, the Certificate of Control is a document required for the first (i.e., documentation control) of the three-step process through which control procedures at import stage take place. Following the "documentation control" phase, custom authorities and MARA's officials will carry-out identity checks and inspections. If the imports fail to comply with the specifications cited in the Certificate of Control, and if the inspections reveal that the imports are not consistent with SPS requirements, these imports are rejected.

Q59. (Turkey) In paragraph 17 of the provisional version of its oral statements, Australia indicates that "Turkey's submission ... that its Certificates of Control deal solely with customs matters -and so are not import licences- gives too great a scope to the carve out for 'customs purposes' and restricts the meaning of 'import licences' beyond that intended by either Article XI of GATT 1994 or the Import Licensing Agreement." Could Turkey comment on this statement.

Turkey notes that Article 1.1 of the Agreement on Import Licensing Procedures reads as follows:

> For the purpose of this Agreement, import licensing is defined as administrative procedures[18] used for the operation of import licensing regimes requiring the submission of an application or other documentation (other than that required for customs purposes) to the relevant administrative body as a prior condition for importation into the customs territory of the importing Member.

Turkey considers that, under this provision, the definition of import license for the purpose of the Agreement on Import Licensing Procedures excludes administrative procedures which are required for customs purposes. Turkey submits that the Certificates of Control are forms required for customs purposes and therefore fall outside the scope of the Agreement on Import Licensing Procedures and the definition of 'import license.'

As a preliminary remark, Turkey considers that the actual scope of the so-called "carve-out" for "customs purposes" can only be clarified by an analysis of what "customs purposes" actually consist of. There is no 'narrow' or 'large' scope of the "carve-out," once it is assessed that a certain form is meant to comply with "customs purposes." The application of concept of "customs purposes" must be neutral in nature and cannot be expanded or diminished for interpretative needs, particularly in relation to the meaning of import license.

[18] Those procedures referred to as "licensing" as well as other similar administrative procedures.

This is to say that the so-called "carve-out" is not indented to provide an exception to the requirements of import licensing procedures that must be interpreted, like all exceptions, in the most restrictive way. It is also not meant to narrow the definition of import license, be it for the purposes of the Agreement on Import Licensing Procedures or for the application of the term 'import license' under GATT Article XI:1. Rather, the reference to "customs purposes" is designed to confine the scope of the rules on import licensing procedures so to avoid any interference and possible confusion between the application of those rules and the enforcement of legitimate customs policies. Turkey fails to understand how Australia would draw the boundaries of the scope of application of this so-called "carve-out".

In relation to this, Turkey wishes to emphasize that it is not the scope and the content of the information requested by MARA for approval of the Certificate of Control that can change an administrative document used for customs purposes into an import license. Turkey believes that the distinguishing factor between an "import license" and other documentation (such as that used for "customs purposes") is a matter of procedures and not of content of the documentation. In addition, Turkey already submitted that the "customs purposes" of the Certificates of Control are evident both *de jure* and *de facto*. Turkey's customs regime shows nothing considerably different from the customs regimes of other WTO Members in that the process of importation and customs clearance is more than just compliance with the obligation to pay the applicable duty and other charges.

Q60. (Both Parties) In paragraph 26 of the provisional version of its oral statements, Australia indicates that "the measure at issue is Turkey's alleged blanket denial of Certificates of Control." Could the Parties comment on this statement. If appropriate, provide evidence to support your statements.

Turkey believes that it has already conclusively demonstrated, through the provision of factual evidence,[19] that there has never been a *de jure* or *de facto* "blanket denial" in the approval of Certificates of Control. Individual instances of denial of approval in relation to specific applications made by individual importers cannot be used to imply a "blanket denial" that would amount to a measure of general application.

Turkey also believes that, in this respect, the United States has failed to prove that, either *de jure* or *de facto* Turkey ever imposed a measure of general application that resulted in a "blanket denial" in the approval of Certificates of Control.

Q61. (Both Parties) In paragraph 27 of the provisional version of its oral statements, Australia indicates that "[i]f the Panel finds that Turkey has in fact adopted a practice of denying Certificates of Control altogether ... this could constitute a 'measure of general application' for the purposes of Article X:2 [of the GATT 1994], whether or not the Letters of Acceptance themselves can be enforced". Could the Parties comment on this statement.

Turkey would like to respectfully reiterate that there has never been a *de facto* "*practice of denying Certificates of Control altogether*". Therefore, there was never a "*measure of general application*" within the meaning of GATT Article X:2. In addition, Turkey would like to emphasize that, in relation to individual instances of rejection of approval of Certificates of Control, the affected importers were always systematically notified of the reasons for rejection. This is clear evidence of the specificity of the measures (i.e., the individual rejections). These individual rejections were not, as argued by the United States, measures of general application and never amounted to a *de facto* "blanket denial". Had Turkey wished to introduce a measure of general application, it would have duly published it as it does with all its measures of general application (for example, the TRQ or the rules on the Certificates of Control).

[19] See Annexes TR-8 and TR-20 and Annex TR-33 herewith.

Q63. (Both Parties) During the first substantive meeting with the Panel, Turkey asserted that the case of the difficulties faced by Torunlar in trying to import rice was exceptional.

(a) To the extent possible, could Turkey further develop this assertion and explain on what grounds the difficulties faced by Torunlar in trying to import rice were exceptional.

(b) Can Turkey also explain to what extent the cases of the other importers cited by the United States (Mehmetoglu and ETM) were also exceptional?

(d) Can Turkey refer to the other two importers mentioned by the United States in its first submission, who were allegedly denied Certificates of Control to import rice into Turkey (Mehmetoglu, and ETM).

(e) Can the Parties provide information regarding the importance and share of these three importers (Torunlar, Mehmetoglu, and ETM) in total imports of rice into Turkey and, more specifically, in imports of US rice into Turkey during the relevant period.

Turkey preliminarily submits that, despite the exceptional problems faced in the approval of certain Certificates of Control requested by these firms, a considerable number of Certificates of Control were approved for Torunlar, Mehmetoglu and ETM. In relation to this, Turkey refers to Annex TR-38 for detailed information on the approval of Certificates of Control for these companies.

The relevant Provincial Directorate of MARA states that the rejected applications filed by these firms were due to missing documents and incorrect information.

Turkey also refers to Annex TR-39 for detailed import figures regarding the above-mentioned importers and their relative shares of total imports.

Q66. (Both Parties) In paragraph 31 of its first submission, the United States asserts that Torunlar's lawsuit against the Ministry of Agriculture and Rural Affairs (MARA) "is still pending", making reference to a letter from the Ankara Governorship Province Agriculture Department (Exhibit US-33). What is the current status of the lawsuit to date?

Turkey respectfully submits that the lawsuit has been concluded in favour of the Ministry of Agriculture and Rural Affairs. The firm chose not to appeal it at the High Court.

Q67. (Turkey) In paragraph 35 of its first submission, the United States asserted that "[i]n early April, forty rice producers visited MARA to protest that one company (Mehmetoglu Domestic and Foreign Trade) had allegedly received a Certificate of Control without procuring domestic rice". Can Turkey comment on this information.

It is evident that this information was provided from a newspaper article. Just as it happens in every other WTO Member country where freedom of expression is allowed, in Turkey interest groups meet with the relevant governmental authorities to discuss or present their concerns and problems in relation to their area of operation. These meetings may naturally lead to certain sensational media statements which do not necessarily reflect the truth or that may be used for political or demagogical ends. Turkey believes that a newspaper article, the accuracy of which is doubtful, should not be used as an evidentiary element to build a WTO dispute settlement case.

Q71. (Turkey) Can Turkey provide detailed figures on the operation of its domestic purchase requirement under the TRQ, in particular as regards to:

(a) The date, value, price and type of domestic rice purchases under the TRQ;

(b) The origin of the specific rice imports; and

(c) The specific Certificates of Control in connection with which such domestic rice purchases have been made.

In relation to question 71(a), Turkey respectfully refers to Annex TR-27. In relation to question 71(b), Turkey refers to Annex TR-8, which also includes reference to the origin of both in-quota and out-quota imports from January 2004 to August 2006. Finally, in relation to question 71(c), Turkey refers to Annex TR-33, which lists all the approved Certificates of Control, for both in-quota and out of quota imports.

Q72. (Both Parties) Can Turkey comment on the United States' assertion contained in paragraph 123 of its first submission, that "Turkey ensures that the full amount of the quotas cannot be reached by setting the domestic purchase requirement so high that the entire Turkish domestic production of rice would be purchased by importers before the in-quota amount was reached" and that, "[b]ased on the levels of domestic purchase set forth thus far, there is no way for importers to be able to import anywhere approaching the 300,000 metric ton limit on milled rice imports." If that were the case, please refer in particular to the reasons Turkey would have, if any, in setting the import quotas above the actual level of possible realisation of imports. Does the United States have any comments on the matter?

Turkey submits that the total amount of the tariff quota was determined on the basis of the production projections of each year and the conversion coefficients indicated in related Communiqués.

Turkey's estimate for 2005-2006 crop season (September – November 2005) in Turkey was about 620.000-630.000 tons of paddy rice. If all the domestic production had been purchased under the TRQ, 500.000 tons of paddy or 300.000 tons of rice equivalent would have been imported only via TRQ in 2005. These were the exact quantities, which the quota opened for.

Q73. (Both Parties) In paragraph 23 of the written version of its oral statements, Australia indicates that "... WTO jurisprudence supports the view that the imposition of an 'additional requirement' or an 'extra hurdle' on imported products, when compared to like domestic products, constitutes less favourable treatment ..." Australia adds that "these 'extra hurdles' need not be onerous in commercial and/or practical terms to be inconsistent with Article III:4 of GATT 1994". Could the Parties comment on this statement.

Turkey respectfully recalls that GATT Article III:4, as interpreted by WTO case law, requires imported products to be accorded 'competitive opportunities' no less favourable as compared to domestic products. Turkey acknowledges that the imposition of additional requirements on imported products may result in granting less favourable treatment.

However, Turkey respectfully recalls that the scope and the meaning of GATT Article III:4, as described by Australia in its oral statements, must necessarily find application within the context of Turkey's WTO MFN commitments. Turkey disagrees that such reasoning should also apply to volumes of trade within the TRQ, which provides an advantage to imported rice over domestic rice. In particular, Turkey cannot support the view that the obligations provided under GATT Article III:4 would apply beyond the scope of Turkey's actual commitments and within an advantage that Turkey was spontaneously granting to imported over domestic rice. In this respect, Turkey considers that, if

MFN trade is not impaired, hampered or otherwise affected, it is a matter for the importers' business determinations (and not a matter of governments' evaluations) whether or not the domestic purchase requirement constitutes an "extra hurdle." In relation to this, Turkey considers that within the TRQ the essence of the advantage is ultimately determined by the choice of the importers. It is the importers that must assess the convenience of the TRQ and its domestic purchase requirement. The fact that importers made great use of the TRQ and benefited of its tariff rate advantage, while MFN trade remained available, represents a clear testimony of the existence of a considerable advantage for imported products, in spite of the domestic purchase requirement.

Q74. (Both Parties) In pages 2 and 3 of the written version of its oral statements, Korea indicates that "[n]o matter how much the cost of buying domestic rice was lowered by virtue of the so called domestic purchase requirement, it can not be denied that importers had to resource additional funds to purchase domestic rice, and foreign rice could be imported more if such funds were not forced to be used to buy domestic rice. The main focus in this issue is not the price of domestic rice but the additional obligation imposed on the importers". Could the Parties comment on this statement.

The calculations made on the average prices and the scenarios provided clearly indicate that importers autonomously decided on the basis of purely commercial considerations whether or not it was advantageous to purchase domestic rice in order to benefit of the tariff preference within the TRQ.

Turkey disagrees that greater amounts of foreign rice would have been imported had there not been a domestic purchase requirement. At any time, as conclusively demonstrated on the basis of factual evidence, importers could have destined unlimited funds to purchase rice at the MFN or applied rates. The fact that most importers preferred to import within the TRQ, despite the domestic purchase requirement, was entirely an individual business decision made on the basis of purely commercial calculations.

Q75. (Both Parties) Two of the Third Parties in their oral statements have presented views on the applicability of the Agreement on Trade-Related Investment Measures (TRIMs Agreement). China in paragraphs 4 and 5 of the provisional version of its oral statement, asserted that "Turkey ignores the fact that the US fails to define what 'trade-related investment measure' is and to prove Turkey's measure constitutes a TRIM"; and adds that "[i]n no case it is proper to bring a measure out of the coverage of TRIMs Agreement under the jurisdiction of it." Korea, in page 3 of the written version of its oral statement, noted that the TRIMs Agreement can only be applied to investment measures, which must have both a trade and an investment element. In the case of the domestic purchase requirement, it asserted that "there does not appear to be an investment element", and if so, "it can not be an investment measure, therefore the TRIMs Agreement could not be applied." Could the Parties please comment on the assertions made by China and Korea in their oral statements.

Turkey notes that China and Korea raised interesting points with respect to the application and the necessary methodology for interpretation of the TRIMs Agreement. The United States seem to argue that, as the domestic purchase requirement appears to fall within the definitions provided in the Illustrative List under subparagraph 1(a), the measure constitutes *ipso facto* a trade-related investment measure, in violation of Article 2.1 of the TRIMs Agreement.

China believes that the United States has failed to identify which aspect of Turkey's domestic purchase requirement constitutes a TRIM. Basically, China argues that the United States failed to prove that the measure is a TRIM in the first place and simply made this assumption on the basis of the Illustrative List. Korea rightly points out that, for the TRIMs Agreement to apply, a measure must be a TRIM (i.e., have both a trade and an investment element). Korea believes that the Turkey's domestic purchase requirement lacked the investment element. In addition, Korea considers that a

cross-border financial movement stands out as an essential element of any investment measure. In practice, both China and Korea consider that the fundamental requirement of the existence of a TRIM has been overlooked by the United States in its claim.

Turkey shares these views and considers that the correct methodology for interpretation of the TRIMs Agreement should require a preliminary assessment of the existence of both the trade and the investment elements of an alleged TRIM. This appears to be reinforced by the reading of Article 1 of the TRIMs Agreement, according to which "*[t]his Agreement applies to investment measures related to trade in goods*."

Turkey is aware of the fact that the Panel in *Indonesia – Autos* did not consider necessary to decide "*whether any requirement by an enterprise to purchase or use a domestic product in order to obtain an advantage, by definition falls within the Illustrative List or whether the TRIMs Agreement requires a separate analysis of the nature of a measure as a trade related investment measure before proceeding to an examination of whether the measure is covered by the Illustrative List*."[20] Turkey wishes to observe, however, that in the same case the Panel felt it appropriate to determine fist whether Indonesian measures were trade-related investment measures.[21] Turkey invites the Panel to proceed in the same way, as it seems more consistent with the provision of Article 1 of the TRIMs Agreement.

Should the Panel engage in such analysis, which Turkey considers necessary, it would indeed find that Turkey's domestic purchase requirement is not, as Korea also argued, a trade-related investment measure. Turkey considers that, so far, neither the TRIMs Agreement nor any Panel or the Appellate Body provided a definition of what a trade-related investment measure is for the purposes of the application of the TRIMs Agreement. It is clear, however, that despite not having yet been defined, a TRIM necessarily requires a trade element and an investment element.

With respect to the investment element, Turkey wishes to recall that, without intending to provide an overall definition of what constitutes an 'investment measure', the Panel in *Indonesia – Autos* has found the Indonesian measures to meet the 'investment requirement' because they "*aimed at encouraging the development of a local manufacturing capability for finished motor vehicles and parts and components in Indonesia*. *Inherent to this objective is that these measures necessarily have a significant impact on investment in these sectors. For this reason, we consider that these measures fall within any reasonable interpretation of the term "investment measures.*" According to the Panel, the review of the legislative provisions related to those measures revealed "*investment objectives and investment features and which refer to investment programmes*."[22]

The Panel in *Indonesia – Autos* was encouraged to identify investment measures from few revealing expressions and words included in the Indonesian legislation, such as, *inter alia*, "effort to promote the growth of the domestic automotive industry", "a decree for the regulation of investment in the national automobile industry", "to realise the development of the national automobile industry," "within the framework of promoting the development of the automotive industry in the increased use of domestically produced automotive components." Indonesia had also argued that its programmes were aimed at, *inter alia*, improving the competitiveness of local companies and strengthen overall industrial development; encourage the development of the automotive industry and the automotive component industry, encourage car companies to increase their local content, resulting in a rapid growth of investment in the automobile industry.[23]

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[20] *Indonesia – Certain Measures Affecting the Automobile Industry*, Panel Report, para.14.71.
[21] *Indonesia – Certain Measures Affecting the Automobile Industry*, Panel Report, paras. 14.71-14.72.
[22] *Indonesia – Certain Measures Affecting the Automobile Industry*, Panel Report, para. 14.80
[23] *Indonesia – Certain Measures Affecting the Automobile Industry*, Panel Report, paras. 14.77-14.78.

Turkey notes that nothing in its expired TRQ legislation revealed or even implied 'investment objectives'. Turkey also emphasises that, if a relation to investment is the key element that characterises a measures as an "investment measure," it is clear that Turkey's domestic purchase requirement could never have been an "investment measure" because it had no relation with investment. In addition, Turkey has repeatedly stated that the TRQ, and its domestic purchase requirement, aimed at achieving the necessary supply of rice into Turkey and at stabilizing the domestic market. The TRQ has even done so providing foreign rice with an advantage. It was never aimed at protecting or distorting trade, let alone at promoting the development of the national industry. Turkey also fails to understand how the TRQ and its domestic purchase requirement could have had a significant impact on investment in the rice sector and development of a domestic rice industry. Therefore, Turkey wishes to underline that its expired TRQ system, and the domestic purchase requirement in particular, lacked any of the investment elements necessary for them to fall within the scope of the TRIMs Agreement.

Turkey also wishes to make a statement in relation to the application of the TRIMs Agreement. Turkey believes that this statement is of particular importance to further clarify its own previous statements in relation to the TRIMs Agreement, not only in the light of China's and Korea's submissions, but also in the light of the considerations made by the EC concerning the idea of the "order of analysis."

This directly calls into question the relationship between the TRIMs Agreement and the GATT, which has been the object of few Panel and Appellate Body Reports leading to mixed results. In *EC – Bananas III*, the Panel, faced with a an EC measure claimed to be inconsistent with both GATT Article III:4 and Article 2.1 of the TRIMS stated that: "*the TRIMs Agreement essentially interprets and clarifies the provisions of Article III where trade-related investment measures are concerned. Thus the TRIMs Agreement does not add to or subtract from those GATT obligations, although it clarifies that Article III:4 may cover investment-related matters*."[24] On this basis, once it found the measures inconsistent with GATT Article III:4, the Panel decided to resort to judicial economy with respect to the claims related to the TRIMs.

The Panel in *Indonesia – Autos* came, instead, to a different conclusion. On the relationship between the TRIMs Agreement and GATT Article III:4, the Panel had this to say: "*we note first that on its face the TRIMs Agreement is a full fledged agreement in the WTO system. The TRIMs Agreement is not an 'Understanding to GATT 1994', unlike the six Understandings which form part of the GATT 1994. The TRIMs Agreement and Article III:4 prohibit local content requirements that are TRIMs and therefore can be said to cover the same subject matter. But when the TRIMs Agreement refers to 'the provisions of Article III', it refers to the substantive aspects of Article III; that is to say, conceptually, it is the ten paragraphs of Article III that are referred to in Article 2.1 of the TRIMs Agreement, and not the application of Article III in the WTO context as such. Thus if Article III is not applicable for any reason not related to the disciplines of Article III itself, the provisions of Article III remain applicable for the purpose of the TRIMs Agreement. This view is reinforced by the fact that Article 3 of the TRIMs Agreement contains a distinct and explicit reference to the general exceptions to GATT. If the purpose of the TRIMs Agreement were to refer to Article III as applied in the light of other (non Article III) GATT rules, there would be no need to refer to such general exceptions.*"[25]

On this basis, and referring to the Appellate Body Report on *EC – Bananas III* in relation to the order of examination, the Panel began its analysis of the consistency of the measures from the TRIMs Agreement, as more specific than Article III:4, as far as the particular claims were concerned. The Panel, having found the measures at issue inconsistent with Article 2.1 of the TRIMs Agreement,

[24] *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Panel Report, para.7.185.

[25] *Indonesia – Certain Measures Affecting the Automobile Industry*, Panel Report, paras. 14.60-14.61.

bearing in mind the principle of judicial economy and considering that action to remedy the inconsistencies found under the TRIMs Agreement would also remedy any inconsistency found under the GATT Article III:4, did not consider necessary to address the claims under GATT Article III:4.

Such latter approach was, however, not followed by the Panel in the *Canada – Autos* dispute.[26] As for the other disputes cited, certain measures were claimed to be inconsistent under both GATT Article III:4 and the TRIMs Agreement. The Panel reverted to the approach followed by the Panel in *EC – Bananas III* and decided to analyse the claims under GATT Article III:4 first. This Panel was in fact not "*persuaded that the TRIMs Agreement can be properly characterized as being more specific than Article III:4 in respect of the claims raised by the complaints*."[27] Therefore the Panel, considering that from the order in which the complainants had presented their claims it was implicit that the claims under GATT Article III:4 were to be addressed first, started its analysis from the GATT Article III:4 and found the measures to be inconsistent with the obligations set therein. The Panel did not further investigate the consistency of the measures with the TRIMs Agreement, aligning its reasoning with what previously stated in the *EC-Bananas III* Panel Report.

Conversely, the same Panel found that certain other requirements were not inconsistent with GATT Article III:4. In the light of this latter finding the Panel also rejected the claim under Article 2.1 of the TRIMs Agreement.

A similar approach was followed by the Panel in *India – Autos*. Here the Panel clarified that "*[a]lthough the TRIMs Agreement has an autonomous legal existence, independent from the relevant GATT provisions, as noted in the Indonesia – Autos Panel, the substance of its obligations refers directly to Articles III and XI of the GATT, and clarifies their meaning, inter alia, through an Illustrative list. On one view, it simply provides additional guidance as to the identification of certain measures considered to be inconsistent with Articles III:4 and XI:1 of the GATT […]*."[28] The Panel considered that in this case the order of analysis was of not much relevance and, following the order of the complaints' claims, considered the claims under GATT first. In relation to the TRIMs violations, the Panel again resorted to judicial economy.

Turkey considers this statement of the Panel of particular importance: "*The order selected for examination of the claims may also have an impact on the potential to apply judicial economy. It seems that an examination of the GATT provisions in this case would be likely to make it unnecessary to address the TRIMs claims, but not vice-versa. If a violation of the GATT claims was found, it would be justifiable to refrain from examining the TRIMs claims under the principle of judicial economy. Even if no violation was found under the GATT claims, that also seems an efficient starting point since it would be difficult to imagine that if no violation has been found of Articles III or XI, a violation could be found of Article 2 of the TRIMs Agreement, which refers to the same provisions* "[29]

Turkey has previously stated that, in order to establish the existence of a violation of the TRIMs Agreement, its domestic purchase requirement must first be found to be inconsistent with the provisions of GATT Article III. Turkey believes that the United States has not established that the domestic purchase requirement is inconsistent with GATT Article III:4. For this reason, the Panel should dismiss also the United States' claim in relation to the TRIMs Agreement.

To conclude, Turkey invites the Panel to reject the claims in relation to the alleged violations of the TRIMs Agreement on the basis of the fact that the United States has not proved how Turkey's

[26] *Canada – Certain Measures Affecting the Automotive Industry*, Panel Report.
[27] *Canada – Certain Measures Affecting the Automotive Industry*, Panel Report, para 10.63.
[28] *India – Measures Affecting the Automotive Sector*, Panel Report, para. 7.157.
[29] *India – Measures Affecting the Automotive Sector*, Panel Report, para. 7.161.

domestic purchase requirement would result in a trade-related investment measure and if so whether it would violated GATT Article III.

Q77. (Both Parties) In paragraph 122 of its first submission, Turkey asserts that the deadlines for the submission of applications for import licenses was extended twice in 2005, as "evidence that Turkey did not intend to discourage full utilization of the quotas."

(b) Can Turkey indicate whether any import licences have been granted during these extensions.

Turkey submits that 95 import licenses were issued by UFT within the extended period.

Q79. (Turkey) In paragraph 32 of its first submission, Turkey asserts that the tariff-rate quota system (TRQ) "was not introduced as an instrument to protect or distort trade, but rather as a tool to achieve the necessary supply of rice to Turkey and to stabilize the domestic market". Can Turkey confirm whether alternative mechanisms, such as a lower MFN tariff, would, in its opinion, not be capable of achieving the same objectives.

Turkey notes that through the TRQ it pursued, at the same time, two legitimate objectives, i.e., that of a greater market supply and that of market stabilization. Turkey submits that through the TRQ system, not only the supply of rice has increased, but also market and price stability was achieved.

In this respect Turkey notes that lower MFN rates would have achieved the desired increase in supply without contributing to market stabilization. In any event, Turkey submits that recourse to lower MFN rates was made as lower rates were applied within the TRQ system. Recourse to lower MFN rates would have also limited Turkey's ability to manage the market. It is well known that actual rates cannot be continuously modified (i.e., increased or lowered, as need may be) even if this occurs within the bound rate. Turkey believed that a TRQ would give greater stability, commercial predictability and legal certainty to all stakeholders, including importers or third country exporters.

Q80. (Turkey) In paragraph 50 of its first written submission, the United States asserts that "Turkey re-opens the TRQ with a domestic purchase requirement that has been adjusted to ensure that all domestically-produced rice is purchased and imports are effectively capped at the difference between projected domestic consumption and projected domestic production." Can Turkey comment on this assertion.

Turkey rejects these allegations and considers these assertions to be untrue and misleading. Turkey also submits that imports could have never been capped, given that importation at MFN and applied rates always remained available to importers.

Q81. (Both Parties) In its oral statement, Thailand has raised the issue of "the inconsistency of Turkey's rice TRQ regime with its obligations under Article II of GATT 1994 with respect to its Schedule of Concessions". Further, in paragraph 5 of the written version of its oral statement, it based its argument on "the factual evidence submitted by the United States, [according to which] the treatment actually accorded by Turkey under its TRQ regime is 'less favourable' than that provided in its Schedule to all Members." Can the Parties comment on the issue raised by Thailand in its oral statement.

Turkey believes that Thailand's analysis of the effects of the TRQ regime in relation to GATT Article II:1(a) is legally incorrect for two main reasons.

Turkey points out that GATT Article II:1(a) reads, in relevant part, that: "Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement."

In order to find a violation of GATT Article II:1(a), therefore, a comparison between the tariff commitments included in the Schedules and the treatment actually granted to trade with other contracting parties is required. To comply with the relevant GATT obligations, the treatment actually granted must not be *less favourable* than what indicated in the Schedules.

First, it appears that Thailand based its considerations on "the factual evidence submitted by the United States." Turkey maintains that, rather than on circumstantiated factual evidence, many of the United States' arguments rest on unproven assertions.

In particular, Thailand's arguments that the TRQ regime would be inconsistent with the obligations set forth under GATT Article II:1(a) must follow from the paramount assumption that MFN trade of rice is prohibited, restricted or otherwise impaired. Turkey has always rejected any allegation of this kind and repeatedly submitted that the TRQ regime was only an advantageous option available to importers. These importers have always been free to choose to import at the MFN and applied rates. Turkey has brought ample evidence, expressed *inter alia* through data on approved Certificates of Control[30] for MFN imports, which sharply contradicts "the factual evidence submitted by the United States" on which Thailand's arguments appear to be based.

Second, Thailand seems to have overlooked that the calculations submitted by Turkey in its First Submission and in its Oral Statements[31] have shown that, for both paddy and milled rice importation, the TRQ regime provided a substantial advantage vis-à-vis imports of rice at the MFN and applied rates. Remarkably, Turkey demonstrated in its First Submission and Oral Statements that this was at times even the case with respect to the average cost of the TRQ imports, had they occurred without the application of the domestic purchase requirement.

For these reasons, Turkey fails to understand where, according to Thailand, Turkey would have granted less favourable treatment than the one committed under the Schedules. Turkey therefore rejects the idea that its TRQ regime resulted into a violation of GATT Article II:1(a). In any event, Turkey submits that the review of an alleged violation of GATT Article II:1(a) was never included in the claims put forward by the United States and falls outside of the terms of reference of this dispute.

Q82. (Turkey) Both Parties have introduced claims concerning the intended and actual effects of the TRQ regime, including the domestic purchase requirement. In the light of Turkey's claim that the TRQ is no longer in force and Turkey's statement that it does not intend to reintroduce the TRQ, can Turkey specify whether and, if so, through what instruments the intended and actual objectives under the TRQ might be achieved in the future.

Turkey submits that the TRQ regime, and its domestic purchase requirement, had been introduced as temporary measures. Turkey wishes to point out that the TRQ regime provided and advantage to importers as compared to the importation at MFN rates, which always remained available. Turkey has used the TRQ regime for two years (i.e., in 2004 and 2005) after which it automatically expired. Turkey has already expressed that it has in no intention to reintroduce the TRQ regime or any similar system.

The domestic and international economic indicators also lead Turkey to the assumption that there will not be, at least for the foreseeable future, needs for market intervention and stabilization of the types

[30] See Annex TR-33.
[31] See First Written Submission of Turkey, para. 95, and Oral Statement from Turkey, paras. 27 and 28.

that the TRQ helped address. In particular, the Turkish Lira is no longer weak and unstable, plenty of rice is available internationally, and domestic rice remains competitive with predictable production forecasts.

In any event, Turkey wishes to emphasize that it will no longer have recourse to the TRQ system, if anything to lower its administrative costs and to avoid misunderstandings of the type that may have triggered this dispute settlement proceeding. The only real market stabilization instruments will remain the action of the TMO coupled with the use of appropriate MFN actual rates of duty.

Q83. (Both Parties) In page 1 of the written version of its oral statements, Korea indicates that "the disproportionate number of certificates for out-quota imports should be explained by Turkey in order to avoid the suspicion that the issuance of out-quota certificates have been deliberately controlled". In page 2, Korea also notes that "the proportion of out-quota certificates to in-quota certificates in 2006 is much higher than it is for the years 2004 and 2005" and states that "[a]n explanation for this should be sought so as to avoid the assumption that Turkey loosened its grip on out-quota certificates only after having been challenged in the WTO". Could the Parties comment on these statements.

Turkey does not consider that the number of out-of quota Certificates of Control for 2004 and 2005 is "disproportionate," given that the advantage provided by the TRQ rendered in-quota importation far more appealing. 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 Certificates of Control were approved for out-of-quota imports and 432 for in-quota imports.

Turkey also submits that the different trends of 2006 are easily explained by the fact that the TRQ regime expired in July 2006, so that after this date all importations have been realized on out-of-quota basis. In any event, Turkey wishes to respectfully submit that the Certificates of Control were always approved on the basis of the requests for approval put forward by importers. The choices of importers were only ever dictated by business considerations and commercial calculations.

Q84. (Both Parties) In the hypothetical case that Certificates of Control do not qualify as import licenses under the Import Licensing Agreement, would it automatically flow that such documents cannot qualify as import licenses under GATT 1994 either?

Article 1.1 of the WTO Agreement on Import Licensing Procedures circumscribes the coverage of the Agreement by stating that:

> For the purpose of this Agreement, import licensing is defined as administrative procedures used for the operation of import licensing regimes requiring the submission of an application or other documentation (other than that required for customs purposes) to the relevant administrative body as a prior condition for importation into the customs territory of the importing Member.

GATT Article XI:1 and the Agreement on Import Licensing Procedures cover different issues and pursue different objectives. In particular, the Appellate Body in *EC – Bananas* clarified that the Agreement on Import Licensing Procedures "*concerns import licensing* procedures. *The preamble of the* Licensing Agreement *indicates clearly that this agreement relates to import licensing procedures and their administration, not to import licensing rules. Article 1.1 of the* Licensing Agreement *defines its scope as the* administrative procedures *used for the operation of import licensing regimes*".[32]

[32] *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Appellate Body Report, para. 197.

However, Turkey notes that the Agreement on Import Licensing Procedures was endorsed by WTO Members, *inter alia*, with the aim of furthering the objectives of the GATT and ensuring that import licensing procedures are not utilized in a manner contrary to the principles and obligations of the GATT. These principles and obligations are, *inter alia*, those included in Article XI:1 of the GATT, so that it can be concluded that the Agreement on Import Licensing Procedures shows a substantial link with GATT Article XI:1 by aiming at further developing and clarifying the provisions therein included in a manner which is consistent with the wording and the scope of GATT Article XI:1.

In light of these considerations, Turkey believes that, in the absence of a precise definition of the concept of "import license" under GATT Article XI:1, Article 1.1 of the Agreement on Import Licensing Procedures must necessarily provide an element of interpretative guidance. Therefore, Turkey submits that, while the non-applicability of GATT Article XI:1 cannot be an automatic result of the inapplicability of the Agreement on Import Licensing Procedures, the practical result should be the same as a consequence of the recourse to the interpretative guidance on the meaning of the term "import license" offered by the Agreement on Import Licensing Procedures for purposes of the application of the GATT 1994.

Q85. (Turkey) In paragraph 28 of its first submission, Turkey explained that "Turkish law does provide for the use of import licenses [that] are required for imports of rice within the TRQ". Turkey added that these import licenses "do not serve a customs purpose, but rather aim at allocating the available quota among traders and guaranteeing predictability of the market supply". Is the approval of these import licenses the only intervention that customs authorities would have in relation with the importation of rice into Turkey?

Importers wishing to import through the TRQ, have to submit to the customs authorities the import license and their Certificate of Control in order to benefit from the reduced rates of duty. The customs authorities are not the authorities competent for the approval of import licenses. This competence belongs to UFT. Customs authorities merely check the licenses for the imposition of the duty and for dual usage prevention.

Q86. (Turkey) In relation to paragraph 2 of the United States' first submission, please provide information establishing the average time importers must wait for a response to their license applications at the MFN tariff rate.

Turkey would like to emphasize that no import licence has ever been requested for imports at the MFN rates of duty. Import licences have always only applied to TRQ in-quota trade (when this system was in force).

If the Panel is referring to the administrative delay for purposes of the approval of Certificates of Control, Turkey submits that a general administrative rule applicable to all instances of interaction between the Turkish administration and the world at large provides for a maximum delay of 15 days for a decision to be taken. In relation to the approval of Certificates of Control, Turkey wishes to refer to the dates provided in the table contained in Annex TR-33 herewith.

A general overview will clearly show that the general administrative delay is well below 15 days. Often the Certificates of Control were (and are) adopted within 1 or 2 dates from the date of first application. Other times, this delay has been up to 25 days, but those instances show repeated applications to correct mistakes or fill gaps in the first application.

Q87. (Turkey) Under the WTO Agreement on Import Licensing Procedures one of the requirements for automatic import licences to be deemed as not having trade-restricting effects

is that "applications for licences may be submitted on any working day prior to the customs clearance of the goods" (Article 2.2(a)(ii)). Could Turkey explain how the deadlines for submitting applications for import licences under its tariff-rate quota regime as contained in various communiqués from its Foreign Trade Undersecretariat (FTU) comply with this requirement?

Turkey believes that its TRQ system and the procedures for import licensing were always well within the rules and provisions of the WTO system, including those of the Agreement on Import Licensing Procedures. In particular, its licenses always had a validity which corresponded to the duration of the TRQ. Applications for licences were admitted within a time frame that ranged from three to six months from the opening of the TRQ and was often extended to ensure full utilization of quotas.[33] Finally, licences did not entail the deposit of bonded securities.

The result of such a permissive system was always one of great quota utilization. Importers never applied, in practice, at such short notice (i.e., one day from customs clearance) simply because rice trade and rice importation cannot be improvised at such short notice, but require early planning to order the rice, load it, transport it, unload it, etc.

Q88. (Turkey) In paragraph 43 of its first submission, Turkey states that the requirements for the application and evaluation procedures of the import licenses under its tariff-rate quota regime have always been clear, transparent and easy to implement for all importers.

(a) Can Turkey elaborate on what are these evaluation procedures?

The evaluation procedure consists in controlling the documents provided by the applicant and comparing them with the information required in the relevant legal instruments (i.e., the relevant communiqués). In addition, a calculation of the quantity of imported rice which the import licence should be granted for is carried-out. This calculation is based on the quantity of domestic rice purchased and the applicable coefficients.

(b) Does the application of evaluation procedures imply that the import licenses will not be granted in all cases?

(c) If so, in which cases will they not be granted?

Turkey submits that import licenses have always been granted, provided that the quota is available and all the documents and information required are duly completed.

Q89. (Turkey) In paragraph 51 of its first submission Turkey states that: "[t]here is no import licensing regime applicable to imports of rice into Turkey under MFN trade. There is an import licensing regime only in relation to rice imports under TRQ trade." To support this, in the same paragraph Turkey points out that "[t]he rules in relation to these licenses are set out in Decree No. 2005/9315 on the 'Application of Tariff Quota for the Importation of Some Species of Paddy Rice'." Could Turkey specify the relevant situation and legal rules applicable to import licences for rice prior to the entry into force of Decree No. 2005/9315.

Turkey wishes to clarify that Decree No. 2005/9315 is only related to TRQ opened in year 2005. There are two other Decrees (i.e., Decree No. 2004/7135 and Decree No. 7756, which relate to the

[33] See, in particular, Article 2 of Communiqué on Application of Tariff Quota For the Importation of Some Species of Paddy rice and Rice No. 25943, Annexe TR-13 of Turkey's First Submission and Article 2 of Communiqué on Application of Tariff Quota For the Importation of Some Species of Paddy rice and Rice No. 25577 and further amendments, in Annexes TR-17, TR-18 and TR-19 of Turkey's First Submission.

TRQ openings in 2004). For a detailed chronology of the history of the TRQ regime, reference should be made to the factual background provided by Turkey in its First Submission.[34]

Q90. (Turkey) Regarding the Turkish Grain Board:

(a) Can Turkey provide more information on the nature and role of the Turkish Grain Board.

(b) Can Turkey provide copy of the relevant legal instruments that regulate the functions and composition of the Turkish Grain Board.

(c) Can Turkey explain what are the functions of the Turkish Grain Board as regards to the production and sale of domestic rice and the importation of rice.

Turkey refers to Annex TR-40 herewith for all relevant information regarding the nature, functions and composition of the TMO.

Q91. (Both Parties) Is the Turkish Grain Board a state trading enterprise as defined in GATT Article XVII and the Understanding on the Interpretation of Article XVII of the GATT 1994?

Turkey respectfully submits that the TMO is not a state trading enterprise in that it was never granted any exclusive or special right or privilege through which it could exercise influence on the level of imports and exports. The TMO merely acts as an intervention agency to prevent grain prices from excessively falling or increasing.

Q92. (Turkey) During the first meeting with the Panel, Turkey asserted that the Turkish Grain Board plays a role, *inter alia*, in stabilising the domestic rice market. In this regard,

(a) Under what legal basis does the Turkish Grain Board perform this function?

Turkey submits that the relevant information is to be found in Annex TR-40.

(b) How is the Turkish Grain Board financed in order to participate in the market in this manner?

TMO's activities are financed by its own resources as well as by credits obtained from domestic and/or foreign financial markets.

(c) If the Turkish Grain Board buys rice at a more expensive price than that of the market, why would a domestic producer sell rice to an importer, at market price, instead of to the Turkish Grain Board, at a higher price?

Turkey submits that while it is correct that TMO declares purchasing prices which are higher than the market prices (the ceiling price is for the best quality product), received prices are much lower than what is declared (please note Turkey's reply to question 7-iii). Turkey also submits that it is received prices that must be compared with the market prices. Such comparison would indicate that TMO prices received by rice producers are similar to those formed in the domestic market. For instance, in 2005, although the TMO's declared price was 720 YTL/TON, the received price ended up being 612 YTL/TON, which is even lower than the market price, i.e. 640 YTL/TON. On the other hand, most rice producers are usually in need of receiving immediate payment for their deliveries. TMO sometimes declares purchasing with a certain amount of delay and growers in such a position seek for

[34] See paras. 35-42 of the First Submission by Turkey.

buyers other than TMO. Another factor which explains why rice producers prefer to sell to importers rather than to the TMO relates to the fact that deliveries to the TMO can be difficult and sometimes take long time, especially for those rice producers that suffer from the lack of transportation means. For all these reasons, rice producers tend to sell to the importers instead of selling to the TMO.

(d) If the Turkish Grain Board sells rice at a price above that of the market, in order to comply with the domestic purchase requirement to import under the TRQ, why would an importer purchase rice from a Turkish Grain Board instead of from a domestic producer, at the lower market price?

Since Turkey is a net importer of rice, once the harvesting season is finished, supply from the market is quite limited. Therefore, it is frequently TMO rather than domestic growers that meets the demand of rice importers. Additionally, TMO offers forward sales option to attract potential rice buyers. And this also affects buyers' preference for TMO rice.

Q93. (Turkey) The Panel has noted Turkey's letter dated 30 August 2006, in which Turkey informs the Panel that it has designated as "confidential" all its submissions concerning the current proceedings and that it would provide the United States with a non-confidential summary of its submissions in accordance with Article 18.2 of the DSU. Is the executive summary of Turkey's first submission, dated 18 October 2006, to be considered as the non-confidential summary of the information contained in Turkey's first written submission under the terms of Article 18.2 of the DSU?

Yes.

ANNEX C-3

REPLIES BY AUSTRALIA TO QUESTIONS POSED BY THE PANEL AFTER THE FIRST SUBSTANTIVE MEETING

(21 November 2006)

Q94. (For all third parties) Have any of the Third Parties who have exported rice to Turkey encountered difficulties entering the Turkish market similar to the ones described by the United States, and in particular with respect to the requirement of Certificates of Control? If so, please describe the nature of such difficulties.

Australia last exported rice to Turkey in 2003. Many of the problems the US claims to have encountered appear to date from late 2003. However, Australian exporters' experience was that import certificates were often unavailable from the start of harvest to the completion of new crop marketing so that imports were often effectively banned during the critical harvest period.

Q95. (For all third parties) In the case of Third Parties who have exported rice to Turkey, have their exports entered the Turkish market within or outside the TRQ?

The US submission states (at paragraph 39) that the TRQ was applied from April 2004. This post-dates Australia's last export of rice to Turkey.

Q96. (For all third parties) In the case of Third Parties who are at least potential exporters of rice, but have not exported rice to Turkey, what are the reasons for not exporting rice to Turkey?

Australia only exports rice to Turkey when Australia has surplus production. Australia does not normally export to Turkey as the tariff schedule rates for rice favour imports of paddy rice above milled rice. Australian exporters prefer to export branded processed and milled rice, so Turkey's tariff rates make it an unattractive export market. Since 2003, drought has constrained the Australian rice crop and Australian exporters have not had enough surplus rice to export to Turkey.

ANNEX C-4

REPLIES BY EGYPT TO QUESTIONS POSED BY THE PANEL AFTER THE FIRST SUBSTANTIVE MEETING

(21 November 2006)

Q94. (For all third parties) Have any Third Parties who have exported rice to Turkey encountered difficulties entering the Turkish market similar to the ones described by the United States, and in particular with respect to the requirement of Certificates of Control? If so, please describe the nature of such difficulties.

Turkish authorities have provided different explanations to Turkish importers of Egyptian rice when refusing their applications for Certificates of Control. As can be noted from the attached copies of letters that were provided to us by Egyptian rice exporters, the explanations given by Turkish authorities to support their decisions were not always clear.

In two letters dated 1 May 2005, the Province Agricultural Directorate of the Ankara Governership returned the applications submitted by Mehmetoğlu Iç Ve Dis Ticaret A.S. and Helin Gida Pazarlama Sanayi Ve Ticaret Ltd. Sti on 21 April and 29 March 2006 respectively. In both letters, the following laconic reason was given for not accepting the applications submitted by the Turkish importers of Egyptian rice: "*Your application file for importing middle grained rice from Egypt has been returned to you because any control document can not be arranged according to the laws*".

In another letter dated 1 May 2005, the Province Agricultural Directorate of the Ankara Governership indicated to Mehmetoğlu Iç Ve Dis Ticaret A.S. that "*Rice control document can not be arranged for your company mentioned in your written application according to the laws*". The company was then invited to submit an application for imports of paddy rice.

In a letter dated 26 May 2005, the Directorate General of Protecting and Controlling of the Ministry of Agriculture and Rural Affairs appears to confirm that the Ankara Governership rejected the application for a Certificate of Control lodged by Mehmetoğlu Iç Ve Dis Ticaret A.S. and that the importation of Egyptian rice into Turkey is, thus, impossible.

Q95. (For all third parties) In the case of Third Parties who have exported rice to Turkey, have their exports entered the Turkish market within or outside the TRQ?

Egyptian exporters of rice to Turkey have indicated to us that the great majority, if not all, imports of Egyptian rice into Turkey in the most recent years were made under the TRQ.

ANNEX C-5

REPLIES BY THE EUROPEAN COMMUNITIES TO QUESTIONS POSED BY THE PANEL AFTER THE FIRST SUBSTANTIVE MEETING
(21 November 2006)

Q94. (For all third parties) Have any of the Third Parties who have exported rice to Turkey encountered difficulties entering the Turkish market similar to the ones described by the United States, and in particular with respect to the requirement of Certificates of Control? If so, please describe the nature of such difficulties.

The European Communities have no evidence of similar difficulties to the ones encountered by the United States, when exporting rice to Turkey.

Q95. (For all third parties) In the case of Third Parties who have exported rice to Turkey, have their exports entered the Turkish market within or outside the TRQ?

1. During the marketing year 2004/2005 (September 2004-August 2005) the European Communities exported to Turkey 41248 tonnes of semi-milled and wholly milled rice. During the marketing year 2005/2006 (September 2004-August 2005), the quantities exported to Turkey amounted to total 31428 tonnes of rice, out of which 28864 of semi-milled and milled rice; 2533 of husked rice and 32 tonnes of paddy rice.

2. The European Communities enjoy a preferential TRQ of 28000 tonnes at 0 duties for semi-milled and milled rice. Rice exports outside the quota are applied MFN tariff rates.

3. The European Communities' exports of rice have entered the Turkish market both within the preferential tariff rate quota and outside the tariff rate quota.

Q96. (For all third parties) In the case of Third Parties who are at least potential exporters of rice, but have not exported rice to Turkey, what are the reasons for not exporting rice to Turkey?

The European Communities exports rice to Turkey.

Q97. (European Communities) In the course of these proceedings, the United States has referred to a bilateral agreement, under which the European Communities would enjoy an annual quota of milled rice into Turkey.

Please provide the provisions of that agreement, relevant to the importation of rice into Turkey.

The Agreement establishing an Association between the European Economic Community and Turkey establishes, inter alia, a preferential trade regime for agricultural products.

Trade preferences between Turkey and the European Communities are consolidated in Decision 1/98 of the EC/Turkey Association Council of 28 February 1998. In particular, the preferential régime applied by Turkey to products originating in the Communities is specified in Protocol 2, Annex II to Decision 1/98. Under Protocol 2, Article 2, par.2 states that "For certain products listed in the annex, the import charges shall be eliminated within the limit of the tariff quotas listed in column "D" thereof for each of them. For quantities in excess of the quotas, the import charges of the Turkish import regime to third countries shall apply". The list of products referred to in Article 2, par. 2 includes a tariff rate quota of 28 000 tonnes at 0 duty for semi-milled and wholly milled rice.

Explain whether European imports of rice into Turkey are treated differently from other imports.

Within the framework of the EC/Turkey Association Agreement, the European imports of rice entering the Turkish market enjoy preferential treatment within a tariff rate quota of 28 000 tonnes at 0 duty. Imports outside the quota are submitted to the import charges which the Turkish import regime applies to third countries.

More specifically, explain whether importers of European rice are required to obtain Certificates of Control in order to import rice into Turkey.

The European Communities confirm that importers of European rice are required to obtain Certificates of Control in order to import rice into Turkey.

Q98. (European Communities) In paragraph 5 of the written version of its oral statements, the European Communities has referred to Egypt's comments in its Third Party submission regarding the "unpublished Letters of Acceptance". In this regard, the EC expresses its view that "the issue is more subtle than as expressed by Egypt as it is important to establish whether a measure exists in the first place", adding that "the fact that a given document has not been published is relevant". Can the EC expand its comments. Can it indicate in what manner the fact that the so-called Letters of Acceptance may have not been published is relevant, in order to determine whether they may be considered as "laws, regulations, judicial decisions or administrative rulings" within the meaning of Article XI:1 of the GATT.

It would appear to the EC that the question of the Panel refers to the wording of Article X:1 of the GATT whereas the oral submission on the point referred to by the Panel related to Article XI:1.

The EC did not intend to suggest that the individual Letters of Acceptance could not qualify as "measures" within the meaning of Article XI:1of the GATT.

In its first written submission the United States considers that "Turkey's denial of import licenses to import rice at or below the bound rate of duty constitutes a prohibition or restriction on imports other than in the form of duties, taxes or other charges and thus is inconsistent with Article XI:1 of the GATT 1994". In other words, it would appear that the "measure" the US is challenging is the denial of import licences, the existence of which is demonstrated allegedly by (inter alia) the individual and unpublished "Letters of Acceptance".

The EC considers that challenging the regime as such is different from challenging the individual Letters of Acceptance addressed to individual importers of rice. It is the unpublished nature of this general denial or "unofficial ban" (see US submission paragraph 14) that the EC considers relevant to the issue of proving its existence. The Letters of Acceptance seem to be presented as evidence of the existence of the measure the US is challenging rather than as the challenged measure itself.

In deciding whether the challenged measure i.e. the denial of import licences exists in the first place, the EC considers it important whether it is manifested in some public way.

In contrast, should the US be challenging the application of the Turkish rice import regime as applied in certain instances, it could be that the individual Letters of Acceptance would qualify as "measures" within the meaning of Article XI:1 of the GATT.

ANNEX C-6

REPLY BY KOREA TO QUESTIONS POSED BY THE PANEL AFTER THE FIRST SUBSTANTIVE MEETING
(21 November 2006)

Q94. (For all third parties) Have any of the Third Parties who have exported rice to Turkey encountered difficulties entering the Turkish market similar to the ones described by the United States, and in particular with respect to the requirement of Certificates of Control? If so, please describe the nature of such difficulties.

Q95. (For all third parties) In the case of Third Parties who have exported rice to Turkey, have their exports entered the Turkish market within or outside the TRQ?

Q96. (For all third parties) In the case of Third Parties who are at least potential exporters of rice, but have not exported rice to Turkey, what are the reasons for not exporting rice to Turkey?

With respect to questions 94, 95 and 96, Korea would like to inform the Panel that Korea has never exported rice to any country, including Turkey, and has no meaningful potential to export rice in the near future.

ANNEX D

REBUTTAL SUBMISSIONS BY THE PARTIES

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ANNEX D-1

EXECUTIVE SUMMARY OF THE REBUTTAL SUBMISSION BY THE UNITED STATES

(15 December 2006)

1. Turkey has employed a non-transparent, discretionary import licensing system for rice that prohibits or restricts the importation of rice and provides less favourable treatment to whatever rice is imported in spite of the hurdles Turkey has imposed. Turkey requires importers to submit an import license – the Control Certificate issued by Turkey's Ministry of Agriculture and Rural Affairs ("MARA") – in order to import rice. Turkey has furthermore restricted rice imports by declining to issue such Certificates. Further, since September 2003, Turkey has applied a tariff-rate quota ("TRQ") for rice under which it requires importers to submit two import licenses (the Control Certificate and an import permit from Turkey's Foreign Trade Undersecretariat ("FTU")) to import at the in-quota rates and also to purchase domestic rice. Turkey's import licensing regime for rice is inconsistent with several provisions of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), the *Agreement on Import Licensing Procedures* ("Import Licensing Agreement"), the *Agreement on Agriculture* ("Agriculture Agreement"), and the *Agreement on Trade-Related Investment Measures* ("TRIMs Agreement").

2. Despite Turkey's claims, the Control Certificate is neither required for customs purposes nor does it establish the fitness and compatibility of imported products with the relevant phytosanitary standards. The Control Certificate is not used for customs purposes; in fact, the Certificate is in addition to the normal customs documentation. Nor is it submitted to Turkish Customs – instead it is submitted to MARA. Further, MARA conducts its inspections for fitness and compatibility only after it has already granted a Control Certificate, so the Certificate is not even necessary for phytosanitary purposes. Therefore, MARA has no reason to require an importer to obtain a Control Certificate other than to provide MARA with an opportunity to permit or deny the importation of rice.

3. With respect to the over-quota rates, MARA has imposed restrictions on the issuance of Control Certificates to import rice. The United States has provided extensive documentary evidence that Turkey denies these import licenses pursuant to so-called "Letters of Acceptance," in which the Minister of Agriculture orders the blanket denial of Control Certificates to those importers who do not purchase domestic paddy rice. When importers have challenged MARA's denial of Control Certificates in Turkish court, Turkey has successfully defended its failure to issue Certificates. At least two courts have agreed with Turkey that the Letters of Acceptance are binding, and that MARA is acting in accordance with Turkish law in not granting the Certificates.

4. Turkey has completely ignored this documentary evidence in its submissions. In fact, Turkey's arguments before this Panel are diametrically opposed to the arguments it advances in Turkish court. Turkey's arguments in this proceeding are inconsistent with the Letters of Acceptance, the rejection letters MARA issued to importers, and recent domestic court decisions. Instead, Turkey focuses on its unverified Control Certificate data. However, such data only serve to confirm that the restrictions on the issuance of Control Certificates at the over-quota rates are in place and being enforced. Further, the United States has provided evidence, in the form of the Letters of Acceptance, rejection letters, and court documents, that Turkey's import licensing system for rice is discretionary, which is all that is needed to support findings that MARA's Control Certificates constitute a restriction on importation under Article XI:1 of the GATT 1994 and a breach of Article 4.2 of the Agreement on Agriculture.

5. With respect to in-quota quantities of rice, Turkey makes the receipt of import licenses from FTU contingent upon the purchase of large quantities of domestic paddy rice (the "domestic purchase

requirement"). This domestic purchase requirement is an additional import restriction that is inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agriculture Agreement. And because only domestic rice qualifies for the purchase requirement, Turkey's requirement alters the conditions of competition in a manner that discriminates against imported rice. Consequently, imported rice receives treatment less favourable than domestic rice and Turkey's requirement is inconsistent with Article III:4 of the GATT 1994.

The Control Certificate is an "Import License" Under Article XI:1 of the GATT 1994

6. The Certificate of Control is an "import license" for purposes of Article XI:1 of the GATT 1994 because MARA requires a Certificate in order for importation to take place. In paragraphs 59-62 of the US First Submission, the United States noted that the ordinary meaning of the term "import license" was "formal permission from an authority to bring in goods from another country". In order to import rice into Turkey, an importer has to obtain a Certificate of Control from MARA. To obtain the Certificate, an importer must follow certain procedures, including completing an application form and attaching an invoice. Because a Certificate of Control from MARA constitutes formal written permission from the Government of Turkey to import goods – in this case, rice – from another country, a Certificate is an "import license" within the ordinary meaning of that term. Footnote 1 to Article 1 of the Import Licensing Agreement, which provides relevant context for interpreting the term "import license" in Article XI:1, clarifies that a Member's characterization of a particular procedure as something other than "licensing" cannot be used to evade the disciplines of the Import Licensing Agreement.

7. Turkey has attempted to characterize the Certificate of Control as something other than an import license by arguing that the Certificate "amount[s] to administrative forms that are required exclusively for '*customs purposes*'." Turkey set forth a list of customs-related items that, if requested by a document, would allegedly prove that document was exclusively for customs purposes (and hence should not be considered an import license). It then asserted that, since MARA requests that importers provide such customs-related information in their applications for Control Certificates, such Certificates are clearly used for customs purposes and, as a consequence, are not import licenses for purposes of Article XI:1.

8. Of course, the question is not what information is requested for a document, but rather what is the function of the document. It would not be difficult for Members to provide that every import license asked for nothing more than some subset of the information normally requested for customs purposes. That would not render every import license exempt from the disciplines of the covered agreements. In this instance, if the Control Certificate were truly no more than ordinary customs documentation, the United States would not be proceeding with this dispute. But clearly Control Certificates are very different from ordinary customs documentation. Not only are they separate and apart from the ordinary customs documentation that Turkey <u>also</u> requires; in fact, they are not even documents of Turkish Customs, but of MARA. And they do not serve to facilitate customs entry. To the contrary, they serve to restrict entry.

9. Turkey's argument is not even consistent with Turkey's own approach, particularly its own statement that the FTU import permit is an import license. The FTU import permit, which Turkey requires from importers in order to import rice under the TRQ, arguably collects even more customs-related information than the Control Certificate does, and so, by Turkey's logic, should not be considered an import permit. At bottom, however, Turkey's proposed interpretation is flawed because it is contrary to customary rules of treaty interpretation, as reflected in the *Vienna Convention on the Law of Treaties*.

10. Article 31(1) of the *Vienna Convention* provides that: "a treaty shall 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". For purposes of the Article XI:1 analysis, one relevant term whose ordinary meaning must be discerned is "import license". The United States has shown that the ordinary meaning of the term "import license" is "formal permission from an authority to bring in goods from another country" and the United States has gone on to explain the text in its context and in light of the Agreement's object and purpose. Turkey, however, has ignored the ordinary meaning of the term "import license".

11. MARA's Control Certificate clearly lies within the ordinary meaning of the term "import license". If a form constitutes formal permission from an authority to bring in goods from another country, it is an "import license" under the ordinary meaning of the terms in Article XI:1. Here, the Certificate of Control fits this criterion. Without this document, which must be approved by MARA, not Turkish Customs, Turkey does not permit importers to import rice into Turkey. The Certificate is not something that is obtained by presenting goods at the border to customs and providing the necessary information to clear customs. Rather it is obtained in advance of shipment – in fact it would appear prudent to obtain it before making a sale of the rice. It is a prerequisite for importation in addition to the ordinary customs documentation.

12. Instead of explaining the ordinary meaning of the term "import license" in Article XI:1 of the GATT 1994, Turkey has seemingly argued that the term must be limited by the definition of the term "import licensing" in Article 1 of the Import Licensing Agreement. Turkey seems to suggest that, as import licenses under the Import Licensing Agreement are "procedures ... requiring the submission of an application or other documentation (other than that required for customs purposes)", if the Control Certificate requires documentation for customs purposes, it is not an import license for purposes of Article XI:1. Turkey's argument is incorrect.

13. The definition of "import licensing" in Article 1 is prefaced with the phrase "[f]or purposes of this Agreement," which acts to limit that specific definition to the provisions of the Import Licensing Agreement. That definition is not a definition for purposes of Article XI:1 of the GATT 1994 nor is it an exemption to Article XI nor does it restrict the scope of Article XI. Rather, the definition is relevant context for interpreting the meaning of the term "import license" in Article XI:1 of the GATT 1994. And in any event the context provided by the Article 1 definition confirms that the term "import license" in Article XI:1 covers the Certificate of Control. That definition of "import licensing" contains two key phrases that are relevant for the Panel's Article XI:1 analysis. The definition (1) covers administrative procedures "used for the operation of import licensing regimes" but (2) exempts from its scope those administrative procedures that require the submission of documentation "required for customs purposes".

14. With respect to the first point, the fact that a document is necessary in order to clear customs does not mean that it is not an import license. Indeed, the very nature of an import license is that it will be used for customs purposes since importation cannot occur without it. The relevant inquiry is simply this: what else is the form in question actually used for? In this case, the Certificate of Control, which is approved by the Turkish Ministry of Agriculture, not Turkish Customs, is being used as an import license: the document, when issued, constitutes formal written permission from the Government of Turkey to import rice. Turkey is not granting these Certificates outside the TRQ for imports of non-EC origin rice in order to enforce restrictions on such imports. Regarding the second point, the question is what is "required" for "customs" purposes. According to the ordinary meaning of those terms, this provision provides an exemption from the disciplines of the Import Licensing Agreement for administrative procedures requiring the submission of documentation that is necessary for purposes of a government's levying of duties on imports.

15. Customs authorities throughout the world collect information from importers with respect to the type of good being imported, quantity, value, and country of origin. All of these pieces of information are "required" in order for a customs authority to make a determination as to how much

of a duty to levy upon the import of a particular good. MARA's Control Certificate does not contribute to this process, since it is completely duplicative of what Turkish Customs already requires importers to provide separately. As would be expected, Turkish Customs requires that importers supply information that is necessary for a customs authority to be able to levy duties on imported merchandise, including: importer identification information, HTS number, description of the merchandise, quantity, country of origin, value, country where the merchandise was loaded, and the port. MARA requires that an importer submit much of this same information on its application for a Control Certificate. It is clear that MARA's Control Certificate is not "required" for customs purposes when Turkish Customs itself already collects this information. Thus, the context provided by Article 1 supports a finding that the Control Certificate is an import license within the ordinary meaning of that term under Article XI:1 of the GATT 1994.

16. MARA requires that importers obtain a Control Certificate in order to import rice for the reason suggested in the name of the document: MARA has injected itself into the importation process for purposes of "control". As evidenced by the Letters of Acceptance, MARA uses the denial of Certificates of Control outside the TRQ to control all imports of rice into Turkey.

17. Turkey also has argued that one of the purposes of the Control Certificate is to ensure the fitness and compatibility of goods with health standards and that MARA will only approve a Certificate when the product to be imported has met certain requirements, including "fitness for use". But Turkey and the United States agree that MARA does not even collect the phytosanitary certificate and make its inspection until after MARA has already granted the Control Certificate. Accordingly, Turkey's argument that the Control Certificate process is meant to ensure the fitness and compatibility of imported products with health standards is not supported by the facts.

Recent Court Decisions Confirm That the "Letters of Acceptance" Are Legal Restrictions Under Turkish Law and That Turkey Prohibits or Restricts Importation of Rice in Contravention of Article XI:1 of the GATT 1994

18. Turkey has continued to advance the argument that the Letters of Acceptance are internal, informal documents that are unenforceable and have no legal status in Turkey, and that the instances where the United States has documented that MARA has denied the issuance of Control Certificates, such as the Torunlar case, are exceptions from the norm. In making this argument, Turkey has ignored the contents of the Letters, which impose a blanket denial of Control Certificates outside the TRQ governing all imports of rice into Turkey. Turkey has also ignored the content of the rejection letters and the court documents submitted by the United States, which make clear that the denials of Control Certificates are not based on importers' failure to meet particular administrative requirements in individual cases, but rather that MARA simply does not issue Control Certificates unless an importer purchases domestic paddy rice. Turkey's argument also fails to accord with the fact that, in April 2006, a Turkish court agreed with MARA's position that the Letters of Acceptance provided for a blanket denial of Control Certificates to importers who do not purchase domestic paddy rice. In sum, Turkey's arguments before the Panel regarding the legal validity and enforceability of the Control Certificates stand in sharp contrast to the arguments it has made in domestic court and contradict the facts.

19. Turkey has now acknowledged that there have been 14 lawsuits brought by importers against MARA with respect to MARA's failure to grant a Control Certificate, nine of which are ongoing and five of which were decided in favour of the government's position. The United States does not possess copies of all of the briefs and court decisions but, in two of those cases, counsel for MARA argued that the Letters of Acceptance precluded the granting of Control Certificates – and the relevant Turkish court agreed, denying the importer's motion for a stay.

20. For example, the court's decision in the Helin case makes clear that MARA is correct under Turkish law in relying on the Letters of Acceptance to deny Control Certificates to applicants. MARA argued that it was simply following "the letter and spirit of the law" when it relied on the Letters of Acceptance to deny a Control Certificate to Helin, and the court agreed, finding no basis for Helin's claim that MARA acted illegally. It is also clear from the court decision that the Letters are sweeping in scope; they apply to all rice imports, not simply those covered by Helin's case. Further, it is clear from the decision that the denial in Helin's case had nothing to do with any alleged failure on the part of the importer to provide certain documents or comply with the applicable administrative requirements. MARA did not issue a Control Certificate for the simple reason that, pursuant to Ministerial approvals by the Minister of Agriculture, it does not issue them.

21. In sum, Turkey has relied on the Letters of Acceptance as the basis for denying Control Certificates to importers. It has argued in its own domestic courts that the Letters of Acceptance are binding under Turkish law and that, as a result, MARA must deny the issuance of Control Certificates. The Turkish courts have agreed with the government's position. And, according to Turkey, the government is bound to comply with court decisions, in whole and without delay, pursuant to the Turkish Constitution. This contrasts with Turkey's argument before this Panel that the Letters of Acceptance are informal, internal documents that are unenforceable by Turkish courts and have no legal standing in Turkey.

Control Certificate Data Provided by Turkey Confirms That Turkey Has Restrictions in Place on the Issuance of Control Certificates for Non-EC Origin Imports Outside the TRQ

22. As just discussed, Turkey's Minister of Agriculture has ordered officials in his Ministry not to grant Control Certificates in clearly-worded, unambiguous documents. When importers have sued the government in Turkish court to demand that they be issued Control Certificates, Ministry lawyers have argued that MARA is bound by such orders. The Turkish courts have ruled in favour of the government's position. These facts alone demonstrate that Turkey is in breach of Article XI:1 of the GATT 1994. Thus, an examination of import and Control Certificate data is unnecessary to establish that Turkey is in breach of Article XI. Nevertheless, the US analysis of that data only serves to confirm that Turkey has imposed restrictions on the importation of non-EC origin rice outside the TRQ regime.

23. As a preliminary matter, the United States notes that Turkey has not provided copies of the actual Control Certificates, as the Panel requested, or even identified the importers. As a result, the United States is unable to confirm that the data are accurate. Further, the data leave many questions unanswered. Nevertheless, the data strongly support the US claim that there is a prohibition or restriction on imports at the over-quota rates of duty. Second, Turkey argues that it has granted a certain number of Certificates of Control over a given period of time. But that does not address the fact that Turkey is prohibiting or restricting imports at the *over-quota* rates. Thus, the question is not whether Certificates are being granted in general, but whether Certificates are being granted <u>for MFN trade</u> (that is, not involving in-quota quantities or imports of EC origin milled rice which, under the EC Quota Arrangement, enter Turkey duty free and are exempted from Turkish import restrictions).

24. Turkey's own data on Control Certificates reveal that, from September 10, 2003 through April 1, 2006, MARA in fact did not grant Control Certificates for non-EC origin imports of rice outside the TRQ regime, except for two brief periods of time, covering minuscule amounts of rice. The data indicate that, with few, relatively small exceptions, the Certificates MARA granted were for rice under the TRQ. When the TRQ closed, imports of non-EC-origin rice declined to very low levels, or ceased altogether. Therefore, the data submitted by Turkey lend additional confirmation to the US claim that MARA is enforcing a prohibition or restriction on MFN trade in rice.

Even if Turkey Were Not Enforcing the Restrictions on Over Quota Imports, Such Restrictions Would Still Constitute a Prohibition or Restriction on Importation Under Article XI:1 of the GATT 1994 and Discretionary Import Licensing Under Article 4.2 of the Agreement on Agriculture

25. The United States has provided evidence that Turkey prohibits or restricts the importation of rice outside the TRQ regime. The Letters of Acceptance, on their face, constitute an import prohibition or restriction. In the Letters of Acceptance, the General Directorate of the Turkish Grain Board recommends to the Minister of Agriculture that Control Certificates are not to be granted for specified periods of time, and the Minister of Agriculture signs the documents, thereby providing Ministerial approval for that decision. In addition, when importers have filed suit against MARA for not granting such Certificates for the import of rice outside the TRQ, MARA has relied on the fact that the Letters of Acceptance provide that no Control Certificates are to be granted as the sole legal basis for denying them. At least two Turkish courts have agreed with MARA that the Ministerial approvals contained in the Letters of Acceptance have effect under Turkish law and that, as a consequence, MARA cannot issue Control Certificates. Further, the import data and Control Certificate data confirm that Turkey has restrictions in place on the issuance of Control Certificates outside the TRQ for rice of non-EC origin.

26. Turkey's Control Certificate data confirm the presence of restrictions on over-quota imports of rice, although there were a few alleged instances where Turkey did grant Control Certificates for non-EC imports outside the TRQ. These instances are, as of yet, unverifiable because Turkey has not made the actual Certificates available for inspection, and the majority of those Certificates were allegedly granted in a six-week time period immediately following a meeting of the WTO Committee on Agriculture where the United States was highly critical of Turkey's import licensing regime for rice. However, for the United States to demonstrate successfully that Turkey is in breach of Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture, the United States is not required to show that no Control Certificates were granted at the MFN rate. The United States has demonstrated that Turkey is restricting at least some trade in rice, and that is sufficient to demonstrate a breach of Article XI:1.

27. Further, there are restrictions in place on their face in the form of the Letters of Acceptance; Turkey has relied upon those documents in open court as the legal basis for denying Control Certificates; and the Turkish courts have agreed with the Turkish government that the petitioning importers have no grounds for their lawsuit because the Letters of Acceptance are clear that Certificates are not to be granted. The fact that a few Certificates may have been issued does not change the fact that there is a legal prohibition or restriction in place. The Letters of Acceptance are an order from Turkey's Minister of Agriculture to the Provincial Agricultural Directorate that Control Certificates are not to be granted to importers who do not purchase domestic paddy rice. If importers were not already dissuaded by the Letters, it is unlikely that importers would have mis-read the significance of the court decisions described above.

28. Even if Turkey's data had demonstrated that the Letters of Acceptance were not enforced at all, that would not change the conclusion that the Letters breach Article XI:1 of the GATT 1994. A mandatory measure may still be found WTO-inconsistent even if it is not being enforced. In the *US – 1916 Act* dispute, the Appellate Body agreed that the panel could find a statute inconsistent "as such" with provisions of the covered agreements, despite the fact that the United States had never successfully prosecuted a case under the statute and had never imposed the criminal penalties provided in case of a violation. And in the *Malt Beverages (GATT)* dispute, the panel found that mandatory legislation that was either not being enforced or only being enforced nominally did not shield measures from being found in breach of the GATT 1947.

29. Here, it is clear that Turkey *is* enforcing the Letters of Acceptance, with the support of the Turkish judicial branch, and the United States has documented several instances of where the restrictions on the issuance of Control Certificates have been enforced, in the form of letters and court documents. Nevertheless, as noted by the *Malt Beverages (GATT)* panel, non-enforced mandatory measures may still breach a Member's obligations, and can affect the decision-making of economic actors. Here, even had they not been enforced, the Letters of Acceptance were known to many importers, and, as a consequence, could have deterred them from applying for Certificates to import rice at the MFN rates, or led them to seek to import under the TRQ. Thus, even were the Panel to conclude that the Letters were not enforced at all, the Panel should still find, in line with findings of past panels with respect to non-enforced mandatory measures, that Turkey's restrictions on MFN trade in rice are inconsistent with Article XI:1.

30. Lastly, Turkey's failure to issue Control Certificates for the import of rice at the over-quota rates of duty breaches both Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture because it constitutes discretionary import licensing. The Communiqués provide that, in order to apply for a Control Certificate, importers must submit the Certificate application form, the pro forma invoice or invoice, and "other documents which may be asked for, depending on product, by the Ministry". This language appears to provide MARA with the discretion not to grant Control Certificates if an importer does not present certain unspecified documents – for example, a receipt showing that the importer has procured the appropriate quantity of domestic paddy rice. The Letters of Acceptance, even if they are, as Turkey implausibly argues, "informal internal documents" that are never enforced, provide strong evidence of this discretion. In each Letter cited by the United States, Turkey's Minister of Agriculture accepts recommendations from the Provincial Agricultural Directorate to delay the start date for issuance of Control Certificates. Therefore, it is certainly clear that *Turkey* believes it has the discretion not to grant Control Certificates if it wants to, and the United States has provided documentary evidence highlighting instances where Turkey has denied or failed to grant such Certificates. Discretionary import licensing is prohibited under Article 4.2 of the Agreement on Agriculture as well as Article XI:1 of the GATT 1994. Accordingly, Turkey's discretionary import licensing system for rice is a prohibited measure under Article 4.2 of the Agreement on Agriculture, as well as a restriction on importation under Article XI:1.

Turkey's Domestic Purchase Requirement Provides Less Favourable Treatment to Imported Rice in Breach of Article III:4 of the GATT 1994 and Imposes an Additional Cost on Importing Rice in Contravention of Article XI:1 of the GATT 1994

31. The United States has made two claims with respect to Turkey's requirement that importers of rice under the TRQ purchase large quantities of domestic paddy rice as a condition upon importation. First, the United States has argued that the domestic purchase requirement breaches Article III:4 of the GATT 1994 because Turkey predicates the ability to obtain a license to import rice under the TRQ, and hence to sell rice domestically, on purchasing domestic rice rather than imported rice. Purchasing imported rice does not provide the same benefit, thereby altering the conditions of competition and providing an incentive to purchase domestic rice. Thus, imported rice is treated less favourably than domestic rice.

32. The United States also has argued that the domestic purchase requirement imposes an additional cost on importing rice, thereby constituting a restriction on importation contrary to Article XI:1 of the GATT 1994. In sum, the United States has argued that it is more expensive to purchase one, two, or three tons of domestic rice as a condition upon importation, than to purchase zero tons of domestic rice in order to import. Turkey has been unable to rebut the US argument because it is a mathematical impossibility that it would cost an importer more to purchase zero tons of rice than it would to purchase x tons of rice, where x is any number greater than zero. Turkey completely ignores this fact, instead focusing its analysis on the cost of each ton that is purchased,

when the relevant question is the total cost to the importer of having to comply with the domestic purchase requirement in order to import rice.

33. Turkey also argues that, through the TRQ, it is simply pursuing the "legitimate objectives" of "greater market supply" and "market stabilization". On this point, the United States would simply note that Turkey has not invoked an Article XX defense in this dispute, and neither of the objectives cited by Turkey are listed in Article XX.

34. Turkey has argued that the US calculation of the cost of domestic purchase in Exhibit US-52, where the United States set forth several possible domestic purchase scenarios under the third TRQ opening, is inaccurate. Yet Turkey has failed to identify which specific figures in the model it finds objectionable. This is not surprising, since the United States utilized numbers that were supplied by Turkey or are consistent with data provided by Turkey.

Turkey's Argument That the Domestic Purchase Requirement Was Not Meant to Promote the Development of Turkey's Rice Industry Is Not Credible

35. The United States has argued that the TRIMs Agreement does not require that a Member demonstrate the existence of a TRIM, in addition to showing that a measure satisfies the elements of the illustrative list contained in the Annex to that agreement, in order to prove a breach of the TRIMs Agreement. However, even if it were necessary for the United States to show that the domestic purchase requirement is a TRIM in order to prevail on the Article 2.1 claim, the United States has done so. Turkey's professed inability to understand how the TRQ could have possibly affected investment in the domestic rice sector is not credible. The TRQ regime serves to aid in the development of the Turkish rice industry and this effect is intended. Turkey is forcing rice importers to purchase large quantities of domestic rice as a condition upon importation. This scheme makes it much more likely that rice produced by Turkish farmers will be purchased, and at higher prices. The Letters of Acceptance, as well as the substantial increase in Turkish production of paddy rice since 2003, confirm that Turkey instituted the domestic purchase requirement in order to strengthen the domestic rice industry.

36. The reasoning of the *Indonesia – Autos* panel on the investment issue supports the US argument that the domestic purchase requirement is a TRIM. The panel found that the Indonesian measures met the alleged "investment requirement" because they "aimed at encouraging the development of a local manufacturing capability for finished motor vehicles and parts and components in Indonesia. Inherent to this objective is that these measures necessarily have a significant impact on investment in these sectors." Turkey notes that the references in the Indonesian legislation to investment objectives differentiates that measure from the TRQ regime, because the TRQ legislation does not mention such objectives.

37. But the panel report also provides that "there is nothing in the TRIMs Agreement to suggest that a measure is not an investment measure simply on the grounds that a Member does not characterize the measure as such". In other words, the fact that Turkey did not specifically state investment objectives in the TRQ legislation does not preclude the conclusion that the domestic purchase requirement has an investment component. If the legal test rested upon a Member's characterization of a measure, then nothing would qualify, because a respondent in WTO dispute settlement would always characterize the measure at issue as not an investment measure. The relevant inquiry is what the measure in fact does. Nonetheless, Turkey did indicate in its Letters of Acceptance that the domestic purchase requirement had investment objectives, and one of those objectives – strengthening the competitiveness of the domestic industry – was cited by Indonesia as one of the investment objectives of the Indonesian measure that was the subject of a successful TRIMs claim in the *Indonesia – Autos* dispute.

ANNEX D-2

EXECUTIVE SUMMARY OF THE REBUTTAL SUBMISSION BY TURKEY
(20 December 2006)

I. INTRODUCTION

1. These rebuttals provide Turkey with the opportunity to clarify a number of issues that have arisen since the First Submission and particularly during the Oral Hearing. They are made in the light of the questions later posed by the Panel and the answers provided by the United States. In them, Turkey addresses principally the alleged "denial" of approval of Certificates of Control and the TRQ regime, providing additional elements of clarification and specific rebuttals to the allegations and statements made by the United States.

II. ON THE ALLEGED DENIAL OF APPROVAL OF CERTIFICATES OF CONTROL

A. THE CERTIFICATES OF CONTROL ARE NOT "*IMPORT LICENSES*"

2. Certificates of Control are not import licenses, but administrative forms that are required exclusively for "*customs purposes*". As indicated by Turkey in its First Submission[1], an important element of interpretative guidance in order to determine what may be considered as an import licence is to be found in Article 1.1 of the Agreement on Import Licensing Procedures.

3. The United States has not offered any evidence, arguments or legal rationale to define or circumscribe the concept of "*customs purposes*". Turkey believes that, *de jure* and *de facto*, its Certificates of Control are not and have never been applied as anything other than administrative forms serving legitimate "*customs purposes*" and aimed at collecting necessary customs clearance information and providing a considerable degree of trade facilitation for both importers and customs authorities.

4. Turkey submits that the "*customs purposes*" of Certificates of Control are evident both *de jure* and *de facto*. In Turkey, as in all WTO Members, the process of importation and customs clearance is more than just compliance with the obligation to pay the applicable duty and other charges. Customs clearance also includes compliance with all administrative requirements and fulfilment of various "*customs purposes*".[2] If all the required information is provided by the importers, the Certificates of Control are automatically approved.

5. Turkey agrees with the United States that the scope and objective of the Agreement on Import Licensing Procedures cover both the administrative procedures referred to as "*licensing*" (i.e., procedures that are *de jure* labelled as import licensing procedures) and the other similar administrative procedures that may function as *de facto* import licensing procedures, regardless of how a WTO Member characterizes them.

6. However, Turkey disagrees with the United States that the phrase "*other than that required for customs purposes*" is meant to provide an exception from the application of this Agreement for all documents that are actually "*customs*" in nature. Following the argument put forward by the United States, the Agreement on Import Licensing Procedures would not apply to customs documentation. This is not legally correct and clearly escapes the intent and logic of the drafters of the Agreement on

[1] See paras. 47-57 of Turkey's First Submission.
[2] See, in particular, para. 53 of Turkey's First Submission.

Import Licensing Procedures. One thing is an administrative procedure that serves the purposes of import licensing regimes (or that *de facto* acts as an import licensing regime), and another thing is an administrative procedure that is required for "*customs purposes*". Turkey concludes that the United States has misinterpreted the Agreement on Import Licensing Procedures and subsequently jumped to a hurried, un-demonstrated and un-evidenced conclusion that, either *de jure* or *de facto*, Turkey's Certificates of Control are not "*customs in nature*" and are used by Turkey to evade its WTO commitments under that Agreement[3].

7. Turkey strongly disagrees with the conclusion reached by the United States in its reply to Question 58 by the Panel. Along the same lines, the United States argues that '*Turkey is using the denial of the Control Certificate, which has all of the characteristics of an import license, as a WTO-inconsistent trade barrier*". Again, after having avoided proving that the "*customs purposes*" of Turkey's Certificates of Control should not be considered within what the WTO system regards as "*customs*" in nature, the United States avoids indicating what are to be regarded as the defining characteristics of an "*import license*". Turkey believes that this is an essential point and a crucial issue in relation to what the Panel is asked to review for purposes of understanding the dispute and finding a solution.

8. Turkey considers that the actual scope of the "*carve-out*" for "*customs purposes*" provided under Article 1.1 of the Agreement on Import Licensing Procedures can only be clarified by an analysis of what "*customs purposes*" actually consist of. There is no 'narrow' or 'large' scope of the "*carve-out*", once it is assessed that a certain form is meant to comply with "*customs purposes*".

9. In relation to this, Turkey wishes to emphasize that it is not the scope and the content of the information requested by MARA for approval of the Certificate of Control that can change an administrative document used for "*customs purposes*" into an "*import license*". Turkey believes that the distinguishing factor between an "*import license*" and other documentation (such as that used for "*customs purposes*") is a matter of procedures and not of content of the documentation. In its Oral Statements, Turkey has already indicated to the Panel that the line of argument put forward by the United States would result in any document used in relation to importation (i.e., SPS certificates, certificates of origin, certificates of compliance with technical regulations) being regarded as an "*import license*". This is not the case. Turkey submits once again that the United States has not shown which elements of the Certificate of Control turn this administrative document into an "*import license*". It has merely asserted that it is an "*import license*".

10. Turkey would also like to draw the attention of the Panel to the trade facilitation purpose of the Certificates of Control, which is two-fold as it serves both the importers and MARA's officials in the exercise of their verification and inspection duties. In particular, the Certificates of Control offer importers a considerable degree of legal certainty and commercial predictability of customs procedures (i.e., inspections, identity checks and documentation review).[4]

11. On the other side, Certificates of Control enhance the necessary efficiency of MARA's officials in the management of their inspection and control duties. These forms are needed in order to facilitate the necessary cooperation, between MARA and customs authorities, which is required in the case of imports of agricultural products. In this respect, Turkey also considers that there is nothing particularly "*revealing*" in that it is MARA (i.e., Turkey's Ministry of Agriculture and Rural Affairs) that approves the Certificates of Control and carries-out customs inspections for sanitary and phytosanitary purposes.

[3] See, in particular, paras. 9-10 of the Oral Statements by the United States.
[4] See, in particular, Turkey's Replies to Questions posed by the Panel, question No. 14.

12. Finally, the fact that Certificates of Control are required for all imports, including TRQ imports which are already subject to an automatic import licensing regime, clearly proves that the Certificates of Control are required for "*customs purposes*" only and are not "*import licenses*". In its first submission, the United States wrongly stated that rice imports under the TRQ did not require Certificates of Control and argued that this made clear that the purpose of the Certificates of Control was to act as "*import licenses*".[5] The United States appears now to accept the fact that Certificates of Control are required for imports within the TRQ, yet it still avoids proving legally and factually that the Certificates of Control are "*import licenses*" and resorts to another unfounded and un-evidenced assumption.

B. THE CERTIFICATES OF CONTROL ARE NOT "*OTHER MEASURES*"

13. As an alternative to the Certificates of Control being considered as "*import licenses*", the United States argues that the alleged 'denial' of Certificates of Control to importers constitutes a "*prohibition*" or "*restriction*" of rice importation made effective by an "*other measure*" within the meaning of GATT Article XI:1. Turkey believes that the United States has failed in its pleadings and written replies to the questions by the Panel[6] to establish the grounds on which Turkey's Certificates of Control (and the alleged denial thereof) can or should be considered "*other measures*" for purposes of the application of GATT Article XI.

14. GATT Article XI:1 aims at preventing WTO Members from introducing or maintaining quantitative restrictions on the importation of products into their territory by means of "*prohibitions*" or "*restrictions*" other than duties, taxes and other charges, independently of whether these prohibitions or restrictions are achieved through quotas, import licenses or "*other measures*". Turkey reaffirms that the essential element to establish whether or not any measure introduced by a WTO Member results in a quantitative restriction is the existence of a "*prohibition*" or "*restriction*" on imports. This must be analyzed and proved both in terms of the *de jure* and *de facto* operation of the measure being reviewed. Only when a *de jure* or *de facto* "*prohibition*" or "*restriction*" of imports can be demonstrated, the specific measure being considered would amount to an "*other measure*" of the type that GATT Article XI:1 considers illegal because it institutes or maintains a quantitative restriction.

15. Turkey believes that the United States has not made a *prima facie* case on the existence of a 'denial of Certificates of Control to importers'. The United States appears to be claiming the existence of a *de jure* "*prohibition*" or "*restriction*" not on the basis of legislation in force, but on evidence (i.e., mere communications such as the so-called Letters of Acceptance and oral instructions given to officials) rather suited for a *de facto* complaint. Turkey notes that the United States has not made clear whether its claim relates to a *de jure* or *de facto* "*restriction*" and "*prohibition*." In any event, Turkey also believes that the United States has not established a *prima facie* case on the existence of either a *de jure* or a *de facto* "*prohibition*" or "*restriction*."

16. The United States has not identified any legislative measure relating to the alleged denial of approval of the Certificates of Control that would support a claim of a *de jure* "*prohibition*" or "*restriction*." On the other hand, when complaints are brought against alleged measures that are not expressed in the form of written and publicly available documents (i.e., *de facto* complaints), the Panel should exercise particular caution before supporting a conclusion as to the existence of a rule or norm. In this respect, Turkey recalls the general rules applicable to the burden of proof set out by the Appellate Body in *US – Wool Shirts and Blouses*, and reiterated by the Panel in *EC – Asbestos*.[7]

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[5] See, *inter alia*, para. 55 of the First Submission by the United States.

[6] See, United States' Replies to Questions posed by the Panel, question No. 56.

[7] *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Panel Report, paras 8.79 and 8.81.

17. Turkey submits that the United States has not provided conclusive evidence that there is an instance of *de jure* "*prohibition*" or "*restriction*". In fact, such evidence is not available and nothing can be found in Turkey's legislative and administrative framework to prove otherwise.[8] In addition, Turkey submits that the United States has also not provided conclusive evidence that there were instances of *de facto* "*prohibition*" or "*restriction*" of rice importation made effective through the alleged 'denial of Certificates of Control to importers'. In order to establish whether or not there is "*another measure*" within the meaning of GATT Article XI:1, Turkey believes that this factual determination must be made.

18. Turkey has already provided ample evidence showing that no *de facto* "*prohibition*" or "*restriction*" is to be found in relation to the approval of Certificates of Control.[9] In particular, Certificates of Control have been approved throughout the period of over 2 and a half years during which the United States allege that a 'blanket denial' was being enforced (i.e., between 10 September 2003 and 1 April 2006, including the months thereafter). A total of 2,242 Certificates of Control were approved between 2003 and 9 November 2006.[10] This stands as clear and irrefutable evidence against the idea that Turkey was maintaining a *de facto* import "*prohibition*" through a 'blanket denial' of Certificates of Control. In addition, and most importantly for purposes of the case at stake, Turkey submits 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).[11] The figure of 2,242 represented an approval rate of over 95% of all applications lodged by importers for approval of Certificates of Control. In particular, between 2003 and September 2006, a total of 2,324 applications for approval were put forward and resulted in the approval of 2,223 Certificates of Control. Only 102 applications (equal to a mere 4.38%) were rejected for 'non-compliance with the requirements set forth in the relevant legislation'.[12] Turkey believes that a rejection rate of less than 5% cannot be quantified or qualified into a *de facto* import "*restriction*".

19. Individual instances of non-approval by MARA of particular rice importers' applications must be seen as a natural component of the interaction between any WTO Member's administration and its business community and cannot be generalized into a '*denial of Certificates of Control to import rice*', particularly when the trade statistics and approval rates clearly indicate otherwise. The particular cases and instances of rejection used by the United States to build large part of their allegations were linked to a number of un-related irregularities and to their non-compliance with some of the requirements set forth for application in the relevant Turkish legislation.[13]

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[8] See, in particular, Turkey's First Submission at paras. 64 and 67.

[9] See, in particular, Turkey's First Submission at paras. 63 to 69.

[10] See Annex TR-33 of Turkey's Replies to Questions posed by the Panel.

[11] See Annex TR-41 herewith.

[12] See Annex TR-35 of Turkey's Replies to Questions posed by the Panel.

[13] In relation to aspects of confidentiality and access to information, Turkey would like to address one issue which represents a very unfortunate and worrying development. The United States has recently argued that "*(…) most of the importers that the United States has contacted have been unwilling to provide additional documentation since the first panel meeting (…)*", implying that Turkish public authorities are putting "pressure" on rice importers not to give any information and documentation to the United States. Turkey strongly believes that the United States should circumstantiate this serious accusation and prove it with factual evidence. Since it is these importers which have had close ties with the United States and are the source of most of the information and documentation that the United States has provided to the Panel, Turkey believes that these statements should be treated with particular caution. Turkey maintains that neither its Government, nor its public authorities, have put any kind of "pressure" on rice importers in order to discourage them from further cooperating with the United States. At the same time, Turkey requests that the Panel demand an explanation from the United States on the allegations that the questions posed by the Panel were leaked to certain importers. This is again a serious accusation that the United States must be prepared and able to corroborate with evidence. If anything, it would appear somewhat odd that the same operators that are now reluctant to further cooperate

20. Turkey has repeatedly indicated that the "Letters of Acceptance" were mere instruments of internal communication among Turkish administrators and public officials. These communications often contained confidential positions and/or political statements which were aimed at debating or developing unofficial policy recommendations. These administrative communications never resulted in the adoption of laws or regulations. The fact that the existence and alleged legal value of the so-called "Letters of Acceptance" were used by certain parts of the Turkish administration during the course of domestic judicial proceedings doesn't change their nature as unofficial and unenforceable communications which are internal to the administration and aimed at developing or debating policy recommendations.

21. Furthermore, Turkey would like to emphasize through specific examples that a considerable amount of Certificates of Control were approved by MARA during the alleged period of operation of the so-called 'blanket denial' of approval of Certificates of Control made operational through the "Letters of Acceptance". If anything, this should be seen as convincing evidence that the so-called "Letters of Acceptance" were (and are) only internal communications suggesting policy recommendations and not formal trade policy measures binding on the administration.

22. In addition, evidence shows that the approval of Certificates of Control always followed, with minimal delays, the applications for approval that had been lodged by rice importers. This is contrary to what the United States claimed in its First Submission, in paragraph 24, that "the letter then recommends that the MARA once again 'delay' the period for issuing Certificates of Control until July 1, 2004". The fact that the compiled data show that Certificates of Control were not approved during certain periods (i.e., between 26 December 2003 and 20 May 2004) does not prove that the approval of Certificates of Control was being delayed and does not prove that trade did not take place. It only proves that, during certain periods, Certificates of Control were not approved.

23. This may have been the result of the combination of two factors, namely the absence of applications for approval and/or the existence of considerable "left-over" approved volumes in the hands of the importers as a result of the difference between the approved and realized quantities of rice imports.[14] It should be noted, in particular, that the applications for approval of Certificates of Control were, and remain, formal acts made by importers on the basis of business considerations and commercial calculations (i.e., profit margins, competitiveness of imported over domestic rice, speculative positions, currency fluctuations, etc.). These business determinations may have resulted in the lack of requests for approval of Certificates of Control during certain periods, but were never the result of specific policy decisions by the Government of Turkey.

24. Turkey believes that the evidence available and the allegations so far put forward by the United States only go as far as indicating that a limited amount of Certificates of Control (if 2,242 can be considered a small amount, both in terms of their number and quantity of allowed imports) were approved during a given period. As already indicated by Turkey, this in itself clearly proves that there was never a *de facto* import "*prohibition*". Most importantly, though, it falls short from proving that either Turkey was rejecting approval of Certificates of Control, by virtue of a *de jure* or *de facto* policy of import "*restriction*". Turkey believes that the burden of proof rests squarely on the United

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with the United States would tell the United States that the Government of Turkey has leaked to them confidential information.

[14] In this respect, Turkey wishes to confirm once again that the period of validity of an approved Certificate of Control is of 12 months. Contrary to the allegation made by the United States in its replies to the questions posed by the Panel (question No. 38), the law does not give any right to MARA to shorten the validity periods of the Certificates of Control. Article 9 of the relevant Communiqués specifies that the validity periods of the Certificates of Control cannot be extended. Therefore, it is clear that in legal terms MARA has no right to shorten the validity periods of the Certificates of Control.

States to prove this occurrence beyond the mere judicial rhetoric. Turkey considers to have already provided enough factual evidence to indicate that there was never any *de facto* import "*prohibition*" or "*restriction*".

25. Turkey believes that the United States has not established a causal link, as established in *Argentina – Hides and Leather*,[15] between the "*contested measure*" (on which, incidentally, there is no clarity: is it the alleged 'blanket denial', is it the "Letters of Acceptance", is it the Certificate of Control as such, or is it something else?) and the level of imports of rice into Turkey. In fact, the United States has not even provided factual evidence that Turkey's level of imports was low. The number of Certificates of Control which were approved and the approval rate, together with the lack of any "causally-linked" factual evidence provided by the United States in support of its complaint, suggest that the case brought by the United States is largely centred on individual rejections, which were perfectly compatible with Turkish legislation and with Turkey's obligations under the WTO, and not on policies or measures of general application.

26. Turkey strongly contests the novel argument raised by the United States that a "*de minimis*" rate of approval of Certificates of Control in connection with MFN rice imports (even if proved and evidenced) would automatically result in a *de facto* import "*restriction*". Turkey believes that the "*de minimis*" rate of approval of Certificates of Control in connection with MFN rice imports, if it actually occurred, would have to find its natural and logical explanation in the business determinations and commercial decisions made by importers and traders in the normal course of trade. It is clear that both the TRQ and the FTA volumes of rice imports always provided appealing and real commercial and tariff advantages which the importers systematically tried to exploit. The trade statistics are clear testimony to these market trends. These very same trade statistics also show that, during the periods when the TRQ was closed or expired, rice originating in countries other than the EC (i.e., Argentina, Bulgaria, China, Egypt, India, Pakistan, Russia, Syria, Thailand, the United States, Uruguay and Vietnam) was imported at MFN or applied rates and, therefore, Certificates of Control were approved.[16]

III. THE TRQ REGIME

A. THE TRQ REGIME IS NO LONGER IN FORCE

27. Turkey would like to reaffirm that the legislative framework providing for the TRQ regime, including the domestic purchase requirement, is no longer in force and that Turkey has no intention to renew it. In light of this consideration, Turkey would like once again to respectfully invite this Panel to refrain from making any finding on the TRQ regime and its domestic purchase requirement or, should this Panel consider this necessary for the positive solution of the dispute, to refrain from making any recommendations on this matter.

28. Turkey has already noted that WTO case law supports the view that a panel is required to make recommendations to bring a measure found inconsistent into conformity 'provided that' such measure is still in force. In this respect, Turkey quoted *United States – Certain EC Products*,[17] *Chile – Price Band*,[18] and *Dominican Republic – Cigarettes*.[19] The United States appears to believe that these

[15] *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, Panel Report, para. 11.21.

[16] See, in particular, Annex TR-33 to Turkey's Replies to Questions posed by the Panel.

[17] See, *United States – Import Measures on Certain Products from the European Communities*, Appellate Body Report, para. 81.

[18] See, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, Panel Report, para. 7.112.

cases are not of relevance to the dispute and, if of any relevance, they should be read as supporting the United States' view.

29. The United States believes that the reports cited respect the "distinction between measures that expired prior to the commencement of the panel proceedings and measures that expire after that." Turkey notes instead that under WTO case law, this distinction draws a line between the cases in which no finding is necessary and the cases in which, if a finding is made, no recommendation is due. Turkey finds that WTO case law supports the view that no finding is necessary on measures expired before the commencement of the Panel proceedings, whereas in the case of measures expired after the commencement of the Panel proceedings, if a finding is made, no recommendation is due.

30. After having clarified that the expiry of the measures before or after the commencement of the Panel's proceeding is only relevant for the Panel in order to decide whether or not to make a finding on the expired measure, but not on whether the Panel should issue recommendations, Turkey notes that the "commencement of the panel proceedings" corresponds to the establishment of the Panel (i.e., the 17 March 2006 for this dispute). As described in greater detail in Turkey's first submission, a great part of the legislative framework establishing Turkey's TRQ regime expired well before the establishment of this Panel and only two measures (i.e., Decree 2005/9315 and the implementing Communiqué No. 25943) expired shortly after the establishment of the Panel.

31. Turkey does not consider that a finding on any of these measures, including the ones expired soon after the commencement of panel proceedings, is necessary to secure a positive solution to the dispute. Turkey has repeatedly maintained, both at the consultations phase and throughout the submissions and oral statements presented so far, that it has no intention to renew these measures, neither extending them nor adopting new legislative instruments. Therefore, Turkey respectfully requests the Panel not to make findings on any of the measures relating to the TRQ regime or, in the alternative, to limit its findings to those measures which were still in force after the establishment of the Panel. In any event, Turkey respectfully requests that the Panel refrain from making any recommendation with respect to the TRQ regime.

B. OBSERVATIONS ON THE TRQ REGIME

32. With respect to the objectives, mechanisms, eligibility criteria and inherent commercial advantages of the now expired TRQ regime, Turkey notes that TRQs were opened in 2004 and 2005, not to protect or distort trade, but to achieve the necessary supply of rice into Turkey and to stabilize the domestic market. In fact, it is well known that Turkey is a net importer of rice and that imports are essential to stabilize the market (both in terms of price and quantities available). The TRQ provided a tariff advantage to imported rice up to predetermined quantities. Any interested importer could apply for a TRQ licence, which was systematically allocated on a "first-come-first-served" basis. There has never been discrimination on the basis of country of origin of the rice or nationality/affiliation of the importer applying for a license. The requirements for the application and evaluation procedures of the import licenses have always been clear, transparent and easy to implement for all importers. Similarly, the administrative procedures for licensing have always been simple and user-friendly. All documents required for application have always been published. When all application requirements were met, the import licenses have systematically been issued within 5 days.

33. The tariff quota system was never meant to act as a, and never had any, restrictive or discriminatory effects on trade and rice imports. In particular, it is wrong and misleading to state, as the United States does, that the fulfilment of the domestic purchase requirement by importers

[19] See, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, Panel Report, para 7.363.

'provides the only way to import rice into Turkey'. Rather, the system was voluntary and conferred an advantage to the importers meeting the requirements stipulated in the legislation. Importers have always been free to make use of the system or not. Turkey has already shown that the high volumes of in-quota imports and the high numbers of licences which have been issued are testimony to the attractiveness and appeal that the tariff advantage has had in the business determinations made by individual rice importers. This in-quota advantage has always existed in parallel to the ability to import at the less advantageous MFN rates of duty.

34. Turkey has shown that the opening of the TRQ always resulted in the modification of the conditions of competition between domestic and imported products in favour of imported products. Turkey believes that the figures used by the United States to construct its simulation scenarios are extreme theoretical figures which are not based on general trade statistics, policies or laws. The United States has not linked these hypothetical scenarios to actual instances of trade and to specific occurrences. Turkey has provided a wealth of data to show that the actual advantages of importing rice within the TRQ were real and that trade statistics clearly show that importers largely benefited from TRQ openings.

35. The choice to import within the TRQ in order to benefit from the tariff advantage was always dictated by business determinations and commercial decisions that were in no way influenced by the Turkish Government. These determinations and calculations were made by importers on the basis of a number of economic and market factors such as domestic and world prices of rice, domestic consumption, exchange rates, conditions of competition between rice of different origins, consumers' preferences, marketing strategies, etc. In any event, the TRQ always provided a significant advantage in favour of imported rice, even if the domestic purchase requirement of the TRQ acted as a balancing factor with respect to the tariff advantage.

36. The domestic purchase requirement was introduced because Turkey had to pursue, at the same time, two legitimate objectives: the one of greater market supply (through the TRQ) and that of market stabilization (through the domestic purchase requirement). The domestic purchase requirement of Turkey's TRQ regime partly moderated (or even magnified, as the data for 2004 and 2005 milled rice imports indicate) the advantageous effects, and not the adverse effects as claimed by the United States, that the TRQ was conferring to imported rice. The TRQ always conferred an advantage. The TRQ success rate, in terms of quota utilization, is clear evidence of this. The domestic purchase requirement did not take away this advantage, it was simply an element used by Turkey to define the scope of the advantage. The domestic purchase requirement must be seen as a fundamental trait of the TRQ system itself, just like the in-quota preferential rates of duty. Turkey maintains that it was fully entitled to decide, in line with its economic policies, the characteristics of the TRQ. For those importers that did not consider TRQ trade advantageous, MFN always remained an option. Turkey has shown that, contrary to what is claimed by the United States, TRQ and MFN rice importation always co-existed.

37. In relation to the allegations made by the United States that the so-called eligibility criteria would restrict the categories of importers/traders able to purchase domestic rice for the purpose of importing under the TRQ, Turkey recalls that there is no eligibility requirement in order to be able to purchase domestic rice. On the contrary, any restriction of the categories of eligible purchasers would have defeated the purpose and objectives of the TRQ system in that it would have diminished the chances that the entire TRQ be allocated and that the market be adequately supplied and, consequently, stabilized. The relevant legislation simply provides that domestic rice may only be purchased from paddy producers having permission to plant paddy rice, their cooperatives and unions, or from the TMO. Provided that the domestic purchase requirement had been complied with, any type of rice (i.e., paddy, brown and/or milled) could be imported into Turkey at the preferential tariff rates accorded by the TRQ.

IV. CONCLUSIONS

38. Turkey submits that the United States has not made a *prima facie* case, it has not proved its allegations, its legal arguments do not find grounds in WTO law and the interpretative guidance offered by WTO case law, and this dispute largely rests on a misunderstanding of facts and a number of individual instances that have little to do with international trade policy and more with domestic judicial proceedings and individual cases.

39. Turkey believes that this dispute may also be the consequence, to a considerable extent, of the relative lack of comparative advantage of rice from the United States vis-à-vis competing exporting countries trading with Turkey (i.e., the degree of competitiveness of United States' rice).

40. The real background to this case is that the United States has seen its rice progressively lose market share in Turkey to the advantage of other exporting countries. This is true both in relation to TRQ and MFN trade and particularly significant in a scenario of continued expansion of market access opportunities. Turkey never adopted its TRQs with the particular intent to diminish the market access opportunities of the United States (or, for that matter, of any other exporting country). The yearly increases in imported volumes are proof of this.

41. The success of the TRQ and the high utilization rates are testimony to the fact that the advantage provided by the TRQ was real and appealing enough for importers to exploit it, despite the allegedly burdensome impact of the domestic purchase requirement. The fact that imports from the United States may have declined (at the MFN rates as well as within the TRQ) has only to do with the progressive loss in competitiveness of rice from the United States vis-à-vis its competitors, and with the business determinations and commercial decisions freely made by rice importers on the basis of a number of economic and market factors. The most recent import statistics seem to support this conclusion. The market-share of rice from the United States has not increased now that imports are occurring only at the MFN (or applied) rates of duty and that the TRQ regime no longer applies.

ANNEX E

ORAL STATEMENTS BY THE PARTIES AT THE SECOND SUBSTANTIVE MEETING

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ANNEX E-1

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT BY THE UNITED STATES AT THE SECOND SUBSTANTIVE MEETING

(25 January 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 US 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 US 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 per cent 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 per cent 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 the figure provided by Turkey yields a total of 56 Control Certificates allegedly granted.

This figure is a mere 2.5 per cent 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 US 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);

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

– 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 US 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 favourably 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 favours 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 US 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 US 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 favourable 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 US 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 – Import and Sale of 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'.

ANNEX E-2

CLOSING ORAL STATEMENT BY THE UNITED STATES AT THE SECOND SUBSTANTIVE MEETING

(18 January 2007)

1. Madam Chair and members of the Panel, we would like to thank you for agreeing to serve on this Panel in order to help resolve this dispute between the United States and Turkey. We would also like to thank the Secretariat for all of their hard work on this matter. Our closing remarks will be brief.

2. The manner in which Turkey has presented its arguments gives the impression that the issues in this dispute are more complicated than they actually are. In fact, the issues in this dispute are very straightforward:

3. First, **does the undisputed fact that importers are required to purchase large quantities of domestic paddy rice in order to import rice act as a restriction on the importation of rice?**

- Consider, when analysing whether the domestic purchase requirement restricts importation at the border, that importers need to purchase at least as much domestic paddy rice as they want to import, which increases the cost of importation and ties up capital that could be used to import more rice.

- And consider that Turkey has accepted all of the numbers utilized in the US calculation of the total cost of domestic purchase, except for one case where Turkey has actually reverted to a number that the United States originally provided (the $295/metric ton spot price).

4. Second, **does the fact that only the purchase of *domestic* rice confers the ability to import create an incentive to purchase domestic rice over imported rice?**

- Consider further that past panels have found that <u>any</u> additional obstacle or disincentive to the internal sale of an imported product, as compared to the like domestic product, is sufficient to show a national treatment violation.

5. Third, **does the Control Certificate constitute an import license?**

- Consider that this is a document that an importer must acquire from MARA in order to have permission to import rice into Turkey, and that this description comports with the ordinary meaning of the term "import license", namely "formal permission from an authority in order to import goods into a country".

- Consider further that there is no dispute between the parties that Turkey's SPS procedure occurs <u>after</u> the Certificate is granted. There is also no dispute between the parties that the Certificate is not issued by Turkish Customs, does not replace the normal customs documentation that is necessary for customs clearance, nor that Turkish Customs already requires much of the same customs-related information as that requested for the Control Certificate.

6. Fourth, **is Turkey prohibiting <u>or</u> restricting the import of rice by operating a discretionary import licensing system and denying the issuance of Control Certificates?**

– Consider that the Letters of Acceptance on their face constitute a legal prohibition on the issuance of Control Certificates for MFN imports; that Turkey's argument before the Panel that these Letters have no legal force is diametrically opposed to the argument the Turkish government is currently making in Turkish court; and that at least two Turkish courts have upheld the government's position that the Letters of Acceptance have legal force under Turkish law.

– Consider further that, incredibly, Turkey is now claiming in this proceeding that Turkey's Agriculture Minister acted *ultra vires* in issuing the Letters – just as Turkish importers are claiming in Turkish domestic court cases – yet instead of settling those cases and granting Control Certificates, the Turkish government continues to argue in several domestic court cases that what the Minister did was perfectly legal and enforceable under Turkish law.

– Lastly, consider that Turkish import data confirms that, except in rare instances, Turkey has not issued Control Certificates for MFN trade in rice, despite the much lower cost of importing outside the TRQ; and that neither the Panel nor the United States can confirm that this data is accurate because Turkey has refused the Panel's request to provide the actual Control Certificates, a refusal from which the Panel may draw an appropriate inference.

7. Madam Chair, members of the Panel, the clear answer to all of these questions is 'yes'. The United States has set forth compelling and voluminous documentary evidence in making out its *prima facie* case, which Turkey has been unable to rebut. Indeed, it is difficult to conceive of how the United States could have provided more documentary evidence in this dispute given that the measure in contention is a non-transparent import licensing regime. Instead, Turkey has relied on an argument we would describe as follows: how a Member characterizes a measure, not what the measure actually does, will determine whether that measure is subject to WTO disciplines. This is a dangerous argument that would allow Members easily to evade their WTO obligations, and we urge you to reject it.

8. Madam Chair, members of the Panel, that concludes our closing statement. We thank you for your attention, and we look forward to receiving your questions in due course.

ANNEX E-3

OPENING ORAL STATEMENT BY TURKEY AT THE SECOND SUBSTANTIVE MEETING

(17 January 2007)

Dear Madame Chair, distinguished Members of the Panel,

Introduction

1. Turkey would like to reiterate its gratitude to the Panel for its work and assistance in the resolution of this dispute.

2. Turkey welcomes the opportunity to submit its views in this last oral hearing in front of the Panel. Turkey has already provided a comprehensive set of information, arguments, statistical data, written replies to questions by the Panel, and rebuttals to the claims made by the United States.

3. In this oral statement, Turkey wishes to emphasise certain factual and legal arguments aimed at addressing certain issues brought by the United States in its last submission and confirming Turkey's conclusion that its regime for the importation of rice is fully compatible with WTO rules. In particular, this oral statement addresses a number of factual and legal considerations related to: the Certificates of Control; the expired Tariff Rate Quota (TRQ); and other general allegations made by the United States.

Certificates of Control

4. Turkey's Certificates of Control are not import licenses, both *de jure* and *de facto*. They are not legally constructed as instruments having an import licensing function and they have never been applied as an import licensing instrument. Turkey believes that the exact understanding of this issue is fundamental in order to evaluate its rice import regime. The allegations and arguments brought by the United States continue to confuse between cause and effects on the basis of a wrong or misleading interpretation of the evidence provided. Turkey will now attempt yet again to clarify the legal nature, administrative framework and factual trends that have surrounded the operation of the Certificates of Control during the period under examination.

5. Turkey believes that the scrutiny of WTO inconsistency of its instrument known as Certificate of Control must be conducted under either a *de jure* or *de facto* lens. It must be noted that this scrutiny is paramount to the *de jure* or *de facto* review of the existence or not of a prohibition or restriction, which Turkey considers essential to interpret the Certificate of Control as an "*other measure*" under GATT Article XI. This other review has already been thoroughly conducted by Turkey in its earlier submissions.[1]

6. Turkey believes that its Certificate of Control is not *de jure* inconsistent with any of its WTO obligations. This is proved and supported by both legal considerations and factual evidence. In particular, Turkey submits that there is nothing in Turkish law providing for the ability of the Turkish Government or its administration to use the Certificate of Control as an import license. There is no provision that gives the relevant authority discretion not to approve Certificates of Control. To do so would be not only inconsistent with the function and customs purposes of the Certificate of Control, but also illegal in that Turkish law clearly provides for import licensing systems and procedures under

[1] See paras. 63-69 of Turkey's First Submission; paras. 16-17 of Turkey's Oral Statements; and paras. 18-20 of Turkey's Rebuttals.

separate legislative instruments. Turkey maintains that the United States has not proved the existence of any legal element of *de jure* inconsistency with WTO obligations. The allegations brought by the United States (i.e., that Certificates of Control applied only to MFN trade; that the period of validity was only four months, that the approved quantities had to be imported all at once; that volume restrictions were imposed; and that no Certificates of Control were needed for FTA imports) were incorrect and have been systematically rebutted by Turkey.

7. Furthermore, the existence of the so-called Letters of Acceptance cannot be intended as evidence of a *de jure* WTO inconsistency of the Certificate of Control instrument *per se*. The Letters of Acceptance are not legal features of the Certificate of Control system. Turkey would like to emphasise that this is a crucial element in order to properly understand the legal framework and operation of the Certificate of Control. If anything, as rightly argued by the European Communities in its Third Party Written Submission, the Letters of Acceptance may only provide an element of factual evidence for a *de facto* finding and are rather suited for a *de facto* complaint. The United States has not made such complaint and it has not provided any related arguments. And yet, the United States emphasises in its Rebuttal Submission[2] that it is the Letters of Acceptance that restrict rice imports. There is an inherent confusion here. The United States has not made a *de facto* complaint but relies exclusively on the fact of the Letters of Acceptance.

8. To further support the argument that there is no *de jure* violation of WTO obligations, Turkey would like to refer to the factual evidence that it has so far provided, which clearly indicates that Certificates of Control have been approved throughout the period under examination (i.e., 10 September 2003 to date). The fact that Certificates of Control have been approved in relation to applications for TRQ rice imports in higher rates than what has occurred with respect to applications for MFN rice imports, cannot prove a *de jure* WTO inconsistency of the instrument of Certificate of Control *per se*. Turkey believes that the United States has not proved the existence of any factual element of *de jure* inconsistency with WTO obligations.

9. On the other hand, in fact, with respect to the *de facto* scrutiny of the WTO consistency of the Certificate of Control instrument, Turkey believes that the statistical data provided in previous submissions clearly show that Certificates of Control were, in reality, approved throughout the period of scrutiny. It is true that Certificates of Control were, at times, mainly approved for imports of rice within the TRQ, but Turkey believes that this cannot, in itself, be valid proof of a *de facto* discrimination or WTO inconsistency of the instrument *per se*. The United States has failed to prove that Turkey has systematically not approved Certificates of Control. The United States has merely claimed the existence of an alleged 'blanket denial', but Turkey believes to have satisfactorily proved that no 'blanket denial' was ever in place. In particular, Turkey questions the curious approach of the United States that considers the Certificates of Control approved for over-quota trade as exceptions to the 'blanket denial'. Either there is a 'blanket denial' or there is not.

10. Certificates of Control are approved on the basis of specific requests which are put forward by importers or traders (in terms of the number of Certificates of Control, type of rice, origin of rice, and quantities sought for importation). The United States has not provided conclusive evidence that individual requests were not approved because of a 'blanket denial'. The United States has alleged that the low rate of approval of Certificates of Control in relation to MFN rice imports during certain periods is proof of the existence of a 'blanket denial'. This cannot be regarded as sufficient and conclusive evidence. Turkey believes that the low rate of approval of Certificates of Control during certain periods was the consequence of the low rate of requests put forward by importers.

11. Importers put forward requests for approval of Certificates of Control on the basis of business determinations and commercial considerations that are totally independent from Governmental

[2] See paras. 45, 55 and 65 thereof.

influence or the alleged trade-restrictive practices. These business determinations are based on a number of commercial factors, such as the import networks used by the traders, their commercial traditions, consumer preferences, quality, brand names, requests by distribution chains, currency fluctuations, existence of tariff advantages, quota rent exploitations, licenses entitlement, proximity of export markets, etc. The United States has not proved that the alleged 'blanket denial' existed *de facto* other than through unsupported allegations and indirect assumptions. One such assumption is the trade-distortive intentions of Turkey as allegedly evidenced in the so-called Letters of Acceptance.

12. As previously indicated by Turkey in its submissions, Turkey accepts that the so-called Letters of Acceptance were written and were in circulation. However, while these letters were internal communications aimed at developing policies, they were not the policies themselves. These administrative communications never resulted in the adoption of laws or regulations and, therefore, they are not to be regarded as measures of the type that support a *de jure* complaint. The fact that these Letters of Acceptance have been used in open Court proceedings by MARA and, in the case referred to by the United States in their rebuttals,[3] have been used by Turkish Court to discharge MARA from the accusations of the plaintiff, cannot be considered as evidence of a systematic denial of approval of Certificates of Control and cannot turn the Letters of Acceptance into measures equivalent to laws or regulations.

13. Turkey submits that the Letters of Acceptance were used, during domestic trial proceedings, to demonstrate that MARA's Provincial Directorate was acting under intra-ministerial administrative instructions in relation to individual applications. The Turkish Court stated that the conduct of MARA's Provincial Directorate was in line with ministerial guidelines. The ruling of the Court discharged MARA by finding that the Provincial Directorate was acting within the confines of its ministerial hierarchy. Furthermore, the fact that a Turkish Court of first instance has given value to a Letter of Acceptance is not relevant. This Panel has to decide whether, *de jure*, there is any provision in the Turkish law on Certificates of Control which gives any administrative authority the discretion to deny their approval. There is none. The cases cited are not relevant because the Turkish Courts have not decided on this issue.

14. When the Letters of Acceptance are considered as factual evidence, the record shows that, despite their existence and the informal circulation within the administration, Certificates of Control were approved in relation to applications made for all types of rice imports (i.e., MFN, FTA and TRQ). The applications for approval of Certificates of Control, whether for MFN, FTA or TRQ rice volumes, were always made by individual importers on the basis of business determinations and commercial factors. The relatively small amounts of requests under MFN, as compared to TRQ requests, cannot be factual evidence of the alleged existence of a 'blanket denial', but stands, on the contrary, as further evidence that importers preferred to deal with TRQ rice for the obvious tariff advantage that such trade entailed. Turkey fails to understand how the United States can persevere in disregarding this obvious truth. The individual instances of domestic litigation must be objectively seen as a natural component of the interaction between any WTO Member's administration and its business community and cannot be used to prove an instance of systematic trade restriction, let alone a trade prohibition (i.e., the 'blanket denial').

15. Turkey would now like to briefly turn to the issue of the purpose and function of the Certificate of Control. As already extensively indicated, the Certificate of Control is a reference document needed to process the customs clearance of specific consignments of a variety of goods, including rice. First and foremost, the Certificate of Control allows MARA and Turkey's customs authorities to verify, on a single document, all required customs information, including the product's compliance with relevant standards and technical regulations.

[3] See paras. 24-26 of the United States' Rebuttal Submission.

16. In relation to certain products (i.e., foodstuffs and other sensitive commodities imported for human or animal consumption), the effectiveness of Turkey's post-entry market surveillance is still in the process of development. It is for this very reason that the Government of Turkey still places (in what must be considered a totally WTO legitimate approach under both the Agreement on the Application of Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers to Trade) emphasis on conducting strict and rigorous processes of product pre-approval and early certification (by MARA, which is the competent ministry for rice). This scrutiny would be difficult to conduct after importation and cannot be entirely left to customs authorities.

17. The Certificate of Control system is designed to centralize the competence and the responsibility for products' compatibility in the authority (i.e., MARA for agricultural products such as rice) which is best suited to verify compliance with all the relevant legislation, and which will ultimately be liable for the products' safety. The approval by MARA of the Certificates of Control is, therefore, meant to grant a safe, uniform and consistent application of the requirements envisaged by the relevant legislation for food products. This is the function of the Certificate of Control. Contrary to what is being claimed by the United States, the function of the Certificate of Control is not that of an import license. Turkey believes that ample legal arguments and factual evidence have been provided up to now to support this statement both *de jure* and *de facto*. Turkey wishes again to draw the attention of the Panel to this crucial aspect.

18. Nothing in WTO law and practice prevents WTO Members from deciding what domestic instruments may be best suited to achieve the legitimate goals of customs inspection, product certification, product safety, fitness for use, etc., which are essential to responsibly engage in international trade while, at the same time, fulfilling WTO obligations and preserving full sovereignty. It is obvious that a review and WTO scrutiny of these mechanisms is available to verify that such instruments do not become trade barriers or disguised forms of protectionism. However, Turkey is confident that the legal arguments and considerable amount of factual evidence provided are clear and conclusive proof that Turkey's Certificate of Control instrument is a legitimate and WTO-consistent instrument, both *de jure* and *de facto*, which has been responsibly used to pursue legitimate regulatory objectives.

19. As already indicated in Turkey's Replies to the Questions posed by the Panel, the control procedures at importation stage are conducted in a three-step process which consists of documentation control, identity checks, and physical inspections. In particular, it must be underlined that the procedures that take place at central level (i.e., with MARA, in order to successfully apply for a Certificate of Control) and the ones that are exhausted at border level (i.e., the physical checks on the rice being imported, which must show compliance "in practice" with all requirements, standards and technical regulations certified "in theory" by MARA when approving the Certificate of Control on the basis of the information provided by the importers) are all part of the same process of certification, verification, inspection and customs clearance.

20. Contrary to what is maintained by the United States, this process is not "duplicative" in nature. The Certificate of Control includes the importers' declarations that the products comply with the applicable standards and is intended to provide pre-advice of the planned customs clearance at particular points-of-entry of individual consignments. As indicated above, these aspects are essential to ensure the necessary degree of administrative integration, foreseeability of customs clearance, and uniformity of action between the central government and the SPS control and inspection laboratories at customs points-of-entry. Turkey would like to emphasize again that it sees nothing sinister in this division of competences between MARA and customs authorities. There is nothing "revealing" in the cooperation of various parts of its administration towards the uniform application and supervision of customs clearance and import control, particularly with regard to certain sensitive commodities (such as rice, which is destined for human consumption). Suggesting, as the United States does, that it is questionable that part of the customs purposes of the Certificate of Control are fulfilled by actions to

be undertaken with MARA appears highly objectionable. Nowhere is it stated or provided that all customs purposes must be sought or fulfilled at once and within a single authority at customs level.

21. It is true that physical inspections of imported products do take place upon importation (i.e., after the Certificates of Control have been approved), but this must be seen as a legitimate and perfectly normal right of any Government. The process of early certification by MARA and the actual verifications and inspections at customs level, carried-out by MARA officials at customs points-of-entry, appear as the only effective instruments for Turkey to guarantee that the products placed in free circulation on its market are safe and fit for consumption. Turkey remains eager to discuss with the United States alternative ways to approach this regulatory matter in light of even greater trade-facilitation objectives, but it is not willing to forego its legitimate WTO rights and it believes that its current system is fully consistent with WTO law.

22. In fact, Turkey firmly believes that its Certificate of Control already acts as an element of trade facilitation. It provides legal certainty and commercial predictability to importers engaged in rice importation. Once approved, the Certificate of Control is a guarantee for the importer that all elements and requirements needed to clear customs are present and will allow importation (provided, of course, that the consignment imported corresponds to the information supplied and passes the phytosanitary and food safety inspections). The importer will then feel confident to conclude all necessary business engagements for purposes of importation. This element of legal certainty must be seen as a tool of trade facilitation. It provides administrative certainty for importers and avoids possible time-consuming and costly procedures at border control. Provided that all legal requirements are met, Certificates of Control are always (and always have been) swiftly and automatically approved. This must be remembered as it indicates the relatively low administrative burden which this instrument places on traders.

23. As a final remark on the Certificate of Control, Turkey wishes to recall that GATT Article XI:1 does not define the concept of "*import license*". Neither is this concept defined by Article 4.2 of the Agreement on Agriculture or by any previous GATT or WTO panel or Appellate Body decision. An element of interpretative guidance appears to be available under Article 1.1 of the Agreement on Import Licensing Procedures, where it is clearly indicated that the submission of an application or other documentation required for "*customs purposes*" falls outside of the definition of import licensing.

Turkey believes that, in the absence of a precise definition of the concept of "*import license*" under GATT Article XI:1, Article 1.1 of the Agreement on Import Licensing Procedures must necessarily provide an element of interpretative guidance. Therefore, Turkey submits that, while the non-applicability of GATT Article XI:1 cannot be an automatic result of the inapplicability of the Agreement on Import Licensing Procedures, the practical result should be the same, as a consequence of the recourse to the interpretative guidance on the meaning of the term "*import license*" offered by the Agreement on Import Licensing Procedures for purposes of the application of the GATT 1994.

24. In WTO law, definitions provided under certain covered agreements must be of relevance for the interpretation of other WTO agreements. In particular, this is required by the general need to guarantee consistency and uniformity of application of WTO law and obligations. In relation to the issue at stake, it would be paradoxical to consider the Certificate of Control as not falling under Article 1.1 of the Agreement on Import Licensing Procedures, in as much as it benefits of the so-called carve-out for "*customs purposes*", while it is considered an import license under GATT Article XI:1. Turkey believes that, in order to guarantee consistency and uniformity of application of WTO law, the interpretative guidelines provided by Article 1:1 of the Agreement on Import Licensing Procedures, including the "*customs purposes*" carve-out, must apply to GATT Article XI:1 and to the legal reasoning conducted to determine what is an "*import licence*" and whether or not the Certificate of Control fits that profile.

25. In particular, if the so-called carve-out is meant, under Article 1:1 of the Agreement on Import Licensing Procedures, to interpret and "restrict" the scope of the Agreement on Import Licensing Procedures in relation to instruments that have "*customs purposes*", Turkey firmly believes that the same interpretative tool should be used to "restrict" the scope of application of GATT Article XI:1 if the same "*customs purposes*" carve-out is applicable to a given instrument. In any event, the fact that, on the basis of this interpretation, the Certificate of Control is not an import license (within the meaning of Article 1:1 of the Agreement on Import Licensing Procedures and GATT Article XI:1), does not exempt the Certificate of Control from being reviewed as an "other measure" under GATT Article XI:1. To this end, Turkey believes to have provided sufficient and conclusive arguments and factual evidence that the alleged denial of approval of the Certificates of Control does not fall within the meaning of GATT Article XI:1 "*other measure*" because no prohibition or restriction has been proved, both *de jure* and *de facto*.

The Expired Tariff Rate Quota Regime

26. After having already thoroughly addressed the issue of the now expired TRQ regime in its previous submissions, Turkey simply wishes here to share with the Panel a number of general considerations with respect to its former TRQ regime.

27. First of all, Turkey would like to once again emphasize that the TRQ regime has expired and it has not been renewed. Turkey has also provided repeated reassurances and commitments not to reintroduce it as a system of market stabilization. Turkey would like to refer to what has already been stated in its previous submissions. In particular, Turkey wishes to recall that, when measures are no longer in force, WTO case law supports the view that no finding is necessary on measures expired before the commencement of the panel proceedings, whereas in the case of measures expired after the commencement of the panel proceedings, if a finding is made, no recommendation is due.

28. WTO case law specifically supports the view that a panel is not necessarily required to make findings in respect of measures expired before the commencement of the panel proceedings and that the discretion in deciding whether or not to make a finding on such measures must be guided by the "*object and purpose of the dispute settlement system*".[4] In exercising such discretion, the Panel must consider whether making a finding would secure a positive solution to the dispute. On the other hand, Turkey has also noted that certain panel and Appellate Body reports have found it "inconsistent" to make recommendations on measures that are no longer in force and that panels are to avoid making recommendations regarding measures that no longer exist, both in relation to measures that expired before or after the commencement of the panel proceedings.

29. Turkey does not consider that a finding on any of its expired TRQ measures, including the ones expired soon after the commencement of panel proceedings, is necessary to secure a positive solution to the dispute. Turkey has repeatedly maintained, both at the consultations phase and throughout the submissions and oral statements presented so far, that it has no intention to renew these measures, neither extending them nor adopting new legislative instruments. Therefore, Turkey respectfully requests the Panel not to make findings on any of the measures relating to the TRQ regime or, in the alternative, to limit its findings to those measures which were still in force after the establishment of the Panel. In any event, Turkey respectfully requests that the Panel refrain from making any recommendation with respect to the TRQ regime.

30. Secondly, Turkey once again wishes to emphasize that the high volumes of in-quota imports and the high number of TRQ licenses which were issued are testimony to the attractiveness and

[4] See, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, para. 7.1652.

appeal that the tariff advantage had among individual rice importers. Turkey refers to Annex TR-42 where it has set out new scenarios which prove the advantage provided by the TRQ regime. In these scenarios, Turkey has used the United States' average FOB price of US$ 295, provided by the United States in its First Submission, and added insurance and freight costs based on customary values declared by Turkish importers.[5] Scenarios 3 and 4 show that the advantage provided under the TRQ for the purchase of 1 tonne of paddy rice amounted to, respectively, US$ 31 and US$ 34.

31. Contrary to what the United States has alleged, importers always freely chose to take advantage of this in-quota tariff preference. At all times, this opportunity has existed in parallel to the ability to import at the less advantageous MFN rates of duty. Turkey has already shown that the choice to import within the TRQ, in order to benefit from the tariff advantage, was always dictated by business determinations and commercial decisions that were made by importers on the basis of a number of economic and market factors such as domestic and world prices of rice, domestic consumption, exchange rates, conditions of competition between rice of different origins, consumers' preferences, marketing strategies, etc.

32. Thirdly, Turkey submits that its domestic purchase requirement was introduced within the TRQ in order to partly moderate the advantageous effects of the preferential rates (i.e., advantages which were totally in favour of imported products). The domestic purchase requirement was never meant to promote the domestic industry, rather it was designed to pursue the legitimate objective of market stabilization by keeping prices at level that would, at the same time, allow trade while maintaining a viable balance between consumer's interests and producers' expectations. There is no "investment" element in the domestic purchase requirement.

General Considerations

33. Throughout these Panel proceedings, Turkey has argued that the United States has not made a *prima facie* case, that it has not proved its allegations, that its legal arguments do not find grounds in WTO law and the interpretative guidance offered by WTO case law, and that this dispute largely rests on a misunderstanding of facts and a number of individual instances that have little to do with international trade policy and more with domestic judicial proceedings. Turkey hopes that the arguments and factual evidence that it has so far provided to the benefit of the Panel and the United States stand as sufficient and conclusive proof that Turkey never adopted a legal framework aimed *de jure* at distorting trade and never implemented or applied its legislative and administrative measures in a *de facto* trade distortive fashion.

34. The obvious question may be why, then, if Turkey's system has always been, both *de jure* and *de facto*, in line with its WTO obligations, would the United States have felt discriminated upon and decided to bring this matter to the attention of a WTO panel in formal dispute settlement proceedings? Turkey believes that this dispute may, in fact, be the consequence, to a considerable extent, of the relative lack of comparative advantage of rice from the United States vis-à-vis competing exporting countries trading with Turkey (i.e., the degree of competitiveness of United States' rice), as shown in Annex TR-43. This circumstance would also explain why the United States appears to challenge so vehemently the (now expired) TRQ and its domestic purchase requirement, while it is widely known that all countries and traders active in international trade are traditionally enthusiastic about TRQs and the quota rents that they offer (provided, of course, that they are administrated in a non-discriminatory fashion, as it was always the case for Turkey's rice TRQs).

[5] For the purpose of these calculations, Turkey has used the United States average FOB price, as there is concern that some Turkish CIF prices may be distorted by traders' practices of tax avoidance and tax minimization. See also Turkey's Reply to Questions Posed by the Panel, Questions Nos. 7 and 49(c). Turkey notes that its average CIF price of US$ 260 is even lower than the average United States' FOB price of US$ 295.

35. As indicated in its last rebuttal submission, Turkey believes that, unfortunately, the real background to this case may be that the United States has seen its rice exports to Turkey progressively lose market share to the advantage of other exporting countries. This is true both in relation to TRQ and MFN trade and particularly significant in a scenario of continued expansion of market access opportunities given by trends of yearly increases in imported volumes. While Turkey understands that it would have been more desirable for purposes of the United States' maintenance of market share that Turkey had not "burdened" its TRQ regime with the domestic purchase requirement, Turkey believes that its TRQ regime was a totally legitimate instrument which was adopted and administered with only two clear objectives in mind: that of greater market supply (through the TRQ itself and the lower applicable rates of duty) and that of market stabilization (through the domestic purchase requirement). Turkey never adopted its TRQs with the particular intent to diminish the market access opportunities of the United States (or, for that matter, of any other exporting country).

36. The success of the TRQ and the high utilization rates are testimony to the fact that the advantage provided by the TRQ was real and appealing enough for importers to exploit it, despite the allegedly burdensome impact of the domestic purchase requirement. The fact that imports from the United States may have declined (at the MFN rates as well as within the TRQ) has only to do with the progressive loss in competitiveness of rice from the United States vis-à-vis its competitors and with the business determinations and commercial decisions freely made by rice importers on the basis of a number of economic and market factors. Even the most recent import statistics appear to support this conclusion. The market-share of rice from the United States has not increased even now that imports are occurring only at the MFN (or applied) rates of duty and that the TRQ regime no longer applies.

37. As previously indicated, Turkey has systematically sought to avoid dispute settlement on this issue and to reach a mutually acceptable solution with the United States. Despite the unfortunate escalation of this matter into formal WTO dispute settlement, Turkey remains willing to address the United States' specific trade concerns in line with Turkey's WTO obligations and legitimate rights.

38. Dear Madame Chair, distinguished Members of the Panel, this concludes Turkey's oral statement. Turkey would like to reiterate its gratitude to this Panel for its assistance in the resolution of this dispute and stands ready to address any further questions that the Panel may have.

ANNEX E-4

CLOSING ORAL STATEMENT BY TURKEY AT THE SECOND SUBSTANTIVE MEETING

(18 January 2007)

Dear Madame Chair, distinguished Members of the Panel,

1. The United States argues that Turkey instituted a policy to systematically deny the approval of Certificates of Control for out-of-quota trade so as to induce traders to import within the TRQ. To succeed, the United States must show either *de jure* or *de facto* that there was a systematic denial of approvals so as to result in a prohibition or restriction on import. The United States has failed to do so. The United States has not identified the provisions of the law governing Certificates of Control which constitute a prohibition or restriction to support a *de jure* claim.

2. The United States is arguing that the absence of approvals for Certificates of Control is proof, in itself, of the systematic policy to deny approvals. The evidence that the United States has provided is not sufficient to sustain this argument. The United States must show that traders have applied for and been systematically denied approvals. What has been shown is denial in individual cases. The United States has not shown that the absence of approvals is not due to the absence of requests.

3. Let's look at the evidence provided by the United States. It boils down to two things: the Letters of Acceptance and their related Court cases as well as the correspondence between Turkey and the United States. The diplomatic Letter to Ambassador Portman was designed to reassure the United States that, with the phasing-out of the TRQ, traders would likely resume trading on MFN terms. It was not an implicit confirmation of any systematic denial of the approval of Certificates of Control.

4. Turkey has shown that the Letters of Acceptance did not result in the 'blanket denial' of approval of Certificates of Control. On the United States' own calculation, a minimum of 969 Certificates of Control were applied for and approved for out-of-quota rice importation. The fact that many of these out-of-quota Certificates of Control were used for FTA trade does not support the argument by the United States. It merely confirms that traders preferred the terms of trade available under the free trade agreements. These Certificates of Control were approved during the period when the Letters of Acceptance were allegedly causing a 'blanket denial' of approvals. Turkey concludes that the Letters of Acceptance were not the cause of a reduction in exports by the United States nor were they evidence of a 'blanket denial'.

5. Turkey argues that a more plausible reason for the lack of requests for approval of Certificates of Control in relation to rice originating in the United States was the progressive fall in competitiveness of paddy rice from the United States and the attractiveness of trade in TRQ and FTA rice.

6. The United States has not shown that there was a systematic rejection of requests for approval. They have given evidence in relation to five individual cases which have resulted in domestic litigation. This represents 0.2% of the approved Certificates of Control. Turkey has even indicated that there are, in fact, fourteen cases pending and the average rate of non approval is 4.38% over the last 3 years.[1] Five or fourteen cases or 4.38% rejections of total requests is not convincing evidence of large scale denial of requests. The United States needs to show something more than 5 or fourteen individual cases to show systematic denial.

[1] See Annex TR-35.

7. The key issue that Turkey would like to underline is that the Letters of Acceptance are not and have never been a legal instrument within the Certificate of Control system. They are not legislative measures or "other measures" of the type that supports a *de jure* complaint. They may, at best, be elements of factual evidence to be used to bring a *de facto* complaint. Turkey argues that the United States has not brought such a case. In any event, should they be considered as evidence in relation to a *de facto* review, Turkey submits that it has provided substantial and convincing evidence in order to rebut their probatory value and to indicate why importers were not applying for Certificates of Control in respect to MFN trade, but rather for FTA or TRQ imports.

8. This factual evidence brought by Turkey is clear and stands as a powerful counter-argument against the evidentiary value of the Letters of Acceptance. Importers were applying for TRQ and FTA rice imports for the commercially-appealing tariff advantages that were offered by this type of trade. In addition, requests for approval of Certificates of Control for rice originating in the United States were even less likely given the progressive loss of competitiveness of paddy rice from the United States. Turkey believes that it has provided enough evidence of this, both in terms of its own statistical data, of the interpretation of data provided by the United States (i.e., the scenarios) and, last but not least, FAO data.

9. The Turkish Court of first instance, in the Helin case, did not address whether Turkish law provides MARA with any discretion to deny the approval of Certificates of Control once the requisite formalities have been duly fulfilled. The Court of first instance appears to have given effect to an *ultra vires* act. Turkey notes that the other cases submitted by the United States take the correct approach and challenge the *vires* of the denial and, implicitly, the legality of the Letters of Acceptance.

10. Turkey has argued that Certificates of Control are not import licences, that there is no *de jure* discretion in relation to their approval when an application has been duly made, and that the United States has not shown or cited any element of Turkish law in support of its case. The United States cannot succeed in a *de jure* complaint for the very simple fact that it has not shown what elements of the law constitute a restriction or prohibition.

11. In any event, the fact that the Certificate of Control is not an import license (within the meaning of Article 1:1 of the Agreement on Import Licensing Procedures and GATT Article XI:1), does not exempt the Certificate of Control from being reviewed as an "*other measure*" under GATT Article XI:1. However, Turkey believes it has provided sufficient and conclusive arguments and factual evidence that the alleged denial of approval of the Certificates of Control does not fall within the meaning of GATT Article XI:1 "*other measure*" because no prohibition or restriction has been proved, both *de jure* and *de facto*. Only when a *de jure* or *de facto* prohibition or restriction of imports can be demonstrated, the specific measure being considered would amount to an "*other measure*" of the type that GATT Article XI:1 considers illegal.

12. Why does Turkey have a Certificate of Control system? The Certificate of Control is a document used as part of Turkey's customs procedures. It is therefore a document used for customs purposes. Importation and customs-clearance involve a number of elements. There is a documentation element, a verification element, a physical inspection element and, ultimately, a tax collection element. The Certificate of Control is part of the documentation phase. The fact that responsibility for part of the documentation phase is allocated to MARA and part to the customs authorities does not make the Certificate of Control any less of a document used for customs purposes.

13. It is perfectly legitimate and common practice in many WTO Members to allocate responsibility for the different elements of customs or market entry to different governmental authorities. The allocation of responsibility to MARA is not decisive. The question is: is this a

document used for customs purposes? It is. Early notification and information-collection through the Certificate of Control occurs at MARA because MARA is the competent Turkish authority in relation to agricultural commodities.

14. On a single document, all required customs information, including the products' compliance with relevant standards and technical regulations, is collected. In relation to certain products (i.e., food products and products destined to human and animal consumption), the Certificate of Control allows the gathering of the necessary information before the goods arrive to customs.

15. Many WTO Members have pre-import documentary requirement. We note that the United States itself now requires, under its *Public Health Security and Bioterrorism Preparedness and Response Act of 2002*, prior notice of food importation. In particular, the Food and Drugs Administration (FDA) and not the US Customs Service, must be notified in advance of any shipments of food for humans and animals that are imported into the United States. Is this requirement to be considered an import licence? We believe not, just like the Certificate of Control is not and should not be considered an import licence, but a legitimate means for Turkey to achieve its legitimate objectives.

16. Turkey remains free under WTO rules to allocate governmental responsibilities to whatever government authority it considers appropriate. The name of the authority is not the main issue. The only question is whether the document is for customs purposes. The Certificate of Control is used for customs purposes.

17. Turkey does not wish to enter into a debate on the legal questions surrounding recommendations and findings of panels in this closing statement. Turkey asks the Panel to review its arguments set out in the written pleadings. Turkey merely observes that the case cited by the United States in its oral statement does not support its argument.

Turkey thanks the Panel for its continued assistance towards the resolution of this dispute and looks forward to its written questions.

ANNEX F

REPLIES BY THE PARTIES TO THE QUESTIONS POSED BY THE PANEL AND OTHER PARTIES AFTER THE SECOND SUBSTANTIVE MEETING, AND COMMENTS BY THE PARTIES ON THE OTHER PARTY'S REPLIES

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ANNEX F-1

REPLIES BY THE UNITED STATES TO QUESTIONS POSED BY THE PANEL AND TURKEY AFTER THE SECOND SUBSTANTIVE MEETING
(6 February 2007)

Questions from the Panel

Q99. (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 US 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 US 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 US 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 US

Department of Commerce, Bureau of Census.[1] 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.[2]

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 US and Turkish data follow a similar trend. Imports appear to have been significantly lower in 2003/2004[3] 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), 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 database was obtained from Turkey's State Institute of Statistics.[4] 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 US 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.

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[1] *See* Exhibit US-73.

[2] *See* Exhibit US-73.

[3] 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.

[4] *See* Exhibit US-73.

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 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.

Q100. (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 US landed CIF price in 2005 was $260 per metric ton,[5] 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 US landed CIF price in 2006 was $274 per metric ton,[6] so this price spike also appears to be an anomaly.

Q101. (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.

[5] *See* paragraph 70 of the US Rebuttal Submission which explained how this figure was derived.

[6] This figure was derived by summing the US monthly totals for 2006 in Annex TR-25 and dividing value by quantity.

12. Please see Exhibit US-74, which contains annual US rice production data and annual and monthly data on total US rice exports and total US rice exports to Turkey. With respect to monthly data on US 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, US 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 US 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.

Q116. (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.[7] Further, a recent article in the Turkish publication, *Referans*, also notes that, despite Minister

[7] *See* Exhibit US-21.

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]."[8]

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 US Rebuttal Submission, Turkey asserts that it granted Control Certificates for 400,000 metric tons of US rice, while Turkey's import data shows that 90,000 metric tons of US rice entered Turkey in 2006. US export statistics record 17,789[9] metric tons of US 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 US 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 US 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), 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.[10] 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.

Q117. (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 per cent for volumes of paddy rice and 88 per cent for volumes of brown rice. In other words, the total weight of paddy rice is reduced by 30 per cent in order to arrive at the milled rice equivalent, and the total weight of brown rice is reduced by 12 per cent in order to arrive at the milled rice equivalent.[11]

Q131. (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.

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[8] *See* Exhibit US-75. As described in the US 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.

[9] *See* Exhibit US-74.

[10] *See* Exhibit US-11.

[11] Andy Aaronson and Nathan Childs, "Developing Supply and Utilization Tables for the US Rice Market," Rice Situation and Outlook/RCS-2000/November 2000, page 45. *See* Exhibit US-80.

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 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.[12] 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.

Q134. (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 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.

[12] *See* paragraphs 22-33 of the US Answers to Panel Questions.

(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.

Q136. (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*.[13] 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).[14] 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 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).

Q139. (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

[13] *See, e.g.,* Article 9 of the 2004, 2005, and 2006 Communiqués (Exhibits US-7 and US-78; Annex TR-1).

[14] 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 Agustos 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."

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 US 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.

Q140. (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 US imports. In this regard, the United States notes that, to the extent Certificates were in fact granted, this would have closely followed US 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.[15]

34. As noted in paragraphs 47 and 48 of the US 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 US 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 US statements at the WTO. Importers brought in US rice almost exclusively under the TRQ for 2 ½ years, except for one six-week period where every single Control Certificate for US rice was purportedly issued for out-of-quota imports.

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 US Rebuttal Submission, the Appellate Body and a GATT panel have found that mandatory measures that were not enforced at all were, nonetheless,

[15] G/AG/R/42, 25 May 2005, para. 21.

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.

Q143. (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. US industry had raised concerns with the US 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.

Q145. (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 US 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[16] 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 concerned under the WTO Agreement.[17]

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,[18] 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.[19] 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

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[16] 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 US 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.

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

[18] *See* Turkey's Answers to Questions, Reply to Question 53(e).

[19] *See* Turkey's Answers to Questions, Reply to Question 53(e).

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.

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.[20] The United States believes that the evidence presented on this score is compelling.

Q150. (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 references 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.[21] 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:

> ... 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*.

[20] *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).

[21] The United States submitted this document in Exhibit US-68.

> [The references prices noted above] will be considered as references 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.[22] (emphasis added).

47. On October 19, 2006, Turkey's General Directorate of Customs sent another unpublished letter to its customs houses.[23] 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 *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.[24]

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:

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[22] Exhibit US-68.
[23] *See* Exhibit US-76.
[24] *See* Exhibit US-75.

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

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.[26]

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 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.

Q152. (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 US panel request, including the domestic purchase requirement. Inasmuch as the domestic purchase

[25] *See* Exhibit US-77 (emphasis added).

[26] The United States further notes that Minister Eker's statement acknowledges that the TRQ resulted in an 87 per cent increase in domestic rice production since 2002 and that, as a result, domestic rice increased from 40 to 66 per cent 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.

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.[27] 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 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 US 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

[27] *See* paragraphs 19-22 of the US Oral Statement at the Second Panel Meeting and paragraphs 42-47 of the US Oral Statement at the First Panel Meeting.

Republic bring the measure into conformity with WTO rules, on the grounds that the measure was no longer in force.[28]

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.[29]

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.[30]

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 the EC asserted no longer existed.[31] 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,"[32] 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

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[28] 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*").

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

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

[31] Panel Reports, *European Communities - Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291, 292, 293/R, para. 8.16 ("*EC – Biotech*").

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

> 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.[33]

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."[34]

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.[35]

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

[34] 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 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 US 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.

[35] *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.

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 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 Article 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.[36]

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.[37] 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 US Answer to Question 150, Turkey's Minister of Agriculture, Mehmet Eker recently stated that:

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

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).

[36] 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.

[37] *See* US Response to Panel Question 145.

[38] Exhibit US-77 (emphasis added).

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 US 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."[39] 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 issues 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 requests for approval?

69. Turkey continues to mis-characterize the US claim. The US 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 US 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.

[39] *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.

ANNEX F-2

COMMENTS BY THE UNITED STATES TO THE REPLIES BY TURKEY TO THE QUESTIONS POSED BY THE PANEL AFTER THE SECOND SUBSTANTIVE MEETING

(20 February 2007)

1. The United States appreciates the opportunity to provide comments on the "Replies by Turkey to the Questions Posed by the Panel" submitted by Turkey on February 6, 2007. The United States has reviewed Turkey's answers and will provide comments on some of those answers as set forth below. With respect to those answers on which the United States is not providing comments, the United States submits that Turkey's arguments are substantially the same as in previous submissions and statements or are rebutted elsewhere in the US comments, so the United States will refrain from repeating its arguments.

Q100. (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.

2. Turkey's contention that the price trends noted by the Panel can be explained by sales of paddy rice for planting during certain periods is not supported by Turkish trade data. There is an 8-digit Harmonized Tariff System code for "rice in the husk (paddy or rough) for sowing" (HS1006.1010). The United States has submitted a more detailed version of Turkish trade data for paddy rice imports.[1] This more specific break-out of the paddy rice sub-heading shows that none of the sales that Turkey describes in the first paragraph of its response actually occurred.

Q102. (Turkey) Aside from the alleged lack of competitiveness of rice from the United States, what other reasons may explain in Turkey's view the fact that, according to the information provided by Turkey in Exhibit TR-25, there seem to have been no imports of:

(a) Paddy rice or brown rice in the months of October in 2003, 2004 and 2005. In addition, the data in Exhibit TR-33 suggest that no rice imports whatsoever (paddy, brown or milled) took place in February and March 2004. Further, the data in Exhibit TR-33 seem to suggest that there were no rice imports other than EC/Former Yugoslav Republic of Macedonia out-quota rice imports in October - December 2003 and in September - October 2005.

(b) Milled rice from the United States during: (i) January - May 2004; (ii) July 2004; (iii) September - November 2004; (iv) July - December 2005; and, (v) January 2006 - onwards.

(c) Paddy rice from the United States during: (i) October - December 2003; (ii) February - May 2004; and, (iii) September - November 2005

3. From September 10, 2003 through the date of panel establishment and beyond, Turkey maintained a legal prohibition on the granting of Control Certificates for MFN trade. Turkey

[1] *See* Exhibit US-82.

instituted minimum import prices for rice on August 1, 2006 – the day after the TRQ allegedly expired – and Turkish import data during the September-December 2006 period shows that rice imports have ceased.[2] Turkey's maintenance of a discretionary import licensing regime, including the TRQ with domestic purchase, is the most compelling reason that rice imports have ceased altogether in certain periods, as the United States has previously argued.

4. Several of the explanations provided by Turkey are unsupported by the evidence on the record. Turkey argues that there was an increase in rice stocks by the beginning of 2004; however, the data on the record shows just the opposite, with Turkish rice stocks declining from 260,000 metric tons on September 1, 2003[3] to 135,000 metric tons on September 1, 2004.[4] Turkey contends that there was a steep increase in world rice prices in 2004, but that would not explain the decline in imports that began in *September 2003.* With respect to prices in 2004, one cannot measure the effect of an increase in world prices for rice in the Turkish market without knowing the domestic prices for rice in Turkey during the period in question. Annex TR-29 shows that TMO purchasing prices increased significantly in 2004 from the previous year, and Exhibit US-54 demonstrates that Turkish wholesale prices rose throughout the 2003-2006 time period. Turkey has taken issue with the data in Exhibit US-54 but has not provided a clear explanation as to why that data is inaccurate. The Panel has requested that Turkey provide data on domestic rice prices in Turkey but, to date, Turkey, which is in the best position to supply this data, has not done so. The Panel should draw the appropriate inference from Turkey's failure to provide this data.

5. Turkey also argues that import decisions have always been exclusively determined by business considerations. Yet an examination of the data shows that the United States has exported large quantities of rice throughout the world since September 2003, yet has been unable to export to Turkey during certain time periods, which implies that something other than business considerations was driving the import trends. Moreover, Turkey maintains that preferential tariffs on rice from the EC and Macedonia could affect importers' choices. However, the EC quota only covers 28,000 metric tons of milled rice, a small percentage of the Turkish rice market. Further, as the United States noted in paragraph 51 of the US Rebuttal Submission, Macedonia is a non-factor in the rice trade. It does not export rice. Even Turkey's Annex TR-33 shows that only one-third of the Control Certificates allegedly granted for the importation of Macedonian rice were ever utilized; some of those Certificates were only utilized in part; and the total quantity of Macedonian rice allegedly imported was less than 1,500 metric tons.

Q103. (Turkey) In reference to the previous question, is Turkey of the view that the lack of imports during the indicated periods was a result of a lack of applications for Certificates of Control to import rice or rather of a rejection of those applications? Please reason your response, referring to relevant evidence, as appropriate.

6. Without examining the actual Control Certificate data, it is impossible to discern whether there was a lack of applications for Control Certificates. However, the United States would not be surprised if that were indeed the case; as the United States has demonstrated, Turkey's legal prohibition on the granting of out-of-quota Control Certificates for MFN trade in rice prohibited or restricted the importation of rice at least through the date of panel establishment. Even Turkey's alleged Control Certificate data shows that it granted only 56 out-of-quota Control Certificates at the

[2] *See* Exhibit US-81rev, which is Exhibit US-81 as revised to include December 2006 data. Turkish data shows imports of US paddy rice in July and August, but US export statistics show a minuscule level of US rice exports to Turkey in 2006, except for approximately 16,000 metric tons of paddy rice in March 2006. As the United States previously has mentioned, the large amount of alleged Turkish imports of US rice in the July-August 2006 period can only be accounted for by US rice that had been stored in Turkish bonded warehouses.

[3] September 1 is the first day of the rice marketing year in Turkey.

[4] *See* Exhibit US-45.

MFN rates over a 2 ½ year period and, as the United States explained previously, many of those alleged Certificates were either not utilized, covered the importation of very small amounts of rice, or were anomalies. Importers would have known from past years that Turkey would ensure that all imports of rice, with the exception of imports covered by a preferential agreement (e.g., the EC), would be made through the TRQ while it was open, and that such imports would cease during the Turkish rice harvest when the TRQ was closed. Further, no rice importer could have mistaken the significance of MARA's apparent decision to go to court to enforce its denial of such Control Certificates, as well as the court decisions siding with the government's position.

7. With respect to the new table provided by Turkey, the United States is unable to verify the accuracy of this data without examining the actual Control Certificates, which Turkey has opted not to provide, and the data in the chart regarding approved Control Certificates is not consistent with the data Turkey provided in Annex TR-33. However, even Turkey's data shows that 11 out of 28 applications for a Control Certificate were rejected, a nearly 40 per cent rejection rate. The United States believes it unlikely that, in the periods covered by the table, almost 40 per cent of Control Certificate applications for rice warranted denial for reasons such as missing documentation or incomplete administrative requirements. Turkey's table provides further evidence that Turkey is restricting the importation of rice and operates a discretionary import licensing regime for rice.

Q105. (Turkey) Exhibit TR-35 seems to show lower figures of rejected applications for Certificates of Control in 2005 and 2006, than Exhibit TR-36. In particular, Exhibit TR-36 would suggest that there were 85 rejections in 2006 versus 38 shown in Exhibit TR-35. Could Turkey explain these discrepancies, including their implications for the total number of rejections and the percentage of rejections shown in Exhibit TR-35.

8. Turkey has confirmed that it rejected 85 applications for Control Certificates in 2006. This admission provides further evidence that Turkey is restricting the importation of rice and operates a discretionary import licensing regime for rice.

Q108. (Turkey) According to Exhibit TR-25 there were no imports of milled rice in April 2004; however, Exhibit TR-33 indicates that 21,000 kg of rice were imported from Pakistan in the same month. Could Turkey please explain this, or any other similar, discrepancies between Exhibits TR-33 and TR-25?

9. The United States agrees that this in-quota importation could not have occurred on April 23, 2004. FTU did not announce the details of the first TRQ opening until April 27, 2004, so this importation could not have occurred before that date.

Q109. (Turkey) In its reply to question 4(c) posed by the Panel, Turkey stated that Exhibit TR-8 provided "import data, broken down into types of rice *and into MFN and TRQ imports* for the years 2004 to 2006" (emphasis added). Actually, the table in Exhibit TR-8 seems to show import figures broken down by types of rice and by "Total imports" (A), "Import Licenses Issued" (B) and a third column indicating the difference between A and B, which is supposed to show the "Total out of quota imports".

(a) Can Turkey please confirm this.

(b) As regards milled rice, the corresponding figure for imports of US rice in the third column is negative. According to footnote 2 to the table, the negative sign indicates that the total quantity of import licenses was larger than the actual imports. Does the negative sign also mean that there were no out of quota imports of US milled rice during the period under consideration?

10. Without being able to examine the actual Control Certificates, which Turkey has elected not to provide, the United States is unable confirm the authenticity of the data provided in the table.

Q110. (Turkey) In its question 7 posed to both Parties, the Panel had asked, *inter alia*, for information regarding Turkey's average prices for domestic production of, separately, paddy, brown and milled rice in its market, for the period from July 2003 to the end of 2006 (including estimates, as appropriate). In response to this question, Turkey indicated that "reference should be made to Annex TR-27". However, the data in Exhibit TR-27 seems to refer only to individual purchases by companies in 2005. It does not show monthly averages and specify the type of rice it refers to, nor does it cover the period requested by the Panel. In the absence of such information, can Turkey comment on the data provided by the United States in Exhibit US-54. Can Turkey find a relation between the price data provided in Exhibit TR-27 and that provided in Exhibit TR-29?

11. As an initial matter, Turkey has not provided the information requested by the Panel, and the Panel should draw an appropriate inference.

12. With respect to the role of TMO in the Turkish market, Turkey understates the effect that TMO's decisions have on market prices. TMO sets the purchase prices for rice produced domestically which, in turn, influences the prices that Turkish producers and producer associations charge importers who must purchase their rice in order to import rice from abroad. TMO also helps establish the domestic purchase requirements under the TRQ. Under each TRQ opening, it has the discretion to import an additional 50,000 tons of rice in order to stabilize the market, and the mere possibility that it may utilize this discretion will have an effect on prices. As Turkey itself notes in its reply to Panel Question 111, TMO "acts as an intervention agency." Whether TMO makes small or large purchases, it still has a major role in influencing "market" prices for rice in Turkey. The fact that TMO may have been purchasing less rice was by design: the domestic purchase requirements under the second and third TRQ openings were set in such a way that an importer could import more rice by purchasing rice directly from the Turkish producers and producer associations than by purchasing the rice from TMO. Thus, importers, rather than TMO, now bore the burden of purchasing and storing domestic rice.

13. Regarding Turkey's comparison between the pricing data in Exhibit US-54 and Annex TR-29, prices for paddy rice will, of course, be lower than prices for milled rice, so it is clear that TMO purchasing prices for paddy rice will be lower than the price of US milled rice. However, the record does not support Turkey's contention that prices paid by individual companies for paddy rice purchased directly from producers are lower than TMO purchasing prices for paddy rice in general. The average price for paddy rice purchased from producers in 2005 – 640 New Turkish Lira (or $477) per metric ton – was higher than the average TMO purchasing price in 2005 – 612 New Turkish Lira (or $456) per metric ton.[5]

Q111. (Turkey) In its reply to question 9 posed by the Panel, Turkey provided Exhibit TR-30 showing overall purchases and sales of milled and paddy rice by the Turkish Grain Board (TMO) during the period 2003 to 16 November 2006. Could Turkey please explain the reasons for the significant difference in the quantities of paddy rice sold by the TMO in 2004, as compared to the quantities sold in 2005 and 2006, respectively?

14. The TRQ regime was designed to reduce TMO stocks, which were high entering 2004,[6] so the fact that the quantities of paddy rice sold by TMO declined in 2005-2006 are evidence that the regime

[5] The 640 and 612 New Turkish Lira figures were taken from Annexes TR-27 and TR-29, respectively. The equivalent dollar amounts were derived by multiplying those figures by 0.744759956, the average interbank exchange rate for 2005, which can be found in Exhibit US-52.

[6] *See* Annex TR-30.

was operating as intended. Importers purchased more rice from Turkish producers than from TMO because, under the second and third TRQ openings, one could import more rice by purchasing rice from domestic producers and producer associations than from TMO. Second, the fact that importers were purchasing domestic rice at all had nothing to do with the purported "advantage" of having to make purchases of large quantities of domestic rice as a condition upon import; rather, importers made such purchases because that was the only way to import rice not covered by a special quota arrangement.

Q112. (Turkey) How does Turkey explain the sudden occurrence of over-quota imports of United States rice in May 2005 shown in Exhibit TR-33?

15. The United States respectfully refers to its previous answer. From September 10, 2003 through the date of panel establishment, there was virtually no MFN trade in rice. However, in one six-week period, every Control Certificate allegedly granted for US rice was out-of-quota. Even if Turkey could substantiate this which, to date, it has not, this was an anomaly and does not detract from the conclusion that Turkey prohibited or restricted the importation of rice at the MFN rates at least through the date of panel establishment, and operates a discretionary import licensing regime for rice. As noted by the United States in paragraphs 60-62 of the US Rebuttal Submission, the alleged non-enforcement of the legal prohibition in limited instances, even if Turkey could substantiate it, does not excuse an Article XI:1 breach.

Q114. (Turkey) In its reply to question 15 posed by the Panel, Turkey refers to Exhibit TR-33.

(b) With reference to the data in that same Exhibit, please provide the reasons, other than commercial considerations, which explain why no Certificates of Control for over quota imports for US rice seem to have been issued between September 2003 and April 2005 and consequently no over quota imports of US rice seem to have actually occurred during the same period, with the exception of one shipment of 611 tons of paddy rice (date of Certificate of Control 15.09.2004; importation date 16.09.2004).

(c) The period mentioned in the preceding paragraph seems to coincide that in which the United States claims that consecutive so-called "Letters of Acceptance" from MARA's General Directorate would have delayed the date for issuing Certificates of Control (see paras. 23 to 26 of the United States first written submission). If, in Turkey's view, the lack of imports and approved Certificates of Control bears no relation with the issuance of Letters of Acceptance, could Turkey then explain what reasons, other than commercial considerations, may explain this apparent coincidence.

16. Throughout this dispute, Turkey has argued that there is no blanket ban on the issuance of Control Certificates and, if there was, it is not enforced; therefore, the US Article XI:1 claim necessarily fails. This argument attempts to distort the US claim, mis-states the correct legal test under Article XI:1 of the GATT 1994, and ignores past panel reports which provide useful guidance on the subject.

17. The US claim is that Turkey prohibits or restricts trade in rice at the MFN rates for paddy, brown, and milled rice.[7] It does so by failing to issue Control Certificates. The earlier US argument

[7] As discussed in paragraph 13 of the US First Submission, the MFN rates are 45 per cent *ad valorem* for paddy, brown, and milled rice. However, Turkey's domestic tariff schedule provides different effective tariff rates for paddy, brown, and milled rice: 34 per cent *ad valorem* for paddy rice, 36 per cent *ad valorem* for brown rice, and 45 per cent *ad valorem* for milled rice. In the US panel request, the United States claimed that Turkey

that there was a blanket ban on the issuance of Control Certificates was based on the US belief that Turkey did not require such Certificates under the TRQ. Turkey has clarified that it does require importers to obtain Certificates under the TRQ, which provides further evidence that the TRQ regime is discretionary – as is the entire Turkish import licensing regime for rice. Thus, Turkey's argument that it grants Control Certificates under the TRQ does not rebut the US claim that it is denying the issuance of such Certificates at the MFN rates.

18. Second, Article XI:1 provides that a breach occurs if a measure prohibits or restricts importation. Thus, even if Turkey did issue some Control Certificates, that would not rebut the US claim that Turkey is restricting imports through the use of a discretionary import licensing regime. The United States has provided voluminous evidence that Turkey is restricting imports of rice – the Letters of Acceptance, the rejection letters, the court cases decided in favor of the government, statements of Turkish officials, newspaper articles and, most recently, the December 15, 2006 statement from the Turkish Minister of Agriculture[8] and documentary proof that Turkey has imposed a minimum import pricing scheme as part of its Control Certificate process for rice.[9] That Turkey is restricting imports of rice and has exercised discretion in denying the issuance of Control Certificates is confirmed by Turkish trade data, Turkey's own Control Certificate data, and Turkey's refusal to provide the actual Control Certificates that the Panel has repeatedly requested.

19. Turkey's contention that it has granted Certificates at the MFN rates for Egypt, China, Vietnam, Thailand, and Pakistan demonstrates the weakness of its argument. As the United States discussed in paragraph 10 of its Oral Statement during the second panel meeting, the fifteen Certificates referenced here by Turkey, assuming that they were granted, were exceptions to the rule, covering minuscule amounts of trade. We cannot confirm that the Certificates were even granted because Turkey has chosen not to provide the actual Certificates. Further, whereas Turkey allegedly granted 56 Control Certificates for MFN rice imports during the September 10, 2003 through March 17, 2006 period, it allegedly granted 740 in-quota Control Certificates for rice during that same period.[10] Even if MARA approved 56 Certificates during that time, the data still shows that the overwhelming majority of Certificates were issued to importers who "chose" to purchase large quantities of domestic paddy rice as a condition for obtaining a license to import rice, rather than importers who imported without having to make such purchases. Thus, the wide disparity in Annex TR-33 between the number of Certificates allegedly granted in quota and at the MFN rates provides further compelling evidence that Turkey is restricting rice imports at the MFN rates.

20. Essentially, Turkey's response to the documentary evidence provided by the United States has been that the documents do not mean what they say on their face and, that even if they did, the Letters of Acceptance are not enforced. It is troubling that Turkey continues to maintain this position despite taking a directly contrary view in its aggressive enforcement of those Letters in Turkish court. In any event, non-enforced mandatory measures may still be found to be inconsistent with GATT/WTO rules, as evidenced by the *Malt Beverages* panel report. Turkey has failed to distinguish, or even address, this report in any of its submissions or statements, instead arguing that the Letters of Acceptance are not laws and regulations so they are not subject to WTO rules. But Article XI:1 of the GATT 1994 necessarily has a broad scope of application and does not make an exception for measures based on their form or how a Member chooses to characterize them; if it did make such an exception, Article XI:1 would have no teeth. Turkey has imposed a legal prohibition on the issuance of Control Certificates for those importers who do not purchase domestic paddy rice, in order to

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denied or failed to grant import licenses to import rice "at or below the bound rate of duty" in order to cover importation at the effective tariff rates, as well as the MFN rates.

[8] *See* Exhibit US-77.

[9] *See* Exhibits US-68 and US-76.

[10] *See* Exhibit US-71.

prohibit or restrict MFN trade in rice. The Letters provide for the denial of Certificates on their face, and Turkey has not denied their authenticity.

Q115. (Turkey) During the second substantive meeting with the Panel, the United States presented Exhibit US-71, in which the number provided by Turkey of the allegedly approved Certificates of Control of 2,242, was broken down in order to exclude the ones that in its opinion were not relevant, such as those approved during an allegedly "irrelevant time period", as well as those granted for in-quota imports and for rice imports from the EC and the Former Yugoslav Republic of Macedonia (with whom Turkey has preferential trade agreements). The United States thus suggested that, once all these exclusions were made, the final number of relevant Certificates of Control allegedly approved by Turkey was 56. Can Turkey comment on this number and what would it imply. If in Turkey's view, the final number suggested by the United States is not correct, could Turkey provide its reasons, referring to relevant evidence, as appropriate.

21. In its answer, Turkey contends that Control Certificates allegedly granted for the import of EC and Macedonian rice are relevant to the US claim that Turkey is prohibiting or restricting MFN trade in rice. The United States respectfully refers to its answer to Panel Question 114. Turkey wants the US claim to be that Turkey denies all Control Certificates. As previously mentioned, that is not the US claim. The US claim is that Turkey is prohibiting or restricting imports at the MFN rates by denying Control Certificates for the importation of rice at those rates. Accordingly, the fact that Turkey may grant Certificates to the EC and Macedonia under special quota regimes and may grant Certificates under the TRQ with domestic purchase does not rebut the US claim. The United States notes, however, that while Turkey argues that the number 56 is irrelevant, it does not contest the validity of that figure.

22. Turkey now argues that, if it had intended to use Certificates to restrict rice imports, it would have denied Certificates for EC and Macedonian rice under the special quota regimes because imports from the EC and Macedonia presented a threat to the domestic industry. That contention is not supported by the evidence on the record. First, as previously noted by the United States in its comment on Turkey's reply to Panel Question 102, Macedonian rice is a complete non-factor. Second, the EC quota regime covers 28,000 metric tons of milled rice. This is a relatively small quantity of rice, relative to the Turkish market. As neither EC rice nor Macedonian rice would pose a threat to the Turkish rice industry, there would have been no reason to block such imports.

23. Turkey also alleges that the US calculation of 2.5 per cent is incorrect because the United States used the wrong denominator in its calculation. The United States used the number 2,242 because that is the number Turkey provided, and the United States stands by its calculation. Even if Turkey were correct and the actual number were either 3.25 per cent or 6 percent, it is striking that the overwhelming majority of importers "chose" to import rice under a regime where they had to purchase massive quantities of domestic rice as a condition for importing rice, rather than importing the rice "free and clear." Any of these figures would provide further compelling evidence that Turkey is restricting trade in rice.

24. Lastly, the United States would like to clarify its characterization of time periods as "relevant" or "irrelevant." The United States is not alleging that Turkey did not grant Control Certificates prior to September 10, 2003 and does not need to prove that Turkey has not granted Control Certificates after the date of panel establishment in order to establish a breach. Turkey has attempted to inflate the alleged number of Control Certificates it has granted during the time period where the United States is alleging a breach (September 10, 2003 through March 17, 2006) by referring to Certificates it may have issued during other periods (i.e., prior to September 10, 2003 and after panel establishment). Turkey's attempt to re-cast the US claim to its liking is what prompted the United States to make the distinction between periods that are "relevant" and periods that are "irrelevant."

25. In fact, it would have been more precise to say that, on the one hand, there were periods where the United States was alleging a breach and, on the other hand, there were periods where it was not alleging a breach (pre-September 10, 2003) or did not need to allege breach to sustain its claims for purposes of WTO dispute settlement (post-panel establishment). In fact, these other periods are highly relevant, because Turkey's actions in these periods provide strong evidence of a breach during the period covered by the US claims.

26. Indeed, the United States has provided documentary evidence that Turkey is continuing to prohibit or restrict imports since March 17, 2006 through the denial of Control Certificates and the imposition of a minimum import price regime for rice, which appears to be having the same effect on imports. Since Minister Tuzmen's announcement that Control Certificates will be issued as of April 1, 2006, Turkish import data shows that only 1,044 metric tons of rice were imported into Turkey between that date and the end of 2006.[11]

27. Moreover, as demonstrated in Exhibit US-71, the United States is not alleging that Turkey was prohibiting or restricting trade in rice prior to September 10, 2003; therefore, the period January 1, 2003 through September 9, 2003 should provide a relevant "control" period for how Turkey's import regime should work in the absence of such a prohibition or restriction. In fact, the evidence to be gathered from this period is compelling. According to Annex TR-33, Turkey allegedly granted 274 Control Certificates at the MFN rates from January 1 - September 9, 2003. There was no TRQ regime during that time, so all of these Certificates were issued outside the TRQ. This figure is significant because, from September 10, 2003 through March 17, 2006, the period in which the United States is alleging a breach, Turkey allegedly granted just 56 Certificates at the MFN rates. Thus, over the 2 ½ year period in which the United States is alleging a breach, Turkey granted only 56 Certificates, whereas during the previous eight months where the United States is not alleging a breach, Turkey granted almost five times that number of Certificates.

Q125. (Turkey) In its reply to question 14 posed by the Panel, Turkey submitted "that the import procedure which applies for imports at both MFN and TRQ rates is described in the scheme provided in Annex TR-32". In that Exhibit, Turkey has identified the legal basis for both the procedure for importation at MFN rate and that for importation at TRQ rate. During the second substantive meeting with the Panel, however, Turkey stated that Communiqué No. 2006/5 on the Standardization in Foreign Trade had been replaced by new legislation.

(a) Can Turkey confirm that Communiqué No. 2006/5 on the Standardization in Foreign Trade has been replaced by new legislation and provide a copy of such new legislation.

28. In its response, Turkey contends that Communiqué No. 2006/5 (the 2006 Communiqué) has been repealed and replaced by Communiqué No. 2007/21 (the 2007 Communiqué). However, Turkey has provided no documentary evidence that the 2006 Communiqué has been repealed. Article 12 of the 2006 Communiqué states that the 2005 Communiqué has been abolished. By contrast, Article 12 of the 2007 Communiqué notes that two other Communiqués have been abolished but it does not mention the 2006 Communiqué.

29. The 2007 Communiqué appears to be the same as the 2006 Communiqué in most respects. However, the 2007 Communiqué contains a new Article 8, which provides that:

> [u]nder the protocol that will be made between the Ministry of Agriculture and Rural Affairs and Undersecretariat for Customs all-important information related to the

[11] *See* Exhibit US-81rev.

> realized importation will be provided to the Ministry of Agriculture and Rural Affairs by Undersecretariat for Customs.

30. As the United States noted in its response to Panel Question 150, Turkey's reference price system for rice, which is enforced by Turkish Customs, is linked to the issuance of Control Certificates. In an August 10, 2006 Order, the General Directorate of Customs noted that, under an 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:

> ... 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 references prices noted above] will be considered as references 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.[12] (emphasis added).

Article 8 of the 2007 Communiqué appears to operationalize the obligation of Turkish Customs under an interagency agreement to provide information on invoice values to MARA so that MARA can consider that data in making a determination regarding whether to issue a Control Certificate. This provision demonstrates a direct link between the reference price scheme for rice and MARA's Control Certificate system, thereby providing further evidence that Turkey restricts trade in rice and operates a discretionary import licensing regime.

(b) Can Turkey confirm what is the basis, in Turkish domestic legislation, for the authority that the Turkish Foreign Trade Undersecretariat (FTU) has to issue Communiqués on the Standardization in Foreign Trade. Is it Decree No. 2005/9454 on "The Regime for Technical Regulations and Standardization for Foreign Trade" in Exhibit TR-2?

31. In paragraph 19 of the US First Submission, the United States noted that Article 1 of the 2005 Communiqué states that it had been promulgated pursuant to subparagraph 2(g) of the 1996 General Assessment.[13] Article 14 of the 2007 Communiqué states that the "Annex" to the 1996 General Assessment was abolished; however, it is silent on whether the rest of the General Assessment remains in force. As a result, while subparagraph 2(g) of the General Assessment was not cited in either the 2006 or 2007 Communiqués, Turkey has not provided any evidence that that provision has become inoperative.

Q128. (Turkey) Article 6 of Turkey's Communiqué No. 31 on the Approval of Control Certification at the Importation of Foodstuffs and Packaging Materials that come into Contact with Foodstuffs and on Control Procedures at Importation Stage apparently contains the list of documents required for the issuance of a Certificate of Control for imports into Turkey. In section 6 B) c), this provision lists "other documents that must be presented according to the type of product".

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[12] Exhibit US-68.
[13] *See* Exhibit US-1.

(b) In its reply to question 25 posed by the Panel, the United States argued that the language in the 2005 and 2006 MARA Communiqués was "broad enough to provide MARA with the flexibility to 'ask for' other documents on a product-by-product basis". Does Turkey agree with this statement? If the United States' statement is not correct, could Turkey provide its reasons, referring to relevant evidence, as appropriate.

32. Article 2 states that "it is necessary to apply to [MARA] "with control certificate form (Annex VII), pro forma invoice or invoice, and other documents which may be asked for, depending on product, by the Ministry."[14] Turkey argues that this language does not provide MARA with the flexibility to ask for documents other than the application form and invoice on a product-specific basis. In sum, Turkey is contending that Article 2 does not mean what it says on its face. The United States has also demonstrated that, in fact, Turkey has imposed a legal prohibition on the granting of Control Certificates for the importation of rice unless importers provide documentation certifying that they have purchased the requisite quantity of domestic paddy rice. (Turkey failed to cite documentary proof of domestic purchase in its answer as one of the required documents.) Thus, Article 2 allows MARA to request other documents and MARA has utilized that discretion to do so, and deny or fail to issue Certificates where those documents are not provided.

33. Turkey also argues that it is "clear" that the reference to "other documents which may be asked for, depending on product, by the Ministry" refers to SPS-related documentation, such as an SPS certificate. The United States does not agree. The language used in Article 2 – "other documents" – is broad and could cover virtually any document that MARA would require. If MARA had meant to refer only to SPS-related documentation, it could have explicitly said so. In addition, Article 2 requires importers to submit customs-related documentation – i.e., the invoice or pro forma invoice – as part of the application process. Thus, it is not clear from the text of Article 2 that "other documents" should be interpreted to encompass only SPS-related documents. Turkey admits as much in its answer when it contends that the additional document requirement "is simply nature of the product (i.e., the degree of processing that the product has been subject to)." Accordingly, Turkey's arguments run directly contrary to the text of Article 2, as well as MARA's implementation of that Article.

Q129. (Turkey) Turkey has argued that the Certificates of Control act "as an element of trade facilitation ... provid[ing] legal certainty and commercial predictability to importers engaged in rice importation" (Turkey's oral statement during the first substantive meeting with the Panel, para. 6), as well as pursue "*inter alia,* sanitary and phytosanitary objectives" (Turkey's response to question 14 posed by the Panel, page 7).

(a) Please explain how these sanitary and phytosanitary purposes are achieved through the Certificate of Control, and how can MARA and Turkish Customs Officials verify the products compliance with relevant standards and technical regulations, without having either seen the appropriate sanitary and phytosanitary certificate or having made the relevant physical inspection of the good to be imported.

34. Turkey states that the Control Certificate "allows MARA and Turkey's customs authorities to verify, on a single document, all required customs information, including the product's compliance

[14] Article 6 of Communiqué No. 2003/31 on the "Issuance of Control Certification at the Importation of Foodstuffs and Packaging Materials that come into Contact with Foodstuffs and on Control Procedures at Importation Stage," as amended (Annex TR-21), also notes that MARA requests certain documents from importers, including the Control Certificate form, proforma invoice, and "[o]ther documents that must be presented according to the type of the product."

with relevant standards and technical regulations." Turkey has acknowledged that actual verification of product compliance with SPS controls occurs after MARA has issued the Certificate, so this statement is not correct. Further, Turkey has not explained why it is necessary for both MARA and Turkish Customs (not to mention FTU, with respect to its import permit) to verify the same customs-related information twice in two separate documents. Turkish Customs already requires submission of this information[15] and MARA does not conduct inspections until after it has granted the Certificate, so the Certificate is extraneous. The function of the Control Certificate is to prohibit or restrict imports of rice (and other agricultural products as MARA sees fit).

(c) Please provide supported arguments, making reference to relevant evidence, as appropriate, that can counter the United States' assertion (in its response to question 14 posed by the Panel, footnote 11 to para. 23) that, according to Turkish importers, the Ministry of Agriculture and Rural Affairs (MARA) "does not request the phytosanitary certificate at the stage when it decides whether or not to grant the Control Certificate. Rather, MARA does not require the presentation of a phytosanitary certificate until the Provincial Agricultural Directorate that has jurisdiction over the port where the importation is to be realized asks for it. But this step only takes place after MARA has already granted the Control Certificate."

35. Turkey is now contending that MARA requires SPS information and commitments from rice importers at the time they apply for Control Certificates. (Turkey refers to this as "early-screening" in its answer to Panel Question 132(a).) This contradicts the evidence, as both Turkey and the United States agree that the SPS process does not begin until after Certificates have been approved. The United States also would note that in Turkey's description of the rice importation process in its answer to Panel Question 14, Turkey makes no mention of any such requirement.[16]

Q133. (Turkey) In its question 44 (e) posed by the Panel after the first substantive meeting with the parties, the Panel asked Turkey to "provide a copy of each of the 2,223 Certificates of Control approved between 2003 and September 2006". In its response, Turkey stated that photocopies of such Certificates of Control were available; that the relevant Ministries were not, however, authorized to provide all the copies to the Panel; and that, in any event, Turkey would be able to provide to the Panel in strict confidence copies of any individual Certificate of Control listed in Annex TR-33 upon its request.

(a) Can Turkey elaborate on the legal reasons why, under Turkish domestic legislation, the government would not be authorized to provide the copies requested by the Panel.

(b) If Turkey cannot provide a photocopy of each of the 2,223 Certificates of Control approved between 2003 and September 2006, can it then at least provide a photocopy of each of the 56 approved Certificates of Control characterized as "relevant" by the United States during the second substantive meeting with the Panel (see para. 8 of the United States statement during the second substantive meeting with the Panel and Exhibit US-71).

(f) If Turkey cannot provide the full photocopies requested in paragraphs (b), (c), (d) and (e) above out of concerns for the privacy of the companies involved, can it at least provide those same photocopies after having blacked out the names of the companies.

[15] *See* Exhibit US-62.
[16] *See* Step 1 and Step 2 on pages 7-8 of Turkey's Replies to the First Set of Panel Questions.

36. The Panel first asked Turkey to provide the legal basis for its refusal to provide the Control Certificates at the first panel meeting. Turkey could not identify any specific provision and asserted that it was less a matter of what Turkey could provide than what it was *choosing* to provide to the Panel. Now, in the next-to-last-submission, Turkey has identified what it claims to be a provision of Turkish law that prohibits Turkey from providing the Certificates. Turkey has not provided an actual copy of this document, and the document is not readily available, so it is impossible for the Panel or the United States to discern whether the cited provision provides what Turkey says it does.

37. The United States has two observations on this matter. First, Turkey is claiming that Article 13 of the Turkish Statistical Law prohibits Turkey from providing the Control Certificates. Yet in its answer to Panel Question 133, Turkey has offered to provide these documents to the Panel (but only the Panel). To the extent Turkey is indicating that there is an exception to its law that would allow it to submit copies of the Certificates to the Panel in connection with this proceeding, there is no basis for concluding that the exception would not equally be applicable were Turkey to also provide these copies to the United States. However, the United States notes again that the contents of the Turkish Statistical Law are known only to Turkey, and it is possible, given Turkey's offer to provide copies to the Panel (only), that the Law does not in fact prohibit Turkey from providing the Certificates, as Turkey now asserts.

38. Second, the Panel has asked Turkey to provide copies of the Control Certificates at the first panel meeting, in its first set of questions to the parties (Question 44(e)), at the second panel meeting, and in its second set of questions to the parties (Question 133(b)). Turkey's answer to Question 133 is that Turkey will provide copies of the Certificates *if the Panel wants such documents*. The Panel has now requested that Turkey provide this information on no fewer than four occasions during these panel proceedings. It is clear that the Panel wants Turkey to provide this information. Yet Turkey still has not provided it. The Panel should draw an appropriate inference from Turkey's refusal to comply with the Panel's repeated requests for this information.

39. The United States has obtained only a handful of Certificates which pre-date the period in which the United States is alleging a breach. We provided a copy of one of those Certificates in Exhibit US-79. Turkey continues to maintain the position that all Control Certificates are valid for twelve months. However, the particular Certificate the United States submitted was valid for only two weeks and expired just prior to the beginning of the Turkish rice harvest. Only Turkey has copies of the Control Certificates during the period in which the United States is alleging a breach.

> **(e) In its reply to question 44 posed by the Panel, Turkey refers to Exhibit TR-36, with a list of rejected Certificates of Control, including the reasons for denial, until 21 September 2006. Can Turkey provide a photocopy of each of the rejected applications as well as of the corresponding letters by which it notified the requesting companies of the rejection of a requested Certificate of Control, for the importation of rice corresponding to each of the cases cited in Exhibit TR-36.**

40. In Annex TR-36, Turkey put together a chart listing several denied Control Certificate applications along with the alleged reasons for denial. This chart was submitted to the Panel on November 30, 2006. Turkey now claims that it does not maintain the information it would have needed in order to create Annex TR-36. The Panel should draw the appropriate inference from Turkey's failure to provide the information the Panel is requesting.

Q135. (Turkey) The United States has submitted, as Exhibit US-29, photocopy of an application for a Certificate of Control for the importation of 10,000 tons of rice, allegedly

"returned due to spelling errors". The Panel notes that "spelling errors" were not listed as "reasons for denial" of Certificates of Control in Exhibit TR-36.

(a) Can Turkey confirm whether spelling errors would be grounds for the rejection of an application for a Certificate of Control? If so, under which of the three categories ("Missing documents not completed", "Upon the demand of the Company" or "Incomplete Administrative Requirements") would a spelling error fall? What is the legal basis for rejecting applications owing to "spelling errors"?

(b) Can Turkey confirm whether the specific photocopy submitted by the United States as Exhibit US-29 corresponds to the application identified as number 3 in the list of "Denied Control Certificates Applications and Reasons for Denial in 2003", provided by Turkey in Exhibit TR-36?

41. In its response, Turkey asserts that it cannot respond to the Panel's question because the Control Certificate application submitted by the United States is not in MARA's records. If that is indeed the case, then the data Turkey has provided in Annex TR-36 is incomplete, and there could be more instances where MARA rejected Control Certificate applications on which Turkey has not reported. Beyond that, the United States takes note of Turkey's confirmation in its response that it sometimes rejects Control Certificates due to spelling errors. Further, contrary to Turkey's contention, the United States does not rely solely on individual episodes of rejection to make its case that applications are not being issued. The United States has submitted to the Panel documents issued by Turkey's Minister of Agriculture providing unambiguously that no Control Certificates are to be granted during certain time periods, and those documents cover a 2 ½ year time period with no gaps. There was a restriction on the granting of Control Certificates at the MFN rates in place at least through the date of panel establishment. The individual episodes of rejection, as well as the court cases in which the Turkish government has argued in favor of the legal prohibition and Turkish courts have upheld the government's position, provide evidence that the legal prohibition that was codified in the Letters of Acceptance is being enforced. Further, even enforcement of a clear legal prohibition is not necessary to sustain a successful claim that WTO rules have been breached.

Q136. (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?

(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?

42. In its answer to Panel Question 136(a) and (b), Turkey asserts that "Certificates of Control ... are not quantity-specific." In Exhibit US-19, the United States provided a blank copy of a Control Certificate. The ninth item that an importer must list when it submits its application for a Control Certificate is "Quantity of the Commodity." In Annex TR-33, Turkey even lists the specific quantities covered by each Control Certificate it allegedly granted, as well as the specific quantities that were allegedly imported under each Certificate. Thus, Turkey's contention that a Control Certificate is not quantity-specific is belied by the Control Certificate document itself.

43. Throughout these panel proceedings, Turkey has made various assertions that contradict the documentary evidence then on the record or documentary evidence later provided. Without being

able to examine the actual Control Certificates, which Turkey refuses to provide, the United States cannot agree that Control Certificate issuance is never conditioned on importation of specific amounts. In fact, most of the Control Certificates for imports of US rice granted during the period in which the United States is alleging a breach were allegedly issued for quantities that are much smaller than a typical shipment of US paddy rice. A rational importer would apply for one Control Certificate to import 10,000 tons of paddy rice, not multiple Control Certificates. Yet the data provided by Turkey in Annex TR-33 shows that the majority of Control Certificates allegedly issued between September 10, 2003 and March 17, 2006 were for the importation of 2,000 metric tons of rice or less, and the amount of rice covered by each Certificate was often recorded right down to the ton because Turkey was enforcing a TRQ. Further, Letter of Acceptance 390 provides that, as of April 1, 2006, Control Certificates could be issued but only one at a time and with strict quantitative limits – 10,000 metric tons for milled rice and 15,000 metric tons for paddy rice.[17] Thus, the evidence in the record demonstrates that regulating quantity is a critical element of the Control Certificate process.

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

(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?

(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)?

44. As the United States noted in its answer to this question, Turkey has maintained throughout these proceedings that it differentiates between "in-quota Certificates of Control" and "out-of-quota Certificates of Control." These were terms coined by Turkey, not the United States and, in Annex TR-33, Turkey set forth what it purported to be a list of all of the Control Certificates it has granted, broken down into "in quota" and "over quota." In the column "In Quota/Over Quota," there was not a single instance in 58 pages listing over 2,000 alleged Control Certificates in which the word "both" was entered in that column. In every single case, the Certificate was issued for either in-quota imports or over-quota imports.[18] Apparently, Turkey has now realized the implications of that distinction and is attempting to reverse itself, arguing that there is no such thing as in-quota or out-of-quota Certificates of Control. But its reversal is contradicted by its own prior arguments and the evidence it has itself provided.

Q138 (Turkey): The United States has submitted, as Exhibit US-35, a letter dated 24 March 2006, by which the Turkish Minister of State informs the United States Trade Representative that the Control Certificates "will be issued as of April 1, 2006".

(a) Does this letter imply that Certificates of Control were not being issued at the time when the letter was issued?

[17] *See* Exhibit US-36.
[18] Except for eleven entries where the "In Quota/Over Quota" column was left blank.

(c) Can Turkey also elaborate on its closing statement during the second substantive meeting with the Panel (para. 3), that the letter "was designed to reassure the United States that, with the phasing-out of the TRQ, traders would likely resume trading on MFN terms" and that "[i]t was not an implicit confirmation of any systematic denial of the approval of Certificates of Control".

45. Turkey was unable to answer this question when the Panel first posed it at the second panel meeting. Now Turkey is arguing that the letter was meant to "reassure the United States that, with the phasing-out of the TRQ, traders would have likely resumed trading on MFN terms" and that the letter "does not imply that Certificates of Control were not being issued." However, that is exactly what the letter implies. The letter states that Control Certificates "will be issued as of April 1, 2006." The logical implication of that statement is that Certificates were not being issued prior to that date. This is confirmed by the rest of the letter, which shows that the offer to issue Control Certificates was put forward by Turkey as a way to resolve this dispute. Turkey would not have offered something it was already doing as a concession to the United States in order to settle the dispute. Rather, Turkey was offering to do something it was not doing at that point in time.

46. Moreover, the letter does not state that traders would likely resume trading on MFN terms. What the letter provides is that the Government of Turkey would issue Control Certificates as of April 1, 2006.

47. Further, Turkey's new explanation that the letter meant to reassure the United States that trade would likely resume on MFN terms implicitly recognizes that traders were not trading at the MFN rates while the TRQ was open. The United States would not have needed reassurance that MFN trade would likely resume unless there was no MFN trade at the time Minister Tuzmen delivered the letter.

48. Turkey's *ex poste* interpretation and explanation of Minister Tuzmen's letter is inconsistent with the wording of the letter and the context in which it was issued and serves to confirm the US claim that Turkey was prohibiting or restricting MFN trade in rice.

(b) What relation, if any, does the date of 1 April 2006, mentioned in the Turkish Minister of State's letter, bear with the end of the TRQ on 31 July 2006 (please make reference to relevant evidence, as appropriate.)? Was the adoption of any new or modified measure necessary to achieve the results indicated in the Minister's letter? If so, has any such measure been adopted as a result of the Minister's letter? What is the factual and legal relationship between the letter in Exhibit US-35 and any measure adopted to put that into effect, on the one hand, and, on the other hand, the Letter of Acceptance signed by the Minister of Agriculture and reproduced in Exhibit US-36?

49. Turkey's assertion is contradicted by the evidence. Minister Tuzmen's letter, in which he states that Control Certificates will be issued as of April 1, 2006 and that the TRQ will "cease to exist" after July 31, 2006 was presented to Ambassador Portman on March 24, 2006. On the same day, Turkey's Minister of Agriculture approved the recommendation contained in Letter of Acceptance 390 which provides that the "start date to issue certificates will be April 1, 2006 and the closing date will be August 1, 2006."[19] August 1, 2006 was the day after the TRQ was set to "expire" (and we now know that, on that date, Turkey put in place a reference price system for rice which implicates various WTO obligations of Turkey). The evidence supports the conclusion that Letter of Acceptance 390 was the measure by which Turkey meant to implement the commitments contained in

[19] *See* Exhibit US-36. *See also* Exhibit US-24 ("The Decree to 'open the doors as of April 1, 2006' came from the Ministry of Agriculture. . . It is said that the Minister of Agriculture, Mr. Mehdi Eker, had positively responded to the requests of starting the rice import in April").

Minister Tuzmen's letter. As the United States has documented – in the form of importer rejection letters, newspaper articles, and Turkish trade data – Turkey did not do so.

50. On a final note, Turkey continues to argue that the Letters of Acceptance are internal, unofficial documents that were never enforced. The United States has already documented that Turkey introduced these documents in domestic court proceedings and that Turkey's lawyers argued that they constituted the sole legal authority for MARA's denial of Control Certificates. The United States has also shown that at least two Turkish courts have concurred with the government's position and enforced the restriction on the issuance of Control Certificates for MFN trade. Lastly, Turkey's argument that it does grant Control Certificates for rice is unresponsive to the US claim that Turkey is prohibiting or restricting rice imports by failing to grant Control Certificates for MFN trade.

Q141. (Turkey) In its statement during the second substantive meeting with the Panel (para. 6), Turkey asserted that "[t]here is no provision that gives the relevant authority discretion not to approve Certificates of Control." In other submissions (see, for example, para. 78 of its first submission and reply to question 23 from the Panel), Turkey has stated that the so-called "Letters of Acceptance" are internal communications aimed at developing policy recommendations.

(a) If the Minister of Agriculture and Rural Affairs has no discretion not to approve Certificates of Control, under what legal basis have then officers from the same ministry submitted internal communications to the Minister recommending that Certificates of Control not be approved? What could explain a Director General of MARA repeatedly making a recommendation to the Minister to adopt a policy if the Minister had no discretion to adopt such policy?

(b) What legal basis, if any, would give the Director General of MARA the authority to issue these so-called "Letters of Acceptance". Please also specify under what basis these letters could extend to the subject of the issuance of Certificates of Control.

(c) What factors or events would trigger these recommendations from the Director General of MARA?

(d) Would one of the reasons that could trigger such a recommendations from the Director General of MARA be that there is a sufficient level of domestic production or a high level of imports?

(e) Could the Minister refuse the recommendation made by a Director General of MARA through a so-called "Letter of Acceptance"? Please provide documentary evidence in support of your response.

51. In its answer to question (e), Turkey acknowledges that "the Minister may refuse the recommendation made by a Director General of MARA." There are consequences when a recommendation is refused and consequences when a recommendation is approved. When a recommendation is refused, no action is taken. On the other hand, when a recommendation is approved, the Minister is ordering that action be taken to implement that recommendation. In this dispute, the United States has provided documentary evidence of several instances where a recommendation from the Director General was approved. It is not a coincidence that, in the 2 ½ year period covered by these recommendations, Turkish trade data shows that MFN trade in rice was virtually shut down when the TRQ was closed. Even Turkey's alleged Control Certificate data – which, again, we are unable to verify because Turkey is refusing to provide the actual Certificates –

shows that, while only 56 Control Certificates were allegedly issued at the MFN rates during that period, there were 740 Control Certificates allegedly issued under the TRQ with domestic purchase, which no rational economic actor would select if he or she had the choice.[20]

52. Further, Turkey acknowledges that the "demands of interest groups" or high levels of imports could trigger the issuance of Letters of Acceptance, yet it maintains the position that the recommendations contained therein would never have been implemented. Instead, it contends that the Letters are merely set forth to "discuss" policy recommendations and to define an "internal policy." The United States has already shown that the Letters had effects that were not simply "internal" and that what was set forth in the Letters was enforced. But even a cursory examination of the Letters does not support Turkey's contention as to their character. The Letters do not engage in an analysis of potential options for further discussion. They set forth a recommendation that is accepted on the signature of the most senior official in the Ministry of Agriculture.

Q142. (Turkey) Can Turkey provide evidence of so-called "Letters of Acceptance" containing policy recommendations that the Minister of Agriculture and Rural Affairs did not approve?

53. Letters of Acceptance are not privileged and internal communications because Turkey introduces them in open domestic court. Turkey is refusing to provide information that the Panel is requesting, and the Panel should draw an appropriate inference.

Q144. (Turkey) Please describe the procedure that follows the issuance of a so-called "Letter of Acceptance". Would such a letter, after being accepted by the Minister, be communicated to the provincial MARA offices, and if so, how?

54. Recommendations that are approved by the Minister of Agriculture are circulated to provincial levels so that they can be enforced.

Q145 (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?

55. Turkey cannot argue before this Panel that the Letters of Acceptance are not enforceable and not enforced, while simultaneously arguing (successfully) in its own domestic court that those same Letters are enforceable and must be enforced. There is no basis to conclude that Turkey's contrary arguments and aggressive enforcement of the Letters of Acceptance in its own courts are not relevant evidence in determining the legal status of the Letters. Turkey now claims that it did not appeal one of the court decisions "for reasons of judicial expediency." It seems more plausible that Turkey did not appeal the decision because the Government of Turkey argued for the court to make that decision and the court agreed with the government's position.

[20] *See* Exhibit US-71.

Q146. (Turkey) Could Turkey please confirm, making reference to relevant evidence, as appropriate, the dates during which the tariff quota for the various types of rice imports (paddy, brown, milled) was opened and closed. Could Turkey also please confirm whether or not there was a domestic purchase requirement at all periods and if so, whether or not there were specific domestic purchase ratios to imported paddy, brown and milled rice to which importers could determine how much domestic rice needed to be purchased to be able to import a certain volume of paddy, brown or milled rice.

56. The United States disagrees with Turkey's assertion that Turkey specified the domestic purchase ratios in each of the three TRQ openings thus far. In the first TRQ opening, the exact quantities of rice an importer had to purchase were not specified and, thus, it was within TMO's discretion how much rice had to be purchased with respect to each individual importation. *See* Exhibit US-3. This can be confirmed by examining the Turkish version of the regulation in both Exhibit US-3 and Annex TR-12. Contrary to what is contained in Turkey's English version of the regulation, there is no column specifying the domestic purchase requirement in the original Turkish version. Turkey appears to have inserted a column in the English version that is not contained in the Turkish version.

Q147. (Turkey) Could Turkey please explain why data from Exhibit TR-33 seem to indicate that in-quota imports of non-EC origin rice occurred during periods in which the Panel understands the TRQ was not in place (January, September and October 2004; August and September 2005; and August 2006)?

57. In the US view, Turkey has yet to substantiate that any rice imports have occurred at the MFN rates. The only concrete evidence that has been presented has come from the United States, in the form of the Letters of Acceptance, the importer rejection letters, the court filings and decisions, statements from Turkish officials, and newspaper articles, which demonstrate that the opposite is true.

58. A review of the instances identified by the Panel shows that the vast majority of the alleged Certificates identified by the Panel covered in-quota importations that occurred within three days after the TRQ was closed. It is impossible to know for certain without examining the Certificates and other accompanying documentation themselves, but a likely explanation is that the Certificates and FTU import permits were approved for in-quota importation before the TRQ was closed, but completion of the customs process was delayed so the importation did not officially occur until the beginning of the following month. As the United States previously noted in its answer to Panel Question 14, the importer obtains the FTU import permit first, then the Control Certificate, and then must undergo several other steps, including the SPS assessment at the applicable provincial directorate of MARA, returning to Turkish Customs to provide all of the necessary documentation, and then going to the port to secure the release of the product. If any one of these steps is delayed, or the importer is unable to pay for the merchandise in full or make alternative arrangements, the importation can be delayed. Thus, it is not inconceivable that, in a few cases where the importer was attempting to realize an importation just before the TRQ closed, the process ran over a few days.

59. Indeed, such a scenario is envisioned by Communiqué No. 2003/31 on the "Issuance of Control Certification at the Importation of Foodstuffs and Packaging Materials that come into Contact with Foodstuffs and on Control Procedures at Importation Stage," as amended, provided in Annex TR-21. Article 5(e) provides that:

> [r]egarding products, for which import procedures have been initiated following the registration of the customs declaration before the expiry date of the control certificate but the control certificate of which has expired at the date of delivery of the commodity to the relevant party, the procedures are completed regardless of such expiry.

Thus, the fact that a few in-quota imports of non-EC origin rice entered during periods when the TRQ was closed does not mean that such imports entered at the MFN rates, as Turkey contends. That would be impossible because, as Turkey has stated repeatedly in the past, there are in-quota Control Certificates and over-quota Control Certificates, and Annex TR-33 shows that there was no overlap between the two. Rather, these few instances where in-quota imports allegedly took place after the TRQ was closed, on the basis of in-quota Control Certificates that were technically no longer valid, were likely examples of the scenario provided for in Article 5(e) above.

Q148. (Turkey) In its response to question 18 posed by the Panel, Turkey responds that "no change was introduced into its import regime for rice in November 2005 or as a consequence of the initiation of WTO dispute settlement proceedings". The only change would have been that the TRQ lapsed on 31 July 2006, without being renewed.

(a) Please explain why the TRQ has not been reopened since?

(b) In its response to question 79 posed by the Panel, Turkey stated in turn that the TRQ regime "pursued, at the same time, two legitimate objectives, i.e., that of a greater market supply and that of market stabilization". Can Turkey explain how these two objectives could now be guaranteed in the absence of the TRQ regime.

(c) In its response to question 82 posed by the Panel, Turkey stated that "[t]he domestic and international economic indicators also lead Turkey to the assumption that there will not be, at least for the foreseeable future, needs for market intervention and stabilization of the types that the TRQ helped address." Is the Panel then right in concluding that if any of those domestic and international economic indicators were to change, Turkey could then reevaluate the convenience of reintroducing a TRQ regime for the importation of rice? If this is not the case, please explain making reference to relevant evidence, as appropriate.

60. Turkey claims that it has not re-opened the TRQ because TRQs are costly to administer and it prefers market forces. However, the TRQ was successful in achieving its objective of increasing Turkish domestic production and reducing imports, which is confirmed by documents that the United States has submitted, including Exhibits US-77, in which Turkey's Minister of Agriculture states that the 87 per cent increase in paddy production was the result of the domestic purchase requirement. Thus, there may be some validity to Turkey's contention that there is no longer a need to re-open the TRQ, although for different reasons than Turkey posits. Turkey is in a position to re-open the TRQ when it deems appropriate, and past history indicates it will do so.

(e) Were Turkey to reintroduce a TRQ regime for the importation of rice, would any change need to be introduced in the current domestic legislation? Is the legislation that allowed for the establishment of the TRQ still in force?

61. The United States notes that Turkey agrees that Decree No. 2004/7333 is still in force. Turkey did not answer the Panel's question as to whether that Decree would need to be modified in order to re-open the TRQ. Given that the referenced Decree supported the three previous TRQ openings, the United States submits that the Decree would not have to be modified for Turkey to re-open the TRQ.

Q149. (Turkey) In paragraph 50 of Turkey's rebuttal, Turkey argued that "[i]t is clear that a TRQ system without the domestic purchase requirement would have resulted in too great an advantage in favour of imported products. This outcome would have also carried negative

consequences in terms of the viability and affordability of Turkey's market intervention mechanisms and its ability to comply with WTO obligations in relation to its committed levels of Aggregate Measurement of Support." Could Turkey please explain how, in its view, it would have failed to comply with WTO obligations in relation to its committed levels of Aggregate Measurement of Support without the domestic purchase requirement as a part of its tariff quota mechanism?

62. Turkey has not answered the question posed by the Panel. Further, if Turkey considered that a TRQ without domestic purchase would have resulted in too great an advantage for imported rice, the United States believes that the obvious alternative would have been not to impose a TRQ at all and simply allow rice importation at the MFN rates. The United States also notes that, in any event, the AMS requirement does not create an exception to other WTO obligations.

Q151 (Turkey): In its reply to question 75 posed by the Panel, Turkey asserted that the correct methodology for interpretation of the TRIMs Agreement should require a preliminary assessment of the existence of both the trade and the investment elements of an alleged TRIM. Turkey also stated that, in order to establish the existence of a violation of the TRIMs Agreement, its domestic purchase requirement must first be found to be inconsistent with the provisions of GATT Article III. Finally, Turkey invited the Panel to reject the United States claims regarding an alleged violation of the TRIMs Agreement because the United States has not proved how Turkey's domestic purchase requirement would result in a trade-related investment measure and if so whether it would violate GATT Article III. Please clarify the implications of the above statements in relation to the "order of examination" of the US claims:

(a) Does Turkey propose that the Panel first examine US claims under GATT Article III:4 and then consider the claims under the TRIMs Agreement separately?

(b) In the negative, can Turkey explain why would the United States be required to prove how Turkey's domestic purchase requirement would result in a trade-related investment measure in the first place?

(c) Alternatively, does Turkey believe that once the Panel has made a ruling under GATT Article III:4, it should resort to judicial economy and refrain from making a finding under the TRIMs Agreement?

63. The United States agrees that, with respect to the domestic purchase requirement, the Panel should examine the US claim of an Article III:4 breach before turning to the US claim of a breach of Article 2.1 and paragraph 1(a) of Annex 1 of the TRIMs Agreement. The United States recognizes that, if the Panel finds that Turkey has breached Article III:4 of the GATT 1994 by instituting a domestic purchase requirement, it need not make a finding under Article 2.1 and paragraph 1(a) of Annex 1 of the TRIMs Agreement.

64. With respect to the substance of this claim, the United States stands by its previous arguments that the domestic purchase requirement contains an investment element. These arguments are supported by the nature of the domestic purchase requirement, Turkish production data, and other evidence, including statements from Turkish officials in Letters of Acceptance. By contrast, Turkey's assertions ignore the evidence. Turkey now alleges that certain factors – for example, the renewal and modernization of farm systems and technologies and an increase in the harvested area – provide evidence that the increase in domestic rice production resulted from increases in productivity, rather than the domestic purchase requirement. Turkey's argument does not necessarily follow. All of these factors also could provide evidence that the domestic purchase requirement worked as intended. For the previous three years, Turkish producers have been assured that their entire crop would be

purchased at above-market prices which, as the data demonstrates, has encouraged them to increase their harvested area. These developments have led to increased industry profits, some of which could have been expended on modernizing farming equipment and investing in new technologies.

65. Further evidence that the domestic purchase requirement has led to investment in the domestic industry that has benefitted many Turkish rice producers can be found in four letters that Turkish producer groups sent to the US Embassy in Ankara at the beginning of February.[21] The four letters, which are virtually identical, state that the WTO case "is penalizing us". Further, the letters threaten that if the United States does not drop its "meaningless" WTO case, "it will damage our bilateral trade relations" and there will be a "boycott of all American products we use such as seeds, machines, fertilizer and agricultural medicine ...".

66. Lastly, Turkey's argument that rice imports have increased from 2004 through 2006 is misleading. First, imports of rice in 2004 fell from 2003 levels because Turkey imposed its restrictions on September 10, 2003, when Turkey's Minister of Agriculture issued the first Letter of Acceptance, and imports of rice were not permitted to resume until late-April 2004, when FTU first opened the TRQ. As shown in Exhibit US-45, TY (trade, or calendar year) imports were 151,000 metric tons in 2004, as compared to 320,000 metric tons in 2003. With rice exports virtually zeroed out for nearly eight months, it is no surprise that imports would have subsequently increased. However, they did not rebound to previous levels. While TY imports in 2005 were 298,000 metric tons, they fell again in 2006 to approximately 154,000 metric tons, which is virtually the same quantity of imports as in 2004.[22]

[21] *See* Exhibit US-83.

[22] As shown in Exhibit US-45, USDA forecasted that TY2006 imports would be 200,000 metric tons (milled equivalent basis). In Exhibit US-81rev, the December 2006 trade data has been added, and the actual figure for TY2006 is 186,513 metric tons (product weight basis). Using the conversion factors referenced in the US answer to Panel Question 117, this figure is reduced to 153,983 metric tons on a milled equivalent basis.

ANNEX F-3

COMMENT BY THE UNITED STATES ON THE COMMENTS BY TURKEY ON THE REPLIES BY THE UNITED STATES TO THE QUESTIONS POSED BY THE PANEL AND TURKEY AFTER THE SECOND SUBSTANTIVE MEETING

(28 February 2007)

In its comments on the US 6 February 2007 answers to Panel Question 150 and Question TR-1, Turkey states that the United States has mistranslated the Turkish term "Kontrol Belgesi". Specifically, Turkey states that the term's proper English translation is "control document", rather than "import license".

The United States appreciates Turkey having brought this matter to its attention. As a result, the United States has now reviewed the US translations in this dispute, and discovered that, in Exhibits US-76 and US-77, its translators translated "Kontrol Belgesi" as "import license", while in other exhibits they translated this term as "control document". In light of the fact that the United States has confirmed with its translators that they consider either term to be a correct translation, and that the term used by Turkish officials has not changed, the United States wishes to withdraw its assertion in paragraphs 50 and 66 of the US answers to the Panel's second set of questions, which is based on the translation as "import license". The United States notes that this does not change its conclusion, supported by other evidence and argumentation, that Turkey's Control Certificate constitutes an "import license" for WTO purposes.

ANNEX F-4

REPLIES BY TURKEY TO QUESTIONS POSED BY THE PANEL AFTER THE SECOND SUBSTANTIVE MEETING
(6 February 2007)

Q99. (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;

(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.

(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.

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.

(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.

(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 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.

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

Turkey submits that it uses realized import data collected by the Undersecretariat for Customs and processed by the Turkish Statistics Institute (TUIK), and it confirms the data that it has provided in Annexes TR-23, TR-25 and TR-28. Turkey and the United States have taken these figures from the same source (i.e., TUIK), and, as also noted by the Panel, much of these figures match with each other. However, for those periods showing discrepancies, some of the figures included in Exhibit US-53 reflect lower amounts than those included in Annex TR-25 and some others are even missing. In this sense, Turkey once again confirms its figures and believes the discrepancies are due to errors of Exhibit US-53. Moreover, Turkey would like to clarify that it has acquired the relevant statistics officially from TUIK, while the method through which the United States provided these statistics remains unknown. Monthly landed CIF prices shown in Annex TR-28 are calculated by dividing total value of the importation by total quantity for every month.

Q100. (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.

Turkey submits that there are many types of rice and paddy rice which differ in terms of type, quality and also price. HS Code 1006.10 includes paddy rice for sowing, which has a greater value in price (up to 3,600 US$/tonne). In June 2003, for example, the sharp increase in average landed CIF value results from 4 imports of paddy rice for sowing of a single firm, with an average CIF value of 3,395 US$/tonne. The average landed CIF value of paddy rice in June 2003 is 233 US$/tonne if these 4 imports are excluded. On the other hand, the paddy rice import in January 2004 is realized in one single consignment from the United States, with an average CIF value of 897 US$/tonne, which almost equals the average CIF value of paddy for sowing. There are 2 import consignments in November 2004 for paddy rice, with landed CIF values of 1,329 US$/tonne and 268 US$/tonne respectively. In the same manner, a single import of paddy rice for sowing having 1,101 US$/tonne CIF value in February 2005 and again a single import of paddy rice for sowing having a CIF value of 1,530 US$/tonne in March 2006 increases the average landed CIF values. Provided that these imports are excluded from the imports figures, the average values would be 149 US$/tonne in February 2005 and 289 US$/tonne in March 2006 respectively.

On the other hand, all of the rice imports in September 2003 had been realized from Italy, and have higher exporting value due to the high quality of the product. Furthermore, there are only two consignments for rice importation in January 2004 and yet one of them has a CIF landed price of 2,743 US$/tonne. This price was questioned by the Turkish authorities, and the importer declared that the type of rice was "Carnaroli" and that the price was true, and that at the moment the price of this type of rice amounts to 1.25 €/Kg. Again, when in August 2004 and September 2005 imports of rice from Italy took place, the average CIF values started to increase (imports from Italy generally start after August that is crop season). The fall in price in December 2003 is a result of the importation of 10,450 tonnes of rice with average CIF value of 264 US$/tonne.

In any event, Turkey submits that it should be noted that values may often be distorted by importers' declarations.

Q102. (Turkey) Aside from the alleged lack of competitiveness of rice from the United States, what other reasons may explain in Turkey's view the fact that, according to the information provided by Turkey in Exhibit TR-25, there seem to have been no imports of:

(a) Paddy rice or brown rice in the months of October in 2003, 2004 and 2005. In addition, the data in Exhibit TR-33 suggest that no rice imports whatsoever (paddy, brown or milled) took place in February and March 2004. Further, the data in Exhibit TR-33 seem to suggest that there were no rice imports other than EC/Former Yugoslav Republic of Macedonia out-quota rice imports in October – December 2003 and in September – October 2005.

(b) Milled rice from the United States during: (i) January – May 2004; (ii) July 2004; (iii) September – November 2004; (iv) July – December 2005; and, (v) January 2006 – onwards.

(c) Paddy rice from the United States during: (i) October - December 2003; (ii) February - May 2004; and, (iii) September - November 2005

In Turkey, the crop season of paddy rice starts in the second half of September. The major importers of rice into Turkey used to be the millers, although their import share has recently decreased. As a result, generally, in the crop season the demand for importation tends to decrease due to the high volumes of paddy rice supply in the market.

On the other hand, there are two main reasons for the lack of imports in February - March 2004. The first one is the increase of rice stocks by the beginning of 2004, due to the fact that huge volumes of rice imports took place in 2003 (in particular, milled rice imports increased from 131,431 to 214,528 tonnes). The second reason is the steep increase of the world price for rice in 2004, as Annex TR-43 shows, that caused the fall of competitiveness of imported over domestic rice and resulted in a further decrease in the demand for importation.

In any event, Turkey submits once again that the trends in the Turkish rice market have always been exclusively determined by business determinations made by traders. Turkey has outlined above few elements which have affected importers' choices during a specific period. Other elements that play a substantial role on the importers' determination are, *inter alia*, the preferential tariff applied on EC and Macedonian rice within the quotas, together with the quota rent exploitations and licenses entitlement; import networks used by the traders; their commercial traditions; consumer preferences; quality of the rice; brand names; requests by distribution chains; currency fluctuations; existence of tariff advantages; and proximity of export markets.

Q103. (Turkey) In reference to the previous question, is Turkey of the view that the lack of imports during the indicated periods was a result of a lack of applications for Certificates of Control to import rice or rather of a rejection of those applications? Please reason your response, referring to relevant evidence, as appropriate.

Turkey submits that the lack of imports during certain periods was the result of a lack of applications for Certificates of Control. This largely depended on a combination of factors. Among those, the decrease in the demand of imported rice as a consequence of the increase of the world price for rice and the large presence of stocks certainly affected requests for Certificates of Control for the period going from February to March 2004. As for the decrease of imports of paddy in the month of October, Turkey refers to the reasons provided in its answer to question 102.

Turkey submits the following table with the breakdown of requests, rejections and approvals for each rice product (i.e., types of rice) in each period specified in question 102 as it relates to trade with the United States:

PERIOD	Total Application	Rejected	Approved	Product
January-May 2004	2	2	0	milled rice
July 2004	2	0	2	milled rice
September-November 2004	1	0	1	milled rice
July-December 2005	5	5	0	milled rice
January-9 November 2006	6	4	2	milled rice
October-December 2003	0	0	0	paddy rice
February-May 2004	2	0	2	paddy rice
September-November 2005	10	0	10	paddy rice

Q104. (Turkey) Exhibit TR-8 shows that in 2004 Certificates of Control were issued for France, Iran and "Iskenderun Customs Antr." However, Exhibit TR-33 does not show any Certificates of Control for these three. Could Turkey explain this potential discrepancy? Also, what is covered by "Iskenderun Customs Antr."?

Annex TR-8 does not show the figures pertaining to the Certificates of Control approved by the Ministry of Agriculture and Rural Affairs (MARA), but it shows instead the total quantities, for each country, for which import licenses were issued by the Undersecretariat for Foreign Trade (UFT) under the TRQ system. The non-existence of Certificates of Control for imports of rice from these three countries in Annex TR-33 indicates that despite the fact that these importers obtained the licenses from the UFT to import under the TRQ, in the end they did not request a Certificate of Control, therefore they did not import rice (either under the TRQ or over-quota). In addition, Turkey submits that "Iskenderun Customs Antr." refers to the warehouse at the Iskenderun Customs point of entry.

Q105. (Turkey) Exhibit TR-35 seems to show lower figures of rejected applications for Certificates of Control in 2005 and 2006, than Exhibit TR-36. In particular, Exhibit TR-36 would suggest that there were 85 rejections in 2006 versus 38 shown in Exhibit TR-35. Could Turkey explain these discrepancies, including their implications for the total number of rejections and the percentage of rejections shown in Exhibit TR-35.

Turkey submits that the data provided in Annex TR-36 are more updated and respectfully requests the Panel to take into consideration the mentioned Annex. On the other hand, Turkey submits an updated version of Annex TR-35, showing rejections up to 9 November 2006.

Q106. (Turkey) The data in Exhibit TR-33 seem to indicate that the total number of approved Certificates of Control for 2003, 2004 and 2006 were higher, and for 2005 they were lower, than what is indicated in Exhibit TR-35. Could Turkey explain these discrepancies, including their implications for the total number of approvals and the percentage of rejections shown in Exhibit TR-35.

The data provided in Annex TR-33 are more updated and Turkey respectfully requests the Panel to take into consideration the mentioned Annex.

Q107. (Turkey) The figures for Bulgaria and Russia in Exhibit TR-25 seem to show a discrepancy with the actual figures or dates for Bulgarian and Russian imports in Exhibit TR-33. Could Turkey please explain this apparent discrepancy?

The data concerning realized import figures or dates provided in Annex TR-33 is prepared by MARA, which records these figures after the product is released for free circulation following customs control. This method of recording may, at times, lead to certain minor statistical discrepancies with the records of the General Directorate of Imports of the UFT. Turkey requests the Panel to take into consideration, in relation to the realized import figures, Annex TR-25, prepared by the mentioned General Directorate.

Q108. (Turkey) According to Exhibit TR-25 there were no imports of milled rice in April 2004; however, Exhibit TR-33 indicates that 21,000 kg of rice were imported from Pakistan in the same month. Could Turkey please explain this, or any other similar, discrepancies between Exhibits TR-33 and TR-25?

Turkey respectfully submits that a closer scrutiny of Annex TR-33 would reveal that the Certificate of Control relating to the import of 21,000 Kg. of rice realized from Pakistan was approved on 8 June 2004, but the date of importation was inadvertently recorded as 23 April 2004. Annex TR-25 shows that the mentioned importation from Pakistan was realized in June.

Q109. (Turkey) In its reply to question 4(c) posed by the Panel, Turkey stated that Exhibit TR-8 provided "import data, broken down into types of rice and into MFN and TRQ imports for the years 2004 to 2006" (emphasis added). Actually, the table in Exhibit TR-8 seems to show import figures broken down by types of rice and by "Total imports" (A), "Import Licenses Issued" (B) and a third column indicating the difference between A and B, which is supposed to show the "Total out of quota imports".

(a) Can Turkey please confirm this.

Turkey confirms.

(b) As regards milled rice, the corresponding figure for imports of US rice in the third column is negative. According to footnote 2 to the table, the negative sign indicates that the total quantity of import licenses was larger than the actual imports. Does the negative sign also mean that there were no out of quota imports of US milled rice during the period under consideration?

Turkey submits that the negative sign does not necessarily mean that there were no out-of-quota imports. The negative sign indicates that the actual realized imports were less than import licenses issued in that period. So, as a result, actual importation might have been realized either within the tariff quota or out-of-quota. However, if the sign is positive, then we assume that all of the import licenses issued have been fully used (due to the tariff advantage), and the difference between total imports and import licenses issued are definitely realized out of the quota (though, theoretically all of the importation might have been realized out-of-quota since we do not know the actual usage of the import licenses).

Q110. (Turkey) In its question 7 posed to both Parties, the Panel had asked, *inter alia*, for information regarding Turkey's average prices for domestic production of, separately, paddy, brown and milled rice in its market, for the period from July 2003 to the end of 2006 (including estimates, as appropriate). In response to this question, Turkey indicated that "reference should be made to Annex TR-27". However, the data in Exhibit TR-27 seems to refer only to individual purchases by companies in 2005. It does not show monthly averages and specify the type of rice it refers to, nor does it cover the period requested by the Panel. In the absence of such information, can Turkey comment on the data provided by the United States in Exhibit US-54. Can Turkey find a relation between the price data provided in Exhibit TR-27 and that provided in Exhibit TR-29?

In the years 2005 and 2006, the Turkish Grain Board (TMO) was not determining market prices, due to the fact that it made purchases of very little quantities of paddy rice (i.e., approximately 14,000 tonnes), so the prices quoted by TMO cannot represent the price actually paid by the purchasers to the paddy producers. However, as indicated in Annex TR-27, 559,280 tonnes out of 600,000 tonnes of domestically grown paddy rice were purchased from paddy producers by the importing firms that wanted to take advantage of the TRQ system. As a result, Turkey strongly believes that the average purchase price of 0.64 YTL/Kg of domestic paddy rice realized in the transactions between the firms and paddy producers pertaining to 559,280 tonnes of paddy rice is the clear indication of the price of paddy rice in 2005.

The comparison between the data provided in Exhibit US-54 and in Annex TR-29 shows that the purchasing prices declared by the TMO remain lower. The research for price realized by TMO takes as a basis the prices of products that are processed in Edirne, Bandırma, Samsun and Tekirdağ, the regions where paddy rice is cultivated and it is only natural that the price increases in certain amounts in areas that are rather far to these regions because of the transportation cost. The above-noted margin of difference of prices between the United States and Turkish data may also stem from the possibility that the United States may have taken the prices established in certain luxurious shopping centres as average Turkish price for rice. The basis of the data compiled by the USA Rice Federation provided in Exhibit US-54 remains unknown.

Annex TR-27 and Annex TR-29 show that the prices paid by individual companies for paddy rice directly purchased from producers (Annex TR-27) are lower than TMO purchasing prices for paddy rice in general (Annex TR-29). One explanation to this fact is the transportation cost that is necessary in case of TMO purchases, which simply does not exist when producers sell their products directly to the traders. On the other hand, producers may prefer to sell their products to individual companies due to the cash payment advantage. In these cases, those producers deliver their products without further loss of time and receive payment in return, of course also taking into account certain price disadvantage.

Q111. (Turkey) In its reply to question 9 posed by the Panel, Turkey provided Exhibit TR-30 showing overall purchases and sales of milled and paddy rice by the Turkish Grain Board (TMO) during the period 2003 to 16 November 2006. Could Turkey please explain the reasons for the significant difference in the quantities of paddy rice sold by the TMO in 2004, as compared to the quantities sold in 2005 and 2006, respectively?

The differences between the quantities of paddy rice sold by the TMO in 2004 and 2005-2006 are a consequence of the lower amount of purchases of domestic rice made by TMO, for a number of reasons (i.e., the higher world market prices of rice with the related higher degree of competitiveness of Turkish rice, the relative weakness of the Turkish Lira, and last but not least the operation of the TRQ). The lower purchases of domestic rice resulted in lower sales of TMO stocks during the 2005 and 2006 period. With particular respect to the TRQ, it is clear that it provided a great advantage through its preferential tariffs. To fulfil the domestic purchase requirement, traders purchased domestic rice mainly from domestic producers, as it was cheaper than buying it from the TMO. Therefore, the TMO, which acts as an intervention agency, had lower quantities of domestic rice to purchase and, consequently, less domestic rice to sell.

Q112. (Turkey) How does Turkey explain the sudden occurrence of over-quota imports of United States rice in May 2005 shown in Exhibit TR-33?

Turkey strongly objects to the United States' claim in relation to the alleged reasons behind the sudden occurrence of over-quota imports in May 2005. Turkey believes that the explanation rests in the business determinations and commercial decisions made by the individual rice traders on the basis of

the traditional factors that trigger importation of specific consignments of rice from an origin rather than another. The United States is not providing evidence to prove otherwise. Turkey submits that this information is probably easier to be found with the individual importers that made those business determinations and commercial decisions. To this end, Turkey believes that the United States is in a better position to secure this type of information.

Q113 (Turkey): In its reply to question 14 posed by the Panel, Turkey submitted "that the import procedure which applies for imports at both MFN and TRQ rates is described in the scheme provided in Annex TR-32":

(a) In that Exhibit, when referring to "Importation at the MFN rate", Turkey has stated that "[a]fter approval [of the Control Certificate by MARA], importers can start customs procedures". Is this statement compatible with Turkey's assertion in its closing statement during the second substantive meeting with the Panel (para. 12) that "[t]he Certificate of Control is a document used as part of Turkey's customs procedures". Is in Turkey's view the approval of Certificates of Control by MARA part of Turkey's customs procedures or do customs procedures rather begin only after the approval of such Control Certificates?

Turkey submits that the Certificate of Control is a document used as a part of Turkey's customs procedures. In the mentioned statement, the phrase "customs procedures" stands for the procedures at customs points-of-entry. It is not intended to mean that the approval of the Certificates of Control was not a part of customs procedures within the meaning of the Import Licensing Agreement. As already specified in its Oral Statements, importation and customs-clearance in Turkey involve a number of steps, which include a documentation element, a verification element, a physical inspection element and, ultimately, a tax collection element. The Certificate of Control is part of the documentation element whose procedure starts at MARA and ends at customs. The approval of the Certificate of Control by MARA is, therefore, an integral part of the customs procedures. Article 2 of the Communiqué of Standardization for Foreign Trade No. 2006/5, states that: "*at import stage of the products, which have been included in the annex lists (Annex I, Annex II/A-B, Annex III, Annex IV, Annex V/A-B, Annex VI-A), control certificates approved by the Ministry of Agriculture and Rural Affairs shall be asked for by relevant customs administration.*"

(b) In other sections of its submissions, Turkey has stated that no import licenses are required for imports at MFN rate (see, for example, paras. 3 and 28 of its first submission). If the latter statement is correct, why in the last column on "Documents" required for Importation at MFN rates in Exhibit TR-32, is there a reference to "C. Import license". On the other hand, there seems to be no similar mention of "Import license" under the column on document requirements for "Importation under TRQ". Can Turkey clarify this situation?

Turkey submits that the reference to "C. Import License" under the column on documents for the "*Importation at the MFN Rate*" is due to an error. In this respect, Turkey respectfully requests the Panel to take into consideration the corrected version of Annex TR-32 attached herewith. Indeed that reference should have been inserted under the column on documentation under "*Importation under the TRQ*". Turkey has repeatedly stated that while Certificates of Control, as part of the customs documentation, are required for both TRQ and over-quota imports (including MFN and FTA imports), the import license granted by the UFT is required only for imports under the TRQ.

Q114. (Turkey) In its reply to question 15 posed by the Panel, Turkey refers to Exhibit TR-33.

(a) According to the data in that Exhibit, Certificates of Control would have been regularly issued for imports of US paddy and milled rice throughout the first

eight months of 2003. However, the table shows that from September 2003 to the end of May 2004 there seem to have been no Certificates of Control issued for imports of rice from non-European origin either in or outside the TRQ. In addition, it seems that no Certificates of Control were issued for non-EC out-of-quota rice imports from September 2003 to August 2004. Could Turkey explain the reasons for these changes in trend?

As previously explained, the lack of imports in that particular period was due to the lack of application for Certificates of Control as a consequence of two main factors (i.e., the presence of large stocks of rice in the market due to huge volumes of rice imports occurred in 2003 and the steep increase of the world price for rice in 2004) that caused the fall of competitiveness of imported over domestic rice and resulted in a further decrease in the demand for importation. These factors could have encouraged the importers to resort to stocks and/or withhold their business determinations.

(b) With reference to the data in that same Exhibit, please provide the reasons, other than commercial considerations, which explain why no Certificates of Control for over quota imports for US rice seem to have been issued between September 2003 and April 2005 and consequently no over quota imports of US rice seem to have actually occurred during the same period, with the exception of one shipment of 611 tons of paddy rice (date of Certificate of Control 15.09.2004; importation date 16.09.2004).

Turkey submits that, according to the data provided in Annex TR-33, Certificates of Control have been granted within the mentioned time period for importation of rice originating in countries such as Egypt, China, Vietnam, Thailand and Pakistan, together with the rice from the United States. The relative lack of approved over-quota Certificates of Control for importation of US-origin rice, and consequently the lack of imports thereof, are due to the lack of competitiveness of US-origin rice.

(c) The period mentioned in the preceding paragraph seems to coincide that in which the United States claims that consecutive so-called "Letters of Acceptance" from MARA's General Directorate would have delayed the date for issuing Certificates of Control (see paras. 23 to 26 of the United States first written submission). If, in Turkey's view, the lack of imports and approved Certificates of Control bears no relation with the issuance of Letters of Acceptance, could Turkey then explain what reasons, other than commercial considerations, may explain this apparent coincidence.

Turkey has already explained why, with particular reference to the period going from February to March 2004, no imports of rice occurred in Turkey and refers to the answer to question 114(a). Rather than with the Letters of Acceptance, the lack of imports was connected, in addition to commercial considerations, with world prices, presence of stocks and high volumes of imports in the preceding years.

On the other hand, Turkey has also submitted that the fact that the Letters of Acceptance were not enforced and did not affect market trends is evident from the fact that a considerable amount of Certificates of Control were in fact approved by MARA during the alleged period of operation of the Letters of Acceptance. For example, as indicated by Turkey in previous submissions, despite the existence of a "contrary recommendation" contained in a so-called Letter of Acceptance (i.e., the Letter of Acceptance No. 107, as referred to by the United States in its First Submission), 224 Certificates of Control were, in fact, approved between 10 September 2003 and 30 June 2004. If anything, this should be seen as convincing evidence that the so-called Letters of Acceptance were (and are) only internal communications suggesting policy recommendations and not formal trade policy measures binding on the administration. This general trend is confirmed during later periods of

alleged enforcement of the Letters of Acceptance up to September 2006. As a second example, despite the existence of a "contrary recommendation" contained in what the United States describes as the Letter of Acceptance No. 905, 544 Certificates of Control were, in fact, approved between 1 July 2004 and 1 January 2005. The fact that importers chose to import through the FTA and TRQ (when in force) is a result of the advantages conditions and related benefits offered by the preferential rates.

Q115. (Turkey) During the second substantive meeting with the Panel, the United States presented Exhibit US-71, in which the number provided by Turkey of the allegedly approved Certificates of Control of 2,242, was broken down in order to exclude the ones that in its opinion were not relevant, such as those approved during an allegedly "irrelevant time period", as well as those granted for in-quota imports and for rice imports from the EC and the Former Yugoslav Republic of Macedonia (with whom Turkey has preferential trade agreements). The United States thus suggested that, once all these exclusions were made, the final number of relevant Certificates of Control allegedly approved by Turkey was 56. Can Turkey comment on this number and what would it imply. If in Turkey's view, the final number suggested by the United States is not correct, could Turkey provide its reasons, referring to relevant evidence, as appropriate.

In Exhibit US-71, the United States extracts the number of 56 Certificates of Control given for out-of-quota MFN imports, and argues that this should prove the existence of a legal prohibition being imposed on the approval of Certificates of Control. However, Turkey believes that this argument, and the relevance of this number, is based on a wrong assumption. The wrong assumption is that of considering irrelevant imports from the EC and Macedonia, and consequently excluding them, when comparing Certificates of Control approved for in-quota (TRQ) and over-quota trade. Turkey submits that if it had intended to use the Certificates of Control as an instrument to restrict rice imports and protect domestic producers, there would have been no reason to exclude imports under the two FTAs from the alleged denial of approval of Certificates of Control. Certainly imports from the EC and Macedonia might constitute an even greater threat to domestic production because of the greater tariff advantage. Turkey fails to understand why and on which legal basis the United States continues to consider these imports irrelevant in their arguments.

In addition, Turkey believes that, even accepting the exclusion of FTA imports, the calculations elaborated by the United States are still distortive. The United States in fact refers to different time-periods when comparing the total number of approved Certificates of Control (i.e., January 2003 to November 2006) with the total number of Certificates of Control approved for MFN trade (i.e., 10 September 2003 to 17 March 2006). In paragraph 8 of its Oral Statements at the second meeting of the Panel, the United States alleged that the figure of 56 Certificates of Control represents *a mere 2.5 per cent of the 2,242 Certificates of Control figure provided by Turkey*. A correct calculation would result, again given the exclusion of FTA imports and considering the period between 10 September 2003 and 17 March 2006, in a figure of 3.25% (i.e., 56 out of 1,718) of total approved Certificates of Control for importation of MFN rice. On the other hand, Turkey submits that the relevant time period to be considered is between January 2003 and November 2006. The calculations done in relation to this period show that the percentage of the total approved Certificates of Control for importation of MFN rice amounts to 6%. Turkey also submits that the period arbitrarily selected by the United States does not take into account the fact that Certificates of Control have a validity of one year from the date of approval. Therefore, if anything, Turkey submits that the period of reference, for the purposes of actual trade occurring from 10 September 2003 onwards should be, ideally, that starting on 11 September 2002 (with respect to the approval of Certificates of Control).

Q118. (Turkey) Could Turkey clarify whether, in the exhibits it has submitted to the Panel (in particular in Annexes TR-8, TR-23, TR-25 and TR-33), the figures provided for imports of paddy, brown and milled rice are actual data on imported volumes or are rather the volumes of

paddy and brown rice imports shown as milled rice equivalents (i.e., have they been converted to milled rice equivalents)?

Turkey submits that the figures in Annex TR-8 are milled rice equivalents of total imports of paddy rice, brown rice and rice imports. The figures included in Annexes TR-23, TR-25 and TR-33 represent actual data on imported volumes of these products.

Q119. (Turkey) Using the figures provided by Turkey as absolute numbers, and not as milled rice equivalents, the Panel has noted differences in the data concerning import volumes and the number of approved Control Certificates provided by Turkey, particularly between Annexes TR-33 and TR-20 bis and between TR-33 and TR-23.

(a) Can Turkey clarify these divergences.

(b) Can Turkey confirm which of these figures the Panel is to consider as final, providing relevant evidence to support the final figures.

Annex TR-20 covers the period until September 21, 2006; while the more updated data can be found in Annex TR-33, covering until 9 November, 2006. Turkey thus respectfully requests the Panel to take into consideration Annex TR-33.

On the other hand, as previously explained in the answer to Question 107, Turkey requests the Panel to take into consideration Annex TR-25 for data on realized imported quantities.

Q120. (Turkey) Could Turkey clarify the units used in the table in Exhibit TR-28?

The unit used is US$/tonnes.

Q121 (Turkey): During the second meeting with the Panel, Turkey submitted a photocopy from the "FAO Rice Market Monitor – December 2006", with a table entitled "Export Prices for Rice". Could Turkey confirm whether it intends this photocopy to be part of Turkey's exhibits to the Panel?

Yes, the table entitled "Export Prices for Rice" from the FAO Rice Market Monitor should be included in Annex TR-43.

Q122. (Turkey) In its reply to question 13 posed by the Panel (para. 20) the United States argued that "there are no restrictions on EC-origin rice that enters under the EC quota but… importers are required to purchase domestic paddy rice with respect to any imports of EC rice over the 28,000 metric ton annual cap". Could Turkey comment on this assertion? Are imports of EC rice above the 28,000 annual quota subject to a domestic purchase requirement?

Turkey confirms that, as for the rice originating from any other country, there has never been any restriction on rice imported from the EC. EC-origin milled rice benefits of a duty-free quota of 28,000 metric tonnes. Out of the duty-free quota, EC rice can be imported at the MFN or applied rates as well as under the TRQ regime. In this latter case, importers must satisfy the domestic purchase requirement. In any event, whether imported through the duty-free quota, at MFN or applied rates, or under the TRQ tariff advantage, the approval of Certificates of Control is always an element of importation.

Q123. (Turkey) During the second meeting with the Panel, the United States submitted information asserting that that "under the Turkey-Macedonia FTA, Turkey has preferential import possibility within tariff quota (8,000 tonnes, 0% duty)" (Exhibit US-72).

(a) Could Turkey please confirm the information regarding this bilateral tariff quota with zero in-quota duty?

Turkey confirms this information.

(b) Could Turkey also please indicate if rice imports from the Former Yugoslav Republic of Macedonia, either under this tariff quota, or MFN, are subject to obtaining a Certificate of Control or to a domestic purchase requirement?

Rice imports from Macedonia are subject, like rice originating from all other destinations, to approval of Certificates of Control, whether the importation is to be realized under the TRQ regime, the FTA or at the MFN or applied rates. The purchase of domestic rice is required only for the importation under the TRQ regime.

(c) Does Turkey have preferential trade arrangements with any other country for the importation of rice into Turkey? If so, could Turkey please provide information regarding such agreements, indicating their key characteristics with regard to rice imports into Turkey?

At present, there is no preferential trade agreement covering trade in rice other than with the EC and Macedonia.

Q124. (Turkey) Exhibit TR-25 refers to paddy rice imports in June 2004 from "Samsun FTA". Could Turkey explain what is covered by "Samsun FTA"?

Turkey submits that the reference made to "Samsun FTA" should, in fact, read "Samsun FTZ", or "Samsun Free Trade Zone". Free Trade Zones (alternatively also known as Free Economic Zones or Special Economic Zones) are places, in which some incentives are applied so as to promote economic activity and which are accepted as being outside of the Turkish Customs Territory despite being physically located within the borders of Turkey.

Q125. (Turkey) In its reply to question 14 posed by the Panel, Turkey submitted "that the import procedure which applies for imports at both MFN and TRQ rates is described in the scheme provided in Annex TR-32". In that Exhibit, Turkey has identified the legal basis for both the procedure for importation at MFN rate and that for importation at TRQ rate. During the second substantive meeting with the Panel, however, Turkey stated that Communiqué No. 2006/5 on the Standardization in Foreign Trade had been replaced by new legislation.

(a) Can Turkey confirm that Communiqué No. 2006/5 on the Standardization in Foreign Trade has been replaced by new legislation and provide a copy of such new legislation.

Communiqué No. 2006/5 was repealed and replaced by Communiqué No. 2007/21 which was published in the Official Gazette No. 26406 on 17/01/2007.[1] However, Turkey submits that there is no amendment affecting the importation of rice into Turkey.

(b) Can Turkey confirm what is the basis, in Turkish domestic legislation, for the authority that the Turkish Foreign Trade Undersecretariat (FTU) has to issue Communiqués on the Standardization in Foreign Trade. Is it Decree No.

[1] A copy of this Communiqué is attached as Annex TR-44.

2005/9454 on "The Regime for Technical Regulations and Standardization for Foreign Trade" in Exhibit TR-2?

Turkey confirms that Decree No. 2005/9454 on "The Regime for Technical Regulations and Standardization for Foreign Trade", provided in Annex TR-2, is the legal basis for all Standardization Communiqués of UFT, in particular of both Communiqués No. 2006/5 and No. 2007/21.

(c) Can Turkey also confirm what is the basis, in Turkish domestic legislation, for the authority that the Turkish Ministry of Agriculture and Rural Affairs (MARA) has to issue Communiqués, such as Communiqué No. 2006/5.

Turkey would like to clarify that Communiqué No. 2006/5 is promulgated by UFT (and not by MARA) on the basis of Decree No. 2005/9454 on "The Regime for Technical Regulations and Standardization for Foreign Trade". The Communiqué attributes to MARA the task of determining… "*the conformity of the substances which are on the annex lists of this Communiqué and which are subject to the Entry into The Free Circulation Regime, The Internal Process Regime, The Regime On The Process Under The Customs Control and The Temporary Import Regime, in respect of human health and safety, animal and plant existence and health.*"[2]

In general, under the Turkish legal system (like in many other legal systems), the administration has the power to issue implementing legislation laying down rules which are common, abstract, objective, and consistent with primary legislation. For example, Communiqué No. 2003/31,[3] issued by MARA, has been enacted (as stated in Article 3 of the mentioned Communiqué) on the basis of the Decree Having the Force of Law No. 560 concerning the Production, Consumption and Inspection of Foods,[4] Law No. 4128 amending the said Decree Having the Force of Law, and the Decree Having the Force of Law No. 441 on the Establishment and Functions of the Ministry of Agriculture and Rural Affairs, and the provisions related to foodstuffs and other agricultural and fishery products of the Communiqués on the Standardization in Foreign Trade.

As a further example, Communiqués No. 2001/10[5] and No. 2002/11,[6] also issued by MARA, have been prepared on the basis of the Turkish Food Codex Regulation.[7]

(d) Can Turkey confirm whether Communiqué No. 2003/31 on the "Issuance of Control Certification at the Importation of Foodstuffs and Packaging Materials that come into Contact with Foodstuffs and on Control Procedures at Importation Stage" (as amended)", provided in Exhibit TR-21, is still in force?

Turkey confirms that Communiqué No. 2003/31 is still in force.

(e) Can Turkey confirm whether Decree No. 2005/9454 on "The Regime for Technical Regulations and Standardization for Foreign Trade", in Exhibit TR-2, is still in force?

Turkey confirms that the Decree No. 2005/9454 on "The Regime for Technical Regulations and Standardization for Foreign Trade" is still in force.

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[2] See Article 1, Communiqué No. 2006/5 and No. 2007/21 in Annexes TR-1 and TR-44.

[3] See Annex TR-21.

[4] Published in the Official Gazette No. 22327 on 28 June 1995 and amended by Law No. 5179 published in the Official Gazette No. 25483 on 05 June 2004.

[5] See Annex TR- 5.

[6] See Annex TR-6.

[7] Published in the Official Gazette on 16 November 1997.

(f) When was the requirement that importers obtain a Certificate of Control for the importation of rice first introduced? Through which legal instrument?

Turkey submits that the requirement for Certificates of Control has been regulated under different regimes for more than 20 years. Since 1995, it has been regulated through the Communiqués of Standardization for Foreign Trade.

Q126 (Turkey): In its statement during the second substantive meeting with the Panel (para. 6), Turkey asserted that "[t]here is no provision that gives the relevant authority discretion not to approve Certificates of Control." In this regard, Turkey seems to have made the argument that the lack of discretion can be inferred from the absence of any explicit provision that gives such authority to the Turkish Ministry of Agriculture and Rural Affairs (MARA). If this is a proper characterization of Turkey's argument, please provide additional legal basis and/or arguments to support Turkey's assertion regarding MARA's alleged lack of discretion. If not, please explain why, with reference to relevant legal evidence.

Turkey confirms that there is nothing in Turkish law providing for the ability of the Turkish Government or its administration to use the Certificate of Control as an import license and that there is no provision that gives the relevant authority the discretion not to approve Certificates of Control. In particular, the wording of Article 2 of Communiqué No. 2006/5[8] (as well as Article 2 of Communiqué No. 2007/21[9] which replaced it and Communiqué No. 2005/5[10] which was previously in force) clearly suggests that the approval of the Certificate of Control automatically follows the importer's submission of the duly compiled form, together with the relevant documents, to MARA or to the Provincial Directorates.

According to general principles of Turkish legal system, as in the legal systems of other countries, rights exist unless an exception providing for restrictions and prohibitions expressly applies. Therefore, when the law does not provide for restrictions or prohibition to rights, these are granted, naturally, automatically and totally. Since there is no provision that gives the relevant authority the express discretion not to approve Certificates of Control, it is MARA's legal duty and responsibility to approve the Certificates of Control for importers who meet the requirements established by the relevant legislation under the Turkish legal system.

Moreover, according to the case law of the Council of State, which is the administrative high court of Turkey, public authorities cannot use their authority arbitrarily. There is no margin for any kind of discretion to be exercised by either MARA, any of its Provincial Directorates, or the UFT in the approval of Certificates of Control.

Q127 (Turkey): Does the relevant legislation explicitly grant importers the right to obtain the requested Certificates of Control once they have completed all the legal requirements and submitted all the relevant legal documents?

The relevant Turkish legislation specifies that, in order to obtain Certificates of Control, all that importers must do is submit the duly compiled form and the invoice, together with other documents required according to the nature and kind of the product. As stated above, upon submission of the required documentation, MARA has the legal duty and responsibility to approve Certificates of Control. From this, it follows that importers have the right to obtain approved Certificates of Control.

[8] See Annex TR-1.
[9] See Annex TR-44.
[10] See Annex TR- 22.

Q128. (Turkey) Article 6 of Turkey's Communiqué No. 31 on the Approval of Control Certification at the Importation of Foodstuffs and Packaging Materials that come into Contact with Foodstuffs and on Control Procedures at Importation Stage apparently contains the list of documents required for the issuance of a Certificate of Control for imports into Turkey. In section 6 B) c), this provision lists "other documents that must be presented according to the type of product".

(a) Please clarify which of the documents contained in section 6 B) c) are requested for the issuance of a Certificate of Control for imports of rice.

The "other documents" that must be presented according to the type of product are, in general, requested for processed agricultural products and agricultural products which are composed of more than one component. As rice does not involve more than one component, no other document such as "the component list" is requested for the approval of the Certificate of Control for imports of rice.

(b) In its reply to question 25 posed by the Panel, the United States argued that the language in the 2005 and 2006 MARA Communiqués was "broad enough to provide MARA with the flexibility to 'ask for' other documents on a product-by-product basis". Does Turkey agree with this statement? If the United States' statement is not correct, could Turkey provide its reasons, referring to relevant evidence, as appropriate.

Taking into account the main provisions and the objective of the Communiqués 2005/5 and 2006/5 to allow only safe products to be imported into Turkey, it is clear that the phrase "other documents" refers to the documents intended for the human health and safety, animal and plant existence and health. The term "other documents" is required since different documents may be required for different products according to the characteristics of the products. However, Turkey would like to emphasize that no "other documents" are required for importation of rice under the above-mentioned Communiqués.

Turkey firmly objects to the argument made by the United States that the phrase "...*For obtaining control certificate, it is necessary to apply to the mentioned Ministry or to provincial affiliates (bodies) authorized by the Ministry with control certificate form (Annex VII), pro forma invoice or invoice and other documents which may be asked for, depending on product, by the Ministry*" in Article 2 of Communiqué No. 2006/5 would provide MARA with the flexibility to ask for other documents. The necessary documents required for rice importation are clearly stated in Communiqué No. 2003/31. In this Communiqué, the rationale for requesting additional documents is simply nature of the product (i.e., the degree of processing that the product has been subject to). In particular, for importation of unprocessed products such as milled, brown and paddy rice, no documents other than the Certificate of Control, legal entity form, and the *pro forma* invoice are requested by MARA.

(c) Please confirm whether there is any legal instrument or other published list that specifies all the documents that are requested for the issuance of a Certificate of Control for imports of rice. How are importers informed of the documents required?

Besides the mentioned Communiqués 2005/5, 2006/5, as well as the latest Communiqué 2007/21, importers can access the list that states the necessary documents for the approval of Certificate of Control at: http://www.kkgm.gov.tr/birim/gidakont/Kontrol_Belgesi/liste2.html.

(d) Is the payment of any type of fees required for the approval of Certificates of Control for the importation of rice?

An administrative fee is to be paid to the provincial directorates in return for the services rendered.

(e) Please confirm whether there are any other documents, not contained in section 6 B) c), which are additionally required by MARA for the issuance of a Certificate of Control for imports of rice into Turkey. If this is the case, please provide a copy of the relevant legal instrument or instruments.

(f) Please specify any conditions these documents must comply with in order to be accepted and for the Certificate of Control to be subsequently issued.

No document, other than the duly compiled form, the legal entity form, and the *pro forma* invoice are requested for the approval of Certificates of Control for the importation of rice.

Q129. (Turkey) Turkey has argued that the Certificates of Control act "as an element of trade facilitation ... provid[ing] legal certainty and commercial predictability to importers engaged in rice importation" (Turkey's oral statement during the first substantive meeting with the Panel, para. 6), as well as pursue "*inter alia*, sanitary and phytosanitary objectives" (Turkey's response to question 14 posed by the Panel, page 7).

(a) Please explain how these sanitary and phytosanitary purposes are achieved through the Certificate of Control, and how can MARA and Turkish Customs Officials verify the products compliance with relevant standards and technical regulations, without having either seen the appropriate sanitary and phytosanitary certificate or having made the relevant physical inspection of the good to be imported.

As already extensively indicated, the Certificate of Control is a reference document needed to process the customs clearance of specific consignments of a variety of goods, including rice. It allows MARA and Turkey's customs authorities to verify, on a single document, all required customs information, including the product's compliance with relevant standards and technical regulations. Turkey has already explained that, in relation to certain products (i.e., foodstuffs and other sensitive commodities imported for human or animal consumption), the level of development of its post-entry market surveillance does not allow a satisfactory achievement of sanitary and phytosanitary objectives. For this very reason, a strict and rigorous process of product pre-approval and early certification (by MARA, which is the competent ministry for rice) is still needed.

The Certificate of Control achieves these objectives by centralizing the competence and the responsibility for products' compatibility in the authority (i.e., MARA for agricultural products such as rice) which is best suited to verify compliance with all the relevant legislation, and which will ultimately be liable for the products' safety. The approval by MARA of the Certificates of Control is, therefore, meant to grant a safe, uniform and consistent application of the requirements envisaged by the relevant legislation for food products. With particular respect to the SPS function of the Certificate of Control, ahead of the actual inspection that occurs at customs point-of-entry, an element of particular relevance is the importers' early guarantee that the products comply with the applicable standards.[11] Turkey believes that these aspects are essential to ensure the necessary degree of administrative integration, foreseeability of customs clearance, and uniformity of action between the central government and the SPS control and inspection laboratories at customs points-of-entry.

(b) Can Turkey also explain why an importer would be required to submit, in addition to a Certificate of Control, a customs declaration and a sanitary and phytosanitary certificate if MARA and Turkish Customs Officials are able to

[11] For rice, the ones included in points A and E of the Certificate of Control (see Annex TR-4).

verify "all required customs information, including the product's compliance with relevant standards and technical regulations" through the Certificate of Control?

As indicated in previous submissions, this system mirrors the various phases that characterize the process of importation. The Government of Turkey needs to be made aware as early as possible about the planned importation of certain SPS-sensitive products such as rice. While it is true that "all required customs information, including the product's compliance with relevant standards and technical regulations" may be verified by MARA ahead of actual importation through the approval of the Certificate of Control, an important phase occurs at customs level, where SPS inspections are actually conducted on the specific consignments.

(c) Please provide supported arguments, making reference to relevant evidence, as appropriate, that can counter the United States' assertion (in its response to question 14 posed by the Panel, footnote 11 to para. 23) that, according to Turkish importers, the Ministry of Agriculture and Rural Affairs (MARA) "does not request the phytosanitary certificate at the stage when it decides whether or not to grant the Control Certificate. Rather, MARA does not require the presentation of a phytosanitary certificate until the Provincial Agricultural Directorate that has jurisdiction over the port where the importation is to be realized asks for it. But this step only takes place after MARA has already granted the Control Certificate."

The assertion made by the United States corresponds to reality. However, what the United States continues to misunderstand is the SPS information and commitments that MARA requires from the rice importers at time of application for a Certificate of Control. The SPS certificate for the specific consignment of rice intended for importation is not asked by MARA during the stage of the approval of Certificate of Control as the latter can be utilized within a 12 month time period. Actual SPS inspection and certification can only be made at customs point-of-entry. What is relevant and requested at the time of application for a Certificate of Control is the indication by the importer of the future compliance of the imported rice with the relevant Turkish SPS measures and the importer's commitment that the actual consignment will match the information provided when applying for the Certificate of Control. As strange as this may seem or appear on the basis of the complaint brought by the United States, this process actually enhances the commercial predictability of the process of importation and has proved a powerful instrument of trade facilitation in that it offers an early guarantee that the products comply with the applicable SPS requirements. As indicated by Turkey in previous submissions, this is an element of trade and administrative facilitation for both the traders involved and the Turkish administration.

(d) Please also provide more information regarding the process of risk assessment, mentioned by Turkey in its response to question 14 posed by the Panel, for the importation of rice. At what stage of the importation are products examined, including through laboratory analyses, if that were the case, in order to assess their safety? Do these laboratory analyses and quarantine procedures take place at random, at the discretion of the customs or agriculture authorities, or do they follow certain guidelines? Please provide, as appropriate, copy of the relevant documents laying down such guidelines or setting out the discretion to decide in which cases to conduct such laboratory analysis.

If the product is found proper after the document and identity checks, the next stage is the physical inspection. Physical inspection is the stage of control that, when necessary, includes laboratory analyses. With respect to the importation of unprocessed agricultural products such as rice, laboratory analysis is in most cases found to be necessary. During the analyses, the issues that are essential for

food safety and can pose risk to human health (such as pesticides, microbiological criteria, contaminants, heavy metals) are primarily considered.

Q130. (Turkey) In paragraph 22 of Turkey's oral statement during the second meeting of the parties, Turkey states that "once approved, the Certificate of Control is a guarantee for the importer that all elements and requirements needed to clear customs are present and will allow importation".

(a) How does the Certificate of Control "guarantee ... that all elements and requirements needed to clear customs are present" when MARA has not, at this stage, seen a sanitary and phytosanitary certificate, which according to Turkey's response to question number 14 posed by the Panel, is to be submitted to the provincial directorate of MARA after the approval of the Certificate of Control?

Turkey refers to the replies provided under question 129.

(b) Provided that the product is found to pass the necessary sanitary and phytosanitary requirements on importation, in what way, if any, would Turkish Customs deny the importation of a product?

Turkey submits that if the product meets the necessary sanitary and phytosanitary requirements, Turkish customs authorities cannot deny the importation.

Q131. (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.

Turkey believes that the Certificates of Control currently meet the traditional test of reasonableness and necessity used to determine the degree of their trade-facilitation. In particular, with respect to the SPS functions of the Certificate of Control, Turkey considers that this instrument perfectly complies with Article 8 of the SPS Agreement and every single provision of Annex C to the SPS Agreement on "Control, Inspection and Approval Procedures". The information provided by Turkey throughout the panel proceedings should clearly allow for a positive review on the basis of the requirements of Annex C.

Turkey remains willing, however, to look at other possibilities to enhance the degree of trade-facilitation of its Certificate of Control. One such possibility, under Article 4 of the SPS Agreement, could be that of negotiating an equivalence or mutual recognition agreement between Turkey and the United States (or other interested countries). In this case, the United States would have to objectively demonstrate to Turkey that its measures achieve Turkey's appropriate level of SPS protection. The United States has never requested consultations with the aim of achieving such bilateral agreement.

(b) Does the fact that Certificates of Controls 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.

In the absence of Certificates of Control, the importation would not necessarily be more cumbersome, but more lengthy, costly, unpredictable and less commercially certain. As indicated by Turkey in previous submissions, these are all elements that, ultimately, do not facilitate trade. Long procedures at customs level are costs. The unpredictability of compliance with SPS requirements is, ultimately, a cost to traders and a strain to the already scarce administrative resources of Turkey. A low degree of commercial predictability discourages trade. Turkey genuinely believes that the Certificate of Control provides an element of trade-facilitation with respect to all these possible costs.

Q132 (Turkey): In its response to question 39 posed by the Panel, Turkey asserted that "[t]he process of early certification by MARA and the actual verifications and inspections at customs level are the *only effective instruments* for Turkey to guarantee that the products placed in free circulation on its market are safe and fit for consumption" (emphasis added). Turkey has further stated that Certificates of Control serve, inter alia, the purpose of determining compliance with relevant specifications, standards and technical regulations (including for the protection of human health and safety, animal or plant life or health, environmental protection, fitness for use, etc.) (see, for example, paras. 54, 64 and 67 of Turkey's first submission).

(a) The Panel notes, however, that controls take place after the Certificates of Control have been actually approved and there seems to be no mention of that purpose in the appropriate legislation. Can Turkey provide the legal basis or arguments to support its assertion regarding this point.

The Certificates of Control include the importers' declarations that the products comply with the applicable standards and are intended to provide pre-advice of the planned customs clearance at particular points-of-entry of individual consignments. Importers must declare that the rice they wish to import *conforms to provisions of the Law on Adoption of KHK (Statutory Law) by amending respecting the Law No. 5179 on Production, Consumption and Inspection of Foodstuffs* and *to provisions of the Law No. 6968 respecting Agricultural Pest Control and Agricultural Quarantine.*[12] Turkey has already repeatedly stated that Turkish customs procedures take place both at central level (i.e., with MARA's approval of Certificates of Control) and at border level (i.e., the physical checks on the rice being imported, which must show compliance "in practice" with all requirements, standards and technical regulations certified "in theory" by MARA when approving the Certificate of Control on the basis of the information provided by the importers). Turkey believes that the fact that physical inspections take place upon importation and after the Certificates of Control have been approved does not affect the fundamental role the Certificates of Control carry-out in their assessment and early-screening of whether the products are fit for consumption.

Turkey also wishes to clarify that Article 1(d) of Decree No. 2005/9454, which provides for the legal basis of Communiqué No. 2006/5 (and Communiqué No. 2007/31), provides that one of the objectives sought is "*to secure that the imported products are in conformity with the technical regulations and/or are safe without discriminating between import products and domestic products, to protect the health and safety of persons, the existence of animals and plants and the environment and to fulfil the requirements for public morality, public policy and public security;*"[13]

It is, in fact, pursuant to the objectives listed under Article 1(d) of Decree No. 2005/9454, and in full exercise of the competences granted by such Decree, that the UFT issued Communiqué No. 2006/5,

[12] See Annex TR-4, points A and E.
[13] See Annex TR-2.

which confers MARA the responsibility of determining the conformity of the products (listed in the Annexes; Annex VI-A for rice) with respect to human health and safety, animal and plant health and safety.[14]

Turkey therefore believes that the legitimate objectives of, *inter alia*, the protection of human health and safety, animal or plant life or health, pursued by the Certificate of Control, are clearly enshrined in Turkey's legislation providing for the Certificate of Control.

(b) Are Certificates of Control in their current form the only instruments by which Turkey can achieve these objectives or would there be any other way of achieving them? If so, please describe how, justifying your answer with sufficient arguments and evidence.

Turkey believes that the Certificate of Control represents the best-suited instrument to ensure a safe, uniform and consistent application of the requirements envisaged by the relevant legislation for food products. As Turkey has already submitted, the effectiveness of its post-entry market surveillance in relation to certain products (i.e., foodstuffs and other sensitive commodities imported for human or animal consumption) is still in the process of development. This explains why the Government of Turkey still places (in what must be considered a totally WTO legitimate approach under both the Agreement on the Application of Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers to Trade) emphasis on conducting strict and rigorous processes of product pre-approval and early certification (by MARA, which is the competent ministry for rice). This scrutiny cannot be conducted solely after importation and cannot be left entirely to customs authorities. In this respect, the Certificate of Control is meant to centralize the competence and the responsibility for products' compatibility in the authority (i.e., MARA for agricultural products such as rice) which is best suited to verify compliance with all the relevant legislation, both at a central and at a border level, and which will ultimately be liable for the products' safety.

Q133. (Turkey) In its question 44 (e) posed by the Panel after the first substantive meeting with the parties, the Panel asked Turkey to "provide a copy of each of the 2,223 Certificates of Control approved between 2003 and September 2006". In its response, Turkey stated that photocopies of such Certificates of Control were available; that the relevant Ministries were not, however, authorized to provide all the copies to the Panel; and that, in any event, Turkey would be able to provide to the Panel in strict confidence copies of any individual Certificate of Control listed in Annex TR-33 upon its request.

(a) Can Turkey elaborate on the legal reasons why, under Turkish domestic legislation, the government would not be authorized to provide the copies requested by the Panel.

(b) If Turkey cannot provide a photocopy of each of the 2,223 Certificates of Control approved between 2003 and September 2006, can it then at least provide a photocopy of each of the 56 approved Certificates of Control characterized as "relevant" by the United States during the second substantive meeting with the Panel (see para. 8 of the United States statement during the second substantive meeting with the Panel and Exhibit US-71).

(c) Can Turkey indicate how many of the 2,223 Certificates of Control approved between 2003 and September 2006 were the result of the applicant resubmitting their application after it had been rejected by the Turkish authorities and provide a photocopy of each one of these Certificates of Control.

[14] See Article 1 of Communiqué No. 2006/5, Annex TR-1.

(d) Please provide statistics regarding the total number of resubmissions of applications for Certificates of Control for the importation of rice and subsequent approval or rejection of these, together with the time taken to respond to the applications by the Ministry of Agriculture and Rural Affairs (MARA). Could any of the rejected applications listed in Annexes TR-35 and TR-36 have been resubmitted and later approved, and would therefore appear in Exhibit TR-33?

(e) In its reply to question 44 posed by the Panel, Turkey refers to Exhibit TR-36, with a list of rejected Certificates of Control, including the reasons for denial, until 21 September 2006. Can Turkey provide a photocopy of each of the rejected applications as well as of the corresponding letters by which it notified the requesting companies of the rejection of a requested Certificate of Control, for the importation of rice corresponding to each of the cases cited in Exhibit TR-36.

(f) If Turkey cannot provide the full photocopies requested in paragraphs (b), (c), (d) and (e) above out of concerns for the privacy of the companies involved, can it at least provide those same photocopies after having blacked out the names of the companies.

Reply to question 133(a):

According to Article 13 of the Turkish Statistical Law, the confidential data acquired, processed and kept for official statistics cannot be passed-on to any administrative, judicial or military office, authority or person, and cannot be utilized except for statistical purposes or be utilized as a tool for proof. Public officials or other authorities that gather the information have to abide by this rule. Article 53 of the same law provides that public officials violating the prohibitions embodied in Article 13 will be punished in accordance with Article 258 of the Turkish Criminal Code No. 5237.

Reply to question 133(b) and (f):

Turkey has already provided a consolidation of the relevant information in Annex TR-33. With respect to the actual Certificates of Control, Turkey understands that the documents provided to the Panel would have to be made available also to the United States. Given the strict confidentiality requirements provided by Turkish law (see reply to question 133(a) above) and the well-established communications and information-exchanges between the United States and a number of Turkish rice traders, the Turkish officials involved in this Panel proceeding do not feel comfortable in risking information leaks and possible criminal accusations of violation of Turkish law on confidentiality. The Panel will understand that possession of copies of the actual Certificates of Control (including importers' data, imported/exported quantities, customs values, approving officials, etc.) may give rise to instances of domestic litigation in commercial, fiscal or criminal courts.

Turkey stands firm in relation to the truthfulness, completeness and usefulness of the information that it provided earlier by means of its Annex TR-33 consolidation. However, Turkey is not in a position to provide copies of the actual Certificates of Control for circulation. Exceptionally, Turkey would be willing to provide "blacked-out" copies of the 56 "relevant" Certificates of Control only to the Panel and after a clear understanding with the Panel and between the parties to this dispute that these documents would not be made available to the United States nor to any other entity beside the Panel and the WTO Secretariat. Needless to say that Turkey would have no objection to the United States making available to the Panel, for purposes of these proceedings, copies of the actual Certificates of Control obtained by individual importers which may be in the United States' possession.

Reply to question 133(c) and (e):

Turkey submits that this information and documentation is not available in the records kept by MARA.

Reply to question 133(d):

It is possible that the rejected applications have been re-submitted and later approved, but this information is not recorded by MARA. Importers are free to re-apply for the same amounts or different amounts with new applications.

Q134. (Turkey): 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 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?

Turkey submits that the expression "*Incomplete Administrative Requirements*" refers to applications that are incomplete or missing the documents which are required together with the Certificate of Control form, or to applications where the Certificates of Control form is either incomplete or contains wrong information. For example:

(i) The wrong customs classification of the imported good;

(ii) The choice of a customs point-of-entry which is not available for importation of foodstuffs; and

(iii) The missing information on the origin of the imported good.

Another instance of application of the expression "*Incomplete Administrative Requirements*" may occur when the information included in the documents and related to, *inter alia*, the name of the firm, the address, the name of the product, the country of origin, is inconsistent. Similarly, an application will be deemed incomplete if the relevant letters under the heading "*According to the feature of the Commodity to be imported please mark the following related heading with circle*" (i.e., the importer's SPS declaration) are not selected.

The expression "*Upon the Demand of the Company*" refers to cases where the applicant company withdraws its application. The expression "*Missing Documents not Completed*" refers to cases in which the applicant company is informed of the "incomplete administrative requirements" regarding its application and is given additional time to complete and/or correct the missing/wrong information, but fails to complete or correct those missing elements or mistakes in the application.

(b) Can Turkey provide further detail regarding the reasons for denial of the listed applications for Certificates of Control?

Turkey submits that, as all the applications have been returned to the applicant firms, detailed information cannot be submitted.

(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?

As explained in detail in the answer to Question 134(a), the reasons for denial of approval of Certificates of Control are normally straightforward and communicated verbally to applicants in the normal course of business. In fact, MARA always makes sure that the representatives of applicant companies are promptly informed of the missing or wrong parts of the applications.

Q135. (Turkey) The United States has submitted, as Exhibit US-29, photocopy of an application for a Certificate of Control for the importation of 10,000 tons of rice, allegedly "returned due to spelling errors". The Panel notes that "spelling errors" were not listed as "reasons for denial" of Certificates of Control in Exhibit TR-36.

(a) Can Turkey confirm whether spelling errors would be grounds for the rejection of an application for a Certificate of Control? If so, under which of the three categories ("Missing documents not completed", "Upon the demand of the Company" or "Incomplete Administrative Requirements") would a spelling error fall? What is the legal basis for rejecting applications owing to "spelling errors"?

(b) Can Turkey confirm whether the specific photocopy submitted by the United States as Exhibit US-29 corresponds to the application identified as number 3 in the list of "Denied Control Certificates Applications and Reasons for Denial in 2003", provided by Turkey in Exhibit TR-36?

Turkey submits that it cannot provide an answer to this question as the mentioned application cannot be found among MARA's records. In general terms, it is not MARA's policy to systematically deny applications on the basis of minor spelling mistakes. This would be disproportionate and defeat basic principles of reasonableness and trade-facilitation. However, in certain instances, spelling errors may insist on crucial elements of the application (such as the HS code number) and the process of importation. In those instances, confusion may lead to individual rejections. To this end, however, Turkey would like to underline that these rare occurrences must also be seen in light of the extreme simplicity of application and/or re-application. Importers work closely with MARA and have generally developed long-standing and personal relations with MARA's officials. It does not take much or a long time to re-apply making a small (but possibly important) correction that will avoid later problems or misunderstandings. Again, Turkey regrets that the United States would use an individual episode to imply or suggest a pattern of systematic rejection of applications for futile reasons. This has never occurred and the large volumes of trade and low percentages of rejections stand as clear and powerful testimony to the contrary. Turkey also submits that the specific photocopy submitted by the United States in Exhibit US-29 does not correspond to the application identified as number 3 in the list of "Denied Control Certificates Applications and Reasons for Denial in 2003" provided by Turkey in Annex TR-36 since the dates of application do not match.

Q136. (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?

(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?

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

(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?

(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)?

Reply to question 136(a) and (b):

Turkey submits that there was no period in which the Certificates of Control were not approved, but applications were at times simply not submitted due to importers' commercial considerations relating to the profitability of the importation and other commercial factors. The reason why importers might not have used validly approved Certificates of Control in certain period is related to a number of factors, including the presence of domestic stocks which satisfied the internal demand of rice and that may have made importation of rice simply less profitable in certain periods. Turkey would also like to draw the attention of the Panel that importers traditionally apply for Certificates of Control in relation to quantities greater than the ones that they actually intend to import. Turkey has never regarded this as a problem and has never conditioned the approval of Certificates of Control to the importation of the exact amounts stated on the Certificates of Control. Certificates of Control are not and never were import licenses and, unlike import licenses, are not quantity-specific.

Reply to question 136(c):

There is no difference between the Certificates of Control approved for importation of rice under the MFN or applied rates, the TRQ regime, or the FTA preferential rates. The importer did not have to specify under which of the three possibilities it intended to import. However, as also shown in Annex TR-32, an import licence from the UFT General Directorate of Imports was necessary for the approval of Certificates of Control by MARA for those importers who wished to import under the TRQ regime or the FTA in-quota volumes of trade.

Reply to question 136(d):

The right to import at preferential tariff rates within the TRQ system is granted by means of import licenses issued by the UFT. Certificates of Control do not grant the right to import at the TRQ preferential rates. There are no in-quota or out-of-quota Certificates of Control. Certificates of Control are, at times, approved in relation to importation of rice within a preferential quota (TRQ or FTA). In these cases, the validity of the Certificates of Control is, as mandated by law, 12 months, but an importer would no longer be able to import within the preferential quota if the TRQ has closed or if the quota has been filled. This is the traditional operation of a TRQ system and it works in this way in all WTO Member countries. This is, however, an academic case, in that all importers will

want to quickly import the rice within the quota to benefit of the tariff advantage. In any event, should they not be able to import within the quota before the expiry of the TRQ or before the exhaustion of the quota, the Certificate of Control will remain valid and will allow them to import at the MFN or applied rates of duty.

Reply to question 136(e):

No. When applying for a Certificate of Control, importers are free to apply for the quantity they wish, regardless of the quantity indicated in the import licenses issued by the FTU. Only the quantity for which they have obtained an UFT import license may, however, enter under the preferential rates.

Q137 (Turkey): In its reply to question 49 posed by the Panel, (para. 79) the United States argues that

> **"The fact that Turkey's Annex 20 shows a wide differential in 2003 and 2006 between Control Certificates granted and actual imports is not reflective of a lack of competitiveness but rather the existence of the import restrictions raised by the United States in these panel proceedings. In Exhibit US-59, the United States has presented the data from Annex 20 in graphical form. In 2003, the pace of Turkish imports was tracking the volume of outstanding Control Certificates at pace – at least in January through early-September 2003 – before imports were halted. The most likely explanation as to why realized imports fell short of Control Certificate volumes in 2003 was Turkey's decision, pursuant to Letter of Acceptance 964, to prohibit the issuance of Control Certificates as of September 10, 2003. Thus, rice imports were prohibited for nearly four months, or one third of the calendar year. In 2004 and 2005, realization rates were very high because, according to Turkey's import data, virtually all imports were within the TRQ regime. By contrast, Control Certificates covering nearly 1 million tons in 2006 are grossly out of line with actual imports through September 2006 and outpace trade-to-date by nearly 500 per cent ..."**

Can Turkey provide arguments to respond to these assertions, making reference to relevant evidence, as appropriate.

Turkey strongly disagrees with the allegations put forward by the United States. First, Turkey rejects the idea of the existence of any import restriction on rice. Turkey has already submitted relevant evidence against the allegations of the United States. In particular, Turkey has shown that a total of 2,242 Certificates of Control (59.5% of which for out-of-quota trade) were approved between 2003 and 9 November 2006, despite the existence of the so-called "Letters of Acceptance" and this alone stands as clear and irrefutable evidence against the idea that Turkey was maintaining prohibitions or restrictions on the importation of rice.

Turkey also submits that rice imports were never "prohibited for nearly four months." When Certificates of Control were not approved this was merely a result of both the absence of applications for approval and/or the existence of considerable "left-over" approved volumes in the hands of the importers. Turkey has already pointed-out that, in its view, the applications for approval of Certificates of Control were submitted by the importers solely on the basis of business considerations and commercial calculations. These business considerations may be dictated, *inter alia*, by profit margins, the fall in competitiveness of imported over domestic rice as a consequence of the steep increase of the world price for rice, speculative positions, currency fluctuations, and the presence of large quantities of stocked rice among business operators.

Secondly, Turkey submits that it sees no relation between the alleged existence of import prohibitions or restrictions and the differential between the quantities stated in the Certificates of Control and the ones realized as actual imports. Once importers obtained approval of Certificates of Control, actual importation depended exclusively on their evaluation of the profitability of the commercial operation (see the factors listed above). When Certificates of Control are approved (and the administration has carried-out its early review on the safety of the imports through the approval of the Certificates of Control), the decision on actual importation exclusively depends on the importers' business determinations. In this respect, Turkey submits that, even if import restrictions had really been in place through the alleged denial of approval of Certificates of Control, this would still have had no influence on the choice of an importer as to whether or not the importation should have been realized. On the contrary, if restrictions had really been in place, importers would have had an even greater interest to realize the importation through Certificate of Control so hardly obtained.

Thirdly, the fact that realization rates were high under the TRQ does not prove anything. In fact, importers had a far greater interest in realizing all of the licensed imports under the TRQ in order to take full advantage of the preferential rates (and the quota rents). Certificates of Control for MFN trade, which remained always available, were requested in greater quantities so that importers could manage and decide when and how importation should take place with the necessary margin of discretion. With particular regard to the 2006 figures, it is clear that the *ratio* of approved Certificates of Control is "grossly out of line with actual imports through September 2006" for the very simple fact, which apparently the United States keeps forgetting, that Certificates of Control remain valid for 12 months after approval. If anything, such calculation and clever manipulation of the data can only be conducted *a posteriori*, once importers will have autonomously decided whether or not to realize the imports for which Certificates of Control have been approved.

Turkey simply does not understand on what basis and for what purposes the United States is trying to establish a connection between the alleged restriction and the difference between the realization rates, between 2003 and 2006. In any event, as explained above, Turkey believes that this architecture is of no relevance for purposes of this proceeding.

Q138 (Turkey): The United States has submitted, as Exhibit US-35, a letter dated 24 March 2006, by which the Turkish Minister of State informs the United States Trade Representative that the Control Certificates "will be issued as of April 1, 2006".

(a) Does this letter imply that Certificates of Control were not being issued at the time when the letter was issued?

(b) What relation, if any, does the date of 1 April 2006, mentioned in the Turkish Minister of State's letter, bear with the end of the TRQ on 31 July 2006 (please make reference to relevant evidence, as appropriate.)? Was the adoption of any new or modified measure necessary to achieve the results indicated in the Minister's letter? If so, has any such measure been adopted as a result of the Minister's letter? What is the factual and legal relationship between the letter in Exhibit US-35 and any measure adopted to put that into effect, on the one hand, and, on the other hand, the Letter of Acceptance signed by the Minister of Agriculture and reproduced in Exhibit US-36?

(c) Can Turkey also elaborate on its closing statement during the second substantive meeting with the Panel (para. 3), that the letter "was designed to reassure the United States that, with the phasing-out of the TRQ, traders would likely resume trading on MFN terms" and that "[i]t was not an implicit confirmation of any systematic denial of the approval of Certificates of Control".

Reply to question 138(a) and (c):

Turkey confirms that the diplomatic Letter to Ambassador Portman was designed to reassure the United States that, with the phasing-out of the TRQ, traders would have likely resumed trading on MFN terms. It was not an implicit confirmation of any systematic denial of the approval of Certificates of Control. The Letter does not imply that Certificates of Control were not being issued.

Reply to question 138(b)

Turkey submits that there is no relation between the diplomatic Letter, dated 1 April 2006 and the expiry of the TRQ regime on the 31 July 2006. In particular, the expiry date of the TRQ regime was already established by Decree No. 2005/9315,[15] which was adopted on 10 August 2005 and published on 13 September 2005 and which provided the legal framework for the last TRQ opening. Turkey also submits that no measure was either adopted or modified following the Minister's letter.

In addition, Turkey firmly rejects the idea that there would be a relation between the diplomatic Letter of 1 April 2006 and the Letter of Acceptance included in Exhibit US-36. The first Letter must be considered as an official and formal diplomatic act of the Minister, aimed at addressing the United States' concerns and at facilitating a diplomatic solution. The Letters of Acceptance are, instead, mere instruments of internal communication among Turkish administrators and public officials, unofficial policy recommendations that were never enforced. With particular reference to the letter contained in Exhibit US-36, Turkey would like to draw the Panel's attention to the fact that, contrary to the policy recommendation contained therein, Certificates of Control were granted in great quantities before, during and after the period between 1 April 2006 and 1 August 2006.

Q141. (Turkey) In its statement during the second substantive meeting with the Panel (para. 6), Turkey asserted that "[t]here is no provision that gives the relevant authority discretion not to approve Certificates of Control." In other submissions (see, for example, para. 78 of its first submission and reply to question 23 from the Panel), Turkey has stated that the so-called "Letters of Acceptance" are internal communications aimed at developing policy recommendations.

(a) If the Minister of Agriculture and Rural Affairs has no discretion not to approve Certificates of Control, under what legal basis have then officers from the same ministry submitted internal communications to the Minister recommending that Certificates of Control not be approved? What could explain a Director General of MARA repeatedly making a recommendation to the Minister to adopt a policy if the Minister had no discretion to adopt such policy?

The Directorate General only makes recommendations to the office of the Minister. It is then the responsibility of the Minister to consider or not these internal recommendations for purposes of defining an internal policy which may or may not become a general policy. For a general policy to be adopted, independently of whether or not it is within the competence of a Minister and in line with Turkish law, many other policy recommendations will be considered, coming from the same administration or other relevant ministries.

(b) What legal basis, if any, would give the Director General of MARA the authority to issue these so-called "Letters of Acceptance". Please also specify under what basis these letters could extend to the subject of the issuance of Certificates of Control.

[15] See Annex TR-9.

There is no legal basis in that the Letters of Acceptance are internal documents to any Turkish administration that are customary for officials to interact and put forward or discuss policy recommendations.

(c) What factors or events would trigger these recommendations from the Director General of MARA?

Demands of interest groups and general policy decisions may trigger these recommendations within a part of the administration.

(d) Would one of the reasons that could trigger such a recommendations from the Director General of MARA be that there is a sufficient level of domestic production or a high level of imports?

Yes, this could be the case.

(e) Could the Minister refuse the recommendation made by a Director General of MARA through a so-called "Letter of Acceptance"? Please provide documentary evidence in support of your response.

Yes, the Minister may refuse the recommendation made by a Director General of MARA.

Q142. (Turkey) Can Turkey provide evidence of so-called "Letters of Acceptance" containing policy recommendations that the Minister of Agriculture and Rural Affairs did not approve?

There is no such document that Turkey is in the position to circulate given the privileged natured of the communications internal to the Administration and the confidential nature of the information contained therein.

Q143. (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?

No. Letters of Acceptance relevant to this proceeding were ever circulated within the Administration prior to the ones identified by the United States in its submission.

Q144. (Turkey) Please describe the procedure that follows the issuance of a so-called "Letter of Acceptance". Would such a letter, after being accepted by the Minister, be communicated to the provincial MARA offices, and if so, how?

There is no standard procedure within the Turkish Administration for purposes of what may happen following the issuance of a Letter of Acceptance. It is possible that such a letter, after having been endorsed by a Minister, could be circulated within the provincial level of the administration through the normal channels of communication.

Q145 (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?

Turkey preliminarily submits that the Letters of Acceptance cannot be defined, according to the Turkish legal system, as "domestic law", but rather as policy recommendations, falling outside the very competence of the Minister, to which the domestic courts appear to have given effect. Turkey believes that no value should be given to the rulings issued by the Administrative Courts of Ankara by this Panel and for purposes of this proceeding. This follows both from past Panels' and other international tribunals' rulings and from factual considerations.

Turkey notes that the International Court of Justice (ICJ) and the Permanent Court of International Justice (PCIJ) made *independent* reviews of jurisprudence of domestic courts. In *Brazilian Loans*,[16] the PCIJ stated that: "*The Court will endeavour to make a just appreciation of the jurisprudence of municipal courts. If this is uncertain or divided, it will rest with the Court to select the interpretation which it considers most in conformity with the law*".[17] In *Elettronica Sicula S.p.A (ELSI)*,[18] the ICJ stated that the ruling of a domestic court shall not automatically be accepted by an international tribunal.

Turkey also notes that the Panel in *US – 1916 Act*[19] specifically refers to the case law of the PCIJ and ICJ and thereafter conducts an independent review of the jurisprudence issued by domestic courts. Turkey believes that the Panel should follow this approach. In line with the case law from the ICJ and PCIJ, as well as the *US – 1916 Act*, this Panel should conduct an independent review of the jurisprudence refraining from automatically accepting the rulings issued by domestic courts. This means that this Panel should:

(i) Be able to select jurisprudence that reflects the interpretation which is most in conformity with Turkish law;
(ii) Take into account the quality of the reasoning on what it perceives to be the dominant interpretation; and

(iii) Respect the hierarchy of the national court system.

Turkey believes that in following this approach, the Panel should not take into consideration the rulings issued by the Administrative Court of Ankara.

First, Turkey believes that this Panel should keep in mind that there are ongoing lawsuits that, in accordance with Turkish law, challenge the legality of the *ultra vires* act and, implicitly, the legality of the Letters of Acceptance.

Second, there is not sufficient case law available and the Panel will not be able to have a satisfactory view of the jurisprudence, at least before the ongoing cases have been decided.

Third, there is no review from a higher court.

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[16] *Brazilian Loans*, PCIJ, Ser. A. nos. 20-1.
[17] Ibid, p. 124.
[18] *Elettronica Sicula S.p.A* (ELSI) (*United States of America v. Italy*), ICJ Reports 1989, p 15, at p. 47.
[19] *United States- Anti-dumping Act of 1916* (Japan), WT/DS162/R and *United States- Anti-dumping Act of 1916* (EC), WTDS136/R.

With particular reference as to whether a different value should be given to rulings issued by courts of different ranking, Turkey submits that the weight of the interpretation should follow the hierarchy of the national court system. This is also in accordance with the approach adopted by the Panel in the *US – 1916 Act*. In this dispute, the Panel took into account the fact that the United States' Supreme Court had yet to address the issue. When there is established practice from a higher court, a decision from a lower court does naturally not have any value. However, even when there is no jurisprudence from a higher court, an international tribunal should be careful in attributing any value to a lower court's decision. In finding the right balance between the principle of sovereignty and the assessment of domestic law, this Panel should take into account the legal system of the WTO Member.

In light of these considerations, and taking in particular account the uncertainty created by the ongoing lawsuits, the lack of sufficient available jurisprudence, as well as the fact that the decisions are issued by a domestic lower court, Turkey believes that this Panel should not give any value to interpretations of domestic law developed by the Administrative Court of Ankara for purposes of this proceeding. Furthermore, in line with this reasoning, the arguments of a national administration should not be attributed any value in the Panel's review of what constitutes domestic legislation and whether Turkey has acted consistently with the WTO Agreements.

Finally, it should be noted that the "allegedly erroneous interpretation of Turkish domestic law developed by the local court" was not appealed by the Turkish administration for reasons of judicial expediency.

Q146. (Turkey) Could Turkey please confirm, making reference to relevant evidence, as appropriate, the dates during which the tariff quota for the various types of rice imports (paddy, brown, milled) was opened and closed. Could Turkey also please confirm whether or not there was a domestic purchase requirement at all periods and if so, whether or not there were specific domestic purchase ratios to imported paddy, brown and milled rice to which importers could determine how much domestic rice needed to be purchased to be able to import a certain volume of paddy, brown or milled rice.

The first TRQ was opened on 20/04/2004 through Decree No. 2004/7135 and expired on 31/8/2004 with the following domestic purchase requirement ratios[20]:

PURCHASED FROM TGB	**TO BE ALLOCATED BASED ON THE PURCHASE FROM TGB**		
	HS CODE	**ITEM NAME**	**QUANTITY**
Per 1.000 Kg Paddy Rice	1006.10 (Exc. 1006.10.10)	Rice in the husk (paddy or rough) (Not for sowing)	1.000 Kg
Per 1.000 Kg Paddy Rice	1006.20	Husked (brown) rice	800 Kg
Per 1.000 Kg Paddy Rice	1006.30	Semi-milled or wholly milled rice, whether or not polished or glazed	600 Kg
Per 1.000 Kg Rice	1006.10 (Exc. 1006.10.10)	Rice in the husk (paddy or rough) (Not for sowing)	1.666 Kg
Per 1.000 Kg Rice	1006.20	Husked (brown) rice	1.333 Kg
Per 1.000 Kg Rice	1006.30	Semi-milled or wholly milled rice, whether or not polished or glazed	1.000 Kg

[20] See Annexes TR-11 and TR-12.

The second TRQ was established by Decree No. 2004/7756 and was in place from 01/11/2004 until 31/7/2005, with the following domestic purchase requirement ratios[21]:

		THE ITEM TO BE ALLOCATED		
		HS CODE	**ITEM NAME**	**QUANTITY**
For the Items purchased from paddy producers having permission to plant paddy rice or from their cooperatives and unions *	Per 1.000 Kg Paddy Rice	1006.10 (Exc. 1006.10.10)	Rice in the husk (paddy or rough) (Not for sowing)	1.000 Kg (1)
	Per 1.000 Kg Paddy Rice	1006.20	Husked (brown) rice	800 Kg (2)
	Per 1.000 Kg Paddy Rice	1006.30	Semi-milled or wholly milled rice, whether or not polished or glazed	600 Kg (3)
For the Items purchased from Turkish Grain Board	Per 1.000 Kg Paddy Rice	1006.10 (Exc. 1006.10.10)	Rice in the husk (paddy or rough) (Not for sowing)	500 Kg
	Per 1.000 Kg Paddy Rice	1006.20	Husked (brown) rice	400 Kg
	Per 1.000 Kg Paddy Rice	1006.30	Semi-milled or wholly milled rice, whether or not polished or glazed	300 Kg
	Per 1.000 Kg Rice	1006.10 (Exc. 1006.10.10)	Rice in the husk (paddy or rough) (Not for sowing)	833 Kg
	Per 1.000 Kg Rice	1006.20	Husked (brown) rice	666 Kg
	Per 1.000 Kg Rice	1006.30	Semi-milled or wholly milled rice, whether or not polished or glazed	500 Kg

*: Applied as (1): 700 Kg, (2): 560 Kg, (3): 420 Kg if purchased from the paddy producers having permission to plant paddy rice or from their cooperatives and unions located in Balıkesir, Bursa, Çanakkale, Edirne, Kırklareli, Sakarya and Tekirdağ.

[21] See Annexes TR-16 and TR-17.

The last TRQ was opened on 01/11/2005 and closed on 31/7/2006 with the following domestic purchase requirement ratios[22]:

		THE ITEM TO BE ALLOCATED		
		HS CODE	**ITEM NAME**	**QUANTITY**
For the Items purchased from paddy producers having permission to plant paddy rice or from their cooperatives and unions *	Per 1.000 Kg Paddy Rice	1006.10 (Exc. 1006.10.10)	Rice in the husk (paddy or rough) (Not for sowing)	800 Kg (1)
	Per 1.000 Kg Paddy Rice	1006.20	Husked (brown) rice	640 Kg (2)
	Per 1.000 Kg Paddy Rice	1006.30	Semi-milled or wholly milled rice, whether or not polished or glazed	480 Kg (3)
For the Items purchased from Turkish Grain Board	Per 1.000 Kg Paddy Rice	1006.10 (Exc. 1006.10.10)	Rice in the husk (paddy or rough) (Not for sowing)	500 Kg
	Per 1.000 Kg Paddy Rice	1006.20	Husked (brown) rice	400 Kg
	Per 1.000 Kg Paddy Rice	1006.30	Semi-milled or wholly milled rice, whether or not polished or glazed	300 Kg
	Per 1.000 Kg Rice	1006.10 (Exc. 1006.10.10)	Rice in the husk (paddy or rough) (Not for sowing)	833 Kg
	Per 1.000 Kg Rice	1006.20	Husked (brown) rice	666 Kg
	Per 1.000 Kg Rice	1006.30	Semi-milled or wholly milled rice, whether or not polished or glazed	500 Kg

*Applied as (1): 600 Kg, (2): 480 Kg, (3): 360 Kg if purchased from the paddy producers having permission to plant paddy rice or from their cooperatives and unions located in Balıkesir, Bursa, Çanakkale, Edirne, İstanbul, Kırklareli, Sakarya and Tekirdağ.

Q147. (Turkey) Could Turkey please explain why data from Exhibit TR-33 seem to indicate that in-quota imports of non-EC origin rice occurred during periods in which the Panel understands the TRQ was not in place (January, September and October 2004; August and September 2005; and August 2006)?

In accordance with Turkey's reply to question 136(d), these imports took place at MFN rates, with Certificates of Control that were approved for importation within the TRQ but that, for whatever business determination, importers may have decided not to import. Given the one-year validity of the Certificates of Control, it is clear that importers would have retained the ability to import at a later stage and under MFN conditions.

[22] See Annexes TR-9 and TR-13.

Q148. (Turkey) In its response to question 18 posed by the Panel, Turkey responds that "no change was introduced into its import regime for rice in November 2005 or as a consequence of the initiation of WTO dispute settlement proceedings". The only change would have been that the TRQ lapsed on 31 July 2006, without being renewed.

(a) Please explain why the TRQ has not been reopened since?

As indicated in its response to question 79, Turkey applied the TRQ system for enhancing greater market supply and market stabilization. A new TRQ has not been introduced after the expiration of the last TRQ in 2006 because there is no longer need for such an instrument to achieve the objectives of greater market supply and market stabilization. In particular, Turkey will confess that TRQ systems are costly to administer and it prefers market forces to freely interact.

(b) In its response to question 79 posed by the Panel, Turkey stated in turn that the TRQ regime "pursued, at the same time, two legitimate objectives, i.e., that of a greater market supply and that of market stabilization". Can Turkey explain how these two objectives could now be guaranteed in the absence of the TRQ regime.

Turkey refers to the answer provided to question 82. In particular, Turkey submits that the domestic and international economic indicators lead Turkey to the assumption that there will not be, at least for the foreseeable future, needs for market intervention and stabilization of the types that the TRQ helped address. The only real market stabilization instruments will remain the action of the TMO coupled with the use of appropriate MFN and applied rates of duty.

(c) In its response to question 82 posed by the Panel, Turkey stated that "[t]he domestic and international economic indicators also lead Turkey to the assumption that there will not be, at least for the foreseeable future, needs for market intervention and stabilization of the types that the TRQ helped address." Is the Panel then right in concluding that if any of those domestic and international economic indicators were to change, Turkey could then reevaluate the convenience of reintroducing a TRQ regime for the importation of rice? If this is not the case, please explain making reference to relevant evidence, as appropriate.

No. Turkey has already indicated, both during the consultations with the United States and before this Panel, that it will no longer have recourse to the TRQ system. Turkey believes that, despite the theoretical possibility that "domestic and international economic indicators" may change in the future, the TRQ system is an instrument that Turkey considers too costly and administrative burdensome to achieve the intended objectives of market intervention and stabilization. Other less complicated trade policies (i.e., the action of the TMO as an intervention agency, the appropriate and legitimate use of MFN and applied rates of duty) stand-out as sufficient mechanisms to manage the market in a WTO consistent fashion.

(d) Explaining the domestic and international indicators that lead Turkey to the assumption that there will not be, at least for the foreseeable future, needs for market intervention and stabilization of the types that the TRQ helped to address, Turkey mentions that the domestic rice remains competitive with predictable production forecasts. Can Turkey please explain if this means that domestic rice was not competitive before the introduction of the TRQ?

In its response to question 82, Turkey stated that the "domestic rice remains competitive". Turkey simply meant that domestic rice used to be competitive and it will still be competitive, at least for the foreseeable future.

(e) Were Turkey to reintroduce a TRQ regime for the importation of rice, would any change need to be introduced in the current domestic legislation? Is the legislation that allowed for the establishment of the TRQ still in force?

Turkey submits that, with respect to rice-specific legislation, the reintroduction of a new TRQ system for rice imports, of the kind that is the object of these proceedings, would require the adoption of a new set of legislation. In particular, it would require the adoption of a new Decree fixing the quota openings, quantities and coefficients, together with its implementing Communiqué, providing, *inter alia*, for the quantities of domestic rice to be purchased and for the deadlines for the relevant applications. All the legislation which is specifically related to the establishment of tariff quotas for rice has expired and a new set of rules would therefore need to be adopted, promulgated and published.

With respect to its general trade legislation, Turkey submits that Decree No. 2004/7333 is still in force. This Decree, however, provides the legal basis for the management of all types of quotas and tariff quotas, irrespectively of the product, of the nature and the trade measure allowing for the adoption of the quotas. This legislation is not rice-specific. For example, it provides the legal basis for the management of quotas and tariff quotas stemming from free trade agreements, or applied as a result of safeguard measures.

Q149. (Turkey) In paragraph 50 of Turkey's rebuttal, Turkey argued that "[i]t is clear that a TRQ system without the domestic purchase requirement would have resulted in too great an advantage in favour of imported products. This outcome would have also carried negative consequences in terms of the viability and affordability of Turkey's market intervention mechanisms and its ability to comply with WTO obligations in relation to its committed levels of Aggregate Measurement of Support." Could Turkey please explain how, in its view, it would have failed to comply with WTO obligations in relation to its committed levels of Aggregate Measurement of Support without the domestic purchase requirement as a part of its tariff quota mechanism?

Turkey submits that it has consistently complied with WTO obligations in relation to its committed levels of Aggregate Measurement of Support for agricultural production (i.e., the *de minimis* level of support), but that a TRQ system without the domestic purchase requirement would have likely resulted in too great an advantage in favour of imported products and it would have carried negative consequences in terms of the viability and affordability of Turkey's market intervention mechanisms. The calculations in relation to the amounts of domestic support that could have resulted are difficult to make, but Turkey considered this an issue that it had to factor when designing the TRQ, foreseeing the market-stabilization effects, and anticipating its trade and budgetary consequences.

Q150. (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. Could Turkey provide any further information on this regard, making reference to relevant evidence, as appropriate.

The authorities at customs points-of-entry are notified by the central administration of the reference prices for paddy rice, brown rice and rice simply in order for the customs authorities to be aware of

the average prices for these commodities and to detect instances of unfair trade and tax loss that might occur due to the importer's under-valued customs declarations. In this way, Turkey aims at ensuring that its customs authorities act vigilantly in cases of suspiciously out-standing margins of difference between the notified price and the (average) reference price.

Q151 (Turkey): In its reply to question 75 posed by the Panel, Turkey asserted that the correct methodology for interpretation of the TRIMs Agreement should require a preliminary assessment of the existence of both the trade and the investment elements of an alleged TRIM. Turkey also stated that, in order to establish the existence of a violation of the TRIMs Agreement, its domestic purchase requirement must first be found to be inconsistent with the provisions of GATT Article III. Finally, Turkey invited the Panel to reject the United States claims regarding an alleged violation of the TRIMs Agreement because the United States has not proved how Turkey's domestic purchase requirement would result in a trade-related investment measure and if so whether it would violate GATT Article III. Please clarify the implications of the above statements in relation to the "order of examination" of the US claims:

(a) Does Turkey propose that the Panel first examine US claims under GATT Article III:4 and then consider the claims under the TRIMs Agreement separately?

(b) In the negative, can Turkey explain why would the United States be required to prove how Turkey's domestic purchase requirement would result in a trade-related investment measure in the first place?

(c) Alternatively, does Turkey believe that once the Panel has made a ruling under GATT Article III:4, it should resort to judicial economy and refrain from making a finding under the TRIMs Agreement?

Turkey believes that, in the first place, the Panel should refrain from making any finding or recommendation on the United States' claims of an alleged violation of either GATT Article III:4 and the TRIMs Agreement due to the expiry of the TRQ regime. Turkey refers to its previous arguments on this issue as submitted in the written pleadings.[23]

Should the Panel decide to review those claims despite the TRQ regime's expiry, Turkey submits that the Panel should first examine the United States' claims under GATT Article III:4 and then resort to judicial economy and refrain from making a finding under the TRIMs Agreement.

Alternatively, in the event that the Panel should review previously or anyway separately the claims under the TRIMs Agreement, Turkey considers that the correct methodology for the interpretation of the TRIMs Agreement would require the Panel to preliminarily assess the existence of both the trade and the investment elements of the alleged TRIM (i.e., the domestic purchase requirement). This appears to be reinforced by the reading of Article 1 of the TRIMs Agreement, according to which "*[t]his Agreement applies to investment measures related to trade in goods*", as well as by past panel practice. In this respect, Turkey simply believes that the United States has yet failed to prove that the domestic purchase requirement is an investment measure.

There is no set definition of what an investment measure is.[24] The Panel in *Indonesia – Autos* found the measures to meet the 'investment requirement' as the review of the legislative provisions related to

[23] See, in particular, paras. 136-139 of Turkey's First Submission and paras. 37-44 of Turkey's Rebuttals.

[24] Korea, in its oral statement, for example, suggested that the "financial movement across the border" could be understood as an essential element of any investment measure.

those measures revealed "*investment objectives and investment features and which refer to investment programmes*."[25] Should this Panel follow the reasoning of the *Indonesia – Autos* Panel,[26] it would find that Turkey's domestic purchase requirement is not an investment measure. Turkey submits that its domestic purchase requirement was introduced within the TRQ in order to partly moderate the advantageous effects of the preferential rates (i.e., advantages which were totally in favour of imported products). It was never meant to promote the domestic industry; rather it was designed to pursue the legitimate objective of market stabilization by keeping prices at level that would, at the same time, allow trade while maintaining a viable balance between consumer's interests and producers' expectations. Turkey has done so providing an advantage to imported rice, while other import options (i.e., MFN and FTA) remained always available. There is no investment element in the domestic purchase requirement, nor is there one in the legislative framework providing for the TRQ.

In this respect, it is misleading and incorrect to state, as the United States does, that the increase in domestic production of rice is a direct result of the domestic purchase requirement and that this should be in itself evidence of the existence of an investment intent. Turkey wishes to draw the Panel's attention to the following factors:

(i) The renewal and modernization of farming systems and technologies in rice production (*inter alia,* more efficient irrigation systems, the utilization of high-quality seeds, and the rehabilitation of the cultivated lands);

(ii) The change in the methods of estimation of production as a consequence of the new farmers' registration system and agricultural policies of MARA; and

(iii) The increase in the harvested area, as also shown in Exhibit US-45.

These are all factors that better explain the increase in Turkey's rice production, which is rather the result of an increase in the *productivity*. This productivity improvement cannot be considered, by itself, as convincing evidence of the existence of an investment element. Turkey also wishes to point-out that imports of rice have equally increased. As already submitted by Turkey,[27] in the period between 2004 and 2006, in which the TRQ regime was in force, rice equivalent imports have increased from 146,458 tonnes to 253,436 tonnes, while the rice equivalent production has increased from 294,000 tonnes to 390,000 tonnes.

Turkey therefore believes that, if the Panel were to engage in a review under the TRIMs Agreement, its domestic purchase requirement should not be considered a trade-related investment measure.

[25] *Indonesia – Certain Measures Affecting the Automobile Industry*, Panel Report, para. 14.80
[26] *Indonesia – Certain Measures Affecting the Automobile Industry*, Panel Report.
[27] See Turkey's Replies to Questions posed by the Panel, question No. 49(c).

ANNEX F-5

COMMENTS BY TURKEY ON THE REPLIES BY THE UNITED STATES TO THE QUESTIONS POSED BY THE PANEL AND TURKEY AFTER THE SECOND SUBSTANTIVE MEETING
(20 February 2007)

Q99. (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;

(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.

(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.

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.

(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.

(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 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.

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

Turkey reaffirms its understanding of the possible cause for the discrepancies as indicated in its Reply to Question 99. In particular, Turkey used realized import data collected by the Undersecretariat for Customs and processed by the Turkish Statistics Institute (TUIK). While Turkey and the United States appear to have taken these figures from the same source (i.e., TUIK), Turkey insists that it acquired the relevant statistics officially from TUIK. On the other hand, the United States did not get its figures and trade data directly from TUIK, but obtained them from the Global Trade Information Service (GTIS), a private operator that draws its information from TUIK. GTIS receives monthly data from TUIK organized by item and country basis. However, TUIK regularly and progressively updates the information/data which it has previously provided on the basis of the adjustments needed to reflect trade flow corrections of information updates. Turkey believes that GTIS may not have

updated its records for the products under examination, hence the occasional discrepancies. It is clear that this process of occasional adjustment of statistics is more likely in relation to more recent figures.

Q100. (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.

See Turkey's Comments to the Reply by the United States to Question 99 above.

Q116. (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.

Turkey confirms that 27 Certificates of Control have been applied for and approved between 1 May 2006 and 9 November 2006 in relation to imports of rice from the United States at MFN rates. As indicated in Turkey's reply to question 133(b) and (f), Turkey stands firm in relation to the truthfulness, completeness and usefulness of the information that it provided earlier by means of its Annex TR-33 consolidation. The statement made by the United States that "*(I)n response, Turkey asserted that it was less a matter of what Turkey could provide than what it was choosing to provide to the Panel*" does not correspond to reality. Turkey has never used these words. Turkey has diligently and willingly provided the Panel with all information that it is not covered by confidentiality requirements under Turkish law. To suggest or imply the opposite is, yet again, an unacceptable stand taken by the United States. As indicated in Turkey's reply to question 133(b) and (f) in relation to the '*56 "relevant" Certificates of Control*', Turkey would be willing to provide, exceptionally, "blacked-out" copies of these 27 Certificates of Control only to the Panel and after a clear understanding with the Panel and between the parties to this dispute that these documents would not be made available to the United States nor to any other entity beside the Panel and the WTO Secretariat.

In fact, as pointed-out by Turkey in its reply to question 133, Turkey understands that the documents provided to the Panel would have to be made available also to the United States. Given the strict confidentiality requirements provided by Turkish law and the well-established communications and information-exchanges between the United States and a number of Turkish rice traders, the Turkish officials involved in this Panel proceeding do not feel comfortable in risking information leaks and possible criminal accusations of violation of Turkish law on confidentiality. The Panel will understand that possession of copies of the actual Certificates of Control (including importers' data, imported/exported quantities, customs values, approving officials, etc.) may give rise to instances of domestic litigation in commercial, fiscal or criminal courts. According to Article 13 of the Turkish Statistical Law, the confidential data acquired, processed and kept for official statistics cannot be passed-on to any administrative, judicial or military office, authority or person, and cannot be utilized except for statistical purposes or be utilized as a tool for proof. Public officials or other authorities that gather the information have to abide by this rule. Article 53 of the same law provides that public officials violating the prohibitions embodied in Article 13 will be punished in accordance with Article 258 of the Turkish Criminal Code No. 5237.

In any event, and independently from the Turkish confidentiality requirements, Turkey notes that it is unfortunate and unacceptable for the United States to systematically make allegations in relation to

assumptions or theories for which they have no evidence, shifting the burden of proof onto Turkey. Turkey believes that the burden of proof rests on the United States to prove its complex and creative theories such as the one according to which the 27 Certificates of Control would not, in fact, have been approved or that they were requested for approval by importers without a reason since large quantities of previously approved, but un-imported, rice was stocked in bonded warehouses and available for release on the Turkish market. Something in this imaginary story is clearly wrong and Turkey reiterates its belief that the burden of proof to substantiate its allegations must stand squarely on the United States. The United States has not proven its case.

As a final comment, Turkey would like to stress that, ultimately, the picture painted by the United States confirms the general reality of rice trade. Rice importation is, to a large extent, dictated and shaped by the business determinations and commercial decisions of traders. Turkey cannot explain (and the United States is, presumably, in the same position) why importers would have requested approval for 27 Certificates of Control in relation to rice from the United States while, as alleged by the United States, they had large quantities of ready-to-be-customs-cleared rice available in bonded warehouses. Assuming that the allegation made by the United States is correct, Turkey would submit that, maybe, the real reason for this seemingly erratic behaviour by importers must be found in their business calculations and decisions. It is possible, for example, that those importers would have (voluntarily!) left certain amounts of rice in bonded warehouses waiting for the appropriate moment to release it on the Turkish market in order to maximize the economic returns. It is also possible that those importers would have (voluntarily!) applied for 27 Certificates of Control in order to import rice in the future (the Certificates of Control have a validity of one year from date of approval) and for purposes of planning future importation or even just to re-stock those bonded warehouses about to be emptied as a consequence of their business determinations.

It strikes as a bit odd that every single move or trade pattern related to rice importation would be seen by the United States as part of a broader and far-reaching conspiracy by Turkey with trade-distortive and protectionist objectives. Furthermore, it appears a bit curious that the United States would not be able to prove their allegations in relation to the "theory" surrounding the 27 Certificates of Control and the large quantities of rice released from bonded warehouses by collecting evidence from those very importers of US rice that have traditionally been the primary source of evidence for the many allegations made by the United States.

Q131. (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.

Turkey believes that the United States either did not understand or did not provide an adequate answer to question 131(a) by the Panel. In particular, the United States stated, in relevant part, that it "*fails to see how denying these Control Certificates facilitates trade in rice*". The question by the Panel was aimed at identifying other ways, if any, through which Turkey could achieve the same "trade facilitation" objectives that it currently seeks through the Certificate of Control. Turkey has already

provided considerable arguments in its previous submissions[1] as to the functions of the Certificate of Control and its "trade facilitation" objectives of proportionality, legal certainty, commercial predictability, etc. Therefore, Turkey does not wish to enter again into this debate.

Turkey simply submits that the apparent misunderstanding of the question by the Panel, which is shown by the United States in its reply, emphasizes the continued confusion that the United States makes between the review of the Certificate of Control as a perfectly legitimate legal instrument available to Turkey (i.e., a *de jure* review) and the scrutiny of its alleged effects, which may be based on factual allegations of denial (i.e., a *de facto* review). Turkey believes that, *de jure*, the legal instrument Certificate of Control easily meets any "trade facilitation" test. *De facto*, a "trade facilitation" and proportionality test cannot be diminished by a review that focuses only on a few individual instances of rejection and related domestic litigation. These instances would have to be seen against the background of large volumes of rice importation, very high approval rates for Certificates of Control, and very small percentages of domestic litigation. International trade is not a perfect world. There will always be instances of disappointment between traders and administrations. Turkey believes that its importation regime, as it applies to rice, is by no means less inductive of trade and more cumbersome than other WTO Members' trading environments.

(b) Does the fact that Certificates of Controls 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.

Turkey notes that once again the United States has not answered the question put forward by the Panel in question 131(b). In particular, the United States has failed to indicate how the process of importation could be carried-out by Turkey, while preserving its ability to pursue all legitimate customs purposes and product certification objectives, without Certificates of Control.

However, in relation to the non-pertinent information provided by the United States in its answer, Turkey recalls that the Certificate of Control is a different legal instrument from the UFT import license necessary to import at the more advantageous rates of duty provided within the TRQ. Contrary to what professed by the United States, it is not true that four agencies are involved in the process of approval of the Certificates of Control. The approval of Certificates of Control, in relation to both over-quota and in-quota trade, only requires cooperation between two Turkish authorities (i.e., MARA and customs). Turkey also wishes to reiterate that, since the Certificate of Control is not an import license, no provision of the Agreement on Import Licensing Procedures applies to it.

Q134. (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 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?

(b) Can Turkey provide further detail regarding the reasons for denial of the listed applications for Certificates of Control?

[1] See, in particular, Turkey's Rebuttals, paras. 10, 11 and 12 and Turkey's Oral Statements at the Second Hearing, paras. 15 to 22.

(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?

Turkey was not aware that this issue resulted in dissatisfaction and/or lack of transparency vis-à-vis traders that had seen their requests rejected. As Turkey indicated in its reply to question 134, the reasons for rejection of individual applications for Certificates of Control have always been promptly communicated, informally or verbally, by MARA. In fact, MARA always makes sure that the representatives of applicant companies are promptly informed of the missing or wrong parts of the applications. This is a process of information exchange that Turkey was convinced to have always worked well and to the full satisfaction of traders. However, Turkey is willing to consider introducing a more formal system of notification of the reasons for individual rejections should this better guarantee the rights and expectations of traders. With respect to the specific reasons for denial of approval of Certificates of Control, Turkey refers to what already stated in its reply to question 134(a).

Q136. (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?

(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?

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

(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?

(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)?

The answers provided by the United States appear to indicate, at best, a continued misunderstanding of the functioning of the Certificate of Control system. In particular, Turkey wishes to clarify that there is no different types of Certificates of Control applying to different types of rice trade (i.e., MFN, TRQ, and/or FTA). There is only one form of Certificates of Control that applies to all types of rice imports. It is only when traders seek to import rice within the TRQ or FTA allocations that an import license will be needed in addition to a Certificate of Control.

Turkey would also like to remark that Certificates of Control are stand-alone documents. Even when approved in relation to applications for imports under the TRQ or FTA arrangements, they remain valid for a year from approval, and may be used by traders to import any type of rice (i.e., including "MFN rice" if, meanwhile, the TRQ has been fully allocated, has lapsed, or the importer has made the business determination not to import within the preferential trade volume). This appears to be a simple and straight-forward concept to understand and Turkey is surprised that the United States keeps neglecting it or intentionally misunderstanding it.

Q140. (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?

Turkey would like to comment on the statement made by the United States in relation to the alleged "*temporary relaxation of the legal prohibition for US imports*".

Firstly, Turkey strongly denies the implied idea of the existence of a discriminatory intent vis-à-vis imports of rice from the United States. Turkey has systematically administered its import regime in a non-discriminatory fashion (both in relation to MFN and TRQ rice imports).

Secondly, Turkey reaffirms that there has never been a "*legal prohibition*" to import rice. Here the United States seems to reiterate its wrong assumption that this "*legal prohibition*" was adopted by means of the so-called Letters of Acceptance. Turkey has already thoroughly argued and proved that the Letters of Acceptance are not, under the Turkish legal system, legislative measures of the type that would result in a *de jure* prohibition. In any event, it appears curious that the United States, while indicating the existence of a "*legal prohibition*", would introduce the concept of a "*temporary relaxation*" which is not grounded in any legal provision and appears to be of a *de facto* nature. Presumably, a "*temporary relaxation*" of the type that the United States is referring to would need to be embodied in a legal provision able to override the "*legal prohibition*" of the Letters of Acceptance. This argument is flawed. The apparent reduction of imports is used by the United States as evidence of a "*legal prohibition*".

Lastly, Turkey provided evidence that, in fact, imports of MFN rice were occurring in that same period from sources other then just the United States (for instance, Bulgaria). Therefore, the claim made by the United States that Turkey's alleged "*temporary relaxation*" was targeted to imports from the United States is unfounded and misleading.

Q145. (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?

Turkey maintains that the Letters of Acceptance were internal communications aimed at developing policies and cannot be defined, according to the Turkish legal system, as "domestic law." These administrative communications never resulted in the adoption of laws or regulations and, therefore, they are not to be regarded as measures of the type that may support a *de jure* complaint. The fact that these Letters of Acceptance have been used in open Court proceedings by MARA and have been used by Turkish Court to discharge MARA from the accusations of the plaintiff, cannot legally turn the Letters of Acceptance into measures equivalent to laws or regulations. Turkey believes that the legal status of the Letters of Acceptance does not change merely because a domestic Court of First Instance has upheld MARA's defence in domestic proceedings. This must be taken into account by the Panel when assessing the evidentiary weight and value of such judgments.

Turkey also believes that the amount of Certificates of Control approved in relation to applications made for all types of rice imports (i.e., MFN, FTA and TRQ) between the alleged periods of operation of the Letters of Acceptance stands as clear evidence that, despite their existence and the informal circulation within the administration, these Letters of Acceptance were never enforced and cannot be consider as satisfactory evidence of the existence of a "denial."

Turkey confirms its argument that the domestic courts appear to have given effect to an *ultra vires* act of the Minister. It is essential to underline that the relevant Turkish legislation does not grant to MARA any discretion in relation to the approval of Certificates of Control for which applications have been duly compiled and submitted. Nor it is provided, contrary to what the United States repeatedly alleges, that proof of domestic purchase is required for the approval. The United States appears to once again misinterpret reality and maliciously confusing the approval of Certificates of Control with the issuance of import licenses required for importation at advantageous rates (i.e., TRQ trade, which was subject to a domestic purchase requirement).

Turkish law grants to MARA the authority and the competence, but not the discretion, to approve Certificates of Control for the importation, *inter alia*, of rice. In this respect, any instance of denial by MARA of the approval of Certificates of Control, which is not based on the incompleteness or incorrectness of the applications, is to be considered an *ultra vires* act. In relation to this, Turkey refers to its Reply to Questions 126 and 127 in order to reiterate that there is no provision that gives the discretion not to approve Certificates of Control. It is MARA's legal duty and responsibility to approve the Certificates of Control in relation to all importers' applications that meet the requirements established by the relevant legislation under the Turkish legal system. Any individual decision that contradicts this legal requirement would be an *ultra vires* act.

With respect to the individual administrative decision, the ruling of the domestic Court appears to have discharged MARA by finding that the Provincial Directorate was acting within the confines of its ministerial hierarchy. Turkey submits that the apparent legal value given by a Turkish Court of First Instance to a Letter of Acceptance is not relevant for purposes of the WTO proceeding at stake. The Turkish Court did not rule on the legality of the Letter of Acceptance. This Panel has to decide whether, *de jure*, there is any provision in the Turkish law on Certificates of Control which gives any administrative authority the discretion to deny their approval. There is none. The specific case cited by the United States is not relevant because the Turkish Courts have simply not decided on this issue of legality. As indicated in Turkey's Reply to Question 145, in assessing the value of relevant domestic jurisprudence, the Panel should select jurisprudence that reflects the interpretation which is most in conformity with Turkish law, take into account the quality of the reasoning on what it perceives to be the dominant interpretation, and respect the hierarchy of the national court system. Turkey believes that the application of these criteria should lead the Panel to disregard the evidentiary value of the domestic judgement.

Q150. (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. Could Turkey provide any further information on this regard, making reference to relevant evidence, as appropriate.

Turkey wishes to reaffirm that the alleged "reference price" system, which falls in any event outside of the Terms of Reference of this Panel proceeding, is another element of confusion brought by the United States into this dispute. The alleged "reference price" system does not exist. There is, on the other hand, a "reference price" which is used by Turkey to provide its customs authorities with a benchmark in order to monitor trade flows and systematically identify possible instances of customs valuation abuse by traders.

In particular, as indicated by Turkey in its reply to question 150, the Turkish authorities at customs points-of-entry are periodically notified by the central administration of the reference prices for paddy rice, brown rice and rice simply in order for the customs authorities to be aware of the average prices for these commodities and to detect instances of unfair trade and tax loss that might occur due to the importers' under-valued customs declarations. Turkey believes that, contrary to what is being claimed by the United States, nothing in the language of Exhibit US-68 and US-76 proves the trade-distortive nature of this Turkish instrument to avoid tax evasion and customs valuation fraud.

Furthermore, Turkey submits that the United States is again basing its allegations and its interpretation of this system on a number of manipulated translations from Turkish into English. In particular, the Turkish Minister of Agriculture has never referred to the Certificate of Control as an "*import license*", but rather as a "*control document*" (i.e., the Turkish "*Kontrol Belgesi*"). This may seem as only a minor linguistic correction, but it is one that Turkey considers important in that it further indicates the constant attempt made by the United States to turn every single detail or occurrence as a cornerstone of its theory of a systematic pattern of trade distortion and discrimination allegedly enforced by Turkey. This is simply not the case and a careful reading of the system proves the opposite.

Q152. (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.

Turkey believes that that the United States is wrong in considering that a finding and recommendation on its domestic purchase requirement is necessary in order to solve this dispute. Turkey wishes to recall that the TRQ regime together with its domestic purchase requirement, are no longer in force. Turkey has not re-opened the TRQ since its expiry on 31 July 2006 and it has indicated that it considers this expiry definitive.

As Turkey has already explained, in order to re-open another TRQ with a domestic purchase requirement, Turkey would have to adopt a new Decree, fixing the quota openings, quantities and coefficients, together with its implementing Communiqué, providing, *inter alia*, for the quantities of domestic rice to be purchased and for the deadlines for the relevant applications. All the legislation which is specifically related to the establishment of tariff quotas for rice has expired and a new set of rules would therefore need to be adopted, promulgated and published. Turkey has committed not to adopt a new TRQ with a domestic purchase requirement. On the other side, Turkey does not understand what other evidence would the United States need in order to consider the TRQ regime and its domestic purchase requirement expired.

The mere theoretical possibility that new legislation be enacted in the future cannot be considered as an indication that Turkey may re-introduce a TRQ regime. It is also not sufficient evidence that the TRQ regime had not expired, the fact that Decree No. 2004/7333 is still in force. In relation to this, Turkey has already noted that this Decree provides the legal basis for the management of all types of quotas and tariff quotas, irrespectively of the product, of the nature and the trade measure allowing for the adoption of the quotas. This legislation is not rice-specific. Moreover, contrary to what the United States suggested, there is no mention of the domestic purchase requirement in this Decree, and the fact that the Decree does not specify whether the UFT can or cannot impose a domestic purchase requirement in connection with tariff-rate quotas is not, in itself, proof of the continued existence of the TRQ regime nor of a WTO-inconsistency of the Decree in itself. Finally, the United States has failed to indicate which provisions of Decree No. 2004/7333 would be WTO-inconsistent and would justify its repeal or amendment.

Turkey has maintained that the TRQ regime provided beneficial import conditions of which importers took full advantage. Turkey understands, however, that this has caused a great degree of discontent in the United States. Turkey has repeatedly assured the United States during bilateral consultations and in the course of these proceedings that it does not intend to resort again to the TRQ regime and that, should the need arise, it will address its objectives of market intervention and stabilization through other WTO-consistent trade policies which are less administratively burdensome (i.e., the action of the TMO as an intervention agency, the appropriate and legitimate use of MFN and applied rates of duty).

Turkey considers this to be a commitment that, ultimately, the United States and the Panel should take into serious account. In this respect, Turkey notes that in a similar instance the Panel in *Argentina – Footwear* had this to say in relation to expired measures and the threat of their recurrence: "*We must assume that WTO Members will perform their treaty obligations in good faith, as they are required to do by the WTO Agreement and by international law. We consider, therefore, that there is no evidence that the minimum specific import duties on footwear will be reintroduced*".[2]

(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.

Turkey wishes once again to briefly comment on the United States' assertions in relation to the expiry of Turkey's domestic purchase requirement and this Panel's role under Article 19.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

First, Turkey would like to re-illustrate to the United States the correct interpretation of WTO case law with respect to the Panel's authority in issuing recommendations with respect to measures expired before or in the course of the proceedings. Turkey already noted that while Article 19.1 of the DSU entrusts panels to issue recommendations with respect to measures found inconsistent with the covered agreements, the extent of this authority may be objectively limited by the expiry of the measures, both before and in the course of the panels' proceedings. In this respect, Turkey recalls that in light of WTO jurisprudence, Article 19.1 of the DSU requires a panel to make recommendations to

[2] See *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, para. 6.14.

bring a measure found inconsistent into conformity 'provided that' such measure is still in force. Turkey quoted *United States - Certain EC Products* where the Appellate Body stated that the Panel "*erred in recommending the Dispute Settlement Body to request the United States to bring into conformity a measure which the Panel has found no longer to exist*",[3] *Chile - Price Band*, where the Panel stated that it would not make recommendations with respect to expired measures,[4] and *Dominican Republic - Cigarettes*, where the Panel did not find it appropriate to recommend to the Dispute Settlement Body that it make any request to the Dominican Republic regarding a measure (i.e., the Selective Consumption Tax) since it was no longer in force.[5]

With particular respect to the Appellate Body's report in *Dominican Republic- Cigarettes*, Turkey believes that it is wrong and misleading for the United States to consider that this report supports its assertions. In that case, the Panel had decided not to make a recommendation with respect to the Dominican Republic's Selective Consumption Tax, which was modified in the course of the panel's proceedings. The Appellate Body did not disagree with the Panel's decision of not making a recommendation on the issue, nor did the Parties to the dispute. The broad recommendation included in paragraph 130 of that Appellate Body's report in no way can be interpreted so as to include the Appellate Body's disagreement on the Panel's conduct, while this conduct was not even raised in the appeal. This interpretation is also upheld by the Panel in *EC-Biotech*, which stated that: "*Similarly, in Dominican Republic - Import and Sale of Cigarettes, the panel did not find it "appropriate" to make a recommendation in relation to a WTO-inconsistent measure concerning the determination of the tax base for cigarettes because that measure was "no longer in force" as a result of amendments which were made after the panel was established […]*".[6]

In relation to the tax stamp requirement, which was amended shortly after the issuance of the Panel report, the reason why the Appellate Body issued a ruling is because both Parties requested so, even though they both agreed that the new legislation had changed the tax regime. As the Appellate Body explained in paragraph 129 of its report, "*At the oral hearing, the participants agreed that the tax stamp regime as a whole had been altered by a new decree in October 2004. Both participants nevertheless requested the Appellate Body to rule on the WTO-consistency of the original measure. 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*".[7]

Turkey fails to understand how the two instances of the Appellate Body's report in *Dominican Republic - Cigarettes* could be of any relevance to the present dispute and how they would support the United States' arguments. In particular, Turkey notes that the Appellate Body did not disagree with the Panel's decision not to issue a recommendation on the Selective Consumption Tax and that the Appellate Body issued a ruling on the tax stamp requirement (i.e., on a measure that was changed soon after the issuance of the Panel report) only because the parties to the dispute expressly requested so.

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[3] See, *United States – Import Measures on Certain Products from the European Communities*, Appellate Body Report, para. 81.

[4] See, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, Panel Report, para. 7.112.

[5] See, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, Panel Report, para. 7.363.

[6] See, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, para. 7.1314.

[7] See, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, Appellate Body Report, para. 130.

Second, Turkey also believes that the United States again refuses to understand that under WTO case law the date of the establishment of the panel may affect the Panel's discretion in making findings, whereas in all instances of measures expired before and after the commencement of the Panel proceedings, if a finding is made, no recommendation is due. The relevant parts of the *EC - Biotech* report quoted by the United States fully support this view. In that case, the Panel made a finding with respect to the *de facto* moratorium enforced by the EC, but did not issue a recommendation. The *de facto* moratorium expired prior to the Panel's establishment.

In relation to this, Turkey would like to make two observations. First, the Panel considered the *de facto* nature of the measure as decisive in order for it to make a finding. This appears to be a significant difference with Turkey's domestic purchase requirement, which was not a *de facto* measure. In fact, with respect to other measures expired before the commencement of the proceedings, the same Panel did refrain from making findings as it did not consider making those findings necessary for the solution of the dispute.[8] Second, the Panel acknowledged the value and importance of WTO case law on issuing recommendations on expired measures and recognized that "*the foregoing WTO jurisprudence supports the inference that panels are to avoid making recommendations which would apply to measures that are no longer in existence or have been amended*".[9] The Panel therefore limited its recommendations on the *de facto* moratorium by requesting the European Communities to bring its measures into conformity "*if, and to the extent that, that measure has not already ceased to exist*".[10]

In the light of these considerations, Turkey respectfully invites this Panel not to make a finding on any of the measures establishing the domestic purchase requirement, including the ones expired soon after the commencement of Panel proceedings. Turkey believes that no finding is necessary to secure a positive solution to the dispute. As previously stated, Turkey has repeatedly maintained, both at the consultations phase and throughout the submissions and oral statements presented so far, that it has no intention to renew these measures, neither extending them nor adopting new legislative instruments. Therefore, Turkey once again respectfully requests the Panel not to make findings on any of the measures relating to the TRQ regime or, in the alternative, to limit its findings to those measures which were still in force after the establishment of the Panel. In any event, Turkey respectfully requests that the Panel refrain from making any recommendation with respect to the TRQ regime.

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

Turkey believes that, rather than being "*irrelevant*", it is quite revealing that the United States has not been able to find a *de jure* definition of the Certificate of Control as an "*import licence*". In fact, *de jure*, Turkey's Certificate of Control is not an "*import licence*" and no legal provision in the Turkish legal system and relevant sets of laws assimilates the Certificate of Control to an "*import licence*". Turkey indicated what are, *de jure*, the roles and functions of the Certificate of Control.

[8] See, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, paras. 7.1651-7.1654.

[9] See, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, para. 7.1316.

[10] See, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, para. 8.16.

In addition, and as systematically argued and evidenced by Turkey in the course of these proceedings, the Certificate of Control has also never acted or operated as a *de facto* "*import licence*". Certificates of Control were always approved, throughout the entire period under examination, on the basis of the applications lodged by traders, provided that all legal requirements for approval were duly met.

Finally, with respect to the assertion made by the United States on the relevance of the characterization allegedly made by Turkey's Minister of Agriculture, Turkey recalls it strong rejection made in its Comments to the Reply by the United States to Question 150 above. In particular, the Turkish Minister of Agriculture has never referred to the Certificate of Control as an "*import license*", but rather as a "*control document*" (i.e., the Turkish "*Kontrol Belgesi*").

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?

Turkey believes that the answer provided by the United States in its Reply to Question TR-2 is simply incorrect and not based on any legal and factual evidence. As already indicated by Turkey in its Replies to Questions 126 and 127, upon submission of the required documentation, MARA has the legal duty and responsibility to approve Certificates of Control. From this, it follows that importers have the right to obtain approved Certificates of Control. MARA has no discretion in approving Certificates of Control, provided that all legal requirements are met.

The United States also continues to confuse between Certificates of Control and import licences for in-quota imports (TRQ or FTA). Certificates of Control are "neutral" instruments that are needed independently of the type of rice importation (i.e., MFN, TRQ or FTA imports). On the other hand, import licences were needed only for TRQ imports and are still needed for FTA rice imports. Import licences were issued, in relation to TRQ imports, behind proof of the domestic purchase requirement. Certificates of Control have never required proof of domestic purchase. This continues to be an area of confusion that Turkey believes the United States willingly pretends not to understand.

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 requests for approval?

Turkey notes that "*whether Certificates are required for non-MFN, out-of-quota trade*" is not "*irrelevant*" as the United States argues. Turkey never enforced a "*blanket denial*" (i.e., a total prohibition) and it continued to approve Certificates of Control throughout the period under examination on the sole basis of the applications lodged by traders and the compliance of those applications with legal requirements. The United States has not shown (in fact, it has not even claimed) that all applications there were put forward by rice traders during certain times were systematically not approved.

The United States has merely based its overall claim on a limited number of individual rejections. Turkey believes that this *modus operandi* cannot be considered as sufficient to establish a *prima facie* case. In any event, it certainly appears not to be sufficient evidence of a "*blanket denial*" in Turkey's approval of Certificates of Control. At best, it may prove the lack of applications by traders during certain times for Certificates of Control in relation to MFN trade. Turkey has explained this in its previous submissions on the basis of traders' business determinations and commercial considerations linked to a variety of economic factors, including the existence of considerable tariff advantages for importing within the TRQ.

ANNEX G

REQUEST FOR THE ESTABLISHMENT OF A PANEL

WORLD TRADE ORGANIZATION

WT/DS334/4
7 February 2006

(06-0525)

Original: English

TURKEY – MEASURES AFFECTING THE IMPORTATION OF RICE

Request for the Establishment of a Panel by the United States

The following communication, dated 6 February 2006, from the delegation of the United States to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 2 November 2005, the United States requested consultations with the Government of Turkey pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXII of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), Article 6 of the *Agreement on Import Licensing Procedures* ("Import Licensing Agreement"), Article 8 of the *Agreement on Trade-Related Investment Measures* ("TRIMs Agreement"), and Article 19 of the *Agreement on Agriculture* ("Agriculture Agreement") with respect to Turkey's import restrictions on rice from the United States. The United States and Turkey held consultations on 1 December 2005. Unfortunately, those consultations did not resolve the dispute.

Therefore, the United States respectfully requests, pursuant to Article 6 of the DSU, Article 6 of the Import Licensing Agreement, Article 8 of the TRIMs Agreement, and Article 19 of the Agriculture Agreement, that the Dispute Settlement Body ("DSB") establish a panel to examine this matter.

Turkey maintains a number of restrictions on the importation of rice. Under its import regime for rice, Turkey requires an import license to import rice. Turkey operates tariff-rate quotas ("TRQs") for rice imports requiring that, in order to import specified quantities of rice at reduced tariff levels, importers must purchase specified quantities of domestic rice, including from the Turkish Grain Board ("TMO"), Turkish producers, or producer associations ("domestic purchase requirements"). In addition, Turkey denies or fails to grant licenses to import rice at or below the bound rate of duty without domestic purchase, including at the over-quota rate of duty.

The United States understands that the means through which Turkey has maintained this restrictive import regime include:

- Decree No. 96/7794 related to the General Assessment of the Regime Regarding Technical Regulations and Standardization for Foreign Trade (Official Gazette, No. 22541, 1 February 1996, Repeated);

- Decision of the board of ministers: Decree No. 2004/7135 related to the implementation of a tariff quota for certain types of paddy rice and rice types imports (Official Gazette, No. 25439, 20 April 2004);

- A notification related to implementation of tariff quotas for certain types of paddy and rice imports, from the Foreign Trade Undersecretariat (Official Gazette, No. 25445, 27 April 2004);

- Decision of the board of ministers: Decree No. 2004/7333 related to the management of quota and tariff contingent on import (Official Gazette, No. 25473, 26 May 2004);

- Decision of the board of ministers: Decree No. 2004/7756 related to the implementation of a tariff contingent on the import of certain paddy rice and rice types (Official Gazette, No. 25566, 27 August 2004);

- A notification about the implementation of a tariff contingent on the import of certain paddy rice and rice types, from the Foreign Trade Undersecretariat (Official Gazette, No. 25577, 8 September 2004);

- A communiqué on Standardization in Foreign Trade, Communiqué No. 2005/05 (Official Gazette, No. 25687, 31 December 2004);

- A notification about the amendment of the notification related to the implementation of a tariff contingent on the import of certain paddy rice and rice types, from the Foreign Trade Undersecretariat (Official Gazette, No. 25767, 26 March 2005);

- A notification about the amendment of the notification related to the implementation of a tariff contingent (customs duty) on the import of certain paddy rice and rice types, from the Foreign Trade Undersecretariat (Official Gazette, No. 25812, 11 May 2005);

- Decision of the board of ministers: Decree No. 2005/9315 related to the implementation of a tariff contingent on the import of certain types of paddy rice and rice types (Official Gazette, No. 25935, 13 September 2005);

- A notification related to the implementation of a tariff contingent on the import of certain paddy rice and rice types, from the Foreign Trade Undersecretariat (Official Gazette, No. 25943, 21 September 2005);

- "Letters of Acceptance," including Letter of Acceptance 964 (10 September 2003), Letter of Acceptance 107 (23 January 2004), Letter of Acceptance 905 (28 June 2004), and Letter of Acceptance 1795 (30 December 2004), in which the Minister of Agriculture accepts recommendations from the General Directorate of Protection and Control of the Ministry of Agriculture and Rural Affairs to delay the start date for the period in which import licenses may be granted; and

- any amendments or extensions to these measures, and any related or implementing measures.

The United States considers that these measures are inconsistent with Turkey's obligations under provisions of the GATT 1994, the Import Licensing Agreement, the TRIMs Agreement, and the Agriculture Agreement, specifically:

Denial of, or failure to grant, import licenses to import rice at or below the bound rate of duty

(1) Article XI:1 of the GATT 1994 because Turkey's denial of, or failure to grant, import licenses for rice at or below the bound rate of duty constitutes a prohibition or restriction on imports other than in the form of duties, taxes, or other charges;

(2) Article 4.2 of the Agriculture Agreement because Turkey's denial of, or failure to grant, import licenses for rice at or below the bound rate of duty are "measures of the kind which have been required to be converted into ordinary customs duties," such as quantitative import restrictions, discretionary import licensing, and non-tariff measures maintained through a state-trading enterprise, which Members may not resort to or maintain under that Agreement;

(3) Articles 1.4(a) and (b) of the Import Licensing Agreement and Articles X:1 and X:2 of the GATT 1994 because Turkey has not published its denial of, or failure to grant, import licenses at or below the bound rate of duty and, thus, has neither provided an opportunity for governments and traders to become acquainted with it nor has it provided Members with the opportunity to provide written comments and to discuss those comments upon request;

(4) Articles 3.3 and 3.5(e) and (f) of the Import Licensing Agreement because Turkey does not approve requests for import licenses at or below the bound rate of duty; does not publish sufficient information for other Members and traders to know that import licenses will not be approved; does not specify a time frame within which import license applications that are submitted will be approved or rejected; does not provide applicants with the reasons for rejection; and does not provide a process for appeal or review in the event of rejection;

Domestic purchase requirements and administration of TRQs for reduced duty imports of rice

(5) Article 2.1 and paragraph 1(a) of Annex 1 of the TRIMs Agreement because Turkey imposes domestic purchase requirements;

(6) Article III:4 of the GATT 1994 because Turkey accords imported rice less favorable treatment than domestic rice through the imposition of domestic purchase requirements "affecting [its] internal sale, offering for sale, purchase, transportation, distribution, or use";

(7) Article XI:1 of the GATT 1994 because Turkey's domestic purchase requirements constitute restrictions on imports other than in the form of duties, taxes, or other charges;

(8) Article 4.2 of the Agriculture Agreement because the domestic purchase requirements are "measures of the kind which have been required to be converted into ordinary customs duties," such as quantitative import restrictions, discretionary import licensing, and non-tariff measures maintained through a state-trading enterprise, which Members may not resort to or maintain under that Agreement;

(9) Articles 1.4(a) and (b) and 3.5(b) and (d) of the Import Licensing Agreement and Articles X:1 and X:2 of the GATT 1994 because Turkey does not publish the correct amount of the TRQs to be applied; does not always publish the TRQs to be applied, or changes to the TRQs, within the time periods specified in Article 1.4 and in such a manner as to enable governments and traders to become acquainted with them; and does not provide Members

with the opportunity to provide written comments and to discuss those comments upon request;

(10) Article 3.5(g) of the Import Licensing Agreement because the periods of import license validity under the TRQs are not of reasonable duration and are so short as to preclude imports;

(11) Article 3.5(h) of the Import Licensing Agreement because Turkey administers its TRQs in such a way as to discourage the full utilization of quotas;

Other Claims Relating to Turkey's Import Regime

(12) Article XI:1 of the GATT 1994 because Turkey's domestic purchase requirements, in conjunction with its denial of, or failure to grant, import licenses for rice at or below the bound rate of duty, constitute restrictions on imports other than in the form of duties, taxes, or other charges;

(13) Article 4.2 of the Agriculture Agreement because Turkey's domestic purchase requirements, in conjunction with its denial of, or failure to grant, import licenses for rice at or below the bound rate of duty, are "measures of the kind which have been required to be converted into ordinary customs duties," such as quantitative import restrictions, discretionary import licensing, and non-tariff measures maintained through a state-trading enterprise, which Members may not resort to or maintain under that Agreement;

(14) Articles X:3(a) and (b) of the GATT 1994 because Turkey does not administer its import regime in a "uniform, impartial and reasonable manner" and does not maintain tribunals or procedures for promptly reviewing and correcting administrative actions relating to the importation of rice under Turkey's import regime;

(15) Article 1.2 of the Import Licensing Agreement because the measures Turkey utilizes to implement its import licensing regime are not in conformity with the relevant provisions of the GATT 1994;

(16) Article 1.3 of the Import Licensing Agreement because Turkey's import licensing regime is not administered in a fair and equitable manner;

(17) Article 1.5 of the Import Licensing Agreement because Turkey requires information and documentation upon application that are not strictly necessary for the proper functioning of its import licensing regime;

(18) Article 1.6 of the Import Licensing Agreement because applicants are not provided a reasonable period of time for submitting applications and because applicants have to approach more than one administrative body in connection with their applications;

(19) Article 3.2 of the Import Licensing Agreement because Turkey's non-automatic import licensing regime has trade-distortive or trade-restrictive effects on imports and is more administratively burdensome than absolutely necessary;

(20) Article 3.5(a) of the Import Licensing Agreement because Turkey has failed to provide, upon the request of the United States, all relevant information concerning the administration of Turkey's import licensing regime and the import licenses granted over a recent period; and

(21) Articles 5.1, 5.2, 5.3, and 5.4 of the Import Licensing Agreement because Turkey has failed to notify its import licensing regime for rice.

Turkey's measures also appear to nullify or impair the benefits accruing to the United States directly or indirectly under the cited agreements.

Accordingly, the United States requests that a Panel be established with standard terms of reference as set out in Article 7.1 of the DSU.

ANNEX H

WORKING PROCEDURES FOR THE PANEL

1. The Panel will work according to the normal working procedures as set out in the DSU and its Appendix 3 as well as certain additional procedures, as follows:

2. The panel shall meet in closed session. The parties to the dispute, and interested third parties, shall be present at the meetings only when invited by the Panel to appear before it.

3. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the Panel which that Member has designated as confidential. As provided in Article 18.2 of the DSU, where a party to a dispute submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

4. Before the first substantive meeting of the Panel with the parties, the parties to the dispute shall transmit to the Panel written submissions in which they present the facts of the case and their arguments.

5. At its first substantive meeting with the parties, the Panel shall ask the United States to present its case. Subsequently, and still at the same meeting, Turkey will be asked to present its point of view. Third parties will be asked to present their views thereafter at the separate session of the same meeting set aside for that purpose.

6. All third parties which have notified their interest in the dispute to the Dispute Settlement Body shall be invited in writing to present their views during a session of the first substantive meeting of the panel set aside for that purpose. All such third parties may be present during the entirety of this session.

7. Formal rebuttals shall be made at a second substantive meeting of the Panel. Turkey shall have the right to take the floor first to be followed by the United States. The parties shall submit, prior to that meeting, written rebuttals to the Panel.

8. The Panel may at any time put questions to the parties and ask them for explanations either in the course of a meeting with the parties or in writing. In addition, the parties shall be permitted to ask questions to each other and to third parties. Answers to questions shall be submitted in writing by the date(s) specified by the Panel. Third parties shall not be permitted to ask questions to the parties or to other third parties.

9. The parties to the dispute and any third party invited to present its views in accordance with Article 10 of the DSU shall make available to the Panel and the other party a written version of their oral statements, preferably at the end of the meeting, and in any event not later than the day following the meeting. Parties and third parties are encouraged to provide the Panel and other participants in the meeting with a provisional written version of their oral statements at the time the oral statement is presented.

10. In the interest of full transparency, the presentations, rebuttals and statements referred to in paragraphs 5 to 9 of these working procedures shall be made in the presence of the parties. Moreover, each party's written submissions, including any comments on the descriptive part of the report,

responses to questions put by the Panel and comments on responses made by other parties, shall be made available to the other party.

11. Within seven (7) days following the submission of a written submission or oral statement to the Panel, the parties are invited to provide the Panel with an executive summary of the factual and arguments sections contained therein, as applicable. These executive summaries will be used only for the purpose of assisting the Panel in drafting a concise factual and arguments section of the Panel Report so as to facilitate timely translation and circulation of the Panel report to the Members. They shall not serve in any way as a substitute for the submissions of the parties. Each summary to be provided by each party shall not exceed ten (10) pages in length. The third parties are also invited to submit an executive summary seven (7) days after the third-party session including in separate sections the summary of their written and oral submissions, as applicable, and shall not exceed three (3) pages in length. The Panel may, in light of further developments, allow the parties and third parties to submit longer summaries.

12. Any request for a preliminary ruling, including rulings on jurisdictional issues, to be made by the Panel shall be submitted no later than in a party's first written submission. If a party requests such ruling, the other party shall submit its respective response to such request within the time limit specified by the Panel. Exceptions to this procedure will be granted upon a showing of good cause.

13. Parties shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttals, answers to questions or comments on answers provided by others. Exceptions to this procedure will be granted upon a showing of good cause. In such cases, the other party or parties shall be accorded a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

14. To facilitate the maintenance of the record of the dispute, and for ease of reference to exhibits submitted by the parties, parties are requested to number their exhibits sequentially throughout the stages of the dispute. For example, exhibits submitted by Turkey could be numbered TR-1, TR-2, etc. If the last exhibit in connection with the first submission was numbered TR-5, the first exhibit of the next submission thus would be numbered TR-6.

15. The parties to the dispute have the right to determine the composition of their own delegation. The parties shall have the responsibility for all members of their respective delegations and shall ensure that all members of their delegations act in accordance with the rules of the DSU and the Working Procedures of this Panel, particularly in regard to confidentiality of the proceedings.

16. Parties shall provide a list of the participants in their delegation before or at the beginning of each meeting to the Secretary to the Panel.

17. The Panel will include in the descriptive part of its report a brief summary of the facts and the procedural history of the case and attach thereto the parties' arguments as contained in their first written submissions, rebuttals, responses to questions, comments on responses to questions and written versions of their oral statements at meetings with the Panel. The arguments made by third parties will be reflected in a separate portion of the descriptive part.

18. Following issuance of the interim report, the parties shall have two (2) weeks to submit written requests to review precise aspects of the interim report and to request a further meeting with the Panel. The right to request such a meeting must be exercised no later than at that time. Following receipt of any written requests for review, in cases where no further meeting with the Panel is requested, the parties shall have the opportunity within a time-period to be specified by the Panel to submit written comments on the other parties' written requests for review. Such comments shall be strictly limited to commenting the other parties' written requests for review.

19. The following procedures regarding service of documents will apply:

(a) Each party and third party shall serve all of its written submissions, written versions of oral statements, answers to questions and any integrated executive summary, directly on all other parties, and on third parties as appropriate and confirm that it has done so at the time it provides its submission to the Secretariat.

(b) The parties and third parties should provide their submissions to the Secretariat by 5:00 p.m., Geneva time, on the deadlines established by the Panel, unless a different time is set by the Panel.

(c) The parties and third parties shall provide the Secretariat with nine (9) paper copies of each of their written submissions. These copies should be filed with the Dispute Settlement Registrar, Mr. Ferdinand Ferranco (Office 2150) by 5:00 p.m. on the due dates established by the Panel. Written copies of the oral statements shall be submitted to the Secretariat no later than 5:00 p.m. on the day following the date of the presentation.

(d) The parties and third parties shall also provide electronic copies of all their submissions to the Secretariat at the time they provide their submissions, if possible in a format compatible with that used by the Secretariat. If the electronic version is provided by e-mail, it should be addressed to DSRegistry@wto.org, and copied to *****@wto.org, *****@wto.org, *****@wto.org and *****@wto.org. If a CD-ROM is provided, it should be delivered to Mr. Ferdinand Ferranco at the WTO Secretariat DS Registry.

20. These working procedures may be modified by the Panel as appropriate, after having consulted the parties.

ANNEX I

LETTER FROM THE PANEL TO THE PARTIES, DATED 30 AUGUST 2006, REGARDING PAKISTAN'S PARTICIPATION AS A THIRD PARTY

The Panel thanks both Parties for their views regarding the participation of Pakistan as a third party in these proceedings.

The Panel has noted such views and has decided to accept as third parties all Members that have so far expressed that interest, including Pakistan.

The Panel has asked the WTO Secretariat to circulate a revised Panel composition document reflecting that the Members who have reserved their rights to participate in the Panel proceedings as third parties are: Argentina, Australia, China, Egypt, the European Communities, Korea, Pakistan and Thailand.

Further details regarding the Panel's decision on the matter will be included in full in the Panel's Report.

ANNEX J

LISTS OF EXHIBITS SUBMITTED BY THE PARTIES

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ANNEX J-1

LIST OF EXHIBITS SUBMITTED BY THE UNITED STATES

Exhibit	Title of Exhibit
US-1	Decree No. 96/7794 related to the General Assessment of the Regime Regarding Technical Regulations and Standardization for Foreign Trade (Official Gazette, No. 22541, February 1, 1996, Repeated) (English translation, followed by the original Turkish version)
US-2	Decision of the board of ministers: Decree No. 2004/7135 related to the implementation of a tariff quota for certain types of paddy rice and rice types imports (Official Gazette, No. 25439, April 20, 2004) (English translation, followed by the original Turkish version)
US-3	A notification related to implementation of tariff quotas for certain types of paddy and rice imports, from the Foreign Trade Undersecretariat (Official Gazette, No. 25445, April 27, 2004) (English translation, followed by the original Turkish version)
US-4	Decision of the board of ministers: Decree No. 2004/7333 related to the management of quota and tariff contingent on import (Official Gazette, No. 25473, May 26, 2004) (English translation, followed by the original Turkish version)
US-5	Decision of the board of ministers: Decree No. 2004/7756 related to the implementation of a tariff contingent on the import of certain paddy rice and rice types (Official Gazette, No. 25566, August 27, 2004) (English translation, followed by the original Turkish version)
US-6	A notification about the implementation of a tariff contingent on the import of certain paddy rice and rice types, from the Foreign Trade Undersecretariat (Official Gazette, No. 25577, September 8, 2004) (English translation, followed by the original Turkish version)
US-7	A communiqué on Standardization in Foreign Trade, Communiqué No. 2005/05 (Official Gazette, No. 25687, December 31, 2004) (English translation, followed by the original Turkish version)
US-8	A notification about the amendment of the notification related to the implementation of a tariff contingent on the import of certain paddy rice and rice types, from the Foreign Trade Undersecretariat (Official Gazette, No. 25767, March 26, 2005) (English translation, followed by the original Turkish version)
US-9	A notification about the amendment of the notification related to the implementation of a tariff contingent (customs duty) on the import of certain paddy rice and rice types, from the Foreign Trade Undersecretariat (Official Gazette, No. 25812, May 11, 2005) (English translation, followed by the original Turkish version)
US-10	Decision of the board of ministers: Decree No. 2005/9315 related to the implementation of a tariff contingent on the import of certain types of paddy rice and rice types (Official Gazette, No. 25935, September 13, 2005) (English translation, followed by the original Turkish version)
US-11	A notification related to the implementation of a tariff contingent on the import of certain paddy rice and rice types, from the Foreign Trade Undersecretariat (Official Gazette, No. 25943, September 21, 2005) (English translation, followed by the original Turkish version)
US-12	Letter of Acceptance 107 (January 23, 2004) (English translation, followed by the original Turkish version)
US-13	Letter of Acceptance 905 (June 28, 2004) (English translation, followed by the original Turkish version)
US-14	Letter of Acceptance 1795 (December 30, 2004) (English translation, followed by the original Turkish version)
US-15	Schedule XXXVII – Turkey. Part I – Most Favoured-Nation Tariff. Section I – Agricultural Products. Section 1 – A Tariffs
US-16	2005 Tariff Schedule, Official Gazette (29 December 2005)

Exhibit	Title of Exhibit
US-17	Effective Tariff Rates, Official Gazette (31 December 2005)
US-18	Annex VI-A to "A communiqué on Standardization in Foreign Trade"
US-19	Certificate of Control form, Republic of Turkey, Ministry of Agriculture and Rural Affairs (English translation)
US-20	"TMO is given priority to import rice to prevent extra high prices," *GNToruner*, 13 July 2006 (English translation)
US-21	"Clean the rice from the stones," *Milliyet*, 7 April 2006 (English summary, followed by the original Turkish version)
US-22	Letter from Provincial Agriculture Directorate, Republic of Turkey, to Mehmetoglu Domestic and Foreign Trade A.S., B.12.4.ILM.0.06.00.061868/9338, 1 May 2006 (English translation, followed by the original Turkish version)
US-23	Letter from Torunlar to MARA re: request for a Certificate of Control (22 January 2004)
US-24	*Referans*, 31 March 2006, pps. 1 and 9 (English translation)
US-25	*The New Shorter Oxford English Dictionary*, Volume I, p. 1578
US-26	*The New Shorter Oxford English Dictionary*, Volume I, p. 1324
US-27	*The New Shorter Oxford English Dictionary*, Volume I, p. 1588
US-28	Rejection letter from MARA to Torunlar re: Torunlar's 29 August 2003 application for a Certificate of Control (10 September 2003) (English translation, followed by the original Turkish version)
US-29	Rejection letter from MARA to Torunlar re: Torunlar's 23 October 2003 application for a Certificate of Control (3 November 2003) (English translation, followed by the original Turkish version)
US-30	Motion for Stay, filed by Torunlar in the 1st Administrative Court of Ankara (English translation, followed by the original Turkish version)
US-31	MARA's Response to Torunlar's Motion for Stay (English translation, followed by the original Turkish version)
US-32	Additional submission of Torunlar in the 1st Administrative Court proceedings (English translation, followed by the original Turkish version)
US-33	Rejection letter from MARA to Torunlar re: Torunlar's 20 January 2004 application for a Certificate of Control (9 September 2004) (English translation, followed by the original Turkish version)
US-34	Letter from Torunlar to MARA, Provincial Directorate of Agriculture re: MARA's denial of Torunlar's applications for a Certificate of Control (12 December 2005) (English translation, followed by the original Turkish version)
US-35	Letter from Turkish Minister Kurzad Tuzmen to US Trade Representative Rob Portman re: Turkey's commitment to begin issuing Certificates of Control (24 March 2006)
US-36	Letter of Acceptance 390 (24 March 2006) (English translation, followed by the original Turkish version)
US-37	Letter of Acceptance 603 (14 March 2006) (English translation, followed by the original Turkish version)
US-38	Rice – Wikipedia (en.wikipedia.org/wiki/Rice)
US-39	1st letter of complaint from Mehmetoglu to MARA re: request for a Certificate of Control (25 April 2006) (English translation)
US-40	Letter from MARA to Mehmetoglu re: request for a Certificate of Control (27 April 2006) (English translation)

Exhibit	Title of Exhibit
US-41	2nd letter of complaint from Mehmetoglu to MARA re: request for a Certificate of Control (27 April 2006) (English translation)
US-42	3rd letter of complaint from Mehmetoglu to MARA re: request for a Certificate of Control (28 April 2006) (English translation)
US-43	General Assessment of the Regime Regarding Technical Regulations and Standardisation for Foreign Trade (27 May 2005) (English translation)
US-44	Letter from ETM to MARA re: MARA's denial of the issuance of a Certificate of Control (undated) (English translation)
US-45	USDA Production, Supply and Distribution Online (www.fas.usda.gov/psdonline/psdHome.aspx)
US-46	*The New Shorter Oxford English Dictionary*, Volume II, p. 2372
US-47	Rice import data – Turkey: World Trade Atlas
US-48	Turkey Grain and Feed Annual 2005: USDA Foreign Agricultural Service GAIN Report (GAIN Report Number TU5006, 6 March 2005)
US-49	TMO Sale Price for Importers Fulfilling Domestic Purchase Requirement by Purchasing Rice from TMO: Conversion Table
US-50	"The Turkish Grain Board Paddy Rice Stocks Are Opened For Sale," www.tmo.gov.tr, 6 February 2005 (English translation)
US-51	Information required on Turkish import forms – Certificate of Control and Import License under the TRQ
US-52	Costs of imported rice under MFN rates and TRQ with purchases from TMO and domestic producers
US-53	Monthly Turkish Import Data for Paddy, Brown, and Milled Rice
US-54	Prices for Milled Rice in the Turkish Market
US-55	Average Landed CIF Prices, By Month and Type of Rice
US-56	Turkish Grain Board Announced Prices
US-57	The Creed Rice Market Report, December 21, 2005
US-58	Decision regarding Tariff Quota Imposition on Import of Certain Agricultural Products of European Community Origin (Official Gazette, No. 23225, January 9, 1998), amended by a Board of Ministers Decision of December 13, 2001 (Official Gazette, No. 24626, December 30, 2001) (English translation)
US-59	Annual Turkish Control Certificates Compared to Actual Turkish Imports
US-60	*The New Shorter Oxford English Dictionary*, Volume II, p. 2557
US-61	*The New Shorter Oxford English Dictionary*, Volume I, p. 577
US-62	Blank Turkish Customs Form (English translation, followed by the original Turkish version)
US-63	Helin court decision (11th Administrative Court of Ankara), 18 April 2006 (English translation, followed by the original Turkish version)
US-64	Brief filed by Asena Import Export Construction and Trade Ltd. Company in the 9th Administrative Court of Ankara, 8 November 2005 (2005/2262) (English translation, followed by the original Turkish version)
US-65	Brief filed by Pirtas Construction and Trade Ltd. Company in the 8th Administrative Court of Ankara, 8 November 2005 (2005/2291) (English translation, followed by the original Turkish version)
US-66	Brief filed by Zarifler Construction and Tourism, Inc. in the 4th Administrative Court of Ankara, 8 November 2005 (2005/2371) (English translation, followed by the original Turkish version)

Exhibit	Title of Exhibit
US-67	Brief filed by Etra Civil Engineering Ltd. Inc. in the 9th Administrative Court of Ankara, 12 December 2005 (2006/339) (English translation, followed by the original Turkish version)
US-68	Import of Rice, Undersecretariat of Customs, no. 20421 (10 August 2006) (English translation, followed by the original Turkish version)
US-69	USDA Export Sales Report (rice section)
US-70	US Paddy Rice – 1006.10
US-71	US calculation of Certificates of Control granted at MFN to non-EC (outside TRQ and FTAs)
US-72	Power Point presentation on the website of Turkey's Secretariat General for EU Affairs - Turkey-Macedonia agreement
US-73	Global Trade Information Services: Internet homepage and sources of data
US-74	U.S. Department of Agriculture: Data on Annual US Rice Production and Annual and Monthly Data on Total US Rice Exports and Total US Rice Exports to Turkey (2003-2006)
US-75	*Referans*, "So-called protection of rice has left the producers on their own" December 5, 2006 (English translation, followed by the original Turkish version)
US-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)
US-77	*Hurriyet*, "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)
US-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)
US-79	Certificate of Control (issued to Torunlar on August 15, 2003)
US-80	Andy Aaronson and Nathan Childs, "Developing Supply and Utilization Tables for the US Rice Market," Rice Situation and Outlook/RCS-2000/November 2000.
US-81	Annual and Monthly Turkish Import Data for Paddy, Brown, and Milled Rice (2003-2006)
US-81rev	Annual and Monthly Turkish Import Data for Paddy, Brown, and Milled Rice (2003-2006) (revised)
US-82	Turkish Import Data for Paddy Rice and Paddy Rice for Sowing (Turkey's State Institute of Statistics)
US-83	Letters from Turkish Producer Groups to the US Embassy in Ankara regarding the WTO panel proceedings in this dispute.

ANNEX J-2

LIST OF EXHIBITS SUBMITTED BY TURKEY

Exhibit	Title of Exhibit
TR-1	Communiqué of Standardization for Foreign Trade (No: 2006/5)
TR-2	Ministerial Decree on the Regime Regarding Technical Regulations and Standardisation for Foreign Trade (2005/9454)
TR-3	Annex VI-A of Communiqué No: 2006/05
TR-4	Certificate of Control
TR-5	Ministry of Agriculture and Rural Affairs and Ministry of Health, Turkish Food Codex Communiqué of Rice, No: 2001/10
TR-6	Ministry of Agriculture and Rural Affairs and Ministry of Health, Turkish Food Codex Communiqué of Paddy Rice, No: 2002/11
TR-7	Ministry of Agriculture and Rural Affairs and Ministry of Health, Turkish Food Codex Communiqué of Rice, No: 2002/12
TR-8	Breakdown of Imports of Rice, Paddy and Brown Rice by Countries
TR-9	Decree on Application of Tariff Quota for the Importation of Some Species of Paddy Rice and Rice, Decree No: 2005/9315 OG: 13/9/2005 - 25935
TR-10	Import License Form for the Undersecretariat for Foreign Trade
TR-11	Decree on Application of Tariff Quota for the Importation of Some Species of Paddy Rice and Rice, Decree No: 2004/7135 OG: 20/4/2004 - 25439
TR-12	Communiqué on Application of Tariff Quota for the Importation of Some Species of Paddy Rice and Rice, OG: 27/4/2004 - 25445
TR-13	Communiqué on Application of Tariff Quota for the Importation of Some Species of Paddy Rice and Rice, OG: 21/9/2005 - 25943
TR-14	Decree on the Safeguard Measures and Surveillance for Imports and the Administration of Quotas and Tariff Quotas
TR-15	Decree No: 2004/7333 On the Administration of Quotas and Tariff Quotas (Official Gazette No: 25473 of 26 May 2004)
TR-16	Decree on Application of Tariff Quota for the Importation of Some Species of Paddy Rice and Rice, Decree No: 2004/7756 OG: 27/8/2004 - 25566
TR-17	Communiqué on Application of Tariff Quota for the Importation of Some Species of Paddy Rice and Rice, OG: 8/9/2004 - 25577
TR-18	Communiqué Amending the Communiqué on Application of Tariff Quota for the Importation of Some Species of Paddy Rice and Rice, OG: 26/3/2005 - 25767
TR-19	Communiqué Amending the Communiqué on Application of Tariff Quota for the Importation of Some Species of Paddy Rice and Rice, OG: 11/5/2005 - 25812
TR-20	Approved Control Certificates Between 2003 and 21.09.2006
TR-21	Communiqué on the Issuance of Control Certification at the Importation of Foodstuffs and Packaging Materials that come into Contact with Foodstuffs and on Control Procedures as Importation Stage (Communiqué No: 31)
TR-22	Communiqué of Standardization for Foreign Trade (No: 2005/5)
TR-23	Turkey's yearly import figures for milled rice (2001 to Sept. 2006)
TR-24	Turkey's production and consumption figures for milled rice in Turkey (2001 to 2005)

Exhibit	Title of Exhibit
TR-25	Turkey's rice import figures, by month and organized by country of origin, types of rice, years, quantity and value (2003 to Aug-Sept 2006)
TR-26	Turkey's import data according to type of rice and country of origin (2003)
TR-27	List of quantities and unit price of domestic purchases made by (unspecified) companies, with average price for 2005 (2005)
TR-28	Turkey's monthly CIF prices for rice, as declared by importers (2003 to Aug-Sept 2006)
TR-29	TMO prices: - Yearly declared and received purchase price for long grain paddy rice (2002 to 2006)- Monthly selling price for paddy rice (Jan 2004 to Sept 2006)- Monthly wholesale selling price for milled rice (Jan 2003 to Sept 2006)
TR-30	Yearly quantities of purchases of paddy rice and sales of paddy and milled rice (2003 to Oct-Nov 2006)
TR-31	EC Council Decision No. 1/98 of the EC-Turkey Association Council of 25 February 1998 on the trade regime for agricultural products. Official Journal of the European Communities, 20.3.98, L 86/15- Protocol 2 concerning the preferential regime applicable to the importation into Turkey of agricultural products originating in the Community- Annex: Arrangements applicable to the importation into Turkey of agricultural products originating in the Community
TR-32	Schema of the import procedures applicable to imports at MFN and TRQ rates (New version provided with replies to questions after SSM)
TR-33	Approved Certificates of Control, according to available data compiled by MARA (2003 to 9 November 2006)
TR-34	Regulation on National Farmers' Registration System (by the Ministry of Agriculture and Rural Affairs). Official Gazette, 16 April 2005, No. 25778.
TR-35	Table on rejected and approved Certificates of Control (2003 to 2006)(New version provided with replies to questions after SSM)
TR-36	Table of denied applications of Certificates of Control and reasons for denial (2003 to July 2006)
TR-37	Average monthly exchange rate of New Turkish Lira *per* 1 US Dollar (2003 to November 2006)
TR-38	Approved Certificates of Control for: – Torunlar (2001, 2002, 2003 to 9 November 2006) – EMT (2003 to 9 November 2006) – Mehmetoglu (2001 to 2002, 2003 to 9 November 2006)
TR-39	Import figures for Torunlar, Mehmetoglu and ETM – general imports and imports from the US (2000 to 2006)
TR-40	Legal text: Turkish Grain Board [Agricultural Products Office, Inc.] Articles of Incorporation
TR-41	Certificates of Control for rice approved in-quota and over-quota (MFN and FTA) (2003 to 9 November 2006)
TR-42	Costs of Imported Rice under Different Scenarios
TR-43	Charts of Rice Equivalent Imports and CIF Landed Prices (1997 to 2006)
TR-44	Communiqué of Standardization for Foreign Trade (No: 2007/21)

ANNEX K

CORRESPONDENCE BETWEEN THE PANEL AND PARTIES REGARDING SECTION VII.G OF THE PANEL REPORT

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Annex K-3	Fax dated 9 August 2007 from the Panel to the parties	K-4
Annex K-4	Letter dated 9 August 2007 from the United States to the Panel in reply to Turkey's letter dated 8 August 2007	K-5
Annex K-5	Fax dated 10 August 2007 from the Panel to the parties	K-7
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Annex K-7	Letter dated 20 August 2007 from the United States to the Panel	K-9
Annex K-8	Letter dated 27 August 2007 from Turkey to the Panel	K-10
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ANNEX K-1

LETTER DATED 6 AUGUST 2007 FROM THE UNITED STATES TO THE PANEL

The United States wishes to thank the Panel for its hard work in this dispute and for providing the parties with the final report of the Panel. Upon review of that report, my authorities have instructed me to submit the following request.

In the final report issued to the parties, the Panel has added a new section VII.G on "Special and Differential Treatment" that had not appeared in the Panel's interim report and in which, *inter alia*, the Panel "notes that Turkey is a developing country Member".[1] However, neither party requested the Panel to make findings on this issue as part of its written request for the Panel to review precise aspects of the interim report.[2] Therefore, neither party has commented on this issue as part of the interim review of the Panel's report. Nor has either party provided any arguments and supporting facts as part of its submissions in this dispute for the Panel to make findings on this issue. As the Panel itself notes, "in the course of these Panel proceedings Turkey did not raise any specific provisions on differential and more-favourable treatment for developing country Members that require additional consideration".[3]

The United States does not consider that an entirely new finding, not requested by either party, should be made at the interim review stage, particularly as the basis for that finding was not addressed by the parties during the dispute. Accordingly, the United States respectfully requests that the Panel delete Section VII.G from the report to be circulated to Members.

The United States thanks the Panel for its consideration of this request. The United States is providing a copy of this letter directly to Turkey.

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[1] Panel Report, para. 7.304; *see also id.*, para. 7.305 (noting "the Panel took into account the respondent's status as a developing country Member").

[2] *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Article 15.2 ("DSU"). The final sentence of DSU Article 15.2 establishes that, "[i]f no comments are received from any party within the comment period, the interim report shall be considered the final panel report and circulated promptly to Members".

[3] Panel Report, para. 7.304.

ANNEX K-2

**LETTER DATED 8 AUGUST 2007 FROM TURKEY
TO THE PANEL COMMENTING ON THE UNITED STATES' LETTER
DATED 6 AUGUST 2007**

Turkey is grateful to the Panel for the opportunity to comment on the request put forward very recently by the United States.

Turkey believes that Section VII.G to the Panel Report accurately describes the reality of Turkey being a developing country and the fact that, despite Turkey not having invoked any special and differential provision under the DSU during the panel proceedings, the Panel did occasionally take into account the respondent's status as a developing country when preparing and revising the timetable for the process. Turkey appreciated the Panel's efforts to accommodate both parties' requests during the course of the proceedings and, in particular, Turkey's developing country status.

With respect to the request now being put forward by the United States, it states that "*(T)he United States does not consider that an entirely new finding, not requested by either party, should be made at the interim review stage"*. Turkey disagrees with this statement and believes that, pursuant to Article 12.11 of the DSU, the Panel has correctly indicated what occurred during the panel proceedings with respect to Turkey's developing country's status and the absence of specific requests by Turkey for special and differential treatment. Turkey does not believe that a specific request by either party was necessary for this statement to be made by the Panel.

For this reason, Turkey finds Section VII.G appropriate and accurate and respectfully requests the Panel not to delete Section VII.G from the report to be circulated to the Members.

Turkey is providing a copy of those comments directly to the United States.

ANNEX K-3

FAX DATED 9 AUGUST 2007 FROM THE PANEL TO THE PARTIES

The Panel thanks the United States for its communication dated 6 August and has taken note of its request that Part VII.G be deleted from the final report. The Panel also thanks Turkey for its communication of 8 August and takes note of its view that Part VII.G should not be deleted from the report.

The Panel notes that this part was only included in the final version of the report that was issued to parties. Having considered both parties' views on the issue, however, the Panel feels that Part VII.G should not be deleted from the final report. This part is only a statement that reflects what occurred during the panel proceedings and does not affect the rights and obligations of either party in the current dispute.

As stated in Part VII.G, Turkey is a developing country Member. In the course of the Panel proceedings, Turkey did not make reference to any substantive provisions on differential and more-favourable treatment for developing country Members in the covered agreements that required particular consideration. However, in the light of Article 12.10 of the DSU, the Panel took into account Turkey's status as a developing country Member when preparing and revising the timetable for the process, including when considering Turkey's requests for extensions of deadlines to submit responses and comments.

Accordingly, the Panel intends to circulate its final report, including Part VII.G, to Members on Friday, 10 August, as earlier announced to parties.

ANNEX K-4

LETTER DATED 9 AUGUST 2007 FROM THE UNITED STATES TO THE PANEL IN REPLY TO TURKEY'S LETTER DATED 8 AUGUST 2007

The United States is in receipt of Turkey's letter of 8 August, as well as the Panel's communication of 9 August. With respect to Turkey's letter, it confirms that at no point in this dispute – including in the interim review comments – did either party raise the question of Turkey's status as a developing country Member, let alone provide evidence or arguments on the question. Nor did Turkey refer to or invoke Article 12.11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

The United States appreciates the Panel's efforts and diligence in raising this issue. In the Panel communication of 9 August, the Panel indicates that Part VII.G of the Panel report "is only a statement that reflects what occurred during the panel proceedings and does not affect the rights and obligations of either party in the current dispute". However, Article 15.1 of the DSU requires that any descriptive sections of a panel report be provided to the parties in advance for comment. Part VII.G was not provided as part of the descriptive part of the Panel report in this dispute and so does not accord with Article 15.1.

In addition, the United States recalls that Article 15.2 of the DSU provides, in pertinent part, as follows:

> "... Within a period of time set by the panel, a party may submit a written request for the panel to review *precise aspects* of the interim report prior to circulation of the final report to the Members. At the request of a party, the panel shall hold a further meeting with the parties *on the issues identified in the written comments*. If no comments are received from any party within the comment period, the interim report shall be considered the final report ... ." (Emphasis added).

The panel in *Australia – Salmon* interpreted this language to mean that "it is not open to the Panel to consider anything other than comments dealing with 'precise aspects' of the interim report."[1] In light of Article 15.2, and inasmuch as neither party commented at the interim review stage on the absence of a discussion in the Panel Report of the S&D provisions of the DSU and Turkey's decision not to invoke them, the United States respectfully submits that this issue was "not open to the Panel to consider".

Furthermore, the United States respectfully disagrees with the Panel's statement that the new Part VII.G of the final Panel Report "does not affect the rights and obligations of either party in the current dispute." In Part VII.G, the Panel makes a finding that Turkey is a developing country Member. This finding has obvious implications for various provisions of the WTO Agreements, with the Panel's discussion of Article 12.10 and 12.11 of the DSU offering but one example. Moreover, the manner in which this determination was made is unexplained, although Article 12.7 of the DSU requires a panel to set out the findings of fact and basic rationale behind any findings that it makes.

The inclusion of panel findings and descriptions of the panel proceedings in the final report that were never submitted to the parties for review and comment in accordance with Article 15 of the DSU raises significant, important systemic issues. It would be a precedent of deep concern to many Members and the cause of substantial discussion among Members and at the Dispute Settlement

[1] Panel Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/R, adopted 6 November 1998, as modified by the Appellate Body Report, WT/DS18/AB/R, para. 7.3.

Body. And it appears unnecessary in this dispute since Turkey never raised the issue, never requested the Panel to include any such findings or description, and the Panel itself has characterized Part VII.G as simply descriptive and not intended to affect either party's rights and obligations.

Accordingly, for the foregoing reasons, the United States respectfully requests the Panel to reconsider Part VII.G and delete it from the report to be circulated to Members.

ANNEX K-5

FAX DATED 10 AUGUST 2007 FROM THE PANEL TO THE PARTIES

The Panel takes note of the United States' communication received in the evening of 9 August and of its request that the Panel delete Part VII.G from the report to be circulated to Members.

In the light of this request, the Panel has decided to delay, until further notice, circulation of the final report to the Members, originally scheduled for today.

The Panel will inform parties early next week on any further steps regarding the United States' request.

ANNEX K-6

FAX DATED 13 AUGUST 2007 FROM THE PANEL TO THE PARTIES

Pursuant to the message sent to you on Friday, 10 August, the Panel invites the United States, **by close of business, Monday, 20 August**, to elaborate or supplement, if it so wishes, its arguments regarding Part VII.G of the report and the inclusion of that Part in the final report to be circulated to Members.

Subsequently, Turkey is invited to make any comments on the United States' request and arguments **by close of business, Monday, 27 August**.

...

After receiving these comments, the Panel will decide on any further action regarding the United States' request and Part VII.G of the report.

ANNEX K-7

LETTER DATED 20 AUGUST 2007 FROM THE UNITED STATES TO THE PANEL

The United States thanks the Panel for its communication of 13 August 2007, and its invitation to the United States to elaborate or supplement its arguments regarding Part VII.G of the report and the inclusion of that Part in the final report to be circulated to Members.

My authorities have instructed me to present the following elaboration and supplement to the US letter of 9 August. As indicated in that letter, a key issue presented by Part VII.G is whether a panel may, after the interim report has been issued and commented upon, include an entirely new part in its final report. As the United States described in its letter of 9 August, the answer of necessity is no.

This issue presents important systemic concerns for all Members, regardless of the substance of Part VII.G. While Turkey may believe that in this instance the added part is accurate, the United States did not have an opportunity to express a view. Further, one must consider what would happen if the new part had contained different findings. For example, the United States suspects that Members would have strong concerns if a panel were to add to its final report a new section that was not in the interim report that contained new findings and description either on claims presented or characterizing the panel proceedings (such as the views of experts consulted). Any such addition would not be in conformity with the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"). It would not matter what the content of that additional part might be.

Nor is this issue something that may be "cured" at the stage of a panel's final report. As past panels and the Appellate Body have concluded, it is not appropriate at the interim review stage to consider new evidence.[1]

In addition to these important, systemic concerns, Part VII.G presents another systemic issue. As the United States noted in its letter of 9 August 2007, in Part VII.G the Panel's finding that Turkey is a developing country Member is unexplained, although Article 12.7 of the DSU requires a panel to set out the findings of fact and basic rationale behind any findings that it makes. The lack of citation to evidence and argument is unsurprising since both parties have confirmed that the issue was never discussed during the panel proceedings and no evidence or argumentation was presented by either party. And again, it is not appropriate to consider new evidence at the interim review stage let alone at the point of circulation of a final panel report.

Turkey's only reason for including Part VII.G is that it is "accurate" in Turkey's view. The new Part is not accurate in the view of the United States since, as discussed, this issue was never raised during the panel proceedings nor did Turkey refer to or invoke Article 12.11 of the DSU. But the issue is much larger than whether the new Part is accurate or not. As noted, adding a new part at this stage of the proceedings raises a number of important, systemic concerns and issues of conformity with several provisions of the DSU.

Accordingly, for the foregoing reasons as well as those in the US letter of 9 August , the United States respectfully requests the Panel to delete Part VII.G from the report to be circulated to Members.

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[1] Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, para. 301; Panel Report, *European Communities – Selected Customs Matters*, WT/DS315/R, adopted 11 December 2006, paras. 6.3-6.6.

ANNEX K-8

LETTER DATED 27 AUGUST 2007 FROM TURKEY TO THE PANEL

Turkey wishes to thank the Panel for the opportunity to comment on the request put forward by the United States, most recently on 20 August 2007.

As we previously stated in our letter 8 August 2007, Turkey fails to understand the concern of the United States on Part VII.G of the Panel Report where Panel merely implements the provisions of Article 12.10 and Article 12.11 of the "Understanding on Rules and Procedures Governing the Settlement of Disputes" (DSU). Article 12.11 asserts that "Where one or more of the parties is a developing country Member, the panel's report *shall* explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures".[1] *(emphasis added)*

Also, Article 12.10 of the DSU sates that "… In addition, in examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation. …".[2] In Turkey's view, those two Articles should be read together in order to see the rationale behind Part VII.G where Panel notes the fact that it has taken into account Turkey's status as a developing country Member when preparing and revising the timetable for the process.

In this respect, Turkey believes that Panel is acting according to the provisions of those two Articles in Part VII.G of the Final Report and the absence of any specific request of Turkey does not create any impediment to that. In other words, Turkey believes that its developing country status is a fact independent of whether or not Turkey has invoked any of the specific substantive provisions on special and differential treatment. Thus, Turkey's developing country status itself triggers the obligation on the Panel to accord sufficient time to prepare and present argumentations.

On the other hand, despite the fact that Turkey has not invoked any special and differential provision under the relevant Agreements during the Panel proceedings, it in fact did invoke Article 12.10 by its letter dated 27 February 2007 requesting the assistance of the Chairman of the DSB to extend the period of prior consultations as a developing country. According to the first part of Article 12.10; "[i]n the context of consultations involving a measure taken by a developing country Member, the parties may agree to extend the periods established in paragraphs 7 and 8 of Article 4. If, after the relevant period has elapsed, the consulting parties cannot agree that the consultations have concluded, the Chairman of the DSB shall decide, after consultation with the parties, whether to extend the relevant period and, if so, for how long." The response of the then Chair was received on 21 March 2006 stating that "… there was no past practice in the DSB for dealing with Article 12.10 requests since yours *(Turkey's)* was the first such request ever made" and in fact, the Chair encouraged Turkey to bring this issue in the ongoing negotiations. Although that was an issue of the pre-Panel proceedings Turkey strongly believes that developing country status of Turkey has been considered at different time segments of this dispute including pre and during the Panel process.

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[1] Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 12 Panel Procedures, paragraph 11.

[2] Ibid, paragraph 10.

In addition, the phrase in the United States' comment on 20 August 2007: "… in Part VII.G the Panel's *finding* (*emphasis added*) that Turkey is a developing country Member …" cannot be understood considering Turkey's member status within the WTO.

In conclusion, Turkey respectfully requests the Panel to consider the above-mentioned reasons together with its 8 August 2007 letter and maintain Part VII.G of the Report.

Turkey is providing a copy of those comments directly to the United States.

ANNEX K-9

LETTER DATED 30 AUGUST 2007 FROM THE UNITED STATES TO THE PANEL

The United States is in receipt of Turkey's 27 August response to the elaboration by the United States of its arguments provided on 20 August. Since that response referred to the discussion held prior to the Panel's establishment concerning the applicability of Article 12.10 of the DSU, a discussion to which the Panel was necessarily not privy, my authorities have instructed me to provide one clarification to ensure that the Panel has a more complete understanding of that discussion.

In its letter of 27 August, Turkey recalls that it invoked Article 12.10 of the DSU in a letter dated 27 February 2006[1] "requesting the assistance of the Chairman of the DSB to extend the period of prior consultations as a developing country". As the Chairman concluded, this invocation was untimely, occurring after the United States had requested the establishment of this Panel. Accordingly, the question of whether Turkey was a developing country Member was neither considered nor addressed in that discussion. Thus it is inaccurate to say that the "developing country status of Turkey has been considered at different time segments of this dispute including pre and during the Panel process". That discussion does not afford any support to Turkey's position on the issue of Part VII.G.

[1] In its 27 August letter, Turkey refers to the date of its letter to the DSB Chairman as 27 February 2007. The actual date of Turkey's letter is 27 February 2006.

ANNEX K-10

FAX DATED 11 SEPTEMBER 2007 FROM THE PANEL TO THE PARTIES

The Panel is grateful for the comments and observations you have made over the past month concerning Part VII.G of its report. In the light of Parties' comments and observations, the Panel has decided to keep Part VII.G of its report in the following, slightly modified form:

"G. SPECIAL AND DIFFERENTIAL TREATMENT

7.302. Pursuant to Article 12.11 of the DSU:

> "[W]here one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures."

7.303. In addition, the DSU provides in Article 12.10 that:

> "[I]n examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation."

7.304. The Panel notes that, in the course of these Panel proceedings Turkey did not raise any specific provisions on differential and more-favourable treatment for developing country Members that require particular consideration, nor do we find these specialized provisions relevant for the resolution of the specific matter brought before this Panel.

7.305. In any event, during the Panel proceedings, the Panel took into account the respondent's status as a developing country Member, a fact not contested by the complainant, when preparing and revising the timetable for the process. The Panel attempted, *inter alia*, to accommodate, to the extent possible, Turkey's requests for extensions of deadlines to submit responses to the questions posed by the Panel both after the first and second substantive meetings, as well as Turkey's request for time to submit comments on the United States comments to the Panel's interim report."

In addition, for reasons of transparency, the Panel has decided to reflect, in a new Annex to its report, the relevant parts of the various communications it has exchanged with the Parties concerning Part VII.G. The text of this Annex, which would be Annex K, is attached to this facsimile; as the attached shows, it will also include the text of the current facsimile.

The Panel intends to inform Parties shortly about the date of circulation of its final report to Members.