

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

**(WT/DS334)**

**First Panel hearing: Third Party Session**

**Oral Statement by Australia**

**Geneva**  
**9 NOVEMBER 2006**

## Introduction

1. In this statement, Australia will canvass a number of issues of legal interpretation.
2. First, the Panel should address the arguments relating to the correct order of analysis before considering whether, for reasons of judicial economy, it is no longer necessary to address some or all of the claims raised.
3. Second, Australia submits that Turkey's alleged denial of Certificates of Control, if established, is inconsistent with the prohibition on non-tariff measures in Article 4.2 of the *Agreement on Agriculture*.
4. Third, Australia will make submissions on the term 'import licence' used in the *Agreement on Import Licensing Procedures (Import Licensing Agreement)* and Article XI:1 of GATT 1994.
5. Fourth, if Turkey's Tariff Rate Quota (TRQ) is no longer in existence and there are no continuing measures being applied, the Panel should consider whether it is necessary to make a finding in respect of the claims relating to the TRQ in order to resolve the dispute. Should the Panel decide to make findings on the TRQ, Australia argues that the domestic purchasing requirement is inconsistent with Article III:4 of GATT 1994.
6. Fifth, if the Panel finds that Turkey has adopted a practice of denying Certificates of Control altogether, this would constitute a 'measure of general application' for the purposes of Article X:2 of GATT 1994 and a failure to publish this measure would be inconsistent with Article X:2.
7. Sixth, in relation to Turkey's arguments about the admissibility of certain evidence, Australia notes that all evidence is admissible, but it is for the Panel to determine the weight it is to be given.

## Order of Analysis

8. The Appellate Body in *EC – Bananas* found that the Panel should have applied Article 1.3 of the *Import Licensing Agreement* before considering Article X:3(a) of GATT 1994 since the *Import Licensing Agreement* deals specifically, and in detail, with the administration of import licensing procedures. The Appellate Body noted that if the Panel had adopted this order of analysis, there would have been no need for it to address the alleged inconsistency with Article X:3(a).<sup>1</sup>
9. Australia agrees that, as a general principle, provisions of a more specific agreement should be considered before provisions of a more general agreement where, as in *EC – Bananas*, the provisions are, "for all practical purposes, interchangeable", being identical in coverage and effect. It is for the Panel to determine whether these criteria are met and, if they are, whether to exercise judicial economy with respect to claims made under the more general

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<sup>1</sup> Appellate Body report, *EC – Bananas*, paragraphs 202 to 204

agreement. Where claims are based on provisions which are not identical in coverage and effect, each claim should, in principle, be considered.

### **Inconsistency of Turkish measure with Article 4.2 of the Agreement on Agriculture**

10. Australia submits that Article 4.2 of the *Agreement on Agriculture* and Article XI of GATT 1994 are not identical in coverage and effect, so claims made pursuant to these provisions should be analysed separately.
11. Australia agrees with the EC that, apart from the footnote to Article 4.2 of the *Agreement on Agriculture*, there is no automatic link between the texts of Article 4.2 and Article XI of GATT 1994.<sup>2</sup>
12. Having expressed this caution, Australia considers that under a separate analysis pursuant to Article 4.2 of the *Agreement on Agriculture*, it would be open to the Panel to find that Turkey's alleged denial of the Certificates of Control, if established by the facts, prevents or restricts imports outside the TRQ.
13. Australia agrees with the US<sup>3</sup> that if Turkey has refused to grant Certificates of Control, that would constitute a quantitative import restriction or discretionary import licensing, or fall within the broad category of 'similar border measures other than ordinary customs duties' in footnote 1 to Article 4.2 of the *Agreement on Agriculture*. The measure is therefore 'of the kind' that Turkey may not maintain, resort to, or revert to, and is inconsistent with the prohibition on non-tariff measures in Article 4.2.

### **Article XI.1 of GATT 1994 – import licence/other measure**

14. Australia considers that the Panel should clarify the term 'import licence' under Article XI:1 of GATT 1994, considering its ordinary meaning and in the context of the *Import Licensing Agreement*.
15. Neither Article 1.1 of the *Import Licensing Agreement* nor GATT 1994 defines the term 'import licence'. However, Article 1.1 of the *Import Licensing Agreement* identifies the scope of the Agreement as being concerned with the administrative procedures that are used to implement import licensing. The phrase 'prior condition for importation' in Article 1.1 provides guidance on the meaning of the term 'import licence'. It indicates that the term covers the control of imports.
16. The footnote to Article 1.1 also provides guidance in considering the meaning of 'import licence'. As stated by the Panel in *EC – Bananas*, the footnote [begin quote] "further defines 'administrative procedures' to include 'those procedures referred to as "licensing" as well as other similar procedures'. Accordingly, irrespective of whether the term 'licensing' is used ... administrative procedures

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<sup>2</sup> Third Party Written Submission by the European Communities, 18 October 2006 paragraph 20

<sup>3</sup> First Submission of the United States of America, September 20, 2006, paragraphs 76 to 78

are covered by the Licensing Agreement provided that they have a purpose similar to licensing.”<sup>4</sup> [end quote]

17. Turkey’s submission<sup>5</sup> that its Certificates of Control deal solely with customs matters - and so are not import licences – gives too great a scope to the carve out for ‘customs purposes’ and restricts the meaning of ‘import licences’ beyond that intended by either Article XI of GATT 1994 or the *Import Licensing Agreement*. Australia considers that it would be difficult to consider a procedure that involves product safety checks or SPS measures within the concept of ‘customs purposes’ under Article 1.1 of the *Import Licensing Agreement* or GATT 1994. The fact that there are elements of a regime which are required for customs purposes does not mean, in and of itself, that the regime falls outside the term ‘import licence’. The structure and operation of the regime in practice need to be examined to determine if it has a ‘purpose similar to licensing’.
18. Australia further contends that if the Panel finds that the Certificate of Control is not an ‘import licence’, as referred to in the *WTO Agreements*, the Panel should consider whether either the Certificate of Control or Turkey’s alleged denial of the Certificates is an ‘other measure’ within the meaning of Article XI of GATT 1994. Such a finding will depend on the Panel’s view as to whether the evidence supports the US submission that Turkey has, through use of its Certificates of Control, either acted to prohibit or restrict the entry of rice into Turkey.

#### **Domestic support under Turkey’s TRQ**

19. Turkey argues that it is not necessary to examine the expired Turkish TRQ regime.<sup>6</sup>
20. Australia notes that the Panel has authority to make findings on measures which are properly within its terms of reference, even where those measure have ceased to exist.<sup>7</sup> However, it is established jurisprudence that a panel only needs to address those claims which must be addressed to resolve the matter in issue in the dispute.<sup>8</sup>
21. Where a measure has been withdrawn, it may often be unnecessary to make a finding on the measure’s consistency with the *WTO Agreements*, and panels in the past have generally found it inappropriate to make recommendations on measures which no longer exist.<sup>9</sup> If the TRQ regime has indeed expired, the Panel should consider whether, based on the particular facts of the case, it is necessary to make findings or recommendations on the measure in order to resolve the dispute.

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<sup>4</sup> Panel report, *EC – Bananas*, paragraph 7.147

<sup>5</sup> First Submission by Turkey, 11 October 2006, paragraphs 47 to 54

<sup>6</sup> First Submission by Turkey, 11 October 2006, paragraphs 137 to 139; Third Party Written Submission by the European Communities, 18 October 2006, paragraph 32

<sup>7</sup> Panel report, *India – Autos*, paragraph 7.26; Panel report, *Indonesia – Autos*, paragraph 14.9

<sup>8</sup> Appellate Body report, *US – Wool Shirts and Blouses*, page 19; Appellate Body report, *US – Lead and Bismuth II*, paragraph 71

<sup>9</sup> For example, Appellate Body report, *US – Certain EC Products*, paragraph 81; Panel report, *Chile – Price Bands*, paragraph 7.112

22. If the Panel concludes that elements of the TRQ continue to exist or otherwise decides to make findings on the TRQ, Australia submits that Turkey's imposition of a domestic purchasing requirement under its TRQ regime is inconsistent with Article III:4 of GATT 1994. The only issue between the parties in this regard is whether imported rice is accorded less favourable treatment than domestic rice.
23. Australia notes that WTO jurisprudence supports the view that the imposition of an 'additional requirement' or an 'extra hurdle' on imported products, when compared to like domestic products, constitutes less favourable treatment.<sup>10</sup> In *Canada – Wheat Exports and Grain Imports*, the Panel considered that these 'extra hurdles' need not be onerous in commercial and/or practical terms to be inconsistent with Article III:4 of GATT 1994.<sup>11</sup>
24. Under Turkey's TRQ regime, imported rice cannot be sold in the domestic market unless that importer first purchases a specified quantity of domestic rice. Domestic rice producers are not subject to any such additional requirement. Australia argues that this is an 'extra hurdle' which alters the conditions of competition in favour of domestic rice, and constitutes less favourable treatment for imported products.

#### **Interpretation of "measures of general application" under Article X:2 of GATT 1994**

25. Turkey argues that Article X:2 of GATT 1994 does not apply to the dispute as the Letters of Acceptance are not 'measures of general application' and, because they cannot be enforced, they are not subject to the publication requirement under Article X:2.<sup>12</sup>
26. As the US submission makes clear, the measure at issue is Turkey's alleged blanket denial of Certificates of Control.<sup>13</sup> In Australia's view, this is the 'measure of general application' which is allegedly being enforced, and which, if found to exist, constitutes a 'restriction or prohibition on imports' under Article X:2.
27. If the Panel finds that Turkey has in fact adopted a practice of denying Certificates of Control altogether, Australia argues this could constitute a 'measure of general application' for the purposes of Article X:2, whether or not the Letters of Acceptance themselves can be enforced. Turkey's failure to publish its denial of the Certificates, whether through publication of the Letters of Acceptance or some other instrument, would be inconsistent with Article X:2.

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<sup>10</sup> Panel report, *Canada – Wheat Exports and Grain Imports*, paragraph 6.185

<sup>11</sup> Panel report, *Canada – Wheat Exports and Grain Imports*, paragraph 6.190

<sup>12</sup> First Submission by Turkey, 11 October 2006, paragraph 84

<sup>13</sup> First Submission of the United States of America, September 20, 2006, paragraphs 79 to 80

### **Evidentiary Status of the Letters of Acceptance**

28. Turkey submits that the Letters of Acceptance are inadmissible or partial and unreliable evidence of Turkey's intention and trade policies.<sup>14</sup>
29. The *Dispute Settlement Understanding* contains no rules on the admissibility of evidence. As clarified in the Panel report in *EC – Bed Linen*, WTO panels “are generally free to admit and evaluate evidence of every kind and to ascribe to it the weight that they see fit.”<sup>15</sup>
30. Australia therefore contends that the Letters of Acceptance are admissible and it is for the Panel to determine the weight to be accorded to such evidence.

### **Conclusion**

31. In conclusion, Australia thanks the Panel for its consideration of the points we have raised.

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<sup>14</sup> First Submission by Turkey, 11 October 2006, paragraph 81

<sup>15</sup> Panel report, *EC – Bed Linen*, paragraph 6.34