

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

Communication from the United States

The following communication, dated 22 October 2007, is circulated at the request of the delegation of the United States.

Systemic Concern Raised by the Final Report

The final report in *Turkey – Measures Affecting the Importation of Rice* ("Turkey – Rice"), WT/DS334/R, was circulated to Members on 21 September 2007. While the United States is pleased with the overall result of this dispute, it would like to take this opportunity to highlight one aspect of the report that has systemic implications<sup>1</sup> that the United States believes should be of concern to Members: the inclusion by a panel of findings not requested by either party and that neither party had a chance to review in the interim report.

**Inclusion of New Findings, Not Requested by Either Party, in the Final Report**

The final report issued to the parties in *Turkey – Rice* included a completely new section in the report's findings, Part VII.G, that had not been included in the interim report. Prior to the originally scheduled date for circulation of the final report, the United States drew to the attention of the Panel the irregularity of Part VII.G's inclusion at the final stage in the panel process. After the United States reiterated its objection and request for removal of Part VII.G in reply to both Turkey and the Panel's responses, the Panel delayed circulation of the final report. At the Panel's invitation, the parties then submitted further comments on the issue of including Part VII.G, and on 21 September, the Panel circulated the final report, which retained Part VII.G with some minor modifications, together with the parties' comments regarding the addition of new findings.

The United States is troubled by the systemic implications of the Panel's addition of new findings in the final report. The Panel made the new findings despite the fact that Article 15.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") provides that findings and conclusions are to be issued in the interim report. Even more importantly, neither party requested the findings in question. Because Turkey never requested or raised the issues during the Panel proceedings, neither party presented any evidence or arguments on the subject, and the Panel had no factual basis for making the findings at all. Furthermore, because neither the United States nor Turkey requested the findings as part of the interim comments either, there was no basis under DSU Articles 15.2 or 15.3 for the Panel to make the additional findings in the final report. As previous

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<sup>1</sup> As noted in the statement of the United States to the Dispute Settlement Body at its 22 October 2007, meeting, there is more than one aspect of the panel report that raises systemic concerns. This paper is not intended to address more than the one aspect.

panels and the Appellate Body have noted<sup>2</sup>, panels are not authorized to make findings under these circumstances. The Panel's decision nevertheless to do so represents a serious erosion of the due process protections reflected in these DSU provisions.

### **The "Findings" at Issue**

As the United States explained to the Panel, it does not matter what the substance of the "findings" at issue may be (in this case they involved the treatment of Turkey). The addition of findings after a panel has already provided its interim report and received the parties' requests for review raises important systemic concerns, regardless of what those findings are. It means that, contrary to Article 15 of the DSU, the parties have not been provided an opportunity to review and comment on the findings. Accordingly, there has been no opportunity to review the factual findings that may underlie any legal findings, for example, whether the relevant facts are accurately described, whether they were contested, or even whether they were presented to the panel at all. Similarly, there is no opportunity for either party to consider whether the findings of law or legal interpretation take into account the claims made and arguments presented by a party, including whether they concern a claim actually made by the complaining party or a defense asserted by a responding party. And parties are unable to consider and comment upon how these additional findings might affect any other aspect of the panel report.

### **Treatment of the Parties' Comments**

When the United States discovered that the Panel had added findings to the final report that were not contained in the interim report and that neither party requested either during the panel proceedings or in response to the interim report, the United States raised its concerns with the Panel. Annex K of the final report contains the parties' comments and the Panel's response. This added to the transparency of the discussion and assists Members' consideration of the systemic concerns arising from the addition of these findings. At the same time, however, the United States wonders how this relates to the confidentiality of the interim and final reports provided to the parties. The United States would call to Members' attention that this treatment of the parties' comments also differs from the treatment that is accorded during the interim review phase. At the interim phase, the interim report and the parties' comments on it are treated as confidential. Although some of the comments on the interim report may be summarized as part of the "discussion of the arguments made at the interim review stage" that is required by Article 15.3 of the DSU to be included in the panel's final report, those comments are not treated as non-confidential in their entirety. The fact that the Panel treated the comments on its final report differently than it treated the comments on the interim report only underscores the systemic concerns raised – the Panel considered those findings added for the first time at the final report stage to somehow be of a different nature or status than the findings in the interim report. There is no basis for this under the DSU.

### **Conclusion**

It should not be possible to circumvent the agreed process for interim review in the DSU by including findings for the first time at the final report stage. The United States believes that the systemic interests of the WTO would be best served by the careful adherence by panels to the provisions of the DSU in this area.

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<sup>2</sup> See Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, para. 301; Panel Report, *European Communities – Selected Customs Matters*, WT/DS315/R, adopted 11 December 2006, paras. 6.3-6.6; Panel Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/R, adopted 6 November 1998, as modified by the Appellate Body Report, WT/DS18/AB/R, para. 7.3.