

**DOMINICAN REPUBLIC - SAFEGUARD MEASURES ON IMPORTS OF
POLYPROPYLENE BAGS AND TUBULAR FABRIC**

Request for the Establishment of a Panel by El Salvador

The following communication, dated 20 December 2010, from the delegation of El Salvador to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 19 October 2010, El Salvador requested consultations with the Dominican Republic pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Article 14 of the Agreement on Safeguards concerning the provisional and definitive safeguard measures imposed by the Dominican Republic on imports of polypropylene bags and tubular fabric and the investigation that led to the imposition of those measures.

El Salvador and the Dominican Republic held consultations on 16 and 17 November 2010. Unfortunately, these consultations failed to settle the dispute. Accordingly, pursuant to Article 6 of the DSU and Article 14 of the Agreement on Safeguards, El Salvador requests that at its next meeting, scheduled for 25 January 2011, the Dispute Settlement Body establish a panel with the standard terms of reference as set out in Article 7.1 of the DSU to examine this matter and the claims set forth below.

A. BACKGROUND AND MEASURES AT ISSUE

The measures at issue were imposed pursuant to an investigation conducted by the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic (hereinafter "the Commission").

1. Initiation of the safeguard investigation

On 15 December 2009, at the request of the company Fersan S.A. (hereinafter "Fersan"), the Commission declared the initiation of an investigation with a view to the application of safeguard measures on imports from all origins of polypropylene bags and tubular fabric classified under subheadings 5407.20.20, 6305.33.10 and 6305.33.90 of the Tariff of the Dominican Republic (hereinafter "the initiating resolution").¹ On 17 December 2009, the Commission published a notice of initiation of an investigation.²

¹ Commission Resolution CDC-RD-SG-046-2009 of 15 December 2009; initial technical report of the Commission dated 20 November 2009.

² Notice, general safeguard investigation concerning textiles of man-made filament yarn and bags of polyethylene and polypropylene, dated 15 December 2009.

2. Preliminary determination

On 16 March 2010, the Commission decided to impose a provisional safeguard of 38 per cent on imports of polypropylene bags and tubular fabric classified under subheadings 5407.20.20 and 6305.33.90 of the Tariff of the Dominican Republic. It was also decided to exclude from the application of the measure imports from Mexico, Panama, Colombia and Indonesia pursuant to Article 9.1 of the Agreement on Safeguards.³ On 25 March 2010, the Commission published a notice of application of provisional measures on imports of polypropylene bags and tubular fabric.⁴ The duration of the provisional safeguard measure was 200 days.

3. Final determination

On 5 October 2010, the Commission decided to impose a definitive safeguard of 38 per cent on imports of polypropylene bags and tubular fabric classified under subheadings 5407.20.20 and 6305.33.90 of the Tariff of the Dominican Republic.⁵ The Commission then issued a notice of application of the definitive measures on imports of polypropylene bags and tubular fabric.⁶ In that notice and in the final resolution, the Commission pointed out that pursuant to Article 9.1 of the Agreement on Safeguards, the definitive safeguard measure would not apply to imports from Mexico, Panama, Colombia and Indonesia. The measure is being applied for 18 months starting on 18 October 2010.

Thus, for El Salvador, the measures at issue cover all of the resolutions, technical reports and notices mentioned above as regards the actions and omissions of the authorities of the Dominican Republic during the investigation and imposition of the safeguard measures, including the methodology, calculations, comparisons, determinations, procedures or general practices.

B. LEGAL BASIS FOR THE COMPLAINT

El Salvador notes that according to Article 11.1(a) of the Agreement on Safeguards, a Member shall not take or seek a safeguard action unless such action conforms with the provisions of Article XIX of the GATT 1994 applied in accordance with the Agreement on Safeguards. In this connection, El Salvador considers that:

- (a) The Commission's preliminary and final determinations do not contain reasoned and adequate findings and conclusions with respect to the various relevant factual and legal aspects of the determinations relating to the product under investigation, the domestic like product, and the domestic industry, and this affects the determinations of increased imports, serious injury and causality that stem from those prior determinations. These omissions are inconsistent with Articles 2.1, 3.1, 4.1(a), 4.1(c), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards, and Article XIX:1(a) of the GATT 1994.

³ Resolution CDC-RD-SG-061-2010 of the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic, dated 16 March 2010 ("Preliminary Resolution"). Addendum to Resolution CDC-RD-SG-061-2010 dated 16 March 2010 deciding on the application of the provisional measures requested by Fertilizantes Santo Domingo, C. Por A. (FERSAN) in the *Polypropylene Bags and Tubular Fabric* case, dated 30 March 2010; Preliminary technical report of the Commission (without date).

⁴ Notice, general safeguard investigation concerning tubular fabric and polypropylene bags, 25 March 2010.

⁵ Resolution CDC-RD-SG-089-2010 of the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic, dated 5 October 2010 ("Final Resolution"); Final technical report of the Commission, dated 13 July 2010.

⁶ Notice, general safeguard investigation concerning tubular fabric and polypropylene bags, dated 6 October 2010.

- (b) The preliminary and final determinations do not contain reasoned and adequate findings and conclusions regarding the alleged unforeseen developments and to explain how those developments resulted in increased imports of the specific products covered by the safeguard measure. These omissions are inconsistent with Articles 3.1, 4.2(a), 4.2(b), 4.2(c), 6 and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.
- (c) Moreover, the preliminary and final determinations do not contain reasoned and adequate findings and conclusions with respect to the alleged effect of the obligations incurred under the GATT 1994, and how that effect would have resulted in increased imports of the specific products covered by the safeguard measure. These omissions are inconsistent with Articles 3.1, 4.2(a), 4.2(b), 4.2(c), 6 and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.
- (d) Nor do the preliminary and final determinations contain reasoned and adequate findings and conclusions with respect to the alleged increase in imports of the specific products under investigation, in absolute terms or relative to domestic production. These omissions are contrary to Articles 2.1, 3.1, 4.2(a), 4.2(b), 4.2(c), and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.
- (e) Furthermore, although the state of the domestic industry was found to be favourable, the preliminary and final determinations do not contain reasoned and adequate findings and conclusions as to the existence of the alleged serious injury, understood as significant overall impairment of the domestic industry. Nor does the preliminary determination contain any reasoned and adequate findings and conclusions with regard to the critical circumstances to justify the provisional measure, or with regard to all of the factors that are required to be examined for the determination of serious injury. These omissions are inconsistent with Articles 2.1, 3.1, 4.1(a), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.
- (f) Nor, at the same time, do the preliminary and final determinations contain reasoned and adequate findings and conclusions regarding the causal link between the alleged increase in imports and the serious injury to the domestic industry. In particular, these determinations do not contain the analysis substantiating the causal relationship between the alleged increased imports and the alleged serious injury to the domestic industry. Nor is it explained how the injury to the domestic industry caused by factors other than imports was not attributed to the imports of the products under investigation. These omissions are contrary to Articles 2.1, 3.1, 4.1(a), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.
- (g) The measures at issue do not exempt all of the developing countries whose share of imports does not exceed 3 per cent. Moreover, the required parallelism between the substantive evaluation of the determinations of increased imports, serious injury and causal link on the one hand, and the coverage of the measures at issue as regards origin on the other, was not respected. These omissions are inconsistent with Articles 2.1, 2.2, 4.2(a), 4.2(b), 4.2(c), 5.1, 6 and 9.1 of the Agreement on Safeguards, and Article XIX:1(a) of the GATT 1994.
- (h) The preliminary and final determinations do not contain any reasoned and adequate findings and conclusions as to the reasons why certain information was considered to be confidential without requiring non-confidential summaries or why that information

could not be summarized in a non-confidential manner. These omissions are contrary to Articles 3.1 and 3.2 of the Agreement on Safeguards.

- (i) The preliminary and final determinations do not contain any reasoned and adequate findings and conclusions as to the need for the safeguard measure to facilitate adjustment of the domestic industry. This omission is inconsistent with Articles 3.1, 4.2(c), and 5.1 of the Agreement on Safeguards.
- (j) The resolutions and reports made public concerning the preliminary and final determinations do not contain the reasoned and adequate findings and conclusions on all issues of fact and law supporting the imposition of the measures in question. This omission is inconsistent with Articles 3.1 and 4.2(c) of the Agreement on Safeguards.
- (k) Finally, the Dominican Republic failed to provide the Members having a substantial interest as exporters of the products concerned adequate opportunity for consultations prior to the adoption of the definitive measure. Nor did the Dominican Republic seek to agree on any adequate means of trade compensation for the adverse effects of the measures on the trade of other Members. This omission is inconsistent with Articles 8.1 and 12.3 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994.

In any case, El Salvador considers that:

- (l) The measures at issue are inconsistent with Article I:1 of the GATT 1994 in that they are measures that are not applied to products originating in or consigned from particular origins, and this constitutes an advantage that has not been accorded immediately and unconditionally to other WTO Members.
- (m) Moreover, the measures at issue are duties and charges other than ordinary customs duties that are contrary to Article II:1(a) and the second sentence of Article II:1(b) of the GATT 1994.

In view of the foregoing, El Salvador requests the Dispute Settlement Body to establish a panel with the standard terms of reference as set out in Article 7.1 of the DSU to examine this matter and the above-mentioned claims.

In view of the 18-month period of validity of the definitive safeguard measure and to ensure that the dispute settlement system provides an effective solution to this dispute, El Salvador hopes that the panel will issue the final report to the parties as soon as possible, and in any case not later than the period of six months from the date that the composition and terms of reference of the panel were agreed upon, as stipulated in Article 12.8 of the DSU.
