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Article 1, General Provision

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1 TEXT OF ARTICLE 1

Article 1 of the Agreement on Safeguards provides as follows:

Article 1 General Provision

This Agreement establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994.

2 CONTEXT, TITLE AND STRUCTURE

The first provision of the Agreement on Safeguards is a provision of a ‘general’ character. This starting context reinforces the importance of Article 1 as the rule setting the general function of the whole agreement. The Agreement on Safeguards is a set of auxiliary rules for the application of safeguard measures. A definitional provision like Article 1 must be read in the context of the Members’ objective, stated in the Preamble, to re-establish multilateral control over safeguard measures.

Article 1 must also be considered in the context of the following provisions of the Agreement on Safeguards, which have a more specific character as they address different specific aspects of the process leading up to the application and maintenance of safeguard measures. This relationship between Article 1 and the rest of the Agreement on Safeguards may explain the title ‘General Provision’. The title also reflects the purpose of governing those other more specific provisions of the agreement by establishing their ultimate objective: the application of safeguard measures.

Article 1 must also be understood in the context of Article 11.1(a) of the Agreement on Safeguards.¹ This latter provision conditions the validity of safeguard measures to actions conforming with Article XIX of the GATT 1994 and the Agreement on Safeguards. Accordingly, the Agreement on Safeguards not only contains rules to assist in the application of safeguard measures, it also conditions the legitimacy of these measures to the extent that they have been sought or applied in accordance with the ‘auxiliary’ rules of the Agreement on Safeguards. Thus, the Agreement on Safeguards institutes a non-dispositive set of norms that Members must observe every time they seek a safeguard action in accordance with Article XIX. This GATT provision is what is commonly referred to as the ‘escape clause’ from the obligations contained in that agreement. The joint reading of Articles 1 and 11.1(a) has led to construe the Agreement on Safeguards and Article XIX as a regulatory ‘inseparable package of rights and disciplines’ governing the application of safeguard measures, which must be read ‘harmoniously’.²

Furthermore, Article 1 must also be understood in the context of Article 11.1(c) of the Agreement on Safeguards. This latter excludes from the applicability of the Agreement on Safeguards ‘measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than

¹ Appellate Body Report, *Argentina – Footwear*, paras. 82–83; Appellate Body Report, *Korea – Dairy*, paras. 76–77.

² Appellate Body Report, *US – Lamb*, para. 69. See also Appellate Body Report, *Argentina – Footwear*, para. 81; Appellate Body Report, *Korea – Dairy*, para. 75.

Article XIX, and Multilateral Trade Agreements in Annex 1A other than this Agreement, or pursuant to protocols and agreements or arrangements concluded within the framework of GATT 1994'. Thus, the rules set out in the Agreement on Safeguards must be used only for the purpose of addressing the types of measures that are provided in Article XIX. They cannot be relied upon for the purpose of applying other types of trade remedies, including 'special' safeguard measures under other WTO instruments.³ However, the reasoning made with respect to certain standards of the Agreement on Safeguards has been relied upon as relevant context in other non-safeguard disputes with respect to similar issues as those covered by the standards of the Agreement on Safeguards.⁴

The structure of Article 1 is simple. It consists of a single general statement – that is, that the Agreement on Safeguards establishes rules for the application of safeguard measures. The sentence includes a relative subordinate clause that defines what 'safeguard measures' are. Thus, Article 1 defines the regulatory purpose of the Agreement on Safeguards.

3 ARTICLE 1, MAIN SENTENCE: THE AGREEMENT ON SAFEGUARDS ESTABLISHES RULES FOR THE APPLICATION OF SAFEGUARD MEASURES

Article 1 consists of a subject ('this Agreement') and a predicate, which refers to the establishment of rules for the defined objective of applying safeguard measures.

3.1 *'This Agreement' and the Limited Regulatory Scope of the Agreement on Safeguards*

The use of the term 'this Agreement' in Article 1 implies that the provision intends to govern the whole instrument, including its fourteen provisions. The term does not exclude the possibility that other sources of law may also establish rules that concurrently discipline the Members' ability to apply safeguard measures. In fact, the procedures relating to the investigation and application of safeguard measures are typically regulated by a complex set of rules and procedures coming from different sources of law.

³ See Chapter 11, Section 5.

⁴ Panel Report, *US – Tyres*, para. 7.88.

3.1.1 International Law on Safeguard Matters

Various sources of international law may impose on governments obligations regarding the conduct of safeguard investigations and the imposition of safeguard measures. These obligations may arise from different contexts – that is, multilateral, regional or bilateral.

3.1.1.1 MULTILATERAL, REGIONAL AND BILATERAL RULES

(i) *Multilateral Rules*

At the multilateral level, the basis of the multilateral trading system is contained in the GATT 1994 and the other multilateral agreements on trade in goods that form part of the WTO Agreement. These agreements include the Agreement on Safeguards, which is the main regulatory body on safeguard matters. The Agreement on Safeguards is a normative development derived from Article XIX of the GATT 1994. This provision is the main authority for the imposition of safeguard measures. As the preamble of the Agreement on Safeguards recognizes, the Agreement on Safeguards is a response to the ‘need to clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX (Emergency Action on Imports of Particular Products)’.

In addition to Article XIX, the GATT 1994 contains other provisions that have an impact on the conduct of safeguard-related matters such as Article X. Article X:1 requires the publication of rules of general application on trade restrictions or methods relating to their establishment. It applies to safeguard procedures and specific safeguard measures as recognised in Article 3.1, first sentence of the Agreement on Safeguards,⁵ as well as to the publication of the final determination of a safeguard investigation, in accordance with Article 3.1, third sentence of the Agreement on Safeguards,⁶ and the decision to impose a safeguard measure. In addition, Article X:3(a) requires the uniform, impartial and reasonable administration of laws and regulations that must be published in accordance with Article X:1. This provision requires that domestic safeguard regulations must be applied in the light of those standards.

Article XIII of the GATT 1994 requires the non-discriminatory administration of restrictions and tariff-rate quotas among exporting supplying countries. This provision is applicable when a Member imposes a safeguard in the form of a quantitative restriction or a tariff-rate quota (TRQ).⁷ At the time of

⁵ See Chapter 3, Section 3.3.

⁶ See Chapter 3, Section 5.1.

⁷ Panel Report, *US – Line Pipe*, paras. 7.30–7.50. See also GATT Panel Report, *Norway – Restrictions on Imports of Certain Textile Products*, paras. 14–19.

writing this chapter, there was no resolution to the question of whether GATT provisions in the nature of exceptions (e.g. Article XXI on Security Exceptions) may be invoked and applied concurrently with Article XIX. The matter is under consideration by a WTO panel in the dispute *United States – Certain Measures on Steel and Aluminium Products*.⁸

At a sectoral level, other WTO instruments may also affect the Members' ability to apply safeguard measures. In agriculture goods, Article 4.2 of the Agreement on Agriculture limits the trade measures that Members may apply on agriculture products. While import quotas are permissible under Article XIX and the Agreement on Safeguards, they are prohibited under Article 4.2 and footnote 1 of the Agreement on Agriculture.⁹ There may be other WTO instruments having an impact on the Members' ability to apply safeguard measures. Certain protocols of accession to the WTO contain specific commitments or special assurances regarding the application or maintenance of safeguard measures.¹⁰ Potential limitations arising from sectoral or specific WTO obligations must be read as narrowing the options available to Members under Article 5.1, third sentence of the Agreement on Safeguards. According to this provision, Members enjoy discretion in 'choos[ing the] measures most suitable for the achievement of these objectives' [of protecting the industry and facilitating its adjustment].¹¹

(ii) *Regional and Bilateral Rules*

At the regional and bilateral levels, other international obligations contained in regional trade agreements (RTAs) or under regional integration schemes may provide rules affecting a country's ability to pursue safeguard actions. These RTA rules may (i) authorize the exclusion of imports from regional or bilateral partners from the application of safeguard measures;¹² (ii) establish

⁸ See, for instance, WTO Doc. G/L/1222, G/SG/D50/1, WT/DS544/1; WTO Doc. G/L/1238, G/SG/D53/1, WT/DS547/1; WTO Doc. G/L/1243, G/SG/D54/1, WT/DS548/1.

⁹ Article XIX of the GATT 1994 provides an exception to deviate from the disciplines of the GATT 1994. However, it is unclear whether it may also provide that exception for commitments made under other WTO agreements. In the light of the treatment accorded to other exceptional provisions of the GATT 1994, such as Article XX, in connection with non-GATT instruments, such as protocols of accession, it might be argued that Article XIX may provide an exception to those non-GATT provisions as long as there were to be a clear intent to this effect. See Piérola-Castro 2010.

¹⁰ See Working Party Report of the Accession of the Russian Federation to the WTO. WTO Doc. WT/ACC/RUS/70, WT/MIN(11)/2, paras. 591, 620.

¹¹ See Chapter 5, Section 5.1.

¹² See, for instance, Article 8.6.2 of the DR-CAFTA: 'a Party taking such an action may exclude imports of an originating good of another Party if such imports are not a substantial cause of serious injury or threat thereof'.

6 *WTO Agreement on Safeguards and Article XIX of GATT*

special transparency requirements for the notification of new safeguard investigations or impositions;¹³ or (iii) impose special rules and obligations on compensation and rebalancing actions¹⁴ among RTA partners.¹⁵

(iii) Other Rules of International Law?

The extent to which non-conventional international rules might be relevant for the handling of domestic safeguard matters seems to be limited. Customary rules on treaty interpretation – such as those reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties – are applicable for the clarification of international agreements. Similarly, some general customary principles on state responsibility may inform the interpretation of safeguard-related treaty obligations.¹⁶ However, the extent to which international custom might be applicable by safeguard operators at the national level (i.e. investigating authorities, authorities responsible for the application of safeguard measures, interested parties, practitioners or judicial authorities if applicable) seems to be atypical and might be linked to the role that international law plays within the legal system of the Member seeking the imposition of a safeguard measure, as discussed in the next section.

Concerning the role of jurisprudence, such as dispute settlement reports of WTO panels and the Appellate Body, its relevance is limited to providing guiding reasoning in situations that have been addressed in similar disputes. As noted in the trade remedy field, decisions taken by the WTO Appellate Body with respect to specific cases are expected to create expectations on the manner in which similar situations should be addressed in the future. This approach is considered to provide security and predictability in the rules of the system.¹⁷

¹³ See, for instance, Article 44 of the EU-Colombia-Peru Trade Association Agreement: ‘a Party initiating an investigation or intending to adopt safeguard measures shall provide immediately ad hoc written notification of all pertinent information, including where relevant, regarding the initiation of a safeguard investigation, the preliminary determination and the final determination of the investigation.’

¹⁴ For an explanation of compensation and rebalancing, see Chapter 8, Sections 3.4 and 4.

¹⁵ See, for instance, Article 10.2.6 of the USMCA: ‘The Party taking an action pursuant to this Article shall provide to the Party or Parties against whose good the action is taken mutually agreed trade liberalizing compensation in the form of concessions having substantially equivalent trade effects or equivalent to the value of the additional duties expected to result from the action. If the Parties concerned are unable to agree on compensation, the Party against whose good the action is taken may take action having trade effects substantially equivalent to the action taken under paragraph 1 or 3.’

¹⁶ Appellate Body Report, *US – Cotton Yarn*, paras. 119–120, fn. 90.

¹⁷ See Chapter 14, Section 5.2.5.

3.1.1.2 DIRECT APPLICATION OF INTERNATIONAL RULES AT THE DOMESTIC LEVEL The existence of different sets of international obligations raises questions as to their consistency, relationship and hierarchy *inter se*. This is an issue of concern for governments in respect of states or other subjects of public international law. However, for domestic safeguard operators, the question is relevant only to the extent that international obligations are binding as part of the domestic law and procedures applicable to the conduct of investigations and the imposition of safeguard measures.

At the international level, international law accords rights and imposes obligations on countries in their interaction *inter se* and with other subjects of international law. However, safeguard investigations and measures are local acts that are pursued within the jurisdiction and in accordance with the law of the importing country. Whether international obligations binding upon the government (including those contained in the Agreement on Safeguards) may be directly invoked as part of that domestic law depends on the effect that the importing country assigns to international law within its internal legal regime. Countries that embrace international law as directly applicable in their domestic legal order are known as monist countries, whereas those for which ‘treaty obligations are given effect via domestic laws and regulations, which may or may not mirror the precise language of the underlying treaty’,¹⁸ are known as dualist countries.

In the WTO safeguard field, regardless of the monist or dualist position of countries with respect to the treatment of international law, Article 3.1, first sentence of the Agreement on Safeguards states that no safeguard measure can be imposed unless an investigation is conducted ‘pursuant to procedures previously established’ in the legal system of the country concerned.¹⁹ Domestic laws and regulations on safeguard measures may contain not only procedural rules, but also substantive criteria for the application of safeguard measures.

3.1.2 Domestic Rules Applicable to Safeguard Investigations and Impositions

A safeguard investigation is a domestic administrative procedure that is required by Article 3.1, first sentence of the Agreement on Safeguards, but

¹⁸ In reference to Australia, Panel Report, *Australia – Anti-Dumping Measures on Paper*, fn. 106. See also Jackson 1998, pp. 83–4.

¹⁹ See Chapter 3, Section 3.2.

is ultimately governed by municipal law. There are many aspects of the safeguard investigation and imposition process that need to be regulated by norms that are not contained in international agreements and other sources of international law (or that are not otherwise legally binding at the domestic level). The safeguard investigation process is an administrative proceeding that is typically conducted by competent authorities of the executive branch. In this sense, it is a process that is normally governed by the general administrative law applicable in the importing country. Thus, the set of administrative norms that apply to the competent authorities, including their organizational laws and generally applicable regulations for proceedings conducted by those authorities (e.g. payment of administrative fees for the evaluation of an administrative petition), would be relevant for the conduct of safeguard-related proceedings.

Furthermore, there may be questions of an evidentiary or procedural character that might not be directly regulated by the general administrative law of a country, but by the general civil, common or judicial law. For instances, rules on evidence, burden of proof, the principle of orality or immediacy between the adjudicator and the parties, the treatment of witnesses, documentary formalities, and representation in the proceedings, are all issues that are not regulated by the Agreement on Safeguards and must be dealt with under the applicable rules of civil or procedural codes or statutes of the jurisdiction where a safeguard investigation is conducted.

Furthermore, the imposition of a safeguard measure is effected by an act of administrative character (either a decree or a regulation) that must be implemented by the customs authorities of the importing country. The implementation of this measure may entail a level of complexity according to the type of measure chosen. If the measure is in the form of a quantitative restriction, the administration of that measure would require the application of customs law relating to the issuance of licences or import permits. Similarly, if the measure is imposed in the form of a levy or a duty, the application of that measure must be consistent with the rules and formalities applicable to the enforcement of customs measures, including the rules on import declarations and the collection of taxes at the border.

It must also be noted that domestic regulations on safeguard matters may even go beyond WTO law, and regulate aspects that are not expressly contemplated in the Agreement on Safeguards. For instance, an adjustment plan requirement²⁰ or the consideration of public interest for the imposition

²⁰ See, for instance, Articles 2 and 10 of Colombia's domestic law (WTO Doc. G/SG/N/1/COL/2).

of a safeguard measure²¹ may be imposed by domestic safeguard regulations despite the fact that those notions are only alluded to (and not required) under the Agreement on Safeguards (and Article XIX of the GATT 1994). In fact, in many importing countries, the questions of adjustment and general public interest are relevant when deciding to authorize the application of safeguard measures.

3.2 *The Establishment of Rules for the Application of Safeguard Measures*

The fact that the Agreement on Safeguards ‘establishes’ rules implies that those rules did not exist prior to the agreement.²² The language of Article 1 is not hortatory: the Agreement on Safeguards ‘establishes’ and does not ‘suggest’ or ‘recommend’ those rules. Furthermore, the election of the term ‘rules’, and not softer, less binding standards, such as principles, guidelines, policies, best practices, or criteria, confirms the Members’ intent to establish a firm regulatory framework for the application of safeguard measures. This firmness of purpose is consistent with the aim of the Agreement on Safeguards to clarify and reinforce the ‘disciplines’ of Article XIX of the GATT 1994 and to re-establish ‘control’ over safeguard measures. The Agreement on Safeguards is thus a prescriptive set of rules and not a code of best practices.

Furthermore, the choice of the term ‘the application of safeguard measures’ shows that the purpose of the Agreement on Safeguards is operational. The rules of the Agreement on Safeguards regulate squarely ‘the application of safeguard measures’.²³ The reference to this term must be construed as referring not only to the application of the measures strictly speaking, but also to the conduct of safeguard investigations, the making of determinations, and other aspects related to the application of safeguard measures.

The choice of the term ‘for the application’ implies that the rules of the Agreement on Safeguards are intended to govern the process of introducing and giving legal effect to safeguard measures in the domestic jurisdiction of the Member concerned. However, as mentioned above, whether these rules could influence that process directly is a question that ultimately depends on the monist or dualist character of that Member.²⁴

²¹ See, for instance, Paragraph 19(2)(b) of Schedule 5 of UK domestic law (WTO Doc. G/ADP/N/1/GBR/1, G/SCM/N/1/GBR/1, G/SG/N/1/GBR/1).

²² As compared to other WTO agreements, like the DSU, the Agreement on Safeguards is not an agreement that codifies or crystallizes rules that were developed by case law or previous practice.

²³ Appellate Body Report, *Argentina – Footwear*, para. 83.

²⁴ See Chapter 1, Section 3.1.1.2.

4 ARTICLE 1, THE RELATIVE CLAUSE: SAFEGUARD MEASURES
 ARE THOSE PROVIDED FOR IN ARTICLE XIX OF THE GATT 1994

Article 1 not only sets the purpose of the Agreement on Safeguards, but also defines the object of its regulation: safeguard measures. Generally, a ‘safeguard’ is defined as a means of protection or security.²⁵ The notion of a ‘safeguard’ implies a perceived risk or danger that the safeguard action is expected to counter. This risk or danger is the ‘serious injury’ or ‘threat of serious injury’ to the domestic industry arising from competition with imports.²⁶ However, the definition of a ‘safeguard measure’ goes beyond that of a measure that is intended to counter that type of injury.

Article 1 contains an agreed definition. Safeguard measures ‘shall be understood to mean those measures provided for in Article XIX of GATT 1994’. This definition plays a critical role in the applicability of the Agreement on Safeguards. Measures falling under the scope of Article XIX – or the ‘escape clause’ – are covered by the Agreement on Safeguards. However, any other measure that may be referred to as a ‘safeguard’ (e.g. measures adopted under Articles XII or XVIII of the GATT 1994 for reasons of balance of payment or economic development) are excluded from the scope of the Agreement on Safeguards. In fact, as mentioned above, Article 1 must be read jointly with Article 11.1(c) of the Agreement on Safeguards, which excludes from the applicability of the Agreement on Safeguards ‘measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX, and Multilateral Trade Agreements in Annex 1A other than this Agreement, or pursuant to protocols and agreements or arrangements concluded within the framework of GATT 1994’.²⁷

Thus, for the purposes of the Agreement on Safeguards, safeguard measures have been defined as measures falling under the scope of Article XIX. This means measures entailing the suspension of obligations or the modification or withdrawal of concessions under the GATT 1994, with the aim of preventing or remedying the serious injury to the domestic industry.²⁸

A consequence of applying this definitional threshold under Article 1 of the Agreement on Safeguards is that a Member imposing a measure to counter injury is liable under the Agreement on Safeguards only if the measure concerned suspends obligations or withdraws or modifies concessions under

²⁵ Piérola-Castro 2014, p. 1.

²⁶ See Chapter 4, Section 3.1.

²⁷ See Chapter 11, Section 5. Regarding Article XIX and other GATT provisions as ‘escapes’ to the basic obligations of that agreement, see Wilcox 1949, pp. 179–85.

²⁸ Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60.