

***Previously raised concerns***

**China, UE, Tailândia e EUA X Brasil - Toys (G/TBT/N/BRA//259 and 313)**

*Brazil - Toys (G/TBT/N/BRA//259 and 313)*

The representative of China raised a concern about the new Brazilian regulation on toys, Decree 384 notified as G/TBT/N/BRA/313. China had already expressed its concerns about Brazil's Decree 326, notified as G/TBT/N/BRA/259 on 16 October 2007, that had accorded less favourable treatment to imported toys to be implemented for nearly two years despite its alleged emergency and temporary nature. He noted that Brazil had revised the emergency regulation and submitted the new notification G/TBT/N/BRA/313. However, he pointed out that the proposed new decree failed to address the many WTO inconsistencies that had been identified in previous meetings. For example, according to the proposed decree, if original tests were performed abroad, supplementary test would be required on the products' arrival in Brazil. This would be inconsistent with Brazil's WTO obligations, because it would discriminate against imported toys by imposing an additional and redundant test on imported toys alone. In addition, the decree required imported toys to have the required seal placed on them at the time of clearance, rather than at the time and place of manufacture, as was permitted for domestic toys. This would also constitute a discriminatory requirement and impose substantial additional costs for importers. It would also cause practical difficulties as millions of toys imported annually would have to be labelled in bonded warehouses in Brazil that had no space for this activity. He informed the Committee that China had sent written comments to Brazil in December 2008 and that Brazil replied that all the comments sent were being analyzed and could be incorporated after the closure of the public hearing in Brazil foreseen for January. At that point, the publication of the final version had been scheduled for March 2009 and Brazil had also committed to the final regulation being notified to the WTO. Given that it was already mid-March, the Chinese representative requested an update on this process.

The representative of the European Communities shared the comments raised by China. He noted that the European Communities had sent written comments to the Brazilian authorities on 21 January 2009. He also stated that the proposed modifications introduced by the notified text still fell short of addressing the concerns previously raised. He pointed out that the proposed decree would reinstate, with some amendments, the so-called System 5 procedure for imported toys alongside the currently available System 7 procedure, which was welcomed by the European Communities. However, the revised version of System 5 as applied to imported toys also gave rise to a number of concerns. System 5 was based on the evaluation of the manufacturer's quality management system and type-testing of a number of samples taken from the production line. Toy suppliers were given the possibility of having the tests performed either in Brazil by an INMETRO-accredited laboratory or abroad. With respect to the tests carried out abroad, the notified text provided for the acceptance of tests conducted by foreign laboratories accredited pursuant to IAF (International Accreditation Forum) or ILAC (International Laboratory Accreditation Co-operation) rules. However, even where full tests covering all relevant safety requirements had been carried out abroad in accordance with the set conditions, additional tests would be required to be carried out in Brazil at the time of importation by an INMETRO-accredited laboratory on samples taken from each imported batch. These additional tests would cover major aspects such as general, physical and mechanical properties and migration of certain chemical elements.

The representative of the European Communities emphasized that this would effectively establish a double-testing obligation on imported toys leading to significant additional costs and delays, while domestic toy suppliers would be able to complete the System 5 procedure prior to placing their products on the market. He stressed that this appeared to be more strict than

necessary and would thus create unnecessary obstacles to international trade within the meaning of Article 5.1.2 of the TBT Agreement. Hence, European toy suppliers would continue to be granted less favourable access to the Brazilian market than suppliers of like toys of national origin, in a comparable situation, which was inconsistent with Brazil's obligations under Article 5.1.1 of the TBT Agreement.

The representative of the European Communities also noted his delegation's concern over the requirement for the affixing of the conformity marking after importation, as this would require the unpacking of goods upon importation, their storage in local warehouses and a number of operations relating to the affixing carried out locally, thus entailing additional costs. This could be a breach of the national treatment principle referred to in Article 2.1 of the TBT Agreement. The European Communities considered that, in its present form, the draft Decree imposed overly strict marking and labelling requirements, considering in particular that the packaging used for most toys was not exclusively for the Brazilian market and that bonded warehouses typically had no extra space for this activity. He also pointed out that domestic toy manufacturers would be able to affix the mark at the place of manufacture and to print it on the packaging. These requirements would therefore constitute an unnecessary barrier to trade within the meaning of Article 2.2 of the TBT Agreement.

The representative of the European Communities thanked INMETRO for its openness and willingness to have bilateral discussions with EC representatives. He requested further information on the date of the public hearing with interested parties which INMETRO had announced. He suggested that alternative ways could be explored with a view to pursuing the legitimate objective of protecting children from risks arising from certain imported toys. In particular, he suggested that Brazilian authorities could consider, rather than strengthening the conformity assessment procedure on unequal terms on imports as compared to domestic production, concentrating on better targeted enforcement activities on imported products, based on appropriate risk assessment tools, considerations relating to the origin of the product, the track record of the importer or manufacturer, the characteristics of the products, the health and safety risks associated with the product, accident data, and so on. As this approach had been successfully applied by the European Communities for many years, they would be ready to share their experience in this field with the Brazilian authorities.

The representative of Thailand expressed similar concerns. Her delegation's assessment also came to the conclusion that the newly notified decree did not come any closer than its predecessor to ensuring conformity with the TBT Agreement. Despite Brazil's assurance at the last meeting that its revised procedure would accept foreign test reports, the conditions for the consideration of foreign test reports did not favour effective acceptance. The foreign laboratory would have to pass stringent accreditation criteria set by Brazil. Additionally, the test reports would have to be accompanied by a certified translation into Portuguese. She noted that this was more trade restrictive than necessary, as an international language such as English was accepted worldwide, especially in technical areas. As already noted by other delegations, Brazil also required that, where foreign testing was used, supplementary testing had to be performed on the same general, physical, mechanical and chemical requirements that had already been tested overseas. She said that this would have to be interpreted as Brazil's non-recognition of foreign testing and international collaboration under ILAC, contrary to the Brazilian claim to accept foreign test report.

She further pointed out that the importer had the responsibility to notify the Brazilian authority to sample products for tests, but only after arrival at the port. This implied that the importer had to rent bonded warehouses to store the products in waiting. Additionally, she noted that Article 5 of the new measure required that the conformity identification seal could only be affixed on imported toys after the certification was completed. She emphasized that this effectively meant that exporters would have to hire labour to unload all warehouses, unpack all products, and affix a seal on every individual toy item and packages thereof. They would have to repackage and

reload them for transportation out from the port. Substantial additional time, work and costs would have to be spent by all toy importers into Brazil, in contradiction to Article 2.1 of the TBT Agreement, which states that members must be accorded treatment no less favourable than that accorded to like products of national origin. Furthermore, she pointed out that Brazil's new conformity assessment procedure failed to ensure conformity with Article 5.1.1 and 5.1.2 of the TBT Agreement, as it would create unnecessary obstacles to international trade, being more stringent than necessary to give Brazil adequate confidence that imported toys conformed to its requirements. She pointed out that better ways existed to safeguard children safety.

The representative of Thailand had noted that her delegation was still awaiting a response to the comments submitted on 24 December 2008. She urged Brazil to consider withdrawing the measure or bringing it into conformity with the TBT Agreement, respecting the principles of Good Regulatory Practice. She also suggested bilateral talks and asked Brazil to acknowledge receipt of the Thai comments and respond to them in writing.

The representative of the United States noted his delegation's appreciation of the revisions that Brazil had made to its regulations with a view to ensure that all toy producers, whether foreign or domestic, could utilize either System 5 or 7 to demonstrate that their toys conformed with Brazilian requirements, and that allowed exporters to use ILAC accredited laboratories outside of Brazil to conduct the testing required under either system. However, he also shared the systemic concerns raised by other delegations that the new decree applied an additional in-country testing requirement solely to imported toys. While the United States understood the importance of devising appropriate measures so as to ensure that children were protected from potentially unsafe toys, a continued dialogue would be important in tackling these common challenges confronted by regulators in many countries. He announced that the United States would be willing to facilitate discussions between regulators and to share experiences and discuss alternative approaches.

The representative of Brazil recalled that the current Brazilian regulation on toys had been adopted in an emergency situation with the aim of addressing a lack of confidence regarding the conformity of toys. Since the end of 2008, Brazil's toys regulation had been under revision. He noted that a proposed new regulation had been notified to the TBT Committee under G/TBT/N/BRA/313 and Members had had the opportunity to analyse and comment on this draft. He emphasized that imported toys would be allowed to use System 5 certification again. Both imported and domestic producers would be subject to a regular testing as a means of ensuring conformity with safety specifications. He stressed that tests performed by foreign labs accredited by ILAC would be accepted. He informed the Committee that INMETRO had been assessing all the comments received during the public consultation period and would hold a public hearing on the draft regulation in the coming weeks, to which all interested parties were invited. The date of the hearing would be confirmed by INMETRO in the near future and his delegation remained open for bilateral consultations on the subject.

### **México X Brasil – Regulation on Identification and Quality Standards of Ethyl Alcohol and other Spirits (G/TBT/N/BRA/276-278 and Suppl.1)**

*Brazil – Regulation on Identification and Quality Standards of Ethyl Alcohol and other Spirits (G/TBT/N/BRA/276-278 and Suppl.1)*

The representative of Mexico pointed out that the regulation set forth a definition for tequila with specifications which were below what was allowed for under Mexican legislation. In addition, the measure limited the types of tequila which could be marketed in Brazil, at the same time laying down specifications which would allow for the marketing of a product of inferior quality to the product produced in Mexico under the name "tequila". He stressed that Mexico believed that this ran counter to several provisions of the WTO including GATT 1994, the TBT Agreement and the TRIPS Agreement. He recalled that, at the TBT Committee's meeting held

in July 2008, his delegation had expressed concerns about the measure in question. Industry involved and the Mexican Government had jointly presented their comments and expressed their opposition to the measure both to the Brazilian Enquiry Point as well as to the Ministry of Agriculture Farming and Supply of Brazil. He recalled that concerns had also been reiterated at the Committee's meeting in November 2008 and that a reply from Brazil to the comments made was still awaited.

The representative of Brazil informed the Committee that the proposed regulation on spirits was in the process of being updated. He stressed that public consultations had been held and additional time for comments had been granted to interested parties. All comments received would be analysed before the final regulation was published. Specifically, on the issue of tequila, he pointed out that, in Brazil, "tequila" was considered a generic name since 1973, when decree 73/267 had set quality and identity standard for this kind of spirit. Therefore, Brazil disagreed with Mexico's allegation that Brazil's proposed regulation on tequila violated TRIPS provisions. Considering tequila as a generic name in Brazil was fully in compliance with Article 4.4 of the TRIPS Agreement, which allowed Members to use geographical indications of another Member if it had been doing so for at least ten years preceding 15 April 1994. He reassured Members that the proposed regulations would not affect market access conditions for exports, nor limit the sale of tequila in Brazil.