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THE TURKEY RICE CASE AND ITS IMPLICATIONS FOR INDONESIA

Turkey gets taken to task over failing to fulfill its tariffication obligations

Abstract

This Commentary briefly discusses the WTO dispute between the United States and Turkey over the latter's rice import regime. The ruling could have very important implications for the import regimes of other countries and could represent the opening salvo in a campaign to bring other WTO Members into compliance with their tariffication obligations, which were arguably one of the most significant outcomes of the Uruguay Round agriculture negotiations.

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I. Introduction

The recent Panel ruling in the dispute brought by the United States against Turkey regarding the latter's rice import regime[1] is of great significance for many other countries, not least of all for Indonesia, where rice constitutes the national staple and where similar measures to those found to be WTO inconsistent in Turkey are often used to regulate access to the domestic rice market.

This Commentary briefly reviews the rice import policies Turkey used which were found to be in violation of its WTO commitments and compares them to similar policies currently being employed by Indonesia. Countries such as Indonesia, who have in recent years imposed periodic bans on the importation of rice, should make no mistake about the implications of the Panel's ruling: it could represent the opening salvo in what might turn out to be a protracted campaign against countries who have failed to properly implement their Uruguay Round tariffication obligations.

II. Background of the Dispute

Following the Uruguay Round, Turkey's MFN tariff rate for rice was bound at 45 percent *ad valorem*,[2] with applied rates for imports of paddy, brown and milled rice[3] being 34, 36 and 45 percent *ad valorem,* respectively.[4]

In 2004, Turkey established a tariff rate quota (TRQ) for rice imports. Thereafter, rice imports were subject to one of three import regimes: the MFN rate; the in-quota rate under the TRQ; or preferential market access under preferential trade arrangements Turkey has with the European Communities and the former Yugoslav Republic of Macedonia (FYROM) which allow for limited quantities of duty free rice imports.[5]

The import data submitted by the US and Turkey and the Panel's analysis revealed that since 2003, Turkey had experienced higher domestic production volumes and lower import volumes. The United States produced evidence showing that between January 2004 and August 2006**,** there were almost no imports of rice outside of the TRQ or outside of the preferential scheme with the EU.[6]

An examination of the United States Trade Representative (USTR) National Trade Estimate Reports on Foreign Trade Barriers (NTE Reports) for Turkey over the last several years reveals that import restrictions on rice were noted in the Report as early as 2001. The 2001 Report claims that US rice exports to Turkey were seriously disrupted when the Turkish Ministry of Agriculture abruptly stopped issuing import permits for rice during the domestic harvest period.[7] In subsequent years, the issue of US rice exports to Turkey repeatedly resurfaced in the NTE Report, but it was not until 2005 that the language in the NTE Report describing the barriers to US rice exports was strong enough to suggest a possible WTO challenge.[8]

III. Proceedings before the Panel

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[1] Turkey – Measures affecting the Importation of Rice - Report of the Panel, WT/DS334/R, circulated on 21 September 2007.

[2] Para. 2.30 of the Report (page 13).

[3] HS 1006.10: Rice in the husk, also known as paddy or rough rice, is rice grain still tightly enveloped by the husk; 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.; 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; paragraph 2.4 of the Panel Report (page 3).

[4] Paragraph 2.17 of the Panel Report (page 5).

[5] 28,000 and 8,000 tonnes of duty-free rice imports per annum, respectively. See paragraph 2.17 and paragraphs 2.32 – 2.33 (page 13) of the Panel Report.

[6] Paragraph 2.21 (page 7) of the Panel Report.

[7] USTR, National Trade Estimate Report on Foreign Trade Barriers, 2001, at page 435, available at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2001/2001_NTE_Report/asset_upload_file415_6602.pdf (last accessed on October, 5, 2007).

[8] USTR, National Trade Estimate Report on Foreign Trade Barriers, 2005, at page 288, available at, http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/2005_NTE_Report/asset_upload_file512_7503.pdf, (last accessed on October, 5, 2007).

The precise procedural background to this dispute can be found in the report cited above. Suffice to say that on 2 November 2005, the United States formally initiated dispute settlement proceedings against Turkey by means of a request for consultations pursuant to Article 4 of the WTO Dispute Settlement Understanding (DSU),[9] as well as in application of the corresponding dispute settlement provisions of the other WTO agreements underlying its complaint (see below). The US complaint was leveled against alleged import restrictions on rice.[10] The US request for consultations was quickly followed by requests from Australia and Thailand to join the consultations. In February 2006, the United States requested the establishment of a panel before the Dispute Settlement Body. The panel was established in March 2006, and received written submissions from the parties and third parties[11] in September, October and December 2006. Substantive meetings were held in November 2006 and January 2007. In May 2007, the panel submitted its interim report to the Parties and received written requests for review from them in May and June. Its final report was circulated to Members on 21 September 2007.

The precise factual basis underlying the dispute can also be found in the report cited above. For the purpose of the present Commentary, the measures at issue were a series of regulations and practices by the Turkish authorities whereby rice could only be imported at all into the country if the shipment in question had obtained a document entitled a "Certificate of Control" issued by the Ministry of Agriculture and Rural Affairs (MARA). Moreover, an importer wishing to import rice under the country's tariff rate quota (TRQ, see below) could only do so contingent on the purchase of a certain quantity of domestically grown rice.

IV. The Challenged Measure

The key issues before the panel were a series of regulations and practices by the Turkish authorities limiting rice imports to shipments accompanied by a "Certificate of Control" issued by the MARA.[12] Under a practice known as 'letters of acceptance' the MARA had been under standing orders not to issue any Certificates of Control for the importation of rice.

In addition to the restrictions on imports of foreign rice at the MFN rate, importers could only import rice under the country's tariff rate quota if they also purchased a certain quantity of domestically grown rice. Only with proof of purchase of domestic rice would the required permit allowing for importation of rice from abroad be issued.

The panel reviewed the practice of Certificate of Control, and the use of letters of acceptance, and concluded that the result constituted a quantitative import restriction, as well as discretionary import licensing within the meaning of footnote 1 to Article 4.2 of the Agreement on Agriculture. Therefore, the panel found the limitations on issuing Certificates of Control as a result of the letters of acceptance was a "measure of the kind which would have been required to be converted into ordinary customs duties under Article 4.2 [of the Agreement on Agriculture]".[13]

The central market access provision of the Uruguay Round Agreement on Agriculture is Article 4.2 which required all WTO Members to convert any non-tariff barriers they maintained on imports of foreign agricultural products into tariff equivalents.[14] Panels and the WTO Appellate Body have made findings in

[9] Annex 2 to the WTO Agreement, Understanding on Rules and Procedures governing the Settlement of Disputes, published in "The Legal Texts, The Results of the Uruguay Round of Multilateral Trade Negotiations", Cambridge University Press, 1995.

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

[11] Argentina, Australia, China, Egypt, the European Communities, Korea, Pakistan and Thailand.

[12] See paragraphs 2.34 to 2.70 (pages 13 to 22) of the Panel Report.

[13] See paragraph 8.1 (page 112) of the Panel Report.

[14] A process known as "tariffication".

several cases on the scope of this obligation[15], which they have tended to interpret in a broad manner to give the maximum force and effect to the dismantling of non-tariff barriers agreed during the Uruguay Round.

The domestic purchase requirement for allocation of a license to import under the tariff rate quota scheme was deemed to accord less favorable treatment to imported rice than to domestic rice and was therefore a National Treatment violation under GATT Article III:4. As with Article 4.2 of the Agreement on Agriculture, Article III of the GATT specifies a key obligation of Members under the WTO Agreements, and panels have been inclined to interpret its scope in a manner which gives it broad application.[16]

V. Legal Considerations

Much of the legal wrangling that went on during the dispute involved the Certificate of Control mentioned above, which is issued by the MARA and which is required before an importer can import rice at the MFN rate. The Turkish government claimed that between 2003 and September 2006, 2,223 Certificates of Control had been issued allowing the importation of over 2 million tonnes of paddy, brown and milled rice.[17] The Turkish government, however, had made this claim in its defense against the US' allegation, that for the period in question, almost no rice had been imported into Turkey at the MFN rate (for which a Certificate of Control was required). When asked to produce some evidence of the Certificates of Control it claimed to have issued, or even of some 56 Certificates of Control which the United States had indicated as being of particular relevance to the proceedings, Turkey remained adamant in its refusal to do so. This refusal to produce such evidence, after repeated requests from the panel, ultimately resulted in the panel making the corresponding "appropriate inferences" meaning here that it concluded that, given the Turkish Government's failure to prove their existence, it could only assume they had never been issued.

The United States, however, successfully adduced evidence of numerous requests for a Certificate of Control being refused by the MARA and of such rejections being upheld in ensuing litigation before the administrative courts. The evidence submitted by the US, and the reasons given by Turkish administrative agencies for rejection of requests for a Certificate of Control, seemed to point to a policy decision by the Ministry of Agriculture, not to permit imports of rice into Turkey at the MFN rate, for long periods of time, spanning many consecutive months during the period in question. This policy, it is recalled, was implemented by so-called letters of acceptance by which the General Directorate of Protection and Control of the MARA would recommend to the Minister of Agriculture that the granting of Certificates of Control be suspended for a certain period of time. This is at least what the panel seemed to infer from the evidence adduced by the US and by the Turkish Government's unwillingness or inability to provide any proof to the contrary.

In addition to the import regime under the Certificate of Control (governing imports at MFN rates), the US also complained of the manner in which Turkey was administering its tariff rate quota system. In particular, the US complained of the fact that in order to benefit from the tariff quotas, importers first had to purchase a given quantity of domestically produced rice.[18] Importers who did so, and fulfilled a number of other administrative requirements, were allocated an import license with which to import the quantity authorized therein.

The United States argued, and the panel agreed, that the denial or failure to grant licenses to import rice (the Certificate of Control) at or below the bound rate of duty (MFN rate) violates (inter alia) 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. In light of its finding on this claim,

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[15] See *Chile - Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, (WT/DS207/R), and the corresponding Appellate Body Report (WT/DS207/AB/R).

[16] See Report of the Panel in Italian Discrimination against Imported Agricultural Machinery, adopted on 23 October 1958 (L/833, BISD 7S/60), available at: http://www.worldtradelaw.net/reports/gattpanels/italianmachinery.pdf (last accessed on October 5, 2007).

[17] Paragraph 2.50 (page 17) of the Panel Report.

[18] Paragraphs 2.71 - 2.99 (pages 22 - 29) of the Panel Report.

the Panel declined to make similar findings under GATT Article XI:1, or other provisions of the Import Licensing Agreement.

The US also argued, and the Panel agreed, that the requirement that importers buy specified quantities of domestic rice in order to be allowed to import specified quantities of rice at reduced tariff levels (under the TRQ), was a measure which violates (inter alia) GATT Article III:4, because Turkey accords imported rice less favorable 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. In light of its finding on this claim, the panel declined to make similar findings on the other claims the US had brought in challenge to this particular measure, namely those under GATT Article XI:1, Article 4.2 of the Agreement on Agriculture, or the TRIMS Agreement.

VI. Importance of Rice as a Commodity

Research by the FAO[19] leaves little doubt as to the importance of rice as a staple and source of daily caloric intake for vast swathes of humanity. By some estimates, rice is the principal source of nutrition for approximately half the world's population and is of particular significance for the world's poor.[20] The FAO's estimates also indicate that rice accounts for one in every five calories consumed on the planet (by humans).[21]

Rice markets have long been an issue of major contention in the world trading system, given the high degree of government intervention which takes place to regulate them. In the Uruguay Round, one of the last minute compromises that was hammered out in the agriculture negotiations was the so-called Rice Clause, embodied in Annex 5 to the Agreement on Agriculture. The Rice Clause, which is one of the very few exceptions to tariffication under Article 4.2 of the Agreement, allowed a number of countries, particularly Japan, Korea and the Philippines to delay conversion of quantitative restrictions into tariff bindings for a number of years.

Even in the Doha Round of trade talks, currently on-going and heading very rapidly for a two to three-year hiatus, rice has been a significant issue and has, without a doubt, been the most important commodity driving the negotiations on special products, as advocated most forcefully by the G 33, which is chaired by Indonesia.

VII. Implications for Rice Imports into Indonesia

The NTE Report indicates in its chapter on Indonesia, that the "Indonesian Government has imposed a rice import ban since February 2004, which was only eased somewhat in November 2005, when the Ministry of Trade issued import permits to Bulog allowing for imports of about 70,000 tons of rice, and again in September 2006, when imports of 210,000 tons were authorized".

The recent Trade Policy Review of Indonesia, conducted by the WTO, included the following remarks on the rice import regime in Indonesia[22]:

> "34. A rice import ban in force since February 2004 was eased somewhat in November 2005, when the Ministry of Trade issued import permits to *Bulog* allowing imports of about 70,000 tonnes of rice. Rice imports are prohibited during the peak harvest season (January to June) and may be imported only by importer-producers and registered importers of rice; they can be unloaded only in approved ports in non-rice-producing areas. Rice imports are approved for a

[19] United Nations Food and Agricultural Organization, "Rice Liberalization: Predicting Trade and Price Impacts," Policy Brief no. 12, available at: http://www.fao.org/, last visited on September 27, 2007.

[20] See, Daniel Griswold, Grain Drain, The Hidden Cost of US Rice Subsidies, Trade Briefing Paper No. 25, November 16 2006, at page 2, available at http://www.freetrade.org/, last visited on September 27, 2007.

[21] Ibid.

[22] Trade Policy Review Indonesia, Report by the Secretariat, (WT/TPR/S/184), page 47, available at: http://www.wto.org/english/tratop_e/tpr_e/tp285_e.htm, (last accessed on October 5, 2007).

> specified tonnage, type of rice, port of destination, and shipping schedule. It can be used only as a raw material in industrial processing and may not be sold or transferred to other parties. The policy applies to a wide range of rice categories with the exception of paddy for sowing and glutinous rice."

The Report of the Panel in the *Turkey -Rice* case was circulated on September 21, 2007 and is subject to appeal to the Appellate Body. Failing an appeal, the Panel Report will be adopted within 60 days of its circulation.[23]

The findings of the Panel concerning Turkey's restrictions on rice imports would suggest that similar bans on imports of an agricultural product that is not justified on sanitary or phytosanitary grounds, or under one of the general exceptions contained in GATT Article XX, could be construed 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.

The strong resemblance between the restrictions imposed by Turkey and those in place in Indonesia is apparent. Both were imposed during the domestic rice harvest with a view to alleviating social and economic conditions among rural populations and were then effectively extended indefinitely.

The permanent to semi-permanent nature of the restrictions in place in Indonesia would seem to invite challenge. Also, the discretionary way in which import licenses are periodically issued to import given quantities of rice, would also seem to be a violation of Article 4.2, from a reading of the footnote thereto:

> "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."

Finally, the WTO Secretariat's TPR Report (cited above) notes that imported rice can only be offloaded at certain ports in non-rice-growing areas and can only be used as an input in industrial processing. The end-use restriction would appear unlikely to survive a challenge under GATT Article III:4 on National Treatment, while the port-of-entry restriction is a border measure that would more likely be caught by Article 4.2 of the Agreement on Agriculture or GATT Article XI:1.

A review of Indonesia's last notification to the WTO Import Licensing Committee[24] reveals that rice, among a number of other items and commodities, is subject to non-automatic import licensing procedures, but does not mention the legal basis (within the WTO), nor the specific policy rationale for it, despite some language on "the nation's legitimate needs".[25]

This would suggest that the policy rationale on which the import restrictions on imported rice have been put in place might have been developed without appropriate consideration of compliance with WTO rules which would support the possibility that Indonesia could be exposed to dispute settlement by a trading partner.[26]

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[23] Article 16.4 of the Understanding on Rules and Procedures governing the Settlement of Disputes (DSU).

[24] G/LIC/N/3/IDN/3, dated 27 November 2006, available at www.wto.org, last accessed on October 5, 2007.

[25] Ibid, at page 2.

[26] The most likely sources of a challenge being Australia, Thailand and possibly Vietnam. Australia has shown itself to be an aggressive user of the WTO dispute settlement system, particularly when it comes to pushing the export interests of its farmers who hold the key to the rural election vote. Thailand and Vietnam would both be more likely to pursue their market access interests for this commodity through other fora, particularly ASEAN. However, Vietnam has

The implications from the TPR Report and a review of Indonesia's most recent notification to the Import Licensing Committee (cited above) is that Indonesia should review the legal basis on which its restrictions on rice imports rest. If WTO compatibility is uncertain, other measures which the WTO allows and that also restrict imports of rice, such as raising applied tariff rates closer to the upper limits of their tariff bindings should be considered.[27]

VIII. Concluding Remarks

The conversion of quantitative and other non-tariff barriers to imports of agricultural products which took place under Article 4.2 of the Agreement on Agriculture was one of the most important achievements of the Uruguay Round negotiations. As shown in the *Turkey Rice* case, Members will not be allowed to undermine or circumvent this achievement easily or frivolously.

Likewise, the National Treatment obligation embodied in GATT Article III is one which Panels have been inclined to apply broadly while at the same time interpreting any exceptions in narrow terms.

Indonesia's rice import regime is potentially exposed to challenge under both these articles and consideration should therefore be given to the legal basis on which this regime rests. Consideration should also be given to the potential utility of other, more WTO compliant instruments in the pursuit of Indonesia's legitimate policy goals in this sector.

yet to distinguish itself as a user of the WTO dispute settlement system and might wish to use this as an easy first "test case" to build its capacity for litigating trade disputes with more strategically important trading partners in mind for future litigation, namely the US.

[27] Indonesia has bound its MFN tariff for rice at 160 percent ad valorem, probably high enough to keep out imports.

Further Reading

For those who wish to obtain further information on the issues raised in this Commentary or do further reading on some of the subjects raised therein (the WTO Agreement on Agriculture, trade in agricultural commodities, WTO dispute settlement, the Uruguay Round), the table below provides a non-exhaustive list of further sources.

Author(s)	Title	Place	Publisher / Source	Year
John Croome	Reshaping the World Trading System: A history of the Uruguay Round	Geneva, CH	World Trade Organization	1995
Melaku Desta	The Law of International Trade in Agricultural Products: From GATT 1947 to the WTO Agreement on Agriculture	The Hague, NL	Kluwer Law International	2002
Timothy Josling, Stefan Tangermann and T.K. Warley	*Agriculture in the GATT*	New York, NY	St. Martin's Press	1996
Joseph McMahon	*The WTO Agreement on Agriculture*	Oxford, UK	Oxford University Press	2006
Ernest H. Preeg	*Traders in a Brave New World*	Chicago, IL	University of Chicago Press	1995
Peter van den Bossche	*The Law and Policy of the World Trade Organization*	Cambridge, UK	Cambridge University Press	2005
WTO	*A Handbook on the WTO Dispute Settlement System*	Cambridge, UK	Cambridge University Press	2004