

CHAPTER 5: TRADE REMEDIES

PART I

General Trade Remedies

ARTICLE 5.1

Anti-Dumping Measures

1. Each Party retains its rights and obligations under the *WTO Agreement on Implementation of Article VI of GATT 1994*.
2. Before either Party applies anti-dumping measures against imports originating from the other Party, the Party initiating the action will be mindful of the provisions relating to constructive remedies under Article 15 of the *WTO Agreement on Implementation of Article VI of the GATT 1994*.

ARTICLE 5.2

Subsidies and Countervailing Measures

Each Party retains its rights and obligations under the *WTO Agreement on Subsidies and Countervailing Measures*.

ARTICLE 5.3

Global Safeguards

1. Each Party retains its rights and obligations under Article XIX of GATT 1994 and the *WTO Agreement on Safeguards* and any other relevant provisions in the WTO Agreement.
2. This Agreement does not confer any additional rights or obligations on the Parties with regard to such global safeguard measures, except that a Party taking such a measure may exclude imports of an originating good of the other Party from the action if such imports are not a cause of serious injury or threat thereof.

PART II

Bilateral Safeguards

ARTICLE 5.4

Safeguard Definitions

For purposes of this Part:

(a) “base rate” means the rate of customs duty for an imported good as indicated in the Tariff Schedule of the importing Party in Annex 1;

Comment [D1]: Acceptable.

(b) “domestic industry” means, with respect to an imported good, the producers as a whole of the like or directly competitive good or those producers whose collective production of the like or directly competitive good constitutes a major proportion of the total domestic production of such good;

(c) “preferential tariff rate” means the rate of customs duty for an imported good pursuant to Article 2.3 of Chapter 2 of this Agreement;

(d) “provisional measure” means a provisional safeguard measure described in Article 5.8;

(e) “safeguard measure” means a transitional safeguard measure described in Article 5.5;

Comment [D2]: Acceptable

(f) “special safeguard measure” means a special safeguard measure described in Article 5.11;

(g) “serious injury” means a significant overall impairment in the position of a domestic industry;

Comment [D3]: Acceptable

(h) “transition period”, in relation to a particular good, means the period from the entry into force of this Agreement until the date on which the customs duty on that good is to be eliminated in accordance with Annex 1.

ARTICLE 5.5

Application of a Transitional Safeguard Measure

If, as a result of the reduction or elimination of a customs duty pursuant to this Agreement, an originating good of a Party is being imported into the other Party's territory in such increased quantities, in absolute terms or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to a domestic industry producing a like or directly competitive good, the other Party may, to the minimum extent necessary to prevent or remedy serious injury and facilitate adjustment, apply a safeguard measure, consisting of:

- (a) the suspension of the further reduction of any rate of customs duty provided for under this Agreement on the good from the date on which the action to apply the safeguard measure is taken; or
- (b) an increase of the rate of customs duty on the good to a level not to exceed the lesser of:
 - (i) the most-favoured-nation (MFN) applied rate of customs duty in effect on the date on which the action to apply the safeguard measure is taken; or
 - (ii) the MFN applied rate of customs duty in effect on the day immediately preceding the date of entry into force of this Agreement; or
 - (iii) for a new safeguard measure applied from 1 January 2009 or beyond, the preferential tariff rate in effect under this Agreement on the day four years preceding the date on which the action to apply the safeguard measure is taken.

Comment [D4]: Corresponds with changes to Article 5.6 (1) regarding the termination date of a safeguard measure

Comment [D5]: Acceptable

Comment [D6]: Acceptable

Comment [D7]: See comment on subpara (b)(i) below.

Comment [D8]: We believe the original TAFTA language is already clear. For New Zealand, is there a difference in meaning between the TAFTA language and New Zealand's proposed clarification?

ARTICLE 5.6

Scope and Duration of Transitional Safeguard Measures

1. A Party shall apply a safeguard measure only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment. A Party may apply a safeguard measure for an initial period of no longer than two years. The period of a safeguard measure may be extended by up to one year provided that the conditions of this Chapter are met and that the safeguard measure continues to be applied to the minimum extent necessary to prevent or remedy serious injury and that there is evidence that the industry is adjusting. The total period of a safeguard measure, including any extensions thereof, shall not exceed three years. Regardless of its duration or whether it has been subject to extension, a safeguard measure on a good shall terminate within two years following the end of the transition period for such good. No new safeguard measure may be applied to a good after that date.

Comment [D9]: Pending New Zealand's acceptance of Thailand's proposal on the termination date of a measure.

Comment [D10]: Acceptable

Comment [D11]: Pending New Zealand's acceptance of Thailand's proposal on the termination date of a measure.

Comment [D12]: We would like to retain the TAFTA language regarding the termination date of a safeguard measure because tariff elimination could cause serious injury to our domestic market. To reflect this, we have re-inserted "elimination" throughout the draft. This would also be in accordance with the WTO Safeguards Agreement, which does not limit the timeframe in which Members can apply safeguard measures.

2. In order to facilitate adjustment in a situation where the proposed duration of a safeguard measure is over one year, the Party applying the measure shall progressively liberalise it at regular intervals during the application of the measure, including at the time of any extension.

3. A Party shall not apply a safeguard or provisional measure again on the same good until three years have elapsed since the date of the termination of the earlier safeguard or provisional measure.

4. A Party may not apply a safeguard or provisional measure on a good that is subject to a measure that the Party has applied pursuant to Article XIX of GATT 1994 and the *WTO Agreement on Safeguards*, the *WTO Agreement on Textiles and Clothing*, or any other relevant provisions in the WTO Agreement, nor may a Party continue to maintain a safeguard or provisional measure on a good that becomes subject to a measure that the Party applies pursuant to Article XIX of GATT 1994 and the *WTO Agreement on Safeguards*, the *WTO Agreement on Textiles and Clothing*, or any other relevant provisions in the WTO Agreement.

5. A Party may not apply a safeguard measure to any good indicated by the letters SSG in its Tariff Schedule set out in Annex 1 nor to any good listed in Annex 1.3 which is subject to a tariff quota.

6. On the termination of a safeguard measure, the Party that applied the measure shall apply the rate of customs duty set out in its Tariff Schedule as specified in Annex 1 on the date of termination as if the safeguard measure had never been applied.

ARTICLE 5.7

Investigation

1. A Party may apply or extend a safeguard measure only following an investigation by the Party's competent authorities to examine the effect of increased imports of an originating good of the other Party on the domestic industry, as reflected in changes in such relevant economic variables as production, productivity, levels of sales, utilisation of capacity, inventories, market share, exports, wages, employment, domestic prices, profits and investment, none of which is necessarily decisive. When factors other than increased imports of an originating good of the other Party resulting from the reduction or elimination of a customs duty pursuant to this Agreement are simultaneously causing injury to the domestic industry, such injury shall not be attributed to such increased imports.

Comment [D13]: For Thailand, tariff reduction and elimination for sensitive products occur over a period of 10 years. Therefore, if the total period of a measure is reduced to 3 years as per New Zealand's proposal, there would be 7 years remaining during which it may be necessary to reapply a measure on the same good.

Comment [D14]: Acceptable

Comment [D15]: Corresponds with changes to Article 5.6 (1) regarding the termination date of a safeguard measure.

Comment [D16]: Acceptable

Comment [D17]: Acceptable

2. An investigation under Paragraph 1 shall only take place pursuant to procedures previously established and made public in consonance with Chapter 14 of this Agreement. The investigation shall include reasonable public notice to all interested parties and public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, *inter alia*, as to whether or not the application of a safeguard measure would be in the public interest. An investigation shall be completed expeditiously. Upon completion of an investigation, the competent authorities shall promptly publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.

Comment [D18]: The proposed timeframe is too rigid. We would like to follow the WTO Safeguards Agreement and TAFTA, which do not limit the period of an investigation.

3. 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 summarised, 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 authorise its disclosure in generalised 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.

ARTICLE 5.8

Provisional Measures

1. In highly unusual and critical circumstances where delay would cause injury which would be difficult to repair, a Party may apply a provisional safeguard measure pursuant to a preliminary determination that there is clear evidence that increased imports of an originating good of the other Party as a result of the reduction or elimination of a duty pursuant to this Agreement have caused or are threatening to cause serious injury. The duration of such a provisional measure shall not exceed 120 days, during which period the pertinent requirements of Articles 5.5, 5.6, and 5.7 shall be met. The duration of any such provisional measure shall be counted as part of the total period referred to in Article 5.6 (1). Any additional customs duties collected as a result of such a provisional measure shall be promptly refunded if the subsequent investigation referred to in Article 5.7 (1) does not determine that increased imports of an originating good of the other Party have caused or threatened to cause serious injury to a domestic industry. In such a case, the Party that applied the measure shall apply the rate of customs duty set out in its Tariff Schedule as specified in Annex 1 as if the provisional measure had never applied.

Comment [D19]: Acceptable

Comment [D20]: Corresponds with changes to Article 5.6 (1) regarding the termination date of a safeguard measure.

Comment [D21]: Acceptable

Comment [D22]: We would like to follow the WTO Safeguards Agreement, as 100 days is not sufficient to remedy critical circumstances.

Comment [D23]: Acceptable

Comment [D24]: Acceptable

Comment [D25]: Acceptable

Comment [D26]: Acceptable

2. In determining whether such highly unusual and critical circumstances exist, a Party shall have regard to the rate of increase of imports of an originating good of the other Party, both in absolute and relative terms, and the overall level of the Party's imports of the good from the other Party as a share of total imports of the good, as a result of the reduction or elimination of a duty on the good pursuant to this Agreement.

Comment [D27]: Corresponds with changes to Article 5.6 (1) regarding the termination date of a safeguard measure.

ARTICLE 5.9

Notification and Consultation

1. A Party shall promptly notify the other Party, in writing, on:

- (a) initiating an investigation under Article 5.7;
- (b) making a finding of serious injury or threat thereof caused by increased imports of an originating good of the other Party as a result of the reduction or elimination of a customs duty on the good pursuant to this Agreement;
- (c) taking a decision to apply or extend a safeguard measure, or to apply a provisional measure; and
- (d) taking a decision to progressively liberalise a safeguard measure previously applied.

Comment [D28]: Acceptable

Comment [D29]: Acceptable

Comment [D30]: Corresponds with changes to Article 5.6 (1) regarding the termination date of a safeguard measure.

Comment [D31]: While this change is acceptable to us, the term "modify" is wider in scope, covering decisions to progressively liberalize a measure as well as all other types of modifications to a measure.

2. A Party shall provide to the other Party a copy of the public version of the report of its competent authorities required under Article 5.7 immediately as it is available.

3. In making a notification pursuant to Paragraph 1, the Party applying or extending a safeguard measure shall also provide evidence of serious injury or threat thereof caused by increased imports of an originating good of the other Party as a result of the reduction or elimination of a customs duty pursuant to this Agreement, a precise description of the good involved, the details of the proposed measure including as appropriate the grounds for not selecting the measure described in Article 5.5 (a), the date of introduction, duration, and timetable for progressive liberalisation of the measure, if such timetable is applicable. In the case of an extension of a measure, evidence that the domestic industry concerned is adjusting shall also be provided. Upon request, the Party applying or extending a safeguard measure shall provide additional information as the other Party may consider necessary.

Comment [D32]: Corresponds with changes to Article 5.6 (1) regarding the termination date of a safeguard measure.

Comment [D33]: Acceptable

Comment [D34]: The original "if applicable" is intended to modify just the progressive timetable, which are only required for measures with a duration of more than 1 year.

4. A Party proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with the other Party, with a view to, *inter alia*, reviewing the information provided under Paragraph 3, exchanging views on the measure and reaching an agreement on compensation as set forth in Article 5.10 (1).

Comment [D35]: See comment on Article 5.10.

5. Where a Party applies a provisional measure referred to in Article 5.8, on request of the other Party, consultations shall be initiated immediately after such application.

6. The provisions on notification in this Chapter shall not require a Party to disclose confidential information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

ARTICLE 5.10

Compensation

1. A Party extending a safeguard measure for an overall period beyond two years shall, in consultation with the other Party, provide to the other Party mutually agreed trade liberalising compensation in the form of substantially equivalent concessions during the period of extension of the measure beyond the aforementioned two years. Such consultations shall begin within 30 days of the decision to extend the measure and, in accordance with Article 5.9 (4), shall take place prior to the extension.

2. If the Parties are unable to reach agreement on compensation within 30 days after the consultations commence, the exporting Party shall be free to suspend the application of substantially equivalent concessions to the trade of the Party extending the safeguard measure.

3. A Party shall notify the other Party in writing at least 30 days before suspending concessions under Paragraph 2.

4. The obligation to provide compensation under Paragraph 1 and the right to suspend substantially equivalent concessions under Paragraph 2 shall terminate on the date of the termination of the safeguard measure.

Comment [D36]: We would like to propose the deletion of this Article. Such deletion would follow the WTO Safeguards Agreement, which, in effect, results in compensation 3 years after a measure is taken. This reasoning was also applied to TAFTA, which requires compensation only after the measure has been applied for 3 years.

ARTICLE 5.11

Special Agricultural Safeguard Measures

1. A Party may, in exceptional circumstances, apply a special safeguard measure to a limited number of specified sensitive agricultural goods as indicated by the letters SSG in its Tariff Schedule set out in Annex 1.

2. The Parties shall endeavour to apply special safeguard measures in a manner that is consistent with their commitments under this Agreement to liberalise and promote the expansion of trade in these goods between the Parties.

3. A Party may impose a special safeguard measure on a good only during the period set out in Annex 3 for that good.

4. Such a special safeguard measure may be applied to imports of an agricultural good listed in Annex 3 if the volume of imports of that originating good of the other Party entering the customs territory of the Party during any given calendar year exceeds the specified volume trigger level for that year. The applicable trigger levels are set out in Annex 3.

5. If the conditions in Paragraph 4 are met, a Party may increase the rate of customs duty applicable to the good for the remainder of that calendar year through the application of customs duty on such good at the current MFN applied rate or the base rate, whichever is lower.

6. Supplies of the good in question which were *en route* on the basis of a contract settled before the additional customs duty is imposed under the terms of this Article shall be exempted from any such additional customs duty, provided that they may be counted in the volume of imports of the good in question during the following year for the purposes of triggering the provisions of Paragraph 4 in that year.

7. A Party shall apply any special safeguard measure in a transparent manner. A Party shall ensure that the current volume of imports is published in a manner which is readily accessible to traders and the other Party. A Party applying a special safeguard measure shall give notice in writing, including relevant data, to the other Party as far in advance as may be practicable and in any event within 10 working days of the implementation of such action. A Party which decides not to apply a special safeguard measure where the specified trigger volume has been or is about to be met, shall notify the other Party promptly of its decision.

8. Upon request of a Party, the Parties shall consult promptly and cooperate in exchanging information, as appropriate, with respect to the conditions for applying a special safeguard measure.

9. A Party may not apply a special safeguard measure on a good that is subject to a measure that the Party has applied pursuant to Article XIX of GATT 1994 and the *WTO Agreement on Safeguards*, or any other relevant provisions in the WTO Agreement, or to a measure set forth in Articles 5.5 to 5.10, nor may a Party continue to maintain a special safeguard measure on a good that becomes subject to a measure that the Party applies pursuant to Article XIX of GATT 1994 and the *WTO Agreement on Safeguards*, or any other relevant provisions in the WTO Agreement, or to any measure set forth in Articles 5.5 to 5.10.

10. No later than three years following the entry into force of this Agreement, the Parties shall review the operation of this Article, including the appropriateness of the list of products set out in Annex 3 and the trigger levels, including the growth factors set out in Annex 3. The review shall take into account relevant international, regional and bilateral trade developments.

11. In the event that a Party enters into an agreement or an arrangement with a non-Party following the entry into force of this Agreement that does not provide for special safeguard measures on a good or goods covered in the relevant section of Annex 3 of this Agreement, and where the non-Party is a substantial supplier of the good or goods, the Parties shall, by mutual consent, enter into consultations on the scope for that good or those goods to be withdrawn from Annex 3.