

CHAPTER 6: SAFEGUARD MEASURES

Article 6.01 Definitions

For the purposes of this Chapter, the following terms shall be understood as:

Agreement on Safeguards: the Agreement on Safeguards which forms part of the WTO Agreement, its modifications or any successor agreement;

causal link: as defined in Agreement on Safeguards;

critical circumstances: those circumstances where delay of the application of the safeguard measure would cause damage that would be difficult to repair;

domestic industry: the producers as a whole of the like or directly competitive goods operating within the territory of a Party, or those whose collective output of the like or directly competitive goods constitutes a major proportion of the total domestic production of those goods;

investigating authority: the investigating authority shall be:

- (a) in the case of the Republic of China (Taiwan), the International Trade Commission of the Ministry of Economic Affairs, or its successor;
- (b) in the case of the Republic of El Salvador, the Dirección de Administración de Tratados Comerciales del Ministerio de Economía, or its successor; and
- (c) in the case of the Republic of Honduras, the Dirección General de Integración Económica y Política Comercial de la Secretaría de Estado en los Despachos de Industria y Comercio, or its successor;

safeguard measure: all kinds of tariff measures as applied in accordance with the provisions of this Chapter, with the exception of any derived safeguard measure of an initiated procedure before the entering into force of this Agreement¹;

serious injury: as defined in the Agreement on Safeguards;

threat of serious injury: as defined in the Agreement on Safeguards; and

transition period: a period of ten (10) years as of the date this Agreement enters into force; except when it refers to a good where tariffs should be eliminated in a period of more than ten (10) years, according to the Schedule on Annex 3.04 (Tariff Reduction Schedule) of the Party that applies the measure, in which case **transition period** means the one set out in the aforementioned Schedule.

¹ The Parties understand that neither tariff rate quotas nor quantitative restrictions would be a permissible form of safeguard measure.

Article 6.02 Bilateral Safeguard Measures

1. All the substantive aspects, procedures and in general the application of the safeguard measures shall be governed by this Chapter, and Article XIX of GATT 1994, the Agreement on Safeguards and the applicable legislation for each Party as suppletory.

2. During the transition period, each Party may apply a safeguard measure according to the procedure established in this Chapter if, as a result of the reduction or elimination of a customs tariff in accordance with this Agreement, an originating good from the territory of a Party is being imported into the territory of the other Party, in such increased quantities, in absolute terms or relative to domestic production and under such conditions as to constitute a substantial cause of serious injury, or a threat thereof, to the domestic industry of the like or directly competitive good.

3. The importing Party may to the extent necessary to prevent or remedy serious injury, or the threat thereof:

(a) suspend the further reduction of any customs tariff provided for under this Agreement on the good; or

(b) increase the customs tariff on the good to a level not to exceed the lesser of:

(i) the Most Favored Nation (MFN) applied customs tariff in effect at the time the measure is taken; or

(ii) the MFN applied customs tariff in effect on the day immediately preceding the date of entry into force of this Agreement.

4. The Republic of El Salvador and the Republic of Honduras shall have the right to extend the period of application of a safeguard measure for up to an additional two (2) years beyond the maximum period provided for in Article 6.02, paragraph 5.

5. The following conditions shall be observed in the proceeding that may result in the application of a safeguard measure according to paragraph 2:

(a) a Party shall, without delay and in writing, notify the other Party of the initiation of the proceeding which could have as a consequence the application of a safeguard measure against a good originating in the territory of the other Party;

(b) any safeguard measure shall be initiated no later than one (1) year from the date of the initiation of the procedure; except for what is established by the Article 6.04 paragraph 15;

(c) no safeguard measure may be maintained:

- (i) for more than four (4) years, extendable for a period of four (4) additional consecutive years, as provided in Article 6.04 paragraphs 27 through 29; or
 - (ii) after the termination of the transition period, unless with the consent of the Party against whose good the measure is applied;
- (d) a safeguard measure may be applied as many times as necessary, provided that at least a period has elapsed, equivalent to half of the time during which the safeguard measure was applied for the first time;
- (e) the period in which a provisional safeguard measure has been applied shall be calculated for the purpose of determining the period of duration of the definitive safeguard measure established in subparagraph (c) of this paragraph;
- (f) provisional measures that do not become definitive shall be excluded from the limitation provided for in subparagraph (d) of this paragraph; and
- (g) on the termination of the safeguard measure, the applied customs tariff shall be the rate as that in the Tariff Reduction Schedule.

6. In critical circumstances a Party may apply provisional bilateral safeguard measures pursuant to a preliminary determination that there is clear evidence that increased imports have been given on originating goods of the other Party, as a result of the reduction or elimination of duty pursuant to this Agreement and under such conditions as to constitute a serious injury or threat thereof. The duration of provisional measures shall not exceed two hundred (200) days.

Article 6.03 Global Safeguard Measures

1. Each Party shall reserve its rights and obligations in accordance with Article XIX of GATT 1994, and the Agreement on Safeguards, its modifications or successor provisions, except those relating to compensation or retaliation and exclusion of a safeguard measure which are inconsistent with the provisions of this Article.

2. Any Party applying a safeguard measure in accordance with paragraph 1 shall exclude from this measure, goods imported from the other Party, unless:

- (a) imports from the other Party account for a substantial share of total imports. Those imports normally shall not be considered to be substantial if that Party is not among the top three suppliers of the good subject to the proceeding, measured in terms of its import share during the most recent three (3) year period; and

(b) imports from the other Party contribute importantly to the serious injury, or threat thereof, caused by total imports. To determine this, the investigating authority shall consider factors such as the change in the import share of the other Party in the total imports, as well as the import volume of the other Party and the changes in that volume. Normally, the imports from a Party shall not be considered to contribute importantly to serious injury, or threat thereof, if its growth rate of imports from a Party, during the period in which the injurious surge in imports occurred, is appreciably lower than the growth rate of total imports from all sources during the same period.

3. A Party shall notify in writing within a fifteen (15) day term to the other Party of the initiation of a proceeding that may result in the application of a safeguard measure, in accordance with paragraph 1 of this Article.

4. No Party may apply a measure under paragraph 1 of this Article, that imposes restrictions on a good, without previous notification in writing to the other Party, and without giving appropriate opportunity to carry out consultations in advance with the other Party, with as much anticipation as feasible before applying it.

5. When a Party determines, in accordance with this Article, that it needs to apply a safeguard measure to those goods originating from the other Party, the measure applied to those goods shall consist, only and exclusively, of tariff measures.

6. The Party applying a safeguard measure under this Article shall provide to the other Party mutually agreed trade liberalization compensation, in the form of concessions, having substantially equivalent trade effects or equivalent to the additional customs tariff expected to result from the safeguard measure.

7. If the Parties are unable to agree on the compensation, the Party against whose good the safeguard measure is applied may impose measures which have trade effects substantially equivalent to the effects of the safeguard measure applied pursuant to paragraph 1 of this Article.

Article 6.04 Administration of the Safeguard Measure Proceedings

1. Each Party shall ensure the consistent, impartial and reasonable application of the applicable legislation of each Party, regulations, decisions and rulings governing the application of safeguard measure proceedings, which shall be consistent with the provisions set forth in Article XIX of GATT 1994, Agreement on Safeguards, its modifications or successors.

2. Safeguard proceedings and the determination of the existence of serious injury or threat thereof shall be entrusted to the investigating authority of each Party. The investigating authority empowered under the domestic law of each Party to conduct these proceedings should be provided with all the necessary resources to fulfill its duties.

3. Each Party shall comply in an equitable, timely, transparent and effective manner with the safeguard proceedings under this Chapter.

Proceeding

4. The investigating authority may initiate a proceeding *ex officio* or by a petition of a domestic industry. When the investigating authority acts *ex officio* it shall notify the domestic industry to corroborate with its consent to continue the investigation.

5. When the procedure is initiated *ex officio*, or is a result of a petition by the domestic industry, support by at least twenty five percent (25%) of said domestic industry shall be required.

Content of the Petition

6. The domestic industry that files a petition to initiate an investigation shall provide the following information in the petition, to the extent that such information is publicly available from governmental or other sources, or its best estimates and the basis therefore if such information is not thus available:

- (a) designation of the investigating authority to whom the petition is presented;
- (b) data of identification of the petitioner or petitioners, as well as the location of the establishments in which they produce the like or directly competitive good. A proxy shall document the capacity with which they act;
- (c) documentation to certify petitioner's share of domestic production of the like or directly competitive goods they represent and reasons for claiming that they represent said domestic industry;
- (d) description of the imported good concerned at the level of tariff subheading under which that good is classified, or when necessary at a more detailed level, the effective tariff treatment as well as the specifications and elements that allow to compare them with domestic goods;
- (e) description of the affected like or directly competitive domestic goods and its tariff subheading;
- (f) volume and value of the imports;
- (g) import data for each of the three (3) full years immediately prior to the initiation of the safeguard proceedings that form the basis of the claim that the good is being imported into the territory of the other Party, in increased quantities, either in absolute terms or relative to domestic production;
- (h) cause of injury: the listing and description of the alleged causes of injury or threat thereof, and a summary of the basis for the assertion that imports of the

good concerned increased relative to domestic production. The quantitative and objective indicators that denote the nature and cause of injury or threat thereof to the domestic industry, such as changes in the level of sales, prices, production, productivity, utilization of installed capacity, market share, profits or losses, and employment;

- (i) volume and value of the domestic production of the like or directly competitive goods for each of the three (3) full years immediately prior to the initiation of the safeguard measure proceedings;
- (j) petition to initiate the investigation and for the imposition of a safeguard measure;
- (k) lists of known importers and exporters with addresses or place to serve them notice;
- (l) petitioner's addresses or place to serve them notice;
- (m) place and date of petition; and
- (n) signature of the petitioner or legal representative.

Acceptance or Rejection of the Petition

7. After receiving a petition, the investigating authority shall review it and determine within thirty (30) days whether to accept the petition: a) If the petition fulfills the requirements, the investigating authority shall initiate the investigation; b) If the petition does not fulfill the requirements, the investigating authority shall notify the petitioner of the requirement to fulfill them within a period of fifteen (15) days and this term shall be extended for the same period at the request of the interested parties; or c) the investigating authority may reject the petition, through a justified resolution, if there are not enough elements to justify the investigation or if the petitioner fails to fulfill the standing requirements of the domestic industry support. If the petitioner fulfills the requirements pursuant to part b) of this paragraph, the investigating authority shall, within thirty (30) days after the petitioner fulfills the requirements, accept the petition and initiate the investigation or reject it. If the petitioner does not fulfill the requirements, the investigating authority shall reject it, without prejudice of submittal of a new petition by the interested parties at a later date.

Resolution to Initiate an Investigation

8. The resolution to initiate an investigation shall contain as minimum:

- (a) identification of the investigating authority, as well as the place and date on which the resolution is issued;

- (b) indication that the petition is accepted along with the attached documents;
- (c) name of the individual or legal person of domestic producers of the like or directly competitive goods that support the petition and their addresses to be served notice;
- (d) description of the imported good concerned at the level of the tariff subheading under which that good is classified, or when necessary at a more detailed level, the effective tariff treatment, as well as a description of the like or directly competitive goods;
- (e) the basis that sustains the resolution;
- (f) previous representative period;
- (g) time period for interested parties to submit written allegations and related documents; and
- (h) other relevant data.

Notifications in General

9. The notifications in the proceedings shall be made in writing within fifteen (15) days after the date the resolutions are issued, with attached copies of public versions of the petition and documents.

Publication Requirements

10. When initiating an investigation, the investigating authority shall publish a notice of initiation in an official journal of the Party or nation-wide newspaper, within a period of ten (10) days starting from the acceptance of the petition. The notification of the investigation initiation shall be sent through the investigating authority to the other Party by certified mail, courier, fax or any other means that will ensure its reception.

Opposition

11. The investigating authority shall grant forty-five (45) days to the interested parties, starting from the day after the notification that the investigation has initiated, to allow them to submit their position and introduce evidence. The investigating authority may, at the request of the interested parties, extend the period by no more than thirty (30) days.

Previous Representative Period

12. The previous representative period, shall be the basis for the determination of the existence of serious injury or threat thereof to the domestic industry and shall be determined by the investigating authority upon initiating the investigation and can be modified when necessary.

Consultations

13. Once a petition is accepted, the Party that intends to initiate the case shall notify the other Party, and the Parties may hold consultations at any time during the proceeding, without interrupting them.

14. During these consultations the Parties may address, among others, any issue relating to the investigation, the elimination of the measure, and in general, any related issues.

Period of Investigation

15. An investigation shall normally be concluded within one hundred eighty (180) days, and in exceptional circumstances qualified by the investigating authority, shall conclude three hundred and sixty five (365) days from the initiation of the investigation.

Information Required

16. The investigating authority may request all kinds of information from the interested parties. When the interested parties deny access to the necessary information, or they do not cooperate within the period set by the investigating authority, it can make a determination based on the evidence available.

Provisional Safeguard Measures

17. If the justified elements are gathered for the petition of a provisional measure, and the investigating authority has made an affirmative injury determination or threat thereof, it may recommend that the competent authority imposes a provisional measure.

18. Provisional measures shall take the form of customs tariff increases to be promptly refunded, pursuant to this Chapter, if the subsequent investigation does not determine that increased imports have caused or threatened to cause serious injury to a domestic industry.

Evidence of Serious Injury or Threat Thereof

19. In conducting its proceedings the investigating authority shall gather, to the best of its ability, all relevant information appropriate to make the determination. It shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of the domestic industry, including the rate and amount of

the increased import quantities, absolute or relative to domestic production of the good concerned, the share of the domestic market taken by the increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment. In making its determination, the investigating authority may also consider other economic factors, such as changes in prices and inventories, and the ability of the domestic industry to raise capital or investments.

Public Hearing

20. During the course of each proceeding, the investigating authority shall:

- (a) notify the date and the place of the public hearing to the interested parties, including the importers and exporters, fifteen (15) days before it is held, to allow them to appear in person or through a representative to submit evidence, allegations and be heard on issues of serious injury or threat thereof and the appropriate remedy; and
- (b) provide an opportunity to all interested parties appearing at the hearing to express their arguments and to ask questions.

21. After the public hearing, the interested parties should have fifteen (15) days to submit their supplementary evidence and conclusions on the investigation, in writing, to the investigating authority.

Confidential Information

22. The investigating authority shall establish or maintain procedures for the treatment of confidential information protected by the national legislation that is provided in the course of the proceeding, and shall request that the interested parties furnish non-confidential written summaries thereof. If the interested parties indicate that the information cannot be summarized, they shall explain the reasons why a summary cannot be provided. Unless it is demonstrated that the information is accurate, in a convincing way and from an accurate source, the authority may disregard that information.

23. The investigating authority shall not disclose any confidential information provided in accordance with any obligation related to the confidential information obtained in the course of the proceedings.

Deliberation and Determination

24. The competent authority, before making definitive determination in a proceeding for the application of safeguard measures, shall allow sufficient time to gather and check relevant information, shall hold a public hearing and provide opportunity for all interested parties to prepare and submit their views.

25. The investigating authority shall promptly publish a final determination notice in an official journal or nation-wide newspaper publicizing the results of the investigation and the reasoned conclusions on all pertinent issues of law and fact. The determination notice shall include a description of the imported good, its tariff subheading, the methodology applied and the findings made in the proceedings. The statement of reasons shall set out the basis for the determination, including a description of:

- (a) the domestic industry seriously injured or threatened with serious injury;
- (b) information supporting a finding that imports are increasing, the domestic industry is seriously injured or threatened with serious injury, and increasing imports are causing or threatening to cause serious injury; and
- (c) if provided for by domestic law, any finding or recommendation regarding the appropriate remedy, as well as the basis thereof.

26. Each Party shall ensure that the determinations in safeguard measure proceedings may be subject to review by judicial or administrative proceedings of the Party, as provided in its domestic laws. Negative determinations of the existence of serious injury or threat thereof shall not be subject to modification by the competent authority, unless the modification is required by such judicial or administrative review.

Extension of Measures

27. If the importing Party determines that reasons justify the extension of a bilateral safeguard measure, the Party shall notify the competent authority of the other Party of its intention to extend the measure at least ninety (90) days before the measure is expected to expire, and shall prove that the reasons leading to its application persist, for the purpose of holding respective consultations, which shall be done according to the provisions of this Article.

28. The domestic industry that submitted the request for an extension of measures shall present a readjustment plan, including variables controllable by the domestic industry or production involved to eliminate injury or threat thereof.

29. The notifications of extension and compensation shall be presented pursuant to this Article prior to the expiration of the applied measures.

Compensation

30. The Party that applies a safeguard measure according to this Article shall provide to the other Party mutually agreed compensation in the form of concessions that have commercial effects substantially equivalent to the value of the additional customs duties that are expected from the safeguard measure. However, no compensation shall be provided for the first three (3) years that the

safeguard measure is in effect, as well as the right of suspension of the concession or other obligations substantially equivalent shall not be exercised by the Party against which the safeguard measure is applied during these three (3) years.

31. Following the expiration of the three (3) years mentioned in the previous paragraph, the Party that applies the measure shall give opportunity to hold consultations within ninety (90) days following the expiration. If the Parties cannot reach an agreement on compensation, the Party to whose good the safeguard measure is applied shall be able to suspend concessions or other obligations that have commercial effects substantially equivalent to those of the applied safeguard measure according to this Article, after having notified the other Party in writing at least thirty (30) days before imposing these measures. The Party shall apply the tariff measure during the necessary minimum period to reach the effects substantially equivalent and in any event it shall cease when the other Party finishes the application of the safeguard measure.

Article 6.05 Dispute Settlement with regards to Safeguard Measures

No Party shall request the establishment of an arbitral panel, under Article 15.07 (Establishment of an Arbitral Panel), before the application of a safeguard measure by the other Party.