

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

Report of the Panel

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

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

Short Title	Full Case Title and Citation
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , 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
<i>Canada – FIRA</i>	Panel Report, <i>Canada – Administration of the Foreign Investment Review Act</i> , adopted 7 February 1984, BISD 30S/140.
<i>Italy – Agricultural Machinery</i>	Panel Report, <i>Italian Discrimination Against Imported Agricultural Machinery</i> , adopted 23 October 1958, BISD 7S/60
<i>US – Taxes on Automobiles</i>	Panel Report, <i>United States – Taxes on Automobiles</i> , 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 Suzuki⁵

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

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.

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 provinces¹² 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 years¹⁷, with a steeper increase in production after 2003.¹⁸ This latter trend is underscored by the paddy rice production figures provided by the parties.

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 parties²¹, 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 2006²², 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 tonne²⁴, 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, respectively³¹; (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 28,000³³ and 8,000³⁴ tonnes of duty-free rice imports *per annum*, respectively.³⁵

2.18 The parties concur that Turkey is a net rice importer³⁶, 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	<i>United States*</i>	247,723	10,036	213,519	471,997
	<i>Turkey**</i>	247,723	10,934	213,528	472,186***
2004	<i>United States*</i>	26,749	26,177	101,188	154,485
	<i>Turkey**</i>	35,432	26,176	103,887	165,496***
2005	<i>United States*</i>	102,198	42,193	158,423	302,814
	<i>Turkey**</i>	102,197	42,193	158,422	302,813***
2006 Jan-Nov	<i>United States*</i>	91,744	41,704	53,063	186,513
2006 Jan-Sep	<i>Turkey**</i>	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 differences⁴², 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 2006⁴⁵, 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 imports⁴⁷ 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:

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

SIGNIFICANT REDUCTION OR LACK OF IMPORTS												RICE TYPE
2003												
Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	
									no imports			paddy
no imports								no imports				brown
								significantly lower imports				milled
								only EC imports	mainly EC imports	only EC imports		
2004												
Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	
parties disagree whether any imports	no imports		minimal EC imports	no imports				significantly lower imports	no imports			paddy
no imports				significantly lower imports				no imports				brown
minimal EC imports		no imports										milled
2005												
Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	
								no imports		significantly lower imports		paddy
	significantly lower imports			significantly lower imports			no imports					brown
							significantly lower imports				milled	
							only EC imports					
2006												
Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep				
	parties disagree whether any imports			parties disagree whether any imports				no imports				paddy
							parties disagree whether any imports	parties disagree whether any imports				brown
							parties disagree whether any imports					milled

Based on data in exhibits US-81rev, TR-25 and TR-26

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 Panel⁵⁰, 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 17,789⁶⁶ 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 similar⁶⁹, 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	
	<i>United States*</i>	Turkey**	<i>United States*</i>	Turkey**	<i>United States*</i>	Turkey**	<i>United States*</i>	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

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 authority⁸⁶, 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. 22,541bis, 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

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

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 Control¹¹⁴, 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

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 Torunlar¹⁴³, 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

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. 2004/7333¹⁵⁵, 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.

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 Balıkesir, Bursa, Çanakkale, Edirne, İstanbul, Kırkareli, 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 Balıkesir, Bursa, Çanakkale, Edirne, İstanbul, Kırkareli, 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

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 Balıkesir, Bursa, Çanakkale, Edirne, Kırkareli, 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 Balıkesir, Bursa, Çanakkale, Edirne, Kırkareli, 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 2005¹⁹⁷, 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

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 Secretariat²⁰⁶ 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

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

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 2004²²⁹; (b) letter No. 905, dated 28 June 2004²³⁰; (c) letter No. 1,795, dated 30 December 2004²³¹; and, (d) letter number unknown, dated 24 March 2006²³².

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".

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:

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"; and²⁵¹
- (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

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."

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:

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."

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.²⁷⁴ⁿ²⁷⁵

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

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, *Phillips 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. (Daloz, 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* (Giuffrè 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

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

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

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

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 panel³⁰⁹, 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.

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 duties¹, 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."

7.35 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 governments³¹³ 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.

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 products³¹⁸ is inconsistent with Article XI:1 of the GATT 1994,

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

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 above³²⁸, 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 duties¹, 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."

(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:

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.

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 Turkey³⁴¹;
- (b) photocopies of motions presented in Turkish administrative courts against the Government's rejection of the authorization to import rice³⁴²;
- (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 rice³⁴³;
- (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 rice³⁴⁴;
- (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 approved³⁴⁵;

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 rice³⁴⁶;
- (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:

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

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 22541bis). 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 rice³⁶⁵ 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

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 2004³⁶⁹, from January to July 2004³⁷⁰, from July 2004 to January 2005³⁷¹, from January to August 2005³⁷², 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

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 courts³⁷⁷ 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

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 2006³⁸², 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 time³⁸³, 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:

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 regulations³⁹⁹, copies of forms used for Certificates on Control and for import licences under the tariff rate quotas⁴⁰⁰, 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

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 above⁴¹⁰, 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

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 Turkey⁴¹¹, 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 inferences⁴¹², 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 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 Provisions⁴¹⁸, 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 .

Safeguards⁴¹⁹, the Agreement on Agriculture where quantitative restrictions were eliminated⁴²⁰ 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 Agreement⁴²⁴, 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 1994⁴²⁶, 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

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 "tariffification" 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

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 procedures⁴³⁴ 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

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 Turkey⁴⁴⁰), 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

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

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, pursuant 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

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 occasions⁴⁷⁴, 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:

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 Egypt'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 –*

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

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

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 duties¹, 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

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 before⁵⁰⁵, 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

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 Turkey⁵¹¹ 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

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..."

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

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

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

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}

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

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 of 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

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 duties¹, 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).

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 occasions⁵⁷⁷, 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 concerned⁵⁸³ 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*:

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

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 above⁵⁹⁷, 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.

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 panel⁶⁰⁶ 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 period⁶⁰⁷; 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

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:

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.

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.

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.

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.
