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BRAZIL – ANTI-DUMPING MEASURES ON IMPORTS OF CERTAIN RESINS FROM ARGENTINA

Request for Consultations by Argentina

The following communication, dated 26 December 2006, from the delegation of Argentina to the delegation of Brazil and to the Chairman of the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

My authorities have instructed me to request consultations with the Government of Brazil pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Article XXII:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), and Article 17 of the *Agreement on Implementation* of *Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"), with respect to Brazil's anti-dumping measures relating to imports of polyethylene terephthalate ("PET") resins from Argentina, as well as any amendments thereto or extensions thereof[1] and any related measures, and also with respect to certain provisions of Brazil's Decree No 1602 of 23 August 1995 and Decree No 4732 of 10 June 2003.

On 10 September 2003, Rhodia Ster Fibers and Resins Ltda., whose trade name was later changed to M&G Fibers and Resins Ltda., filed a petition, by means of which it requested the opening of an investigation of dumping, injury to the domestic injury and causal link between the two, on imports of PET resins exported by Argentina and other countries. On 2 March 2004, the Foreign Trade Secretary ("SECEX") of the Ministry of Development, Industry and Foreign Trade decided to initiate the investigation through Circular SECEX No 10.[2]

On 26 August 2005, the President of the Ministers Council of the Foreign Trade Chamber ("CAMEX"), through *Resolução No* 29, *de* 26 *de Agosto de 2005, da Cãmara de Comércio Exterior CAMEX, do Conselho de Goberno*[3], resolved, *ad referendum* of the Council, to terminate the investigation with the application of an anti-dumping duty on the imports of PET resins, with intrinsic viscosity over 0.7 dl/g, excluded added resins of glass fiber and other blends, classified under item 3907.60.00 of the NCM[4], originating from Argentina.

On 16 December 2005, this measure appears to have been ratified by the Council of Ministers of CAMEX.

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[1] This includes any further determinations made pursuant to court order or remand.
[2] Published in the *Diario Oficial da Uniao* on 3 March 2004.
[3] Published in the *Diario Oficial da Uniao* on 2 September 2005.
[4] Nomenclatura Comun Mercosur (Mercosur Common Tariff Schedule).

Argentina considers that the investigation conducted, the determination made and the duties imposed violate Brazil's obligations under the provisions of GATT 1994 and the AD Agreement. In particular, Argentina believes that the anti-dumping measures on PET resin are inconsistent with, at least, the following provisions:

- Article 6 and Annex II of the AD Agreement, because Brazil failed. throughout the investigation, to inform the respondent Argentine exporter of perceived deficiencies in its responses to the Brazilian authorities' questionnaire; failed to provide the respondent Argentine exporter an opportunity to provide further explanations within a reasonable period; failed to provide the respondent Argentine exporter with ample opportunity to present in writing all evidence which it considered relevant in respect of the anti-dumping investigation; failed to give it a full opportunity for the defence of its interests; failed to provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases and to prepare presentations on the basis of this information; and failed to inform it of the essential facts under consideration which formed the basis for the decision to apply definitive measures in sufficient time for the respondent Argentine exporter to defend its interests;

- Articles 2.2.1.1, Article 6 and Annex II of the AD Agreement and Article VI of GATT 1994, because Brazil substituted the facts available for the respondent Argentine exporter's actual records regarding the primary input into PET resin, which records were in accordance with the generally accepted accounting principles of Argentina and reasonably reflected the costs associated with the production and sale of the product under consideration; and by failing to use special circumspection in basing their findings on information from a secondary source;

- Article 2.2.2, Article 6 and Annex II of the AD Agreement and Article VI of GATT 1994, because Brazil substituted the facts available for the respondent Argentine exporter's actual data regarding administrative, selling and general costs and for profits pertaining to production and sales in the ordinary course of trade of the like product by the Argentine exporter under investigation; and by failing to use special circumspection in basing their findings on information from a secondary source;

- Article 2.2.1, Article 6 and Annex II of the AD Agreement and Article VI of GATT 1994, because Brazil improperly treated sales of the respondent Argentine exporter's like product allegedly at prices below per unit costs of production plus administrative, selling and general costs in the domestic market of Argentina as not being in the ordinary course of trade by reason of price and disregarded them in determining normal value;

- Article 2.4, Article 6 and Annex II of the AD Agreement and Article VI of GATT 1994, because Brazil, in calculating the profits accruing to be deducted from the export price on sales in Brazil made by the affiliated party of the respondent Argentine exporter of PET resin after importation, substituted the facts available for the actual profit realized on the sales by the affiliated party of the respondent Argentine exporter;

- Article 2.4 of the AD Agreement and Article VI of GATT 1994, because Brazil improperly denied adjustments to normal value and export price for volume discounts, debits and credits for price adjustments, customer credits, as well as level of trade differences granted by the respondent Argentine exporter to individual customers, failing to make a fair comparison between the export price and normal value;

- Articles 3.1, 3.2 and 3.4 of the AD Agreement, because Brazil, in conducting its injury analysis, failed to collect or examine recent data, and failed to base its injury determination on positive evidence or to conduct objective examinations of the volume of dumped imports, the effect of those imports on prices in the domestic market of the like product, and the impact of the imports on domestic producers of those products;

- Articles 3.1 and 3.5 of the AD Agreement, because Brazil failed to demonstrate that the allegedly dumped imports are, through the effects of dumping, causing injury; failed to base its determination of a causal relationship between the allegedly dumped imports and injury to the domestic industry on positive evidence and an objective examination of all relevant evidence; failed to examine all known factors other than the allegedly dumped imports which at the same time are allegedly injuring the domestic industry; and attributed the alleged injury caused by these other factors to the allegedly dumped imports;

- Article 8 of the AD Agreement, because Brazil rejected a proposed price undertaking based on the disapproval of the petitioning domestic industry, and because the Brazilian authorities did not provide reasons causing them to consider an undertaking inappropriate;

- Article 10 of the AD Agreement, because Brazil began applying anti-dumping duties to products which entered for consumption prior to the time when the decision to impose anti-dumping duties entered into force; and

- Article 12 of the AD Agreement, because Brazil failed in its public notice of initiation to provide adequate information concerning the product involved in the investigation; and failed in its final determination to set forth in sufficient detail the findings and conclusions reached on all issues of fact and law considered material or to provide all relevant information on the matters of fact and law and reasons which led to the imposition of final measures.

In addition, the following provisions of Brazil's Decree No 1602 of 23 August 1995 ("Decree 1602/95"*)* and Decree No 4732 of 10 June 2003 ("Decree 4732/03") appear to be inconsistent with Brazil's obligations under the provisions of the AD Agreement, the GATT 1994 and the *Marrakesh Agreement Establishing the World Trade Organization* ("WTO Agreement").

Article 2 (XV) of Decree 4732/03 authorizes a certain Brazilian governmental entity, the "Cámara de Comercio Exterior – CAMEX, do Conselho de Governo" ("CAMEX") to impose provisional or definitive anti-dumping measures. Article 5 §3 of Decree 4732/03 authorizes the president of CAMEX to perform all acts of CAMEX, including the imposition of anti-dumping measures, *ad referendum* of the Council of Ministers, and Brazilian law prescribes no deadline within

which the Council must ratify or reject those acts nor stipulates the legal status of the anti-dumping measures apparently in force. These provisions appear to be inconsistent with:

- Article 6.14 of the AD Agreement, which requires Members to act expeditiously with regard to reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with the provisions of the AD Agreement;

- Article 10 of the AD Agreement, which requires that anti-dumping duties only be applied to products which enter for consumption after the time when the decision to impose anti-dumping duties enters into force;

- Article X of GATT 1994, which requires that laws, regulations, judicial decisions and administrative rulings of general application made effective by a contracting party be published promptly in such a manner as to enable governments and traders to become acquainted with them and to administer them in a uniform, impartial and reasonable manner;

- Article 18.4 of the AD Agreement, which requires each Member to take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of the AD Agreement; and

- Article XVI:4 of the WTO Agreement which requires Members to ensure the conformity of their laws, regulations and administrative procedures with their obligations as provided in the annexed Agreements.

Article 58 of Decree 1602/95 provides for a review of the determination imposing anti-dumping duties. This provision appears to be inconsistent with:

- Article 9 of the AD Agreement, because it does not appear to provide for collection of the anti-dumping duty in an appropriate amount; it does not appear to provide for a determination of the final liability for payment of anti-dumping duties within 12 months, and in "no case more than 18 months, after the date on which a request for a final assessment of the amount of the anti-dumping duty has been made and for a refund within 90 days following the determination of final liability; nor for a refund, upon request, of any duty paid in excess of the margin of dumping within 12 months, and in no case more than 18 months, after the date on which a request for a refund, duly supported by evidence, has been made by an importer of the product subject to the anti-dumping duty and for a refund within 90 days of this determination;

- Article X of GATT 1994, which requires that laws, regulations, judicial decisions and administrative rulings of general application made effective by a contracting party be published promptly in such a manner as to enable governments and traders to become acquainted with them;

- Article 18.4 of the AD Agreement which requires Members to take all necessary steps, of a general or particular character to ensure that their laws, regulations and administrative procedures are in conformity with the obligations set forth in that Agreement; and

- Article XVI:4 of the WTO Agreement which requires Members to ensure the conformity of their laws, regulations and administrative procedures with their obligations as provided in the annexed Agreements.

Brazil's measures identified in this request also appear to nullify or impair benefits accruing to Argentina directly or indirectly under the cited agreements.

For each of the measures referred to above, this request also covers any amendments, replacements, extensions, implementing measures or other related measures

The Government of Argentina reserves its right to raise additional factual claims and legal matters during the course of consultations. We look forward to receiving your reply to the present request and to fixing a mutually convenient date and place for consultations.