

PART IV: TRADE AND TRADE-RELATED MATTERS

CHAPTER IV

BILATERAL SAFEGUARD MEASURES

Section 1 – Definitions

Article 1

For the purposes of this Chapter:

1. “competent investigating authority” means:

(a) in the case of the EU, the European Commission;

(b) in the case of MERCOSUR, Ministerio de Producción or its successor in Argentina, Secretaria de Comercio Exterior from the Ministério da Economia or its successor in Brazil, Ministerio de Industria y Comercio or its successor in Paraguay, and Asesoría de Política Comercial del Ministerio de Economía y Finanzas or its successor in Uruguay;

2. “serious injury” shall be understood to mean the significant overall impairment in the position of a domestic industry;

3. “threat of serious injury” shall be understood to mean the serious injury that is clearly imminent, based on facts and not merely on allegation, conjecture or remote possibility;

4. “domestic industry” shall be understood to mean the producers as a whole of the like or directly competitive products, operating in the territory of the Party or Signatory Party, or when it is not possible, those whose collective output of the like or directly competitive products constitutes normally more than 50% but in exceptional circumstances not less than 25% of the total production of such products;

5. “like or directly competitive product” means a product which is identical, i.e. alike in all aspects to the product under consideration, or another product which, although not alike in all aspects, has characteristics closely resembling those of the product under consideration, or a product which directly competes within the internal market of the importing Party or Signatory Party, given its degree of substitutability, basic physical characteristics and technical specifications, final uses and channels of distribution. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

6. “Interested parties” shall include:

(a) exporters or foreign producers or importers of a product subject to investigation, or a trade or business association, a majority of the members of which are producers, exporters or importers of such product;

(b) the government of the exporting Party or Signatory Party; and

(c) producers of the like or directly competitive product in the importing Party or Signatory Party or a trade and business association, a majority of the members of which produces the like or directly competitive product in the territory of the importing Party or Signatory Party.

This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.

7. "Transition period" shall mean 12 years from the date of entry into force of this Agreement. Regarding any goods for which the Tariff Liberalization Program of the Party applying the measures provides for tariff elimination in 10 or more years, the transition period shall mean 18 years from the date of the entry into force of this Agreement.

Section 2 Conditions for Application of Bilateral Safeguard Measures

Article 2

1. Without prejudice to the rights and obligations referred to in the Chapter on Trade Defense and Global Safeguards, the Parties may, in exceptional circumstances, apply bilateral safeguard measures under the conditions established in this Section, if after the entry into force of this Agreement, imports of a product under preferential terms have increased in such quantities, absolute or relative to domestic production or consumption of the importing Party or Signatory Party(ies), and under such conditions as to cause or threaten to cause serious injury to the domestic industry of the importing Party or Signatory Party(ies).

2. The safeguard measure shall be applied only to the extent necessary to prevent or remedy serious injury or threat thereof.

3. Bilateral safeguard measures shall be applied following an investigation by the competent investigating authorities of the importing Party under the procedures established in this Chapter.

Article 3

Neither Party may apply, extend or maintain in force a bilateral safeguard measure beyond the expiration of the transition period.

Article 4

1. MERCOSUR may adopt bilateral safeguard measures:

(a) as a sole entity, as far as all requirements to determine the existence of serious injury or threat thereof is being caused by the imports of a product under preferential terms, have been fulfilled on the basis of conditions applied to MERCOSUR as a whole; or

(b) on behalf of one or more of its Member States, in which case the requirements for the determination of the existence of serious injury or threat thereof, being caused by the imports of a product under preferential terms, shall be based on the conditions prevailing in the relevant Member State(s) of the customs union and the

measure shall be limited to that Member State(s). The adoption of a bilateral safeguard measure by one of the Mercosur Member State shall not prevent another Mercosur Member State from adopting a measure regarding the same product afterwards.

2. The EU may apply bilateral safeguard measures to the imports from MERCOSUR or one or more MERCOSUR Member States where such serious injury or threat thereof is being caused by the imports of products under preferential terms.

3. When EU determines the application of a measure to MERCOSUR as a sole entity, Paraguay will be exempted from the application of the measure, unless the result of an investigation demonstrates that the existence of serious injury or threat thereof is also being caused by imports of products from Paraguay under preferential terms.

Section 3: Form and duration of Bilateral Safeguard Measures

Article 5

Bilateral safeguard measures adopted under this Chapter shall consist of:

(a) a temporary suspension of the schedule of tariff reduction of the good concerned provided for under this Agreement; or

(b) a reduction of the tariff preference of the product concerned so that the rate of customs duty does not exceed the lesser of:

- i. the most-favoured-nation applied rate of customs duty on the product in effect at the time the measure is taken or
- ii. the base rate of customs duty referred to in Annex I Tariff Elimination Schedule.

Article 6

Upon termination of the bilateral safeguard measure, the margin of preference shall be the one that would be applied to the product in the absence of the measure, according to the Tariff Elimination Schedule.

Article 7

Bilateral safeguard measures shall be applied only for the period necessary to prevent or remedy the serious injury and to facilitate adjustment of the domestic industry. This period shall not exceed two years including the period of application of any provisional measure.

Article 8

1. The bilateral safeguard measure may be extended only once and for a maximum period identical to the initial period of application, provided that it has been determined, in accordance with the procedures set out in this Title, that the measure continues to be necessary to prevent or remedy serious injury and that the domestic industry provides

evidence that it is adjusting. The measure extended shall not be more restrictive than it was at the end of the initial period.

2. No safeguard measure shall be applied again to the same product imported under the Tariff Elimination Schedule, unless a period equal to the half of the total duration of the previous measures has elapsed.

Section 4 Investigation and Transparency Procedures

Article 9

1. In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, including prices, production, productivity, capacity utilization, profits and losses, and employment.

2. The Investigating Authority shall demonstrate, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof, and shall also evaluate all known factors other than increased imports under preferential terms of this agreement that might be at the same time causing injury to the domestic industry. Special attention should be paid in cases where imports increase also from other sources since their effect should not be attributed to the imports of products under preferential terms.

3. The period of data collection for injury investigations normally should be at least thirty-six months ending as close to the date of the lodging of the application as is practicable.

Article 10

Initiation of investigations

1. Pursuant to each Party's domestic legislation, and provided that there is sufficient prima-facie evidence to justify such initiation as determined below, a Party may initiate a bilateral safeguard investigation:

- at the request of the domestic industry or of a trade and business association acting on behalf of domestic producers of the like or directly competitive products in the importing Party or Signatory Party, or
- at the request of one or more of its Member States.

2. The request to initiate shall contain at least the following information:

a) a description of the product: the name and description of the imported product concerned, its tariff heading and the tariff treatment in force, as well as the name and description of the like or directly competitive product;

b) the names and addresses of the producers or association that submit the request (if applicable);

c) if reasonably available, a list of all known producers of the like or directly competitive product.

d) evidence that the conditions for imposing the safeguard measure set out in Article 2(1) are met. In this respect, the request shall generally contain the following information:

- the production volume of producers submitting or represented in the application and an estimation of the production of other known producers of the like or directly competitive product;

- the rate and amount of the increase in total and bilateral imports of the product concerned in absolute and relative terms, including at least the last three years (thirty-six months) prior to the date of the lodging of the application, for which information is available;

- the level of import prices during the same period;

- where information is available, objective and quantifiable data regarding the like or directly competitive product, on the volume of total production and of total sales on the internal market, inventories, prices for the internal market, productivity, capacity utilization, employment profits and losses, market share, of the requesting firms or of those represented in the request, including at least the last three years (thirty-six months) previous to the presentation of the request, for which information is available.

Article 11

1. Any information which is by nature confidential or which is provided on a confidential basis shall, upon cause being shown, be treated as such by the competent authorities. Such information shall not be disclosed without permission of the party submitting it. Parties providing confidential information may be requested to furnish non-confidential summaries thereof or, if such parties indicate that such information cannot be summarized, the reasons why a summary cannot be provided. However, if the competent authorities find that a request for confidentiality is not warranted and if the party concerned is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.

2. If information regarding production, production capacity, employment, wages, volume and value of domestic sales, average price is presented on a confidential basis,

the investigating authorities shall ensure that meaningful non-confidential summaries disclosing at least aggregated data or, in cases in which the disclosure of aggregated data would endanger the confidentiality of the company's data, indexes for each 12 month period under investigation are submitted, so as to ensure the appropriate right of defense of the interested parties. In this regard, confidentiality requests should be considered in situations in which particular market and/or domestic industry structures so justify it. This provision does not prevent the presentation of more detailed non-confidential summaries.

3. Request for confidentiality will not be warranted for information regarding basic technical and quality standards of the product and uses of the product concerned. Only under exceptional circumstances that shall be duly justified by the investigating authorities, requests for confidentiality shall be warranted for information regarding the identity of the applicants and other known manufacturing companies not part of the petition. In this regard, mere allegations shall not suffice for justifying confidentiality requests. When the identity of the applicants cannot be disclosed, investigating authorities shall disclose the total number of producers included in the domestic industry and the proportion of the production of the applicants with regard to the total production of the domestic industry.

Article 12

The period between the date of publication of the decision to initiate the investigation and the publication of the final decision normally should not exceed one (1) year. Under exceptional circumstances this period could be extended, but in any case shall not exceed 18 months. No safeguard measures shall be applied in case the timeline is not observed by the competent authorities.

Article 13

Each Party or Signatory Party shall establish or maintain transparent, effective and equitable procedures for the impartial and reasonable application of safeguard measures, in compliance with the provisions established in this Chapter.

Section 5 Provisional Safeguards

Article 14

1.-In critical circumstances where delay may cause damage which would be difficult to repair, a Party, or Signatory Party, after due notification, may take a provisional safeguard measure pursuant to a preliminary determination that there is clear evidence that imports under preferential terms have increased and that such imports have caused or are threatening to cause serious injury. The duration of the provisional measure shall not exceed two hundred (200) days, during which period the requirements of this Chapter shall be met. If final determination concludes that there was no serious injury or threat thereof to the domestic industry caused by imports under preferential terms, the increased tariff or provisional guarantee, if collected or imposed under provisional measures, shall be promptly refunded, according to the domestic regulation of the relevant Signatory Party.

2.-Provisional safeguard measures shall not be taken against Paraguay, unless the result of an investigation demonstrates that the existence of serious injury or threat thereof is also being caused by imports of products from Paraguay under preferential terms.

Section 6 Public Notice

Article 15

The public notice of the initiation of a safeguard investigation shall include the following information:

- (a) the name of the petitioner;
- (b) the complete description of the imported product under investigation, and its classification under the Harmonized System;
- (c) the deadline for the request for hearings;
- (d) the deadline to register as an interested party and for the submission of information, statements and other documents;
- (e) the address where the application or other documents related to the investigation can be examined;
- (f) the name, address and e-mail address and/or telephone/fax number of the institution which can provide further information; and
- (g) a summary of the facts upon which the initiation of the investigation was based, including data on imports that have allegedly increased in absolute or relative terms to total production and an analysis of the domestic industry situation based on all the elements conveyed in the application.

Article 16

The public notice of the decision to apply a provisional safeguard measure, to apply or not a definitive safeguard measure shall include the following information:

- (a) the complete description of the product subject to the safeguard measure, and its tariff classification under the Harmonized System;
- (b) information and evidence leading to the decision, such as:
 - i) the increasing or increased preferential imports, if it is the case;
 - ii) the situation of the domestic industry;
 - iii) the existence of a causal link between the increased preferential imports of the goods concerned and the serious injury or threat thereof to the domestic industry, if it is the case;
 - iv) in the case of preliminary determination, the existence of critical circumstances;
- (c) other reasoned findings and conclusions on all relevant issues of fact and law;
- (d) description of the measure to be adopted, if it is the case;

(e) the date of entry into force of the measure and its duration, if it is the case.

Section 7 Notifications and consultations

Article 17

1. The importing Party or Signatory Party shall notify the exporting Party or Signatory Party of:

- (a) the decision to initiate the investigation under this Chapter;
- (b) the decision to apply a provisional safeguard measure;
- (c) the decision to apply or not a definitive safeguard measure.

2. The decision shall be notified by the Party or the Signatory Party within a period of ten (10) days from the publication and shall be accompanied by the appropriate public notice. In the case of a decision to initiate an investigation, a copy of the request to initiate the investigation shall be included in the notification.

Article 18

1. When a Party has determined that the conditions to impose definitive measures are met, it should notify and at the same time invite the other Party for consultations.

2. The notification and invitation for consultations referred to in paragraph 1 shall be made at least 30 days before definitive measures are expected to come into force. No definitive measures shall be applied in the absence of notification.

3. The notification provided in paragraph 1 shall include:

- (a) the data and objective information demonstrating the existence of serious injury or threat of serious injury to the domestic industry caused by the increased imports under preferential terms;
- (b) complete description of the imported product subject to the measure, and its classification under the Harmonized System;
- (c) description of the measure proposed;
- (d) the date of entry into force of the measure and its duration; and
- (e) the invitation for consultations.

4. The objective of the consultations referred to in paragraph 1 shall be a mutual knowledge of the public facts and the exchange of opinions, aimed at reaching a mutually satisfactory solution. If no satisfactory solution is reached within 30 days of the notification under paragraph 1 the Party or Signatory Party may apply the measure at the end of the 30 day period.

5. At any stage of the investigation, the notified Party or Signatory Party may request consultations with the other Party or Signatory Party or any additional information that it considers necessary.

Section 8 Outermost regions of the European Union¹

Article 19

1. Notwithstanding the provisions of Article 2, where a product, imported under preferential terms, originating in one or more Mercosur Member States is being imported into the territory of one or several of the European Union's outermost regions in such increased quantities and under such conditions as to cause or threaten to cause serious deterioration in the economic situation of the European Union's outermost region(s), the European Union, may exceptionally take safeguard measures limited to the territory of the region(s) concerned, unless a mutually satisfactory solution can be reached

2. Without prejudice to the provisions of paragraph 1, other rules laid down in this section applicable to bilateral safeguards are also applicable to any safeguard adopted under this Article.

3. For the purpose of paragraph 1, serious deterioration shall mean major difficulties in a sector of the economy producing like or directly competitive products. The determination of deterioration shall be based on objective factors, including the following elements:

- (a) the increase in the volume of imports in absolute or relative terms to domestic production and to imports from other sources; and
- (b) the effect of such imports on the situation of the relevant industry or the economic sector concerned, including inter alia on the levels of sales, production, financial situation and employment.]

¹ At the entry into force of this Agreement, the outermost regions of the EU are: Guadeloupe, French Guiana, Martinique, Reunion, Mayotte, St. Martin, the Azores, Madeira and the Canary Islands. This Article shall also apply to a country or an overseas territory that changes its status to an outermost region by a decision of the European Council in accordance with the procedure set out in Article 355 (6) of the Treaty on the Functioning of the EU from the date of adoption of that decision. In the event that an outermost region of the EU changes its status as such by the same procedure, this Article shall cease to be applicable from the European Council's decision accordingly. The EU shall notify the other Parties of any change in the territories considered as outermost regions of the EU.