

CHAPTER 9

BILATERAL SAFEGUARD MEASURES

SECTION A

SCOPE

ARTICLE 9.1

Scope

1. Sections B to I of this Chapter apply to any goods other than vehicles classified under HS headings 8703 and 8704.
2. The provisions applicable to vehicles classified under HS headings 8703 and 8704 are detailed in Annex 9-A.

SECTION B

DEFINITIONS

ARTICLE 9.2

Definitions

For the purposes of this Chapter the following definitions apply:

- (a) "competent investigating authority" means:
 - (i) for the European Union, the European Commission; and
 - (ii) for MERCOSUR, the Ministerio de Economía or its successor in Argentina, the Secretaria de Comércio Exterior of the Ministério do Desenvolvimento, Indústria, Comércio e Serviços or its successor in Brazil, the Ministerio de Industria y Comercio or its successor in Paraguay, and the Asesoría de Política Comercial del Ministerio de Economía y Finanzas or its successor in Uruguay;
- (b) "domestic industry" means the producers as a whole of the like or directly competitive products operating in the territory of a Party or, failing that, those whose collective output of the like or directly competitive products normally constitutes more than 50 % (fifty per cent) and in exceptional circumstances not less than 25 % (twenty-five per cent) of the total production of such products;

(c) "interested parties" includes:

- (i) exporters or foreign producers or importers of a product subject to investigation, or a trade or business association a majority of whose members are producers, exporters or importers of such product;
- (ii) the government of the exporting Party; and
- (iii) producers of the like or directly competitive product in the importing Party or a trade and business association a majority of whose members produces the like or directly competitive product in the territory of the importing Party;

this list does not preclude the Parties from allowing domestic or foreign parties other than those mentioned above to be included as interested parties;

(d) "like or directly competitive product" means:

- (i) a product which is identical, meaning alike in all aspects, to the product under consideration;
- (ii) another product which, although not alike in all aspects, has characteristics closely resembling those of the product under consideration; or

- (iii) a product which directly competes within the internal market of the importing Party, given its degree of substitutability, basic physical characteristics and technical specifications, final uses and channels of distribution;

this list of factors is not exhaustive nor can one or several of these factors necessarily give decisive guidance;

- (e) "serious injury" means a significant overall impairment in the position of a domestic industry;
- (f) "threat of serious injury" means a serious injury that is clearly imminent, based on facts and not merely on allegation, conjecture or remote possibility; and
- (g) "transition period" means:
 - (i) 12 (twelve) years from the date of entry into force of this Agreement; or
 - (ii) for goods other than vehicles classified under HS headings 8703 and 8704 for which the Tariff Elimination Schedule of the Party applying the measures provides for tariff elimination in 10 (ten) years or more, 18 (eighteen) years from the date of entry into force of this Agreement.

SECTION C

CONDITIONS FOR APPLICATION OF BILATERAL SAFEGUARD MEASURES

ARTICLE 9.3

Application of bilateral safeguard measures

1. Without prejudice to the rights and obligations referred to in Chapter 8, a Party may, in exceptional circumstances, for goods other than vehicles classified under HS headings 8703 and 8704, apply bilateral safeguard measures under the conditions established in this Section if, after the date of entry into force of this Agreement, imports from the other Party of a product under preferential terms have increased in such quantities, absolute or relative to domestic production or consumption and under such conditions as to cause or threaten to cause serious injury to its domestic industry of the like or directly competitive products.
2. For goods listed in paragraph 1, bilateral safeguard measures shall be applied only to the extent necessary to prevent or remedy serious injury or the threat of serious injury.
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 9.4

Timeframe for the application of bilateral safeguard measures

A Party shall not apply, extend or maintain in force a bilateral safeguard measure beyond the expiration of the transition period.

ARTICLE 9.5

Conditions and limitations

1. MERCOSUR may adopt bilateral safeguard measures to imports from the European Union:
 - (a) as a sole entity, provided that all requirements to determine the existence of serious injury or the threat of serious injury being caused by the imports of a product under preferential terms have been fulfilled, on the basis of conditions applied to MERCOSUR; or
 - (b) on behalf of one or more of the Signatory MERCOSUR States, in which case the requirements for the determination of the existence of serious injury or the threat of serious injury being caused by the imports of a product under preferential terms shall be based on the conditions prevailing in the relevant Signatory MERCOSUR State or Signatory MERCOSUR States of the customs union; and the measure shall be limited to that Signatory MERCOSUR State or those Signatory MERCOSUR States. The adoption of a bilateral safeguard measure by MERCOSUR on behalf of one or more Signatory MERCOSUR States shall not prevent another Signatory MERCOSUR State from adopting a measure regarding the same product afterwards.

2. The European Union may apply bilateral safeguard measures to imports from MERCOSUR as a sole entity or from one or more Signatory MERCOSUR States if the serious injury or threat of serious injury is being caused by imports of products under preferential terms.

3. In case the European Union determines that a measure is to apply to MERCOSUR as a sole entity, Paraguay shall be exempted from the application of the measure, unless the result of an investigation demonstrates that the existence of serious injury or the threat of serious injury is also being caused by imports of products from Paraguay under preferential terms.

SECTION D

FORM AND DURATION OF BILATERAL SAFEGUARD MEASURES

ARTICLE 9.6

Form of bilateral safeguard measures

For goods other than vehicles classified under HS headings 8703 and 8704, bilateral safeguard measures adopted pursuant to this Chapter shall consist of:

- (a) a temporary suspension of Annex 2-A for the product concerned as provided for under this Agreement; or

- (b) a temporary reduction of the tariff preference for 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; and
 - (ii) the base rate of customs duty on the product referred to in Annex 2-A.

ARTICLE 9.7

Margin of preference

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 under Annex 2-A.

ARTICLE 9.8

Duration of bilateral safeguard measures

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. That period, including the period of application of any provisional measure, shall not exceed 2 (two) years.

ARTICLE 9.9

Extension of bilateral safeguard measures

1. Bilateral safeguard measures may be extended once for a maximum period equal to the initially foreseen period of application, if it has been determined, in accordance with the procedures set out in this Chapter, that the measure continues to be necessary to prevent or remedy serious injury and if the domestic industry provides evidence that it is adjusting. The extended measure 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 import of a product under Annex 2-A which has been subject to such a measure, unless a period of time equal to half of the total duration of the previous safeguard measure has elapsed.

SECTION E

INVESTIGATION AND TRANSPARENCY PROCEDURES

ARTICLE 9.10

Investigation

1. In conducting the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry as referred to in Article 9.3, the competent investigating authority 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; and changes in the level of sales, including prices, production, productivity, capacity utilisation, profits and losses, and employment.
2. The competent investigating authority shall demonstrate, on the basis of objective evidence, the existence of a causal link between increased imports of the product concerned and serious injury or the threat of serious injury. The competent investigating authority 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. The effects of an increase in imports of the products concerned from other countries shall not be attributed to the imports under preferential terms.

3. In conducting an injury investigation as referred to in paragraph 1, a competent investigating authority should collect data over a period of at least 36 (thirty-six) months ending as close to the date of the presentation of a request to initiate an investigation as is practicable.

ARTICLE 9.11

Initiation of an investigation

1. If there is sufficient prima facie evidence to justify the initiation of an investigation, a bilateral safeguard investigation may be initiated upon request of:

- (a) the domestic industry or a trade and business association acting on behalf of domestic producers of the like or directly competitive products in the importing Party; or
- (b) one or more importing Member States of the European Union or Signatory MERCOSUR States.

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

- (a) 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 associations that submit the request, if applicable;

- (c) if reasonably available, a list of all known producers of the like or directly competitive product; and
- (d) evidence that the conditions for imposing the safeguard measure set out in Article 9.3(1) are met.

For the purposes of point (d) of this paragraph, the request to initiate an investigation shall contain the following information:

- (i) 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;
- (ii) the rate and amount of the increase in total and bilateral imports of the product concerned in absolute and relative terms, for at least over the 36 (thirty-six) months prior to the date of the presentation of a request to initiate an investigation, for which information is available;
- (iii) the level of import prices during the same period; and
- (iv) if information is available, objective and quantifiable data regarding the like or directly competitive product on the volume of total production and of total sales in the internal market, inventories, prices for the internal market, productivity, capacity utilisation, employment, profits and losses, and market share of the requesting firms or of those represented in the request, for at least the last 36 (thirty-six) month period previous to the presentation of the request, for which information is available.

ARTICLE 9.12

Confidential information

1. The competent investigating authorities shall, upon cause being shown, treat any information which is by nature confidential or which is provided on a confidential basis, as such. Such information shall not be disclosed without the permission of the interested party submitting it. An interested party providing confidential information may be requested to furnish non-confidential summaries thereof or, if such interested party indicates that such information cannot be summarised, the reasons why a summary cannot be provided.
2. Notwithstanding paragraph 1, if the competent authorities find that a request for confidentiality is not warranted and if the interested party is unwilling either 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.
3. If information regarding production, production capacity, employment, wages, volume and value of domestic sales or average price is presented on a confidential basis, the competent 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 period of 12 (twelve) months under investigation are submitted, so as to ensure the appropriate right of defence of the interested parties. In this regard, requests for confidentiality should be considered in situations in which particular market or domestic industry structures so justify it. This provision does not prevent the presentation of more detailed non-confidential summaries.

4. Requests for confidentiality shall not be warranted in respect of information regarding basic technical and quality standards or uses of the product concerned. Requests for confidentiality in respect of information regarding the identity of the applicants and other known manufacturing companies not part of the petition shall be warranted only in exceptional circumstances, which shall be duly justified by the competent investigating authorities. In this regard, mere allegations shall not suffice for justifying confidentiality requests. If the identity of the applicants cannot be disclosed, competent investigating authorities shall disclose the total number of producers included in the domestic industry and the proportion of the production that the applicants represent in relation to the total production of the domestic industry.

ARTICLE 9.13

Timeframe for the investigation

The period between the date of publication of the decision to initiate the investigation and the publication of the final decision should not exceed 1 (one) year. Under exceptional circumstances this period may be extended, but, in any case, shall not exceed 18 (eighteen) months. A Party shall not apply safeguard measures if this timeframe has not been observed by the competent investigating authorities.

ARTICLE 9.14

Transparency

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

SECTION F

PROVISIONAL SAFEGUARD MEASURES

ARTICLE 9.15

Provisional safeguard measures

1. In critical circumstances where delay may cause damage which would be difficult to repair, a 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 200 (two hundred) days, during which period the requirements of this Chapter shall be met. If the 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, in accordance with the domestic regulation of the relevant Party.

2. Provisional safeguard measures shall not be taken against Paraguay, unless the result of the preliminary determination pursuant to paragraph 1 demonstrates that the existence of serious injury or the threat of serious injury is also being caused by imports of products from Paraguay under preferential terms.

SECTION G

PUBLIC NOTICE

ARTICLE 9.16

Public notice on the initiation of an investigation

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

- (a) the name of the applicant;
- (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 deadlines to register as an interested party and for the submission of information, statements and other documents;
- (e) the address where the application and other documents related to the investigation can be examined;
- (f) the name, address and email address or telephone or fax number of the institution which can provide further information; and
- (g) a summary of the facts on 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 9.17

Public notice on the application of bilateral safeguard measures

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

- (a) the complete description of the products subject to the safeguard measure and their tariff classification under the Harmonized System;

- (b) information and evidence leading to the decision, such as:
 - (i) the increasing or increased preferential imports, where applicable;
 - (ii) the situation of the domestic industry;
 - (iii) the existence of a causal link between the increased preferential imports of the products concerned and the serious injury or threat of serious injury to the domestic industry, where applicable;
 - (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) a description of the measure to be adopted, where applicable; and
- (e) the date of entry into force of the measure and its duration, where applicable.

SECTION H

NOTIFICATIONS AND CONSULTATIONS

ARTICLE 9.18

Notifications

1. The importing Party shall notify the exporting Party in writing of the decision to:
 - (a) initiate the investigation under this Chapter;
 - (b) apply a provisional safeguard measure; and
 - (c) apply or not apply a definitive safeguard measure.
2. The decision shall be notified by the importing Party no later than 10 (ten) days after its 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 9.19

Consultations

1. If a Party determines that the conditions to impose a definitive measure are met, it shall notify in writing and at the same time invite the other Party for consultations.
2. The notification and the invitation for consultations referred to in paragraph 1 shall be made at least 30 (thirty) days before a definitive measure is expected to enter into force. A Party shall not apply a definitive measure in the absence of such notification.
3. The notification referred to in paragraph 1 shall include:
 - (a) the data and objective information demonstrating the existence of serious injury or the threat of serious injury to the domestic industry caused by the increased imports under preferential terms;
 - (b) a complete description of the imported product subject to the measure and its classification under the Harmonized System;
 - (c) a 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 to acquire a mutual understanding of the publicly known facts and to exchange opinions, with a view to reaching a mutually satisfactory solution. If no satisfactory solution is reached within 30 (thirty) days of the notification referred to in paragraph 1, the Party may apply the measure at the end of the period of 30 (thirty) days.
5. At any stage of the investigation, the notified Party may request consultations with the other Party or any additional information that it considers necessary.

SECTION I

OUTERMOST REGIONS OF THE EUROPEAN UNION¹

ARTICLE 9.20

Outermost Regions of the European Union

1. Notwithstanding Article 9.3, if a product originating in one or more Signatory MERCOSUR States is imported under preferential terms 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)

¹ At the entry into force of this Agreement, the outermost regions of the European Union are: Guadeloupe, French Guiana, Martinique, Mayotte, Reunion, 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 European Union following the entry into force of that decision. In the event that an outermost region of the European Union changes its status by the same procedure, this Article shall cease to be applicable following the entry into force of the European Council's decision. The European Union shall notify in writing the other Party of any change in the territories considered as outermost regions of the European Union.

concerned, unless a mutually satisfactory solution is reached.

2. Without prejudice to paragraph 1, other rules laid down in this Chapter applicable to bilateral safeguards also apply to any safeguard adopted under this Article.

3. For the purposes of paragraph 1, serious deterioration means major difficulties in a sector of the economy producing like or directly competitive products. The determination of serious 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 countries; and
- (b) the effect of such imports on the situation of the relevant industry or the economic sector concerned, including on the level of sales, production, financial situation and employment.