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| BEFORE THE WORLD TRADE ORGANIZATION |

*European Union – Safeguard Measures on Certain Steel Products*

**Third Party Submission of Brazil**

Geneva, 29 January 2021

**SUMMARY**

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| *Argentina - Footwear* | Appellate Body Report, *Argentina – Safeguards Measures on Imports of Footwear*, WT/DS/121/AB/R, adopted 12 January 2000. |
| *Argentina - Preserved Peaches* | Panel Report, *Argentina – Definitive Safeguard Measure on Imports of Preserved Peaches,* WT/DS238/R, adopted 15 April 2003.  |
| *Korea - Dairy* | Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products,* WT/DS98/AB/R, adopted 12 January 2000.  |
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| *United States - Steel Safeguards* | Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003. |
| *United States - Lamb* | Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia,* WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001.  |
| *United States - Lamb* | Panel Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia,* WT/DS177/R, WT/DS178/R, adopted 16 May 2001. |
| *United States - Line Pipe* | Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/202/AB/R, adopted 8 March 2002. |
| *United States - Wheat Gluten* | Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS/166/R, adopted 19 January 2001.  |

# INTRODUCTION

1. Brazil welcomes the opportunity to present its views on the issues raised in these panel proceedings. Brazil believes that important systemic issues are raised by this dispute, as well as important issues regarding the correct application of the Agreement on Safeguards. We do not comment upon all legal issues raised in this dispute, but reserve the possibility to do so at a later stage in the proceedings.
2. In this submission, Brazil will focus on three relevant aspects of the present dispute: i) the assessment of unforeseen developments; ii) the determination of the increase of imports; and iii) the determination of injury and its causal link with the increase of imports. While addressing some of the arguments advanced by the parties, this should not be interpreted as acquiescence to other points not mentioned herein.

# ARGUMENTS

## Article XIX:1 (a) and the determination on unforeseen developments

1. According to the Appellate Body in *Korea – Dairy*, “unforeseen developments” are unexpected:

developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the relevant country making the concession could and should have foreseen at the time when the concession was negotiated.[[1]](#footnote-1)

1. The European Commission alleged three factors as “unforeseen developments” that would justify the imposition of definitive safeguards measures: (i) the overcapacity in global steel markets; (ii) the increasing use of trade-restrictive practices by third countries, including trade defense measures by WTO Members; and (iii) the enactment of Section 232 measures by the United States.
2. In a broad sense, commodity markets are, by their very nature, commonly subject to fluctuations and periods of turmoil. As recalled by Turkey[[2]](#footnote-2), the Panel in *Argentina – Preserved Peaches*[[3]](#footnote-3)had already found that it would not be reasonable to suppose that negotiators could not have foreseen the possibility of fluctuations in production stocks and prices of commodities, since commodity markets are prone to this type of behavior.
3. When market dynamics – such as oscillation in commodities imports or structural issues of global overcapacity – are identified as unforeseen developments, the investigating authority needs to carefully explain the logical nexus between these trends and the increase of imports. This nexus cannot be simply presumed. It demands a reasoned and detailed analysis by the investigating authority.
4. Next, Brazil sees with caution that the adoption of trade defense measures by WTO Members could constitute an “unforeseen development” that would justify the imposition of safeguard measures. Trade remedies are an integral part of the WTO system and were thoroughly negotiated during the Uruguay Round. As stated by the Appellate Body in *Korea – Dairy,* safeguard measures are emergency actions:

to be invoked only in situations when, as a result of obligations incurred under the GATT 1994, an importing member finds itself confronted with developments it had not ‘foreseen’ or ‘expected’ when it incurred that obligation[[4]](#footnote-4).

1. It can be argued that the use of trade remedies in accordance with multilateral rules agreed by all WTO members was *foreseeable* by the time multilateral trade concessions on goods were negotiated. Therefore, it is reasonable to expect that any Member of the WTO might eventually make use of trade remedies on the importation of any goods if the applicable legal requirements are fulfilled.
2. Following this reasoning, the mere possibility of trade diversion caused by the use of trade remedies by other countries should not be enough to justify the imposition of safeguard measures. Only the assessment of actual data can confirm, first, the increase of imports derived from such measures and, second, the causal link between this increase of imports and the findings of injury to the domestic industry.
3. Finally, Brazil notes that, without an adequate threshold, the qualification of trade remedies by third parties as a potential “unforeseen development” could lead to an unwarranted escalation in trade restrictiveness worldwide, contrary to the objectives pursued by the WTO.

## Article XIX:1 (a) of the GATT 1994 and Articles 2.1 and 4.2 (a) of the Agreement on Safeguards and the determination of increase in imports

1. The assessment of the increase in imports shall be made by the competent authorities on a *case-by-case* basis. Previous disputes extensively qualified the minimum standards and thresholds that must be observed by investigating authorities when determining the increase of imports that would justify the imposition of safeguard measures.
2. The standard for the determination of the increase of imports “in such quantities”, as defined by Article 2.1 of the Agreement on Safeguards, is elucidated by previous case law, notedly *Argentina – Footwear,* where the Appellate Body stated that the Agreement requires:

a demonstration not merely of *any* increase in imports, but, instead, of imports in such increased quantities […] and under such conditions as to cause or threaten to cause serious injury.[[5]](#footnote-5)

The Appellate Body also clarified that the increase of imports must have been:

recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively to cause or threaten to cause ‘serious injury’. [[6]](#footnote-6)

1. It is noteworthy that this standard has been reiterated in subsequent disputes, with findings by the Appellate Body in *United States – Wheat Gluten*[[7]](#footnote-7)and in *United States – Steel Safeguards*[[8]](#footnote-8)*,* and by the panel in *Argentina – Preserved Peaches*[[9]](#footnote-9)*.* The panel in this latter dispute also complemented that the increase of imports must be not only quantitative but also qualitative.
2. Additionally, investigating authorities must analyze trends over the entire period of investigation with a particular focus on the most recent data in order to comply with the requirement expressed by the phrase “is being imported” present in Article 2.1 of the Agreement on Safeguards.
3. This approach was confirmed by the Appellate Body in *United States – Steel Safeguards*[[10]](#footnote-10), when it found that the investigating authority had erred by failing to properly address the decrease of imports that occurred at the very end of the investigation period.
4. The panel in *Argentina – Footwear* also addressed this matter, in a finding later confirmed by the Appellate Body, as quoted below:

(…) if an increase in imports in fact is present, this should be evident both in an end-point-to-end-point comparison and in an analysis of intervening trends over the period. That is, *the two analyses should be mutually reinforcing*. Whereas here their results diverge, this at least raises doubts as to whether imports have increased in the sense of Article 2.1.[[11]](#footnote-11)

1. A panel should give thorough consideration to these standards set out by previous case law, bearing in mind that safeguard measures are an exceptional remedy targeted at fair trade.

## Articles 2.1, 4.1 (a), 4.1 (b) and 4.2 (a) of the Agreement on Safeguards and the determination of a threat of serious injury to the domestic industry and its causal link with the increase of imports

1. Brazil sustains that the assessment of injury or threat of injury should be carried for *each* category of products targeted by the safeguard measures.
2. This methodology is fundamental to ascertain the causal nexus between injury or the threat of injury and the increase of imports, especially when the investigation targets several tariff lines, which can display different behaviors, oscillations, and trends during the period of investigation. The same causal link cannot be presumed for all categories involved, and, in some cases, the increase of imports may not lead to a finding regarding injury or threat of injury.
3. Moreover, bearing in mind that the determination of threat of injury must take into account a future-oriented mentality, a special consideration of recent trends must be carefully explained by the investigating authority. As the Appellate Body detailed in *United States – Lamb*, the expression “serious injury that is clearly imminent” in Article 4.1 (b) means that such threat of serious injury “must be on the very verge of occurring” and that this clause:

provides that any determination of a threat of serious injury ‘shall be based on facts and not merely on allegation, conjecture or *remote possibility*’. To us, the word ‘clearly’ relates to the *factual* demonstration of the existence of ‘threat’. Thus, the phrase ‘clearly imminent’ indicates that, as a matter of fact, it must be manifest that the domestic industry is on the brink of suffering serious injury.[[12]](#footnote-12)

The Appellate Body also added that:

in making a determination on either the existence of ‘serious threat’, or on ‘threat’ thereof, panels must always be mindful of the very high standard of injury implied by these terms.[[13]](#footnote-13)

1. The present tense in the expression “being imported” in Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT indicates that recent imports play a prominent role to justify the imposition of safeguards. It seems logical, therefore, that the most recent evolution of factors listed under Article 4.2(a) should also have a special weight in the determination of injury.
2. Following this logic, Brazil understands that nowhere in Article XIX of the GATT neither in the Agreement on Safeguards is it possible to find any disposition regarding the future likelihood of increased imports as a trigger for safeguard measures. Such emergency measures shall not be applied based on an imminent “threat” of increased imports, but only on the actual trend of imports that have experienced a recent, sharp, sudden, and significative increase and that are consequently threating the integrity of the domestic industry.
3. Moreover, not every listed factor needs to show a declining tendency in the most recent period in order to justify the imposition of safeguard measures. However, if some important indicators show an upward trend at the end of the investigating period, this reinforces the need of a detailed and reasoned analysis of the trends of each product.
4. In this sense, data from the most recent past provide the investigating authorities with the most reliable basis for a determination of threat and, even more importantly, for the determination of threat of injury. As pointed out by the Appellate Body in *United States – Lamb:*

The likely state of the domestic industry in the very near future can best be gauged from the most recent past.[[14]](#footnote-14)

1. From a logical point of view, if facts in the present show an overall improvement of the situation of the industry, the likelihood of a serious injury to the domestic industry in the very near future is lower. Consequently, the causal link between the threat of injury and the increase of imports will require a compelling analysis justifying the imposition of such measures.

# CONCLUSION

1. Brazil appreciates the opportunity to comment on these issues in these proceedings and hopes that the viewpoints presented in this submission will prove helpful to the Panel in assessing the subject-matter brought before it.
1. WT/DS98/AB/R, para. 89. [↑](#footnote-ref-1)
2. Turkey’s First Written Submission, para. 94. [↑](#footnote-ref-2)
3. WT/DS238/R, para. 7.30. [↑](#footnote-ref-3)
4. WT/DS98/AB/R, para 86. [↑](#footnote-ref-4)
5. WT/DS121/AB/R., para. 129. [↑](#footnote-ref-5)
6. *Id.,* para 131. [↑](#footnote-ref-6)
7. WT/DS166/AB/R, paras. 77, 78, and 95. [↑](#footnote-ref-7)
8. WT/DS248~DS259/AB/R, paras. 345-346. [↑](#footnote-ref-8)
9. WT/DS238/R., para. 7.53. [↑](#footnote-ref-9)
10. WT/DS248~DS259/AB/R, para. 388. [↑](#footnote-ref-10)
11. WT/DS121/R, para. 8. 157. *See also* WT/DS121/AB/R, para. 129. [↑](#footnote-ref-11)
12. WT/DS177~DS178/AB/R, para. 125. [↑](#footnote-ref-12)
13. *Id.,* para. 126. [↑](#footnote-ref-13)
14. *Id*.*,* para. 137. [↑](#footnote-ref-14)