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Committee on Sanitary and Phytosanitary Measures

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**RESTRICTIONS ON EXPORTS OF CHOCOLATE AND COCOA PRODUCTS DUE TO THE
APPLICATION OF COMMISSION REGULATION (EU) NO. 488/2014 OF
12 MAY 2014 AMENDING REGULATION (EC) NO. 1881/2006 AS
REGARDS MAXIMUM LEVELS OF CADMIUM IN FOODSTUFFS**

COMMUNICATION FROM PERU

The following communication, received on 26 November 2020, is being circulated at the request of the delegation of Peru.

1. Peru would like to present to WTO Members its trade concern with respect to Commission Regulation (EU) No. 488/2014 of 12 May 2014 amending Regulation (EC) No. 1881/2006 as regards maximum levels of cadmium in foodstuffs. In specific terms, the European Regulation establishes maximum levels for cadmium in chocolate and other cocoa products that, in practice, have a negative impact on trade in cocoa beans and cocoa.
2. Firstly, Peru believes that the European Regulation is inconsistent with Article 2 of the SPS Agreement, as it is not based on scientific principles and constitutes a disguised restriction on trade. Since there is no international standard on this subject, the opinion of the Joint FAO/WHO Expert Committee on Food Additives (JECFA), at its 77th meeting in 2013, which did not consider cadmium in cocoa to pose a risk to public health, should have been taken into account by the European Union when it developed its Regulation. It should be noted, however, that the justification for the European Regulation rests on earlier JECFA reports, and not the 2013 report.¹
3. Furthermore, on the basis of the statements made by FAO on behalf of the JECFA Secretariat at the 42nd Session of the Codex Alimentarius Commission in July 2019, Peru reminds WTO Members that dietary exposure to cadmium in cocoa is insignificant compared to other sources of dietary exposure and does not amount to a public health concern.² Moreover, as stated at the same Codex meeting, it is not felt that new data could change the results previously presented by JECFA.
4. Secondly, while the European Union has indicated that its Regulation applies to chocolate and other cocoa products, it has also affected trade in cocoa beans, as these are the raw materials used to make chocolate and chocolate products. In this regard, the European Union should have taken into account the relevant economic factors, in accordance with Article 5.3 of the SPS Agreement.
5. In this respect, economic damage is being caused, given that European importers require producers to submit analyses of the cadmium in their beans, and lower their purchase prices without technical or regulatory justification. Cadmium levels for chocolate and cocoa products have become a point of negotiation for cocoa beans, even though they do not apply to these products.

¹ The full report of the 77th JECFA meeting is available at:
http://apps.who.int/iris/bitstream/10665/98388/1/9789241209830_eng.pdf.

² The full report of the 42nd Session of the Codex Alimentarius Commission is available at:
http://www.fao.org/fao-who-codexalimentarius/sh-proxy/en/?lnk=1&url=https%253A%252F%252Fworkspace.fao.org%252Fsites%252Fcodex%252FMeetings%252FCX-701-42%252FReport%252FREP19_CACe_Final.pdf.

6. Cocoa bean exports to the European Union fell by over 18% in 2019 compared to 2018.³ In this context, no less than 44% of Peruvian cocoa bean producers have been impacted by the European Union Regulation, particularly those from alternative development zones, such as San Martín, Huánuco, Ucayali and Junín, where 80% of Peru's cocoa is produced.⁴

7. In this regard, Peru wishes to underline that, due to the European Union Regulation, the farm gate price of cocoa in nine districts of the Amazonas region in Peru fell by over 10% in 2019 compared to 2018. Also, in the areas of Montero, Huarmaca, Las Lomas and Chulucanas in the Piura region, the price dropped by between 24% and 31%. In this same context, in the districts of San Juan de la Virgen and Pampas de Hospital in the region of Tumbes, the price dropped by 23%; while in the district of Calzada in the region of San Martín, prices fell by approximately 11%.⁵ It should be noted that price reductions greater than 10% have an impact on the cocoa-based alternative development strategy, since they cause the profitability of cocoa to decline in relation to that of coca.⁶

8. Peru also wishes to refer to the specific case of the cooperatives in the north of the country, which highlights the trade impact of the Regulation, and the misuse of this Regulation by European buyers. Unlike in 2018, when 1,800 tonnes were collected, in 2019 only 800 tonnes were collected, 400 tonnes of which remained warehoused. This resulted in a loss of USD 200,000 for producers.⁷ Cocoa from the north of the country, recognized internationally as high quality, has dropped significantly in value, leading to an approximately 33% drop in the income of domestic producers and the loss of a number of customers for fine cocoa.⁸ The members of these cooperatives are very small-scale producers, with an average of one hectare, who rely on cocoa growing and marketing for their income and family livelihoods. The families of these producers are highly vulnerable and live in conditions of poverty and extreme poverty.

9. European producers, without technical or regulatory justification, require these cooperatives to carry out a cadmium analysis on all batches of cocoa beans for export. Analyses are carried out in Peru and also when the products reach their destination. Maximum level requirements range from 0.7 to 0.8 ppm in the case of German buyers and up to 1.0 ppm for Dutch and French buyers.⁹

10. As regards cocoa powder, Peru's exports to the EU fell by over 39% in 2019 compared to 2018.¹⁰ With respect to the category "sweetened cocoa powder sold to the final consumer" established in Regulation (EU) No. 488/2014, Peru must point out that this part of the Regulation is inconsistent from a final consumer protection viewpoint. For instance, for a product "A" that is sold to final consumers and contains 25% cocoa powder and 75% sugar, the maximum level to be applied is 0.6 ppm, while for a product "B" containing 75% cocoa powder and 25% sugar, the same maximum level of 0.6 ppm is also applicable. However, in each spoonful of product "B", the total cadmium content will be three times that of product "A", and the final consumer intake would therefore vary according to the product purchased.

11. The foregoing shows how the Regulation, as it relates to cocoa powder, fails to protect the final consumer and instead misleads cocoa powder importers, creating unnecessary barriers to the export of this product.

12. It should be pointed out that nearly all the cocoa powder imported by the chocolate industry, including in Europe, is used as an ingredient for chocolate confectionery (confectionery with a

³ Information based on data from the National Supervisory Authority for Customs and Tax Administration (SUNAT).

⁴ Information produced by the Peru Cocoa Alliance on cocoa bean production in 2019, and based on the results of the study by the Bioversity International - CIAT Alliance on the presence of cadmium in cocoa beans. Samples were taken from 1,800 trees on 250 farms throughout the country.

⁵ Ministry of Agriculture and Irrigation (MINAGRI) and Peruvian Association of Cocoa Producers (APPCACAO).

⁶ Ministry of Agriculture and Irrigation (MINAGRI) (2019). Report analysing the trade effects, on the Peruvian exportable supply of cocoa and cocoa products, of the entry into force of Regulation (EU) No. 488/2014, which establishes limits for cadmium in chocolate and cocoa products (MINAGRI, Lima).

⁷ Trade information based on data from the Peruvian Association of Cocoa Producers (APPCACAO).

⁸ Trade information based on data from the Peruvian Association of Cocoa Producers (APPCACAO).

⁹ Trade information based on data from the Peruvian Association of Cocoa Producers (APPCACAO).

¹⁰ Information based on data from the National Supervisory Authority for Customs and Tax Administration (SUNAT).

minimum cocoa content), with a smaller amount intended for final consumption in the form of 100% cocoa powder. However, in practice, making purchases on a differentiated basis - in other words, importing "cocoa powder for the final consumer" and "cocoa powder as an ingredient" separately - is not possible for importing companies. In this regard, chocolate companies impose a limit of 0.6 ppm for cocoa powder imports, regardless of their end use. Given that most cocoa powder is used as an ingredient for chocolate confectionery, the limit of 0.6 ppm is technically baseless since, when such a product is mixed with other components, the level of cadmium contained in the end product is negligible and even less than that set out in the European Regulation.

13. In this respect, Peru would like to present the following case, in which European importers apply the same levels for all types of cocoa powder, even when not intended for direct consumption. A specific Peruvian company exported approximately 100 and 140 tonnes of cocoa powder to the European Union in 2017 and 2018, respectively. However, due to the entry into force of the European Union Regulation, its exports were reduced to 40 tonnes in 2019, and currently it has only been able to export 25 tonnes. The European importer, in its purchase orders and technical data sheets, specifies a maximum level of 0.6 ppm, regardless of the end use of the cocoa powder. Maximum levels are also being used to reduce the purchase price by 20%.¹¹

14. In light of the above-mentioned cases, Peru would like to ask the European Union what steps it has taken and what others it would take in order to prevent the misuse of the Regulation by its importers.

15. The trade implications are also clear from the reduction in exports of conventional cocoa to the European Union and the increase in exports to an Asian market at a lower price. For example, in 2015, 67% of conventional cocoa beans were exported from Peru to the Netherlands, and only 1% to the Asian market in question. In 2019, the opposite occurred, with 31% of cocoa exported to the Netherlands and 40% purchased by the Asian market. This situation could at first be interpreted as a change in our export destinations; however, in 2019, the alternative market paid approximately USD 120 less per tonne than the Netherlands.¹²

16. In the last five years, Peru has developed its processing processes for cocoa for export. Between 2015 and 2019, the use of cocoa beans in the production of cocoa products increased by 21% a year. The largest increase occurred in the manufacture of cocoa butter: in 2015, more than 18,000 tonnes of beans were used to manufacture approximately 7,000 tonnes of cocoa butter, while in 2019, 41,000 tonnes of beans were used to manufacture 15,000 tonnes of the product. The manufacture of more cocoa butter led to the increased production of cocoa powder; however, the European Union Regulation has adversely impacted the export of cocoa powder, with inventories held for longer periods, thereby increasing financial costs and making the industry less profitable.¹³

17. Lastly, Peru wishes to point out that the implementation of Commission Regulation (EU) No. 488/2014 would preclude long-term results in cooperation projects financed by the European Union. For example, as part of the Alternative Development Programme, over 300 projects have been implemented in the areas of Pozuzo and Palcazú, requiring a total investment of EUR 32 million, approximately 26 million of which were donated by the European Union. To maintain the results of these projects, it must be ensured that the price of cocoa is not adversely impacted; otherwise, as explained above, the immediate effects would be to make overcoming poverty impossible due to lower earnings, and a possible return to growing illicit crops.¹⁴

18. In light of the above, Peru calls upon the European Union to rescind Commission Regulation (EU) No. 488/2014, with respect to chocolate and other cocoa products, since it is inconsistent with Articles 2 and 5 of the WTO SPS Agreement and creates unnecessary barriers to trade.

¹¹ Trade information based on data from the Peruvian Exporters Association (ADEX).

¹² Information based on data from the National Supervisory Authority for Customs and Tax Administration (SUNAT).

¹³ Information based on data from the National Supervisory Authority for Customs and Tax Administration (SUNAT).

¹⁴ Ministry of Agriculture and Irrigation (MINAGRI) (2019). Analysis of the impact of the entry into force of Regulation (EU) No. 488/2014 on projects that have been and are being implemented with European technical cooperation in respect of the alternative development strategy promoting licit crop production as an alternative to coca leaves (MINAGRI, Lima).