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## **1 ARTICLE 5**

### **1.1 Text of Article 5**

#### **Article 5**

##### *Special Safeguard Provisions*

1. Notwithstanding the provisions of paragraph 1(b) of Article II of GATT 1994, any Member may take recourse to the provisions of paragraphs 4 and 5 below in connection with the importation of an agricultural product, in respect of which measures referred to in paragraph 2 of Article 4 of this Agreement have been converted into an ordinary customs duty and which is designated in its Schedule with the symbol "SSG" as being the subject of a concession in respect of which the provisions of this Article may be invoked, if:

- (a) the volume of imports of that product entering the customs territory of the Member granting the concession during any year exceeds a trigger level which relates to the existing market access opportunity as set out in paragraph 4; or, but not concurrently:
- (b) the price at which imports of that product may enter the customs territory of the Member granting the concession, as determined on the basis of the c.i.f. import price of the shipment concerned expressed in terms of its domestic currency, falls below a trigger price equal to the average 1986 to 1988 reference price<sup>2</sup> for the product concerned.

*(footnote original)*<sup>2</sup> The reference price used to invoke the provisions of this subparagraph shall, in general, be the average c.i.f. unit value of the product concerned, or otherwise shall be an appropriate price in terms of the quality of the product and its stage of processing. It shall, following its initial use, be publicly specified and available to the extent necessary to allow other Members to assess the additional duty that may be levied.

2. Imports under current and minimum access commitments established as part of a concession referred to in paragraph 1 above shall be counted for the purpose of determining the volume of imports required for invoking the provisions of subparagraph 1(a) and paragraph 4, but imports under such commitments shall not be affected by any additional duty imposed under either subparagraph 1(a) and paragraph 4 or subparagraph 1(b) and paragraph 5 below.

3. Any supplies of the product in question which were *en route* on the basis of a contract settled before the additional duty is imposed under subparagraph 1(a) and paragraph 4 shall be exempted from any such additional duty, provided that they may be counted in the volume of imports of the product in question during the following year for the purposes of triggering the provisions of subparagraph 1(a) in that year.

4. Any additional duty imposed under subparagraph 1(a) shall only be maintained until the end of the year in which it has been imposed, and may only be levied at a level which shall not exceed one third of the level of the ordinary customs duty in effect in the year in which the action is taken. The trigger level shall be set according to the following schedule based on market access opportunities defined as imports as

a percentage of the corresponding domestic consumption<sup>3</sup> during the three preceding years for which data are available:

*(footnote original)*<sup>3</sup> Where domestic consumption is not taken into account, the base trigger level under subparagraph 4(a) shall apply.

- (a) where such market access opportunities for a product are less than or equal to 10 percent, the base trigger level shall equal 125 percent;
- (b) where such market access opportunities for a product are greater than 10 percent but less than or equal to 30 percent, the base trigger level shall equal 110 percent;
- (c) where such market access opportunities for a product are greater than 30 percent, the base trigger level shall equal 105 percent.

In all cases the additional duty may be imposed in any year where the absolute volume of imports of the product concerned entering the customs territory of the Member granting the concession exceeds the sum of (x) the base trigger level set out above multiplied by the average quantity of imports during the three preceding years for which data are available and (y) the absolute volume change in domestic consumption of the product concerned in the most recent year for which data are available compared to the preceding year, provided that the trigger level shall not be less than 105 percent of the average quantity of imports in (x) above.

5. The additional duty imposed under subparagraph 1(b) shall be set according to the following schedule:

- (a) if the difference between the c.i.f. import price of the shipment expressed in terms of the domestic currency (hereinafter referred to as the "import price") and the trigger price as defined under that subparagraph is less than or equal to 10 percent of the trigger price, no additional duty shall be imposed;
- (b) if the difference between the import price and the trigger price (hereinafter referred to as the "difference") is greater than 10 percent but less than or equal to 40 percent of the trigger price, the additional duty shall equal 30 percent of the amount by which the difference exceeds 10 percent;
- (c) if the difference is greater than 40 percent but less than or equal to 60 percent of the trigger price, the additional duty shall equal 50 percent of the amount by which the difference exceeds 40 percent, plus the additional duty allowed under (b);
- (d) if the difference is greater than 60 percent but less than or equal to 75 percent, the additional duty shall equal 70 percent of the amount by which the difference exceeds 60 percent of the trigger price, plus the additional duties allowed under (b) and (c);
- (e) if the difference is greater than 75 percent of the trigger price, the additional duty shall equal 90 percent of the amount by which the difference exceeds 75 percent, plus the additional duties allowed under (b), (c) and (d).

6. For perishable and seasonal products, the conditions set out above shall be applied in such a manner as to take account of the specific characteristics of such products. In particular, shorter time periods under subparagraph 1(a) and paragraph 4 may be used in reference to the corresponding periods in the base period and different reference prices for different periods may be used under subparagraph 1(b).

7. The operation of the special safeguard shall be carried out in a transparent manner. Any Member taking action under subparagraph 1(a) above shall give notice in writing, including relevant data, to the Committee on Agriculture as far in advance as may be practicable and in any event within 10 days of the implementation of such action. In cases where changes in consumption volumes must be allocated to individual tariff lines subject to action under paragraph 4, relevant data shall include the information and methods used to allocate these changes. A Member taking action under paragraph 4 shall afford any interested Members the opportunity to consult with it in respect of the conditions of application of such action. Any Member taking action under subparagraph 1(b) above shall give notice in writing, including relevant data, to the Committee on Agriculture within 10 days of the implementation of the first such action or, for perishable and seasonal products, the first action in any period. Members undertake, as far as practicable, not to take recourse to the provisions of subparagraph 1(b) where the volume of imports of the products concerned are declining. In either case a Member taking such action shall afford any interested Members the opportunity to consult with it in respect of the conditions of application of such action.

8. Where measures are taken in conformity with paragraphs 1 through 7 above, Members undertake not to have recourse, in respect of such measures, to the provisions of paragraphs 1(a) and 3 of Article XIX of GATT 1994 or paragraph 2 of Article 8 of the Agreement on Safeguards.

9. The provisions of this Article shall remain in force for the duration of the reform process as determined under Article 20.

## 1.2 Article 5.1(b)

1. In *EC – Poultry*, Brazil argued that the European Communities had failed to comply with Article 5 of the Agreement on Agriculture in implementing special safeguard measures for imports of poultry meat outside tariff quotas. The Panel found that the phrase in Article 5.1(b) "on the basis of the c.i.f. import price" referred to the c.i.f. price *plus* import duties. Reversing this finding, the Appellate Body first explored the practical significance of this issue, and then went on to distinguish between entry into the customs territory on the one hand, and entry into the domestic market on the other:

"This dispute has no practical significance if both the c.i.f. import price and the c.i.f. import price plus customs duties fall above or below the trigger price. If both prices are above the trigger price, then additional duties cannot be imposed. And, if both prices fall below the trigger price, then additional duties may be imposed regardless of which definition of the relevant import price is adopted. However, the practical significance of this dispute becomes apparent whenever the trigger price falls between the other two prices, that is, when the trigger price is greater than the c.i.f. import price but smaller than the c.i.f. import price plus customs duties. ... [I]f the relevant price is defined as the c.i.f. import price plus customs duties, additional duties may not be imposed since the relevant price is well above the trigger price. If, on the other hand, it is defined as the c.i.f. import price only (that is, without customs duties), additional duties may be imposed because the relevant price is below the trigger price. Thus, to adopt one definition, rather than another, will determine whether or not an importing Member may impose additional safeguard duties.

...

The relevant import price in Article 5.1(b) is described as 'the price at which imports of that product *may enter the customs territory* of the Member granting the concession, as determined on the basis of the c.i.f. import price of the shipment concerned'. It is noteworthy that the drafters of the *Agreement on Agriculture* chose to use as the relevant import price the entry price into the *customs territory*, rather than the entry price into the *domestic market*. This suggests that they had in mind the point of time *just before* the entry of the product concerned into the customs territory, and certainly before entry into the domestic market, of the importing Member. The ordinary meaning of these terms in Article 5.1(b) supports the view that

the 'price at which that product may enter the customs territory' of the importing Member should be construed to mean just that -- the price at which the product may enter the *customs territory*, not the price at which the product may enter the *domestic market* of the importing Member. And that price is a price that does not include customs duties and internal charges. It is upon entry of a product into the customs territory, but before the product enters the domestic market, that the obligation to pay customs duties and internal charges accrues."<sup>1</sup>

2. The Appellate Body in *EC – Poultry* then noted that the Agreement on Agriculture does not define the term "c.i.f. import price", but considered the customary usage of this term in international trade:

"Article 5.1(b) also states that the relevant import price is to be 'as determined *on the basis of* the c.i.f. import price of the shipment concerned'. (emphasis added) The Panel interprets this phrase to mean 'that the market entry price is something that has to be constructed using the c.i.f. price as one of the parameters.' <sup>2</sup> We disagree. In the light of our construction of the preceding phrase 'the price at which imports of the product may enter the customs territory of the Member granting the concession', we conclude that the phrase 'as determined *on the basis of* the c.i.f. import price of the shipment concerned' in Article 5.1(b) refers simply to the c.i.f. price without customs duties and taxes. There is no definition of the term 'c.i.f. import price' in the *Agreement on Agriculture* or in any of the other covered agreements. However, in customary usage in international trade, the c.i.f. import price does not include any taxes, customs duties, or other charges that may be imposed on a product by a Member upon entry into its customs territory.<sup>3</sup> We think it significant also that ordinary customs duties are not mentioned as a component of the relevant import price in the text of Article 5.1(b). Article 5.1(b) does not state that the relevant import price is 'the c.i.f. price plus ordinary customs duties'. Accordingly, to read the inclusion of customs duties into the definition of the c.i.f. import price in Article 5.1(b) would require us to read words into the text of that provision that simply are not there."<sup>4</sup>

3. The Appellate Body in *EC – Poultry* found support for its finding referenced in paragraph 2 above in the context of Article 5.1(b):

"This reading of the text of Article 5.1(b) is supported by our reading of the context of that provision in accordance with Article 31 of the *Vienna Convention*, which specifies that the ordinary meaning of the terms of a treaty should be interpreted in their context.

We look first to the rest of Article 5.1. In considering when additional special safeguard duties under Article 5.1(b) may be imposed, the relevant import price must be compared with a trigger price. According to Article 5.1(b), this trigger price is 'equal to the average 1986 to 1988 reference price for the product concerned'. Footnote 2 to Article 5.1(b) states:

The reference price used to invoke the provisions of this subparagraph shall, in general, be the average c.i.f. unit value of the product concerned, or otherwise shall be an appropriate price in terms of the quality of the product and its stage of processing. It shall, following its initial use, be publicly specified and available to the extent necessary to allow other Members to assess the additional duty that may be levied.

<sup>1</sup> Appellate Body Report, *EC – Poultry*, paras. 143 and 145.

<sup>2</sup> (footnote original) Panel Report, para. 278.

<sup>3</sup> (footnote original) We note that the *Incoterms 1990* of the International Chamber of Commerce explains what the acronym "c.i.f." means "cost, insurance and freight", but does not give a definition of "c.i.f. import price". However, according to customary usage in international trade, c.i.f. import price, or simply c.i.f. price, is equal to the price of the product in the exporting country plus additional costs, insurance and freight to the importing country. This definition may also be inferred from paragraph 2 of the *Attachment to Annex 5 of the Agreement on Agriculture*.

<sup>4</sup> Appellate Body Report, *EC – Poultry*, para. 146.

Thus, the reference price with which the relevant price is compared under Article 5.1 does *not* include ordinary customs duties. It is simply the average c.i.f. import price of the product concerned during the reference period, 1986-1988. Given this definition of the reference price, it could not have been the intention of the drafters to compare a c.i.f. price exclusive of customs duties for the reference period with a c.i.f. price inclusive of such duties today.

Paragraph 5 of Article 5 is also part of the context of Article 5.1(b). This provision establishes a link between the amount of the additional duty to be imposed and the difference between the c.i.f. import price of the shipment and the trigger price. According to the schedule contained in paragraph 5, when the difference between the c.i.f. import price of the shipment and the trigger price is not greater than 10 per cent, no additional duty shall be imposed. When the difference is greater than 10 per cent, additional duties may be imposed. The amount of the additional safeguard duties increases as the difference in the two prices increases. We see no reference in paragraph 5 to 'c.i.f. import price *plus* ordinary customs duties'. The price used to determine when the special safeguard may be triggered and the price used to calculate the amount of the additional duties must be one and the same."<sup>5</sup>

4. The Appellate Body in *EC – Poultry*, after making the findings referenced in paragraphs 1-3 above, considered what it termed two "anomalies" which would arise under the interpretation given to Article 5.1(b) by the Panel:

"Certain anomalies would arise from the interpretation adopted by the majority of the Panel. One of these anomalies was cited in the opinion of the dissenting member of the Panel.<sup>6</sup> If tariffication of non-tariff barriers on a certain product took the form of specific duties that were greater than the trigger price, then an importing Member may never be able to invoke Article 5.1(b). The truth of this observation is evident from the fact that the c.i.f. import price plus customs duties may never fall below the trigger price. This consequence is not limited to the case of specific duties that exceed the trigger price. It could also occur in cases where tariffication takes the form of *ad valorem* duties. We know that tariffication has resulted in tariffs which are, in a large number of cases, very high. The probability is strong, therefore, that the *ad valorem* duties could exceed the percentage decrease in the c.i.f. import price by a substantial margin. In such cases, the decrease in the c.i.f. price would have to be very deep before the relevant import price would fall below the trigger price. Thus, the provisions of Article 5.1(b) would not be operational in many cases. It is doubtful that this was intended by the drafters of the 'Special Safeguard Provisions'.

Another anomaly that would arise from defining the relevant import price as the c.i.f. import price *plus* ordinary customs duties would be that the right of Members to invoke the provisions of Article 5.1(b) would depend on the level of tariffs resulting from tariffication. Faced with a certain decline in the c.i.f. price -- say, 20 per cent -- some Members would find themselves in a situation where they could not invoke the price safeguard; others would have the right to do so. The first category would comprise those Members with a relatively high level of tariffied duties; the second would be those with a relatively moderate level. Thus, the rights of Members would ultimately depend on the level of their tariffied duties. It is doubtful, too, that this was intended by the drafters of the 'Special Safeguard Provisions'."<sup>7</sup>

5. As a result of the reasoning referenced in paragraphs 1-4 above, the Appellate Body in *EC – Poultry* concluded:

"[W]e interpret the 'price at which the product concerned may enter the customs territory of the Member granting the concession, as determined on the basis of the

<sup>5</sup> Appellate Body Report, *EC – Poultry*, paras. 147-150.

<sup>6</sup> (footnote original) Panel Report, para. 291.

<sup>7</sup> Appellate Body Report, *EC – Poultry*, paras. 151-152.

c.i.f. import price' in Article 5.1(b) as the c.i.f. import price not including ordinary customs duties."<sup>8</sup>

### 1.3 Article 5.5

6. Regarding Article 5.5, in *EC – Poultry*, the Appellate Body examined whether it was permissible for the importing Member to offer the importer a choice between the use of the c.i.f. price of the shipment as provided in that provision, and another method of calculation which departs from this principle. Under the relevant regulation, the European Communities calculated a periodic representative price, based, *inter alia*, in part on prices in third-country markets and prices at various stages of marketing within the European Communities. The Commission, in its determination of the trigger price for the purposes of the special safeguard provision, would use this "representative price", unless the importer specifically requested the use of the c.i.f. price, conditional upon the presentation of certain documents and the lodging of a security by the importer. The Appellate Body held as follows:

"[N]either the text nor the context of Article 5.5 of the *Agreement on Agriculture* permits us to conclude that the additional duties imposed under the special safeguard mechanism in Article 5 of the *Agreement on Agriculture* may be established by any method other than a comparison of the *c.i.f. price of the shipment* with the trigger price."<sup>9</sup>

### 1.4 Relationship with other provisions of the Agreement on Agriculture

7. The Appellate Body in *Chile – Price Band System (Article 21.5 - Argentina)* identifies Article 5 as an exception to the obligations that Article 4.2 imposes to all WTO Members:

"In the original proceedings, the Appellate Body acknowledged the importance of agricultural products to many developing country Members of the WTO, and the role of special and differential treatment for developing country Members under the *Agreement on Agriculture*. At the same time, the Appellate Body recognized that the requirements of the *Agreement on Agriculture* apply to developing country Members except where otherwise provided. Article 4.2 expressly identifies two exceptions to the obligations that it imposes on all WTO Members, namely, Article 5 and Annex 5 to the *Agreement on Agriculture*. Annex 5 exempts developing country Members from these disciplines in specific circumstances. Article 5 specifies that a Member may, under certain conditions, impose a special safeguard on imports of an agricultural product 'in respect of which measures referred to in [Article 4.2] have been converted into an ordinary customs duty'. The provisions of Article 5 establish the conditions in which a Member may have recourse to such a special safeguard, set out rules on the form and duration of such safeguard measures, and establish certain transparency requirements that attach to their use. One circumstance in which a qualifying Member may be authorized to adopt a special safeguard is when the price of imports of a relevant agricultural product falls below a specified trigger price. However, pursuant to Article 5, a special safeguard can be imposed only on those agricultural products for which measures within the meaning of footnote 1 were converted into ordinary customs duties and for which a Member has reserved in its Schedule of Concessions a right to resort to these safeguards. Because Chile reserved no such right in respect of wheat and wheat flour, Chile cannot avail itself of the mechanism set out in Article 5 for imports of these products.

The existence of an exemption from the market access requirements in the form of a special safeguard under Article 5 suggests that this provision (in addition to Annex 5) was the narrowly circumscribed vehicle to be used by those Members who reserved their rights to do so in order to derogate from the requirements of Article 4.2. We note that paragraph 9 of Article 5 provides that Article 5 is to remain in force for the duration of the process of reform. Negotiations for the process of reform are envisaged in Article 20 of the *Agreement on Agriculture* and form part of the Doha

<sup>8</sup> Appellate Body Report, *EC – Poultry*, para. 153.

<sup>9</sup> Appellate Body Report, *EC – Poultry*, para. 168.

Development Agenda.<sup>10</sup> The establishment of a special safeguard mechanism for developing country Members forms part of the Doha Work Programme on agriculture.<sup>11</sup> We, however, are charged with reviewing the Panel's interpretation of an existing obligation. We recall, in this regard, that Article 4.2 must be interpreted in a way that does not deprive Article 5 of proper meaning and effect."<sup>12</sup>

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<sup>10</sup> (*footnote original*) Doha Ministerial Declaration, WT/MIN(01)/DEC/1, adopted 14 November 2001, para. 13.

<sup>11</sup> (*footnote original*) See paragraph 42 of Annex A of the Decision Adopted by the General Council on 1 August 2004 (the "July Package"), WT/L/579, as well as paragraph 7 of the Hong Kong Ministerial Declaration, WT/MIN(05)/DEC, adopted 18 December 2005.

<sup>12</sup> Appellate Body Report, *Chile – Price Band System (Article 21.5 - Argentina)*, paras. 173-174.