

Chapter Eight

Emergency Action

Article 801: Bilateral Actions

1. Subject to paragraphs 2, 3 and 4 and Annex 801, and during the transition period only, if a good originating in the territory of a Party, as a result of the reduction or elimination of a duty provided for in this Agreement, is being imported into the territory of another Party in such increased quantities, in absolute terms, and under such conditions so that the imports of such good from that Party alone constitute a substantial cause of serious injury, or threat thereof, to a domestic industry producing a like or directly competitive good, the Party into whose territory the good is being imported may, to the minimum extent necessary to remedy or prevent the injury:

- (a) suspend the further reduction of any rate of duty provided for under this Agreement on such good;
- (b) increase the rate of duty on such good to a level not to exceed the lesser of
 - (i) the most-favored-nation (MFN) applied rate of duty in effect at the time the action is taken, or
 - (ii) the MFN applied rate of duty in effect on the day immediately preceding the date of entry into force of this Agreement; or
- (c) in the case of a duty applied to a good on a seasonal basis, increase the rate of duty to a level not to exceed the MFN applied rate of duty that was in effect on such good for the corresponding season immediately preceding the date of entry into force of this Agreement.

2. The following conditions and limitations shall apply to a proceeding that may result in emergency action under paragraph 1:

- (a) a Party shall, without delay, deliver to any Party that may be affected written notice of, and a request for consultations regarding, the institution of a proceeding that could result in emergency action against a good originating in the territory of a Party;
- (b) any such action shall commence not later than one year from the date of institution of the proceeding;
- (c) no action shall be maintained
 - (i) for a period exceeding three years, except where the good against which the action is taken is provided for in the items in staging category C+ of the Tariff Schedule of the Party taking the action, and that Party determines that the affected industry has undertaken adjustment and requires an extension of the period of relief, in which case the period of relief may be extended

for one year provided that the duty applied during the initial period of relief is substantially reduced at the commencement of the extension period, or

(ii) beyond the expiration of the transition period, except with the consent of the Party against whose good the action is taken;

(d) no action shall be taken by a Party against any particular good originating in the territory of another Party more than once during the transition period; and

(e) upon the termination of the action, the rate of duty shall be the rate that, according to the original Schedule for the staged elimination of the tariff, would have been in effect a year after the commencement of the action, and commencing January 1 of the year following the termination of the action, at the option of the Party that has taken the action

(i) the rate of duty shall conform to the schedule in the Tariff Schedule of the Party, or

(ii) the tariff shall be eliminated in equal annual stages ending on the date set forth in the Tariff Schedule of the Party for the elimination of the tariff.

3. A Party may take a bilateral emergency action after the expiration of the transition period to deal with cases of serious injury, or threat thereof, to a domestic industry arising from the operation of this Agreement only with the consent of the Party against whose good the action would be taken.

4. The Party taking an action pursuant to this Article shall provide to the Party against whose good the action is taken mutually agreed trade liberalizing compensation in the form of concessions having substantially equivalent trade effects to the other Party, or equivalent to the value of the additional duties expected to result from the action. If the Parties are unable to agree upon compensation, the Party against whose good the action is taken may take tariff action having trade effects substantially equivalent to the action taken under paragraph 1. The Party taking such tariff action shall apply the action only for the minimum period necessary to achieve such substantially equivalent effects.

5. This Article does not apply to emergency actions respecting goods covered by Annex 300-B (Textile and Apparel Goods).

Article 802: Global Actions

1. Each Party shall retain its rights and obligations under Article XIX of the GATT or any safeguard agreement pursuant thereto except those regarding compensation or retaliation and exclusion from an action to the extent that such rights or obligations are inconsistent with this Article. Any Party taking an emergency action under Article XIX or any such agreement shall exclude imports of a good from each other Party from such action unless:

(a) imports from a Party, considered individually, account for a substantial share of total imports; and

(b) imports from a Party, considered individually, or in exceptional circumstances imports from Parties considered collectively, contribute importantly to the serious injury, or threat thereof, caused by imports.

2. In determining whether:

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

(b) imports from a Party or Parties contribute importantly to the serious injury, or threat thereof, the competent investigating authority shall consider such factors as the change in the import share of each Party, and the level and change in the level of imports of each Party. In this regard, imports from a Party normally shall not be deemed to contribute importantly to serious injury, or the threat thereof, if the growth rate of imports from a Party during the period in which the injurious surge in imports occurred is appreciably lower than the growth rate of total imports from all sources over the same period.

3. A Party taking such action, from which a good from another Party or Parties is initially excluded pursuant to paragraph 1, shall have the right subsequently to include that good of the other Party or Parties in the action in the event that the competent investigating authority determines that a surge in imports of such good of the other Party or Parties undermines the effectiveness of such action.

4. A Party shall, without delay, deliver written notice to the other Parties of the institution of a proceeding that may result in emergency action under paragraph 1 or 3.

5. In no case shall a Party impose restrictions on a good in an action under paragraph 1 or 3:

(a) without delivery of prior written notice to the Commission, and without adequate opportunity for consultation with the Party or Parties against whose good the action is proposed to be taken, as far in advance of taking the action as practicable; and

(b) that would have the effect of reducing imports of such good from a Party below the trend of imports of such good from that Party over a recent representative base period with allowance for reasonable growth.

6. 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 to that Party or Parties or equivalent to the value of the additional duties expected to result from the action. If such

Parties are unable to agree upon 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.

Article 803: Administration of Emergency Action Proceedings

1. Each Party shall ensure the consistent, impartial and reasonable administration of its respective laws, regulations, decisions and rulings governing all emergency action proceedings.

2. Each Party shall entrust determinations of serious injury, or threat thereof, in emergency action proceedings to a competent investigating authority, subject to review by judicial or administrative tribunals, to the extent provided by domestic law. Negative injury determinations shall not be subject to modification, except by such review. The competent investigating authority empowered under domestic law to conduct such proceedings should be provided with the necessary resources to enable it to fulfill its duties.

3. Each Party shall adopt or maintain equitable, timely, transparent and effective procedures for emergency action proceedings, in accordance with the requirements set out in Annex 803.

4. This Article does not apply to emergency actions respecting goods covered by Annex 300-B (Textile and Apparel Goods).

Article 804: Dispute Settlement in Emergency Action Matters

No party may request the establishment of an arbitral panel under Article 2008 regarding any proposed emergency action.

Article 805: Definitions

For purposes of this Chapter:

competent investigating authority means the "competent investigating authority" of a Party as defined in Annex 804;

contribute importantly means an important cause, but not necessarily the most important cause;

critical circumstances means circumstances where delay would cause damage that would be difficult to repair;

domestic industry means the producers as a whole of the like or directly competitive good operating within the territory of a Party;

emergency action means any emergency action proceeding instituted after the date of entry into force of this Agreement;

serious injury means a significant overall impairment of a domestic industry;

surge means a significant increase in imports over the trend for a recent representative base period;

threat of serious injury means serious injury that, on the basis of facts and not merely on allegation, conjecture or remote possibility, is clearly imminent; and

transition period means the 10-year period commencing on the date of the entry into force of this Agreement, except where the good against which the action is taken is provided for in the items in staging category C+ of the Tariff Schedule of the Party taking the action, in which case the transition period shall be the period of staged tariff elimination for that good.

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ANNEX 801

Bilateral Actions

Notwithstanding Article 801, bilateral emergency actions between Canada and the United States on goods originating in the territory of either Party shall be governed in accordance with the terms of Article 1101 of the Canada-U.S. Free Trade Agreement, which is hereby incorporated into and made a part of this Agreement for such purpose.

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ANNEX 803

Administration of Emergency Action Proceedings

1. Institution of a Proceeding:

(a) An emergency action proceeding may be instituted by a petition or complaint by entities specified in domestic law. The entity filing the petition or complaint shall demonstrate that it is representative of the domestic industry producing a good like or directly competitive with the imported good.

(b) A Party may institute a proceeding on its own motion or request the competent investigating authority to conduct a proceeding.

2. Contents of a petition or complaint. When the basis for an investigation is a petition or complaint filed by an entity representative of a domestic industry, the petitioning entity shall, in its petition or complaint, provide the following information to the extent that such information is publicly available from governmental and other sources, and best estimates and the basis therefore if such information is not available:

(a) Product description. The name and description of the imported good concerned, the tariff subheading under which such good is classified, its current tariff treatment, and the name and description of the like or directly competitive domestic good concerned,

(b) Representativeness:

- (i) The names and addresses of the entities filing the petition or complaint, and the locations of the establishments in which they produce the domestic good,
- (ii) the percentage of domestic production of the like or directly competitive good that such entities account for and the basis for claiming that they are representative of an industry, and
- (iii) the names and locations of all other domestic establishments in which the like or directly competitive good is produced;
- (c) Import data. Import data for each of the five most recent full years that form the basis of the claim that the good concerned is being imported in increased quantities, either in absolute terms or relative to domestic production;
- (d) Domestic production data. Data on total domestic production of the like or directly competitive good for each of the five most recent full years;
- (e) Data showing injury. Quantitative and objective data indicating the nature and extent of injury to the concerned industry, such as data showing changes in the level of sales, prices, production, productivity, capacity utilization, market share, profits and losses, and employment;
- (f) Cause of injury. An enumeration and description of the alleged causes of the injury, or threat thereof, and a summary of the basis for the assertion that increased imports, either actual or relative to domestic production, of the imported good are causing or threatening to cause serious injury, supported by pertinent data; and
- (g) Criteria for inclusion. Quantitative and objective data indicating the share of imports accounted for by imports from the territory of each other Party and the petitioner's views on the extent to which such imports are contributing importantly to the serious injury, or threat thereof, caused by imports of that good.

3. Petitions or complaints, except to the extent they contain confidential business information, shall promptly be made available for public inspection upon being filed.

4. With respect to an emergency action proceeding instituted on the basis of a petition or complaint filed by an entity asserting that it is representative of the domestic industry, the competent investigating authority shall not publish the notice required by paragraph 6 without first assessing carefully that the petition or complaint meets the requirements of paragraph 4, including representativeness.

5. Notice requirement. Upon instituting an emergency action proceeding, the competent investigating authority shall publish notice of the institution of the proceeding in the official journal of the Party. The notice shall identify: the petitioner

or other requester; the imported good that is the subject of the proceeding and its tariff subheading; the nature and timing of the determination to be made; the time and place of the public hearing; dates of deadlines for filing briefs, statements, and other documents; the place at which the petition and any other documents filed in the course of the proceeding may be inspected; and the name, address and telephone number of the office to be contacted for more information.

6. Public hearing. In the course of each such proceeding, the competent investigating authority shall:

(a) hold a public hearing, after providing reasonable notice, to allow all interested parties, and any association whose purpose is to represent the interests of consumers in the territory of the Party instituting the proceeding, to appear in person or by counsel, to present evidence, and to be heard on the questions of serious injury, or threat thereof, and the appropriate remedy; and

(b) provide an opportunity to all interested parties and any such association appearing at the hearing to cross-question interested parties making presentations at that hearing.

7. Confidential information. The competent investigating authority shall adopt or maintain procedures for the treatment of confidential information, protected under domestic law, that is provided in the course of a proceeding, including a requirement that interested parties and consumer associations providing such information furnish non-confidential written summaries thereof, or if they indicate that such information cannot be summarized, the reasons why a summary cannot be provided.

8. Evidence of injury and causation:

(a) In conducting its proceeding the competent investigating authority shall gather, to the best of its ability, all relevant information appropriate to the determination it must make. It 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 good concerned, in absolute and relative terms, the share of the domestic market taken by increased imports, and changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment. In making its determination, the competent investigating authority may also consider other economic factors, such as changes in prices and inventories, and the ability of firms in the industry to generate capital;

(b) The competent investigating authority shall not make an affirmative injury determination unless its investigation demonstrates, on the basis of objective evidence, the existence of a clear causal link between increased imports of the good concerned and serious injury, or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports;

9. Time period for deliberation. Except in critical circumstances and in global actions involving perishable agricultural products, the competent investigating authority, before making an affirmative determination in an emergency action proceeding, shall allow sufficient time to gather and consider the relevant information, hold a public hearing, and provide an opportunity for all interested parties and consumer associations to prepare and submit their views.

10. The competent investigating authority shall publish promptly a report, including a summary thereof, in the official journal of the Party setting forth its findings and reasoned conclusions on all pertinent issues of law and fact. The report shall describe the imported good and its tariff item number, the standard applied and the finding made. The statement of reasons shall set forth the basis for the determination, including a description of: the domestic industry seriously injured or threatened with serious injury; information supporting a finding that imports are increasing, the domestic industry is seriously injured or threatened with serious injury, and increasing imports are causing or threatening serious injury; and, if provided for by domestic law, any finding or recommendation regarding the appropriate remedy and the basis therefor. In its report, the competent investigating authority shall not disclose any confidential information provided pursuant to any undertakings concerning confidential information that may have been made in the course of the proceedings.

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ANNEX 804

Country-Specific Definitions

For purposes of this Chapter:

competent investigating authority means:

(a) in the case of Canada, the Canadian International Trade Tribunal, or its successor;

(b) in the case of the Mexico, the designated authority within the Ministry of Trade and Industrial Development ("Secretaría de Comercio y Fomento Industrial"), or its successor; and

(c) in the case of the United States, the U.S. International Trade Commission, or its successor.