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ARGENTINA – DEFINITIVE SAFEGUARD MEASURE ON IMPORTS OF PRESERVED PEACHES

Request for the Establishment of a Panel by Chile

The following communication, dated 6 December 2001, from the Permanent Mission of Chile to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

I am writing to request the establishment of a panel, in accordance with Articles 4 and 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), concerning the definitive safeguard measure applied by the Government of Argentina on imports of preserved peaches.

On 7 August 2001, Resolution No. 348/2001 of the Ministry of the Economy was published in the Official Bulletin of Argentina, imposing a definitive safeguard measure in the form of minimum specific duties of US$0.50 per kg. on imports of peaches preserved in water containing added sweetening matter, including syrup, preserved in any other form or in water (MERCOSUR tariff headings 2008.70.10 and 2008.70.90).

On 14 September 2001, Chile, pursuant to Article XXIII:1 of the General Agreement on Tariffs and Trade (GATT) 1994, Article 4 of the DSU and Article 14 of the Agreement on Safeguards (SA), requested consultations with Argentina with a view to reaching a solution to this matter. That request was circulated in document WT/DS238/1, G/L/479 and G/SG/D19/1. The consultations, which were held in Geneva on 2 November last, enabled the parties to gain a better understanding of each other's positions but unfortunately did not give rise to a mutually satisfactory solution.

The prior consultations with Argentina, at Chile's request, also failed to yield any positive results. Specifically, and pursuant to Article 12.4 of the SA, these were the consultations held when Argentina made the notification required by that Article before taking a provisional safeguard measure and upon initiating an investigation with a view to applying a safeguard measure on the products concerned. This was also the case for the consultations conducted under Article 12.3 of the SA, following Argentina's notification of the finding of serious injury and decision to apply a definitive safeguard measure.

The Chilean Government considers this definitive safeguard measure imposed on preserved peaches to be inconsistent with Article XIX:1(a) of the GATT 1994 and with Articles 2, 3, 4, 5 and 12 of the SA. Indeed:

1. Neither Record No. 781 of the National Foreign Trade Commission (CNCE) nor the Technical Report prior to the final determination (ITDF) indicate that the investigating authority or the CNCE have found and demonstrated, as an issue of fact and law prior to taking safeguard action, that the condition of "unforeseen developments", as laid down in Article XIX:1(a) of the GATT 1994, has been fulfilled. Nor is there any finding or evidence of an increase, whether absolute or relative, in imports threatening to cause or causing serious injury to the domestic industry that produces like or directly competitive products. This is in breach of and infringes the aforementioned Article XIX:1(a) of the GATT 1994 and Article 2.1 of the SA.

2. Likewise, it does not emerge from the report of the competent authorities, namely Record No. 781 of the CNCE and the ITDF, that the CNCE or the investigating authority have made adequate and sufficient findings on all the pertinent issues of fact and law, which, pursuant to Article XIX of the GATT 1994 and the SA, must be investigated, analysed, established, found and verified, as stipulated in the final part of Article 3 of the Agreement.

3. Similarly, as pointed out in Record No. 781 of the CNCE, the position of the industry cannot be deemed to be suffering serious injury within the meaning of Article 4.1(a) of the SA. More serious still, and contrary to the provisions of Article 4.1(b) of the Agreement, neither Record No. 781 nor the ITDF contains any factual evidence of an alleged increase, whether absolute or relative, in imports threatening to cause serious injury to the domestic industry that produces like or directly competitive products, in terms which show that such injury is clearly imminent – i.e. highly likely to occur in the near future.

4. Neither Record No. 781 nor the ITDF contains any sound argument based on "objective evidence" of a possible causal link between alleged increased imports and alleged injury or threat of injury. On the contrary, the Record establishes the existence of objective and quantifiable factors other than alleged increased imports, which might be responsible for the loss in market share claimed to be suffered by the domestic industry. However, there is no adequate or sufficient analysis of the impact of those other factors in giving rise to alleged serious injury or threat of serious injury. Without conducting the prior causal analysis, the Argentine investigating authority and the CNCE attribute all the alleged injury or threat of injury to an alleged increase in imports. This is inconsistent with Article 4.2(a) and (b) of the SA.

5. The level and formulation of the definitive safeguard measure exceed the extent necessary to prevent or remedy the alleged serious injury or threat of serious injury and to facilitate adjustment, as prescribed by Article 5.1 of the SA. The specific duty of US$0.50 per kg., which, in *ad valorem* terms and in relation to Chilean production, represents nearly an extra 70 per cent on the customs duties applicable to Chile (19.6 per cent) is unreasonable, prohibitive and equivalent to an import prohibition, as demonstrated by the fact that, since the entry into force of the safeguard measure, Argentina has failed to register any imports of canned peaches from Chile. In spite of this prohibitive effect, at the time of adopting its decision the CNCE offered no explanation whatsoever regarding the way in which the measure had been calculated or its amount.

6. Contrary to the provisions of Article 12.2 of the SA, when Argentina notified the Committee on Safeguards of its finding of alleged serious injury or alleged threat of serious injury as a result of alleged increased imports, it failed to provide the Committee with evidence substantiating that finding.

Accordingly, the Republic of Chile requests the establishment of a panel with the standard terms of reference set out in Article 7 of the DSU. To that end, I should be grateful if this request could be included in the agenda for the next meeting of the Dispute Settlement Body on 18 December 2001.