TURKEY – MEASURES AFFECTING THE IMPORTATION OF RICE

(WT/DS334)

EXECUTIVE SUMMARY OF THE

ORAL STATEMENT OF

THE UNITED STATES OF AMERICA

AT THE FIRST MEETING OF THE PANEL

November 17, 2006

1. In its first submission, the United States made out a *prima facie* case that Turkey has breached several provisions of the GATT 1994 and the WTO Agreements, including with respect to barriers to importation as well as to discrimination against imported rice. For example, the United States demonstrated that Turkey has maintained a WTO-inconsistent domestic purchase requirement (DPR) as part of its tariff rate quota (TRQ) system. To import rice under the TRQ and obtain a lower rate of duty, an importer must purchase substantial quantities of rice from the Turkish Grain Board (TMO) or Turkish producers and producer associations in order to obtain an import permit from Turkey's Foreign Trade Undersecretariat (FTU). And only domestic rice qualifies an importer to obtain this advantage – imported rice does not receive this advantage. Turkey's domestic purchase requirement treats imported rice less favorably than domestic rice, thereby breaching Article III:4 of the GATT 1994.

2. Although the DPR makes it very expensive to import rice, importers have no alternative but to import rice under the TRQ because Turkey's Ministry of Agriculture and Rural Affairs (MARA) fails to grant licenses to import rice at the over-quota rates of duty. Through the unpublished "Letters of Acceptance," Turkey's Minister of Agriculture repeatedly accepts recommendations from his staff to "delay" the start date of the period in which such licenses, or "Certificates of Control," will be granted, thereby ensuring that rice trade occurs under the TRQ. When even the TRQ is closed during Turkey's annual rice harvest, no rice importation can occur. Turkey's denial of Certificates of Control outside the TRQ regime is a prohibition or restriction on importation that breaches Article XI:1 of the GATT 1994.

3. Turkey has denied the U.S. claims but has essentially ignored the extensive factual evidence presented by the United States and, despite all evidence to the contrary, has asserted

that Turkey's rice regime actually provides an *advantage* to foreign rice producers over Turkish rice producers. Turkey has failed to rebut the *prima facie* case made by the United States.

Definition of Import License

4. First, Turkey claims that the Certificate of Control is not an import license and hence is not subject to the provisions of the Import Licensing Agreement and other provisions, because the Certificate "amount[s] to administrative forms that are required exclusively for '*customs purposes*'." In its first submission, Turkey sets forth its proposed criteria for when a document is exclusively for customs purposes (and hence should not be considered an import license). Turkey then asserts that, since the Certificates of Control may be used for customs purposes, they are not licenses but rather official documents for customs purposes.

5. This argument is unpersuasive. The fact that a document is necessary to clear customs does not mean it is not an import license. Indeed, import licenses will be used for customs purposes – that is the very nature of an import license since importation cannot occur without it. The real question is what else is the document used for. Here, the Certificate of Control is used to control importation – not just in the customs sense, but in the sense of a restriction or ban on importation. The Certificate of Control is not even a customs document in the most basic sense – it is very revealing that the Certificate of Control is approved by MARA, not by Turkish Customs.

6. Second, the Certificate of Control is an import license even under Turkey's standard. In its submission, Turkey acknowledges that the import permit required by FTU for importation under the TRQ is an import license. Yet a side-by-side comparison of the elements required by

MARA for the Certificate of Control and those required by FTU for the import permit reveal a remarkable degree of similarity. Accordingly, under Turkey's own logic, there would be no reason to exclude the Certificate of Control from Import Licensing Agreement disciplines on the basis that it contains customs-related information.

7. Third, a Member cannot shield a measure from coverage under the Import Licensing Agreement or other provisions by including customs-related information in the license application and then claiming it is no longer an import license. The footnote to the definition of "import licensing" in the Import Licensing Agreement makes clear that, regardless of how a Member characterizes particular administrative procedures, such procedures are still considered "import licensing" if they satisfy the criteria in Article 1 of the Import Licensing Agreement.

8. The addition of customs-related information in the Certificate of Control does not change the fact that the Certificate is part of Turkey's requirement for the submission of an application or other documentation as a prior condition for importation, and approval constitutes formal permission from MARA (not Customs) to import rice into Turkey. In other words, the Certificate is an import license within the definition in Article I of the Import Licensing Agreement.

Over-Quota Imports and the Issuance of Certificates of Control

9. In its first submission, the United States made a *prima facie* case that Turkey's denial of import licenses outside the TRQ is in breach of Article XI of the GATT 1994 because Turkey prohibits or restricts imports at the over-quota rate through the use of import licenses or other measures. In making its case, the United States presented a large amount of documentary

evidence demonstrating that Turkey does not issue Certificates of Control, which are necessary to import rice outside the TRQ. The United States presented examples of "Letters of Acceptance" signed by Turkey's Minister of Agriculture. Through these documents, the Minister directs MARA officials not to grant Certificates to protect the domestic rice industry. The United States presented examples of correspondence between Turkish importers and MARA, including several letters from MARA rejecting importer requests for Certificates. In one letter, dated May 1, 2006, a Turkish government official admitted that the government did not have authority under Turkish law to grant Certificates. And the United States presented Minister Tuzmen's March 24, 2006 letter to USTR Portman, which was issued just after the DSB established the panel in this dispute and which promised that Turkey would issue Certificates "as of April 1, 2006." Apparently, MARA was not in agreement with the contents of Minister Tuzmen's letter, as evidenced by the May 1 rejection letter referenced above. The rejection letter was completely consistent with the guidance provided in the unpublished Letter of Acceptance that was operative at the time.

10. As the United States has met its burden to make out a *prima facie* case that Turkey is in breach of Article XI:1 of the GATT 1994, it is now up to Turkey to rebut the U.S. case. Turkey has not done so. Turkey has not contested the authenticity of any of the documents submitted by the United States. Moreover, Turkey has not provided any documentary evidence to rebut their contents. Instead, Turkey merely asserts, without any substantiation, that contrary to the express terms of the Letters of Acceptance, it has been granting Control Certificates at the over-quota rates of duty. In the *Wool Shirts and Blouses* dispute, the Appellate Body noted it was "difficult,

indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof."

11. Instead of attempting to rebut the U.S. arguments directly, Turkey attempts to dismiss the Letters of Acceptance as "informal internal documents," documents that are "never enforced" and cannot be enforced by the courts, "unreliable evidence of the real intention and trade policies of Turkey in relation to rice importation", and "inadmissible evidence" that cannot be reviewed by this panel. In addition, Turkey dismisses the rejection letters sent to importers by MARA and the court documents as nothing more than "a natural component of the interaction between any WTO Member's administration and its business community." While the United States certainly understands why Turkey would like the Panel to ignore these documents, the fact is they are evidence that cannot be ignored. And whether they are leaked or internal or enforced by the courts is irrelevant. The simple fact is they show that Turkey decided not to issue Certificates of Control, thus demonstrating that the Certificates are discretionary import licenses (and therefore an import restriction as such) and that Turkey is using them in practice to restrict imports.

12. Turkey's arguments that the Letters of Acceptance are confidential, unenforceable and disregarded by the judiciary are contradicted by the fact that Turkey tried to use these documents in Turkish court to justify its denial of Control Certificates to an importer and, in fact, relied upon the documents in court as its sole source of legal authority for the denial. It is difficult to understand how the Letters are an unreliable source of the intentions of Turkish trade policy when counsel for MARA argued before the court that MARA did not have authority under

Turkish law to grant Certificates to the importer under the terms of those Letters, and that the Letters were adopted in order to protect domestic rice producers against foreign competition.

13. In lieu of documentary evidence, Turkey has produced a chart which purports to show that Turkey is granting Certificates of Control outside the TRQ, but which raises additional questions. U.S. export data and Turkish data on Control Certificates with respect to U.S. rice imports vary significantly. For example, Turkey claims that through September 21, 2006, MARA has granted Certificates covering the importation of over 400,000 tons of U.S. rice, whereas U.S. trade data puts the volume of U.S. rice exports to Turkey in 2006 at just under 18,000 tons through October 26. Further, even under Turkey's own chart, at least 96 percent of rice approved in 2004 and 90 percent of rice approved in 2005 was for entry under the TRQ, for which domestic purchase is required. As it is much more expensive to import under the TRQ, it is clear that such an overwhelming majority of importers would only "choose" to import rice under the TRQ if there were severe restrictions or a ban on importing at the over-quota rates.

14. Turkey also claims that the Letters of Acceptance are not being enforced, as evidenced by the fact that MARA is granting Certificates of Control to importers who purchase domestic rice under the TRQ regime. If Turkey is requiring the Certificates to import under the TRQ regime, the United States thanks Turkey for that clarification. However, that information is irrelevant to the question of whether Turkey is granting the Certificates, and therefore blocking importation, outside the TRQ. The Letters only purport to suspend the granting of Certificates to importers who want to import at the over-quota rates without domestic purchase. They do not address whether the Certificates are granted under the TRQ regime. In addition, this clarification only

deepens our concern with respect to the WTO-inconsistency of the DPR because, if what Turkey says is correct, an importer that wants to import rice under the TRQ will have to approach four different Turkish government agencies – TMO, FTU, MARA, and Turkish Customs – and obtain two different import licenses in order to effectuate the importation.

15. With respect to the ban on the issuance of Control Certificates at the over-quota rates, even if Turkey could substantiate that it is not enforcing the Letters of Acceptance, that is not a bar to this panel making a finding of WTO-inconsistency concerning them. A measure may still be found WTO-inconsistent even if it is not being enforced, as was the case in the *1916 Act* dispute. Furthermore, even if Turkey were issuing some Certificates, that would not alter the fact that they constitute discretionary import licensing and an import restriction contrary to Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

Domestic Purchase Requirement

16. With respect to the DPR, Turkey contests that (1) the DPR is a measure "affecting [the] . . . internal sale, offering for sale, purchase, transportation, distribution or use" of domestic and imported rice, and (2) that the DPR treats imported rice less favorably than domestic rice. Turkey's rationale is that importers can freely import rice outside the TRQ and that the TRQ modifies conditions of competition so that imported products are actually treated more favorably than domestic products. Turkey has failed to rebut the U.S. *prima facie* case on both issues.

17. With respect to the first issue, the DPR directly affects the conditions of competition between domestic and imported rice. Only domestic rice satisfies the purchase requirement in order to import rice into Turkey under the TRQ. Thus, domestic rice has an advantage in the

marketplace that imported rice does not have, and is more attractive as a result. Turkey claims that the United States has not satisfied the "affecting" standard because importers can import rice into Turkey outside the TRQ where domestic purchase is not required. Even if that were true, it does not erase the discrimination against imported rice.

18. In this respect, a Member's requiring the sourcing of domestic goods as a condition to receive a benefit has long been recognized as inconsistent with Article III:4 of the GATT 1994. In 1958, the GATT panel in *Italian Discrimination Against Imported Agriculture Machinery* found an Italian law that conditioned the receipt of special credit terms for farmers on the purchase of domestic agricultural machinery to be in breach of Article III:4. And the *India Autos* panel found an Article III:4 breach where India's local content requirement for automobile manufacturers created an incentive to purchase and use Indian-origin parts and components and, thus, a disincentive to use like imported parts and components.

19. On the issue of whether the DPR treats imported rice less favorably than domestic rice, Turkey argues that the TRQ system actually provides foreign rice producers with an advantage over Turkish rice producers in selling their rice in Turkey. However, Turkey completely ignores the costs stemming from the DPR in its analysis. The large cost from domestic purchase more than offsets any alleged cost savings resulting from the preferential rates of duty realized by importers under the TRQ. It hardly matters that one ton of U.S. rice will allegedly be a few dollars cheaper than one ton of Turkish rice if one fails to account for the fact that, in order to import that one ton of U.S. rice into Turkey, the importer needs to purchase two tons of Turkish rice at a cost of several hundred additional dollars.

Restrictions on Who May Import Rice Under the TRQ Regime

20. Turkey claims that anyone can import rice under the TRQ. While it is true on the face of the regulation that this is a theoretical possibility, Letter of Acceptance 1795 confirmed that Turkey only permits entities that purchase paddy rice to import rice under the TRQ. Practically speaking, only millers or those with milling capacity would purchase paddy rice. Consumers, wholesalers, retailers, and other distributors are unlikely to have milling capacity and, thus, would not be able to "take advantage" of being able to import under the TRQ. Even if TMO would allow entities to purchase milled rice in order to satisfy the DPR, the TRQ regime would still exclude much, if not all, of the non-milling community from importing rice under the TRQ, as restaurants and retailers that might be interested in importing milled rice would be dissuaded by the high purchase and storage costs. For these reasons, the eligibility criteria for domestic purchase under the TRQ also are inconsistent with Article XI of the GATT 1994.

Measures That Have Allegedly Expired

21. Lastly, Turkey argues that the measures comprising its TRQ regime are no longer in force and, thus, the panel should refrain from making findings with respect to that regime or, if it does make such findings, should not make any recommendations to the DSB regarding those measures. The United States disagrees that the Panel should refrain from making findings and recommendations and further disagrees that the measure is no longer in force.

22. The text of the DSU, as clarified by past panel and Appellate Body reports, makes clear that if a measure exists at the time of consultations and panel establishment, it has not expired for purposes of WTO dispute settlement. In this dispute, the DSB established this panel with

standard terms of reference to examine the matter raised by the United States on March 17, 2006. The TRQ regime allegedly "expired" more than four months later. Therefore, the TRQ regime had not "expired" at the time of consultations and panel establishment, and the Panel is charged by the terms of reference and Article 3.3 of the DSU to issue findings with respect to the consistency of the measures comprising Turkey's TRQ regime with the relevant provisions of the covered agreements and make recommendations in order to resolve the dispute.

23. The reports cited by Turkey respect the distinction between measures that expire prior to consultations and panel establishment and measures that expire after panel establishment. In *Certain EC Products* and *Chile Price Bands*, the panels declined to make findings on measures that expired prior to panel establishment. With respect to *DR Cigarettes*, Turkey states that the panel did not find it necessary to make finding with respect to a measure that expired during the course of panel proceedings, but failed to note that the Appellate Body disagreed with the panel and recommended that the Dominican Republic bring its measure into conformity with its WTO obligations to the extent that it had not already done so.

24. Further, it is not clear to the United States that the TRQ regime ceased to exist on July 31, as Turkey claims, given the number of unpublished documents that Turkey issues with respect to the rice trade. Moreover, Turkey claimed that the TRQ regime "expired" in 2003, 2004, and 2005 and yet the measure resurfaced a few months later. Therefore, the United States believes that it is critical for achieving a definitive resolution of this matter that, if the Panel were to make adverse findings in this dispute, it also issue recommendations that Turkey bring its measures into conformity with its WTO obligations.