



PERU – ADDITIONAL DUTY ON IMPORTS OF CERTAIN AGRICULTURAL PRODUCTS

ARB-2015-3/30

Arbitration
under Article 21.3(c) of the
Understanding on Rules and Procedures
Governing the Settlement of Disputes

*Award of the Arbitrator
Ricardo Ramírez-Hernández*

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ABBREVIATIONS USED IN THIS AWARD

Abbreviation	Description
Appellate Body Report	Appellate Body Report, <i>Peru – Additional Duty on Imports of Certain Agricultural Products</i> , WT/DS457/AB/R and Add. 1, adopted 31 July 2015
CCV	<i>Comisión de Coordinación Viceministerial</i> (Vice-Ministerial Coordination Commission)
DGAEICYP	<i>Dirección General de Asuntos de Economía Internacional, Competencia y Productividad</i> (Directorate-General of International Economic Affairs, Competition and Productivity)
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
Economic and Legal Analysis Manual	Manual for the economic and legal analysis of normative output in the Ministry of Economy and Finance of Peru (Exhibit PER-9)
GATT 1994	General Agreement on Tariffs and Trade 1994
Panel Report	Panel Report, <i>Peru – Additional Duty on Imports of Certain Agricultural Products</i> , WT/DS457/R and Add. 1, adopted 31 July 2015, as modified by Appellate Body Report WT/DS457/AB/R
PRS	Price Range System
WTO	World Trade Organization

CASES CITED IN THIS AWARD

Short Title	Full Case Title and Citation
<i>Argentina – Hides and Leather (Article 21.3(c))</i>	<i>Award of the Arbitrator, Argentina – Measures Affecting the Export of</i>

Short Title	Full Case Title and Citation
<i>US – COOL (Article 21.3(c))</i>	Award of the Arbitrator, <i>United States – Certain Country of Origin Labelling (COOL) Requirements – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS384/24, WT/DS386/23, 4 December 2012, DSR 2012:XIII, p. 7173

WORLD TRADE ORGANIZATION
AWARD OF THE ARBITRATOR

**Peru – Additional Duty on Imports of
Certain Agricultural Products**

Parties:

Guatemala
Peru

ARB–2015–3/30

Arbitrator:

Ricardo Ramírez-Hernández

1 INTRODUCTION

1.1. This arbitration is being conducted pursuant to Article 21.3(c) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) in order to determine the "reasonable period of time" for implementation of the recommendations and rulings of the Dispute Settlement Body (DSB) in the dispute *Peru – Additional Duty on Imports of Certain Agricultural Products*.¹

1.2. On 31 July 2015, the DSB adopted the Appellate Body Report² and the Panel Report³, as modified by the Appellate Body Report, in *Peru – Additional Duty on Imports of Certain Agricultural Products*. This dispute relates to the imposition of additional duties by Peru on certain types of rice, sugar, maize and milk. The Panel and the Appellate Body found that the additional duties resulting from the Price Range System (PRS) are in

parties have agreed that this Award will be deemed to be an arbitration award under Article 21.3(c) of the DSU.⁹

2 ARGUMENTS OF THE PARTIES

2.1. The arguments of the parties are reflected in the executive summaries of their written submissions, which are contained in Annexes A and B of this Award.

within its legal system in order to implement the relevant recommendations and rulings of the DSB in the shortest period of time possible.¹⁴

3.5. With regard to the method of implementation, previous awards have indicated that the Member has a measure of discretion in choosing the means of implementation that it deems most appropriate.¹⁵ However, a Member's right to choose the means of implementation is not unfettered.¹⁶ Accordingly, it is necessary to consider whether the implementing action falls within the range of permissible actions that can be taken in order to implement the DSB's recommendations and rulings.¹⁷ Thus, "the means of implementation chosen must be apt in form, nature, and content to effect compliance".¹⁸ On the basis of the foregoing, a Member's chosen method of implementation must be capable of bringing the measure into conformity with its WTO

3.24. With regard to the third step, Peru points out that the competent ministries prepare the draft Supreme Decree which will contain the description of the measure and the justification of the need for its implementation.⁵⁶ In this case, the draft Supreme Decree will be referred for approval to the Ministry of Agriculture and Irrigation.⁵⁷ According to the Economic and Legal Analysis Manual, the DGAEICYP must conduct a prior assessment of the economic impact of the regulatory draft.⁵⁸ Peru maintains that the process of preparing the draft may take 30 to 45 days.⁵⁹

3.25. With respect to the fourth step, Peru indicates that, inasmuch as it involves more than one sector, the draft Supreme Decree must be approved by the CCV.⁶⁰ Within the CCV, the Vice-Ministries of the Executive Branch have the option of determining the viability of the draft, and of making observations or comments thereon.⁶¹ Peru states that the period of time for this step may be 14 to 30 days under normal conditions, depending on the observations submitted and the time it takes to respond to them.⁶²

3.26. Regarding the fifth step, Peru indicates that the draft is placed on the agenda of the Council of Ministers, which must approve the draft or return it for any further amendment. According to Peru, such approval, in normal circumstances, may take between 7 and 14 days on average.⁶³

indicated that the domestic "contentiousness" of an implementation measure also does not serve as a basis for granting longer implementation periods.⁷⁹ In fact, in my opinion, any consideration of the domestic effect or "contentiousness" that might be generated by the implementation of a measure would also necessarily lead to the consideration of the domestic effect produced by the failure to implement a WTO-inconsistent measure in the complaining Member.

3.34. In addition, at the hearing, Peru explained that the support programmes in question, addressed during the first step, are the same support programmes that are included in the second step. As I indicated above, the second step includes two activities that are developed in parallel: (i) the definition of the implementation measure, and (ii) the establishment of programmes enabling the affected sectors of production to cope with the impact of implementation and to accept modification of the PRS.⁸⁰ Thus, in relation to the second step, Peru expressly accepted that the establishment of support programmes may take place in parallel to the definition of the implementation measure.⁸¹

3.35. For the foregoing reasons, I do not consider the framing and establishment of support programmes to be relevant for the establishment of a reasonable period of time. These are actions unrelated to the implementation of an inconsistent measure. In any event, I observe that such consultations and actions could take place parallel to the implementation process.⁸²

3.36. In the light of the foregoing, I consider that the first step and the part of the second step related to the support programmes in question are not relevant to the determination of the reasonable period of time for implementation.

3.37. With regard to the period of time for the part of the second step that relates to the definition of the implementation measure, Peru points out that, according to the Economic and Legal Analysis Manual, the maximum period of time for this step will be six months.⁸³ Guatemala argues that this step can be carried out within a maximum period of three months in view of the clarity of Peru's obligations to implement the recommendations and rulings of the DSB – that is, that Peru should stop collecting the additional duty resulting from the PRS.⁸⁴ As was noted above, although Peru has the overall burden of proving that the period of time requested for implementation constitutes a "reasonable period of time", Guatemala may submit evidence in support of its assertion that the period of time requested by Peru is not "reasonable" and that a shorter period of time is justified for implementation.⁸⁵ However, Guatemala did not duly substantiate how it arrived at the maximum period of three months that it proposed for this step. Therefore, I consider only the period of six months, as provided for in Peru's legal system, as the maximum period of time for the part of the second step that relates to the definition of the implementation measure.

3.38. With regard to the third, fourth, fifth, and sixth steps, Peru indicates that the total period of time for these steps may be 58 to 96 days "under normal conditions".⁸⁶ Guatemala does not question the relevance of these steps for the implementation of the measure or the minimum or maximum time-frames for the periods described by Peru. Its argument is that, in determining the reasonable period of time, the defending party must

its legal system to reduce that period to the greatest extent possible. Accordingly, Guatemala considers that, with respect to these steps, I must consider the minimum periods of time indicated by Peru.⁸⁷

3.39. In this connection, I agree with Guatemala's reasoning. In my opinion, a Member must undertake all available efforts, within the flexibility offered by its legal system, to implement, as expeditiously as possible, the recommendations and rulings of the DSB and to bring into conformity a measure that has been declared inconsistent with WTO rules. Expeditious compliance with the recommendations and rulings of the DSB is essential to the proper functioning of the WTO dispute settlement mechanism. Consequently, for the purpose of calculating the "reasonable period of time" within the meaning of Article 21.3(c), I will take the shortest possible period of time as the baseline, that is, the *minimum* periods indicated by Peru in relation to the third, fourth and fifth steps, in addition to the single period indicated by Peru in relation to the sixth step.

3.40. During the hearing, Peru argued that the periods of time may also vary in accordance with the nature of the implementation measure. In my opinion, it is clear that, to the extent that I have more information regarding the way in which the inconsistent measure is to be implemented, this could facilitate my consideration of other elements that might justify a longer period of time. However, Peru did not provide detailed or specific information concerning the *implementation measure*. As I do not have that information, it is impossible for me to assess precisely the impact, within the Peruvian legal system, on the periods of time established for each step of the implementation measure.

3.41. In the light of the foregoing, I consider that, in accordance with the regular periods of time provided for in the Peruvian legal system, and taking into account Peru's obligation to bring its measure into conformity as quickly as possible, Peru is able to draft and enact a supreme decree in a shorter period of time than the period it proposes.

3.42. I shall examine below the particular circumstaTfu wie9articme mafcs16.2(c)h(me mafc)5(s16.umstau047

3.44. With regard to the 2015-2016 El Niño phenomenon, Peru contends that the implications of this natural phenomenon have an impact on the different steps of the regulatory process in Peru.⁹¹ Peru foresees a severe future impact on the main agricultural crops of the country from the El Niño phenomenon, generating losses and harm to life, health and means of subsistence of the population, in addition to public and private infrastructure.⁹² Guatemala, for its part, argues that the El Niño phenomenon is not a circumstance justifying extension of the reasonable period of time beyond the minimum period permitted under the Peruvian legal system.⁹³ Guatemala claims that the likelihood of natural disasters occurring is an extra-legal factor which cannot be taken into consideration in determining the reasonable period of time.⁹⁴ According to Guatemala, the

noted above, Peru bears the overall burden of proving that the period of time requested for implementation constitutes a "reasonable period of time".¹⁰³ In the course of the hearing, Peru did not demonstrate or, at least, explain how it arrived at the calculation of the additional period of time said to derive from the actions of prevention or mitigation in relation to the El Niño phenomenon. Nor did Peru indicate, in relation to each of the steps in the procedure for drafting and enacting a supreme decree, how and for what reasons the period of time for each step of this

the products covered.¹¹⁴ I consider that Peru has not demonstrated that the PRS currently constitutes an essential element of its tariff an

ANNEX A

EXECUTIVE SUMMARY OF PERU'S SUBMISSION

1 INTRODUCTION

1. On 31 August 2015, Peru informed the DSB that it intended to implement the DSB's recommendations and rulings in this dispute. Peru explained that it would not be possible to comply immediately and that it would need a reasonable period of time to bring its measures into conformity with the WTO Agreements.

2. Given that the Appellate Body's recommendation concerning the additional duties implies a significant change in Peruvian tariff policy, and that "particular circumstances" exist, an implementation period of at least 19 months constitutes a reasonable period of time for the

3 ANALYTICAL FRAMEWORK FOR DETERMINING THE REASONABLE PERIOD OF TIME FOR IMPLEMENTATION OF THE APPELLATE BODY'S RECOMMENDATIONS

7. Taking into consideration the particular circumstances of the present case, which include the nature of the measure as an integral part of the country's economic policy and the current state of emergency requiring the prioritization of Government resources, set out below are details of the administrative procedure required to implement the recommendations of the Appellate Body and the Panel.

3.1 Consultation process with the production sectors concerned

8. Given that the implementation of the DSB's recommendations will have a negative impact on the staple goods-producing sectors concerned, it is essential to conduct a consultation process. The ministries responsible for formulating relevant programmes assess comments and hold coordination meetings to design the programmes concerned. On average, this process can take between 15 and 20 days, following which a further meeting is held with the production sectors. The total duration of these consultations is around 60 to 70 days.

3.2 Definition of the measure

9. The measure to implement the DSB's recommendations must be defined by the ministries responsible for issuing the Supreme Decree. Coordinated efforts are therefore required, involving not only the Ministries of the Economy and Finance (MEF), and of Agriculture and Irrigation, but other State sectors.

10. By Ministerial Resolution No. 639-2006-EF/67, the MEF approved the "Economic Analysis Manual", according to which the determination of a measure requires a preparatory meeting with all the units involved in the draft legislation.

11. To date, despite the efforts made, the competent ministries have been unable to agree on any proposed modification of the measure in order to match the DSB's recommendations to the PRS. A period of between six and nine months is therefore envisaged for the completion of this stage.

3.3 Preparation of the draft Supreme Decree

12. Once the measure has been determined and the consultation process with the sectors concerned has been concluded, the competent ministries formulate the draft Supreme Decree that will contain the description of the measure and the justification for its implementation. Under normal circumstances, the process of preparing and approving the draft measure can take 30 to 45 calendar days.

3.4 Vice-Ministerial Coordination Commission

13. Any draft Supreme Decree involving more than one sector must first be approved by the

3.6 Ministerial endorsement, publication and entry into force

15. Once the draft text has been agreed and approved by the Council of Ministers, it is endorsed by the Minister of Agriculture and Irrigation and signed by the Minister of the Economy and Finance, for subsequent publication in the Official Journal, *El Peruano*. Under normal circumstances, this endorsement can take around seven days. The Supreme Decree will enter into force on the day following its publication, unless otherwise provided.

4 CONCLUSION

16. Peru requests the Arbitrator to determine that the reasonable period of time for the implementation of the Appellate Body's ruling be 19 months, starting from the date of approval of the report by the DSB and thus ending on 31 October 2016.

6 CONCLUSION

15. Five months is an amply sufficient and perfectly reasonable period of time for Peru to implement the DSB's recommendations and rulings. The determination of the reasonable period of time should not be influenced by the design of production sector support measures; speculation concerning potential effects of the El Niño phenomenon; or considerations such as how long the PRS has been in place or its level of integration in tariff policy.

16. If the El Niño phenomenon were to have devastating consequences in Peru, thereby affecting the country's regulatory capacity to the point of preventing it from complying with the DSB's recommendations and rulings within the reasonable period of time determined by the Arbitrator, Peru could inform the DSB of this situation in the context of its status reports on compliance pursuant to Article 21.6 of the DSU. Guatemala would give sympathetic consideration to this situation.
