WORLD TRADE ORGANIZATION

WT/DS596/1
G/ADP/D134/1
G/L/1361

15 July 2020

(20-4837)

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Original: Spanish

BRAZIL - MEASURES CONCERNING THE IMPORTATION OF PET FILM FROM PERU AND IMPORTED PRODUCTS IN GENERAL

REQUEST FOR CONSULTATIONS BY PERU

The following communication, dated 10 July 2020, from the delegation of Peru to the delegation of Brazil, is circulated to the Dispute Settlement Body in accordance with Article 4.4 of the DSU.

Pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), Article 17 of the Agreement on Implementation of Article VI of the GATT 1994 (Anti-Dumping Agreement) and Article XXII of the *General Agreement on Tariffs and Trade 1994* (GATT 1994), the authorities of Peru have instructed me to request consultations with the Federative Republic of Brazil (Brazil) with respect to specific measures that affect the importation and marketing in that country of biaxially oriented polyethylene terephthalate (PET) film products from Peru and imported products in general.

These measures consist of definitive anti-dumping duties on the importation of PET film products, including the various stages of the investigation carried out by the Under-Secretariat of Trade Defence and Public Interest (SDCOM, the current title of the Department of Trade Defence at the Secretariat of Foreign Trade), which resulted in the imposition of these measures, as well as the differential tax treatment granted to imported products in general (including PET film products specifically), compared with the treatment received by like products of national origin in the context of the tax replacement scheme applicable to the industrial products tax (IPI).

The grounds for this request for consultations are set out below. Peru hopes to receive specific explanations from Brazil relating to these grounds with a view to exploring concrete alternative solutions to this dispute.

I. MEASURES AT ISSUE

The measures at issue are as follows:

- The definitive anti-dumping measures imposed pursuant to Ordinance No. 473 of 28 June 2019 of the Special Secretariat of Foreign Trade and International Affairs at the Ministry of Economic Affairs, published on 1 July 2019 in the Official Gazette of Brazil, and also the decision to initiate an investigation, contained in Circular No. 68 of 29 December 2017, published on 2 January 2018, of the Secretariat of Foreign Trade, including, but not restricted to, the related supporting documentation, the relevant determinations, the decisions regarding confidentiality of information, and other aspects of the investigation linked to the imposition of anti-dumping measures.

- The practice of the competent authority of Brazil not to require, in conjunction with the request to initiate the investigation, the presentation of evidence relating to domestic sales in the country of origin or exportation but rather to accept at face value the information provided by the applicant (including at a wider product level) regarding exports to third countries or the construction of normal value without undertaking a critical examination or questioning of that information in such a way as to guarantee its accuracy and adequacy.[1]

- The tax treatment of products imported under the Brazilian IPI legislation, set forth in Article 26 of Decree No. 7.212/2010 ("IPI Regulations"), Article 35.II and §2 of Law No. 4.502/64, which provide for a general tax replacement scheme ("Tax Replacement Scheme"), and Article 17 of Normative Instruction No. 1.081 of 2010 of the Brazilian Federal Revenue Department, which expressly prohibits the application of the special IPI replacement scheme to customs clearance – all these standards considered individually or in conjunction – in relation to imported products, including PET film products.

This request is also being made against any other normative and/or administrative act, or practice, that complements, supplements, amends or replaces the above-mentioned instruments or practice.

II. LEGAL CLAIMS

Peru holds the view that the measures in question appear to be inconsistent with Articles III and VI of the GATT 1994 and with the Anti-Dumping Agreement for the following reasons:

A. ANTI-DUMPING MEASURES AND INVESTIGATION INTO PET FILM PRODUCTS FROM PERU

The anti-dumping measures relating to imports of PET film products from Peru appear to be inconsistent with Articles 1 and 18.1 of the Anti-Dumping Agreement and Article VI of the GATT 1994, given that:

(i) The measures were based on an investigation that was allegedly initiated in a manner inconsistent with Articles 5.2, 5.3 and 5.8 of the Anti-Dumping Agreement inasmuch as:

- The competent authority initiated the investigation without the application having sufficient evidence of the existence of dumping, and in particular of the normal value of domestic sales in the Peruvian market. It thus accepted without questioning the information given by the applicant, without explaining the basis for not requiring evidence of domestic sales in Peru – something that was relevant – and for making use of the price of exportation to a third country.

- The competent authority did not adequately justify why Colombia was the "appropriate" third country in that context, or why its price was "representative", especially when in the same initial determination (regarding PET film products from Bahrain and Thailand) the "appropriate" nature of the third country was determined on the basis of the third country that was the destination of the greatest volume of exports. In the light of this criterion, the export volume from Peru to Colombia was much less, and the export price significantly higher, than that of exports to other third countries.

[1] As examples of this practice, the following should be taken into consideration: the investigation into alleged dumping in exports of BOPP film to Brazil from Argentina, Chile, China, Ecuador, Peru and the United States (2009); the investigation into alleged dumping in exports of BOPP film to Brazil from Argentina, Chile, China, Colombia, India and Peru (2013); and the investigation into alleged dumping in exports of BOPET film (2015).

- Moreover, despite its in-depth knowledge of the product in question, the competent authority did not take into account that the information on normal value contained information on a product of a greater scope than the product strictly under investigation, but it nevertheless compared that information with the export price, which was limited to the product under investigation. The evidence consisted of price information from TRADEMAP corresponding to the six-digit tariff heading 3920.62[2], and not to the headings on the basis of which the investigation was formally initiated (namely, the eight-digit headings 3920.62.19, 3920.62.91 and 3920.62.99).

- Furthermore, even though this was not an ex officio investigation, the competent authority gathered additional information to that submitted by the applicant in order to supplement the information on the period selected for the dumping investigation and to be able to make the respective calculations on this basis.

- Despite these evidentiary shortcomings and the explicit questioning of the exporter in the context of the investigation procedure, the competent authority neither rejected the application to initiate the investigation nor immediately terminated the investigation.

(ii) The measures were based on a final determination of dumping that appears inconsistent with Articles 2.1, 2.2, 2.2.2, 2.4, 6.8 and Annex II of the Anti-Dumping Agreement, for the following reasons:

- The competent authority evaluated the sufficiency of domestic sales on the basis of codes for subproducts of the product under investigation, and reached the conclusion that in view of the "insufficiency" of domestic sales in relation to two codes (and also the non-existence of domestic sales in relation to a third code), use should be made of the constructed value method for the three indicated codes. The competent authority did not consider the totality of the "product under investigation" in the analysis of sufficiency, which diverges from the type of sufficiency analysis provided for in Article 2.2 of the Anti-Dumping Agreement. Furthermore, Peru also observes that, in constructing the normal value in relation to specific subproducts, the authority made incorrect use of this method, which, according to Article 2.2, is intended to establish normal value in relation to the product under investigation in its entirety, and not in relation to specific subproducts or models.

- In carrying out a sufficiency analysis for domestic sales that was limited to certain codes and rejected domestic sales in relation to two codes on account of "insufficiency", the competent authority rejected this information without having observed the guarantees and the circumspection required by Article 6.8 and Annex II of the Anti-Dumping Agreement.

(iii) The measures were based on a final determination of material injury, which lacked any reasoned and adequate explanation and appears to be inconsistent with Articles 3.1, 3.2 and 3.4 of the Anti-Dumping Agreement. In particular, but not exclusively[3]:

- The competent authority carried out an undercutting analysis on the basis of unequal tax conditions relating to the IPI, with different impacts on the prices of domestic and imported products, and this had a distorting effect on the undercutting analysis, and therefore appears to be inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

[2] This wider range includes, for example, printed PET film, which by definition has a significantly higher price and product characteristics different from the product strictly under investigation.

[3] Peru reserves the right to raise other questions concerning the analysis of injury under Articles 3.1, 3.2 and 3.4 of the Anti-Dumping Agreement in the context of the consultations with Brazil.

- Furthermore, the competent authority established the existence of material injury to the domestic industry without having taken account of the fact that most economic indicators in this branch showed favourable performance, even substantial growth. In addition, there was no adequate appreciation of the evidence in the construction of capacity utilization indicators, or an adequate appreciation of cost-benefit indicators. This appears to be inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

- Moreover, the competent authority made a finding of material injury on the basis of an incomplete and biased appraisal of the investigation period, comparing P5 with P1 and P4, without considering the distorting effect of the imposition of other trade defence measures during those periods. This appears to be inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

(iv) The measures were based on a final causal link determination that appears to be inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because the competent authority established the existence of a causal link without having an adequate evidentiary basis. Moreover, it did not analyse or objectively quantify the effect of factors other than imports that could have caused injury to the domestic industry. In particular, but not exclusively[4]:

- To explain the loss of benefits, the competent authority did not attach any importance to the effect of the imposition of other trade defence measures on the financial situation of the domestic industry.

- As regards the explanation of the loss of market share, the competent authority did not evaluate exhaustively the limitations on the production capacity of the domestic industry to supply the national market (in the light of information from the parent company that the applicant was operating at "full capacity") and it did not take account of the business strategy, in which some 40% of production is intended for export.

- The competent authority did not consider that the undercutting margin in P5 was barely 5%, which could not have cause the alleged loss of market share. Nor did it consider the applicant's decision to significantly increase its prices in P4 contrary to the trends in the costs of raw materials, owing to the application of anti-dumping duties against other origins. Lastly, the competent authority did not consider that Peru has tariff preferences obtained through the Economic Complementarity Agreement between MERCOSUR and the Government of the Republic of Peru (ACE No. 58), whereby the full 16% tariff does not have to be applied to Peruvian imports of this kind of film.

(v) The investigation that gave rise to the anti-dumping measure appears to have been conducted in a manner inconsistent with Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement, in that the competent authority: (a) treated as confidential the information provided by the applicants without showing good cause; (b) failed to require the applicants to furnish a non-confidential summary thereof; and/or (c) where such summaries were provided, they were not in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence.

(vi) The competent authority acted in a manner inconsistent with Article 6.9 of the Anti-Dumping Agreement in not duly notifying certain key facts that formed the basis of the final determination.

[4] Peru reserves the right to raise other questions concerning the analysis of injury under Articles 3.1 and 3.5 of the Anti-Dumping Agreement in the context of the consultations with Brazil.

(vii) The competent authority did not indicate in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authority, and all relevant information on the matters of fact and law and reasons which have led to the imposition of measures, which is inconsistent with Article 12.2.2 of the Anti-Dumping Agreement.

B. PRACTICE OF THE COMPETENT AUTHORITY TO INITIATE AN INVESTIGATION WITHOUT QUESTIONING THE NORMAL VALUE INFORMATION PROVIDED BY THE APPLICANT TO GUARANTEE ITS ACCURACY AND ADEQUACY

The apparent ongoing practice of the competent authority not to require, in connection with the request to initiate an investigation, the submission of evidence relating to domestic sales in the country of origin or exportation, and instead to accept information at face value on non-representative prices from an inappropriate third country, despite specific information on the product under investigation being available to the applicant, is contrary to Articles 2.1, 2.4, 5.2 and 5.3 of the Anti-Dumping Agreement.

C. DIFFERENTIAL TAX TREATMENT OF PRODUCTS IMPORTED IN THE CONTEXT OF THE IPI

The tax treatment established under the Brazilian IPI legislation – set forth in Article 26 of Decree No. 7.212/2010 ("IPI Regulations"), Article 35.II and §2 of Act No. 4.502/64, and Article 17 of Normative Instruction No. 1.081 of 2010 of the Brazilian Federal Revenue Department (all these standards considered individually or in conjunction) – accorded in the context of IPI taxation to imported products in general, including PET products specifically, appears to be inconsistent with Articles III:2, first and second sentences, and III:4 of the GATT 1994 on the following grounds:

(i) With regard to Article III:2, first and second sentences, of the GATT 1994, the prohibition of Article 17 of Normative Instruction No. 1.081 of 2010 of the Brazilian Federal Revenue Department applicable to the tax replacement scheme for imports appears to result in a greater financial burden for imported products (including PET film products) by comparison with like products of national origin. The purchaser of imported products must make the IPI payment at the time of importation. However, the same purchaser (if authorized under the special tax replacement scheme) would not have to make the same payment if purchasing a like product of national origin.

(ii) With regard to Article III:4 of the GATT 1994, the prohibition of Article 17 of Normative Instruction No. 1.081 of 2010 of the Brazilian Federal Revenue Department applicable to the tax replacement scheme for imports appears to result in less favourable treatment for imported products (including PET film products) by comparison with like products of national origin. This unequal treatment would affect conditions of competition to the detriment of imported products.

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The Government of Peru considers in any case that the measures in question would have eliminated or undermined advantages resulting from the application of the GATT 1994 or would have compromised the fulfilment of the objectives of that Agreement.

It also observes that these consultations might give rise to other matters of fact or having legal implications that are not expressly stated in this request but relate to other obligations of Brazil under the WTO Agreement, in particular obligations relating to the administration in a uniform, impartial and reasonable manner of measures that affect international trade in goods, as set forth in Article X:3(a) of the GATT 1994. With a view to facilitating a wide-ranging exchange of views, it

should be understood that, if such were to be the case, these matters would also be covered by the scope of this request for consultations.

The Government of Peru looks forward to receiving a reply to this request for consultations. The Peruvian diplomatic mission will in due course contact the Permanent Mission of Brazil with a view to liaising on the case in order to hold the consultations.