

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

Request for Consultations by El Salvador

The following communication, dated 19 October 2010, from the delegation of El Salvador to the delegation of the Dominican Republic and to the Chairman of the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

I have received instructions from the authorities of my country to request 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.

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

In its initial technical report³, the Commission indicated that during the initial phase of the investigation it would examine the trends for polypropylene bags and tubular fabric jointly, since according to the requesting company, the two products constituted one and the same final product. Moreover, the Commission pointed out that the domestic industry was made up solely of producers

¹ Commission Resolution CDC-RD-SG-046-2009 of 15 December 2009.

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

³ Initial technical report of the Commission dated 20 November 2009.

that manufactured both polypropylene bags and tubular fabric as part of the same production process. The Commission also considered that the unforeseen development that led to the increased imports was the cuts resulting from the Free Trade Agreement between Central America and the Dominican Republic. As regards the analysis of serious injury, understood as significant overall injury, the Commission found that there had been a loss of profits and an increase in stocks. Finally, the Commission pointed to the existence of factors other than imports (e.g. increased costs, investment, and bank indebtedness) that apparently had a bearing on the state of the domestic industry.

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.⁴ The duration of the provisional safeguard measure is 200 days. On 25 March 2010, the Commission published a notice of application of provisional measures on imports of polypropylene bags and tubular fabric.⁵ In that notice and in the preliminary resolution, the Commission pointed out that pursuant to Article 9.1 of the Agreement on Safeguards, the provisional safeguard measures would not apply to imports from Mexico, Panama, Colombia and Indonesia.

El Salvador has several concerns with respect to the preliminary determination, including, but not limited to, those set forth below. Based on the preliminary technical report⁶, the Commission decided that during the preliminary phase of the investigation, it would continue to examine the trends for polypropylene bags and tubular fabrics jointly. The Commission also pointed out that Fersan represented the entire domestic industry, since it was the only company that covered all stages of the manufacturing process of the product under investigation. Moreover, the Commission appears to have assumed that the unforeseen development that led to the alleged increase in imports was the cuts resulting from the Free Trade Agreement between Central America and the Dominican Republic and the Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA). As regards the analysis of serious injury to the domestic industry, understood as significant overall injury, the Commission found that there had been a loss of profits and an increase in stocks. Finally, the preliminary determination identified certain factors that had a bearing on the state of the domestic industry (e.g. increased costs and bank indebtedness).

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.⁷ The Commission then issued a notice of application of the definitive measures on imports of polypropylene bags and tubular fabric.⁸ In that notice and in the final resolution, the Commission pointed out that pursuant to Article 9.1 of the

⁴ 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").

⁵ Notice, general safeguard investigation concerning tubular fabric and polypropylene bags, 25 March 2010.

⁶ Preliminary technical report of the Commission (without date).

⁷ 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").

⁸ Notice, general safeguard investigation concerning tubular fabric and polypropylene bags, dated 6 October 2010.

Agreement on Safeguards, the definitive safeguard measures would not apply to imports from Mexico, Panama, Colombia and Indonesia.

El Salvador has several concerns with respect to the final determination, including, but not limited to, those set forth below. Based on the final technical report⁹, the Commission assumed that polypropylene bags and tubular fabric constituted a single product under investigation. The Commission also reaffirmed its view that Fersan constituted the entire domestic industry, since it was the only company manufacturing the product under investigation starting with the resin.¹⁰ Furthermore, the Commission appears once again to have assumed that the unforeseen development that led to the alleged increase in imports was the cuts resulting from the Free Trade Agreement between Central America and the Dominican Republic and from DR-CAFTA. The Commission also considered that the accession of China to the WTO was a development that "could not have been foreseen by the domestic industry at the time when the Dominican Republic subscribed to the measures contained in Article XIX of the GATT 1994".¹¹ Finally, as regards the analysis of serious injury to the domestic industry, the Commission pointed out that the domestic industry "suffered significant financial losses during the period under investigation, as evidenced by the increase in stocks, the decrease in cash flow, and the sharp decline in production."¹² At the same time, the Commission refers to certain factors other than imports that apparently had an impact on the domestic industry (e.g. increase in costs and bank indebtedness).

B. LEGAL BASIS FOR THE COMPLAINT

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.

El Salvador is deeply concerned about certain aspects of the safeguard measures and the underlying investigation, including, *inter alia*, the methodology, calculations, comparisons, determinations, and procedures or practices used by the Dominican Republic in the framework of the investigation and the imposition of the safeguards.

In particular, El Salvador considers that:

- (a) The preliminary and final determinations do not contain reasoned and adequate findings and conclusions with respect to the determinations relating to the product under investigation, the domestic like-product, and the domestic industry. These omissions appear to be 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.
- (b) The preliminary and final determinations do not contain reasoned and adequate findings and conclusions to substantiate 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 appear to be inconsistent with Articles 3.1, 4.2(a), 4.2(c), 6 and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

⁹ Final technical report of the Commission, dated 13 July 2010.

¹⁰ Final technical report, page 47.

¹¹ Final technical report, page 66.

¹² Final Resolution, paragraph 38.

- (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 appear to be inconsistent with Articles 3.1, 4.2(a), 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 appear to be 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 appear to be 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, they contain no demonstration that the injury to the domestic industry caused by other factors was not attributed to the imports of the products under investigation. These omissions appear to be 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.
- (g) The measures at issue are applied only to products imported from certain countries of origin and/or consignment. Moreover, the required parallelism between the substantive evaluation of the determinations on the one hand, and the coverage of the measures at issue on the other, was not respected. These omissions appear to be inconsistent with Articles 2.1, 2.2, 4.2, 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 appear to be contrary to Articles 3.1 and 3.2 of the Agreement on Safeguards.
- (i) It would appear that 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 appears to be inconsistent with Articles 3.1 and 4.2(c) of the Agreement on Safeguards.

- (j) 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. This omission appears to be inconsistent with Article 12.3 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994.

In addition to the above considerations, El Salvador reserves its right to raise other matters that may arise during the consultations in relation to the measures at issue and their application under the Agreement on Safeguards and the GATT 1994.

In view of the above, I look forward to receiving your reply to this request as soon as possible. I propose that the date and venue of these consultations be agreed between our two Missions.
