

SAFEGUARD MEASURES ON THE IMPORT OF CERTAIN STEEL PRODUCTS FROM THE UAE.

Memorandum prepared for Brisko Scaffolding Limited

This memorandum had been prepared for Brisko Scaffolding Limited ("Brisko") by their advisors, for submission by Brisko in response to the Statement of Intended Preliminary Decision on Transition review TF0006 – Safeguard measures on certain steel products, published on 19 May 2021.

Executive summary

This submission responds to points raised in the Statement of Intended Preliminary Decision ("The Statement") on Transition review TF0006 – Safeguard measures on certain steel products. It addresses three key shortcomings of the Transition review findings in relation to the Safeguard measures for product categories 20 and 21.

- Based on the WTO existing case law (in particular, *Argentina – Footwear*) concerning what constitutes a significant increase in imports, TRID has erred in its finding that Categories 20 and 21 were imported into the UK in increased quantities during the Period of Investigation ("POI") and that this increase was significant.
- Even if TRID maintains there was a significant increase in imports for these categories, there is unlikely to have been any damage to domestic industry as product categories 20 and 21 are primarily produced in the UK for export. As a result, competition between domestic production and imports is limited.
- It is neither appropriate nor rational in public law terms for TRID to use import data from 2017-2019 as the relevant period for applying the developing country exception, when the POI was from 2013-17. The POI should have been used as the relevant period.

This submission expands upon some of the points made in our submission of 26 April ("26 April Submission"), using the data included in The Statement. It also introduces an additional argument against concluding that there has been damage to domestic industry, using the data included in The Statement which we have reviewed for the first time.

Duty on TRID to have regard to interested party submissions.

Despite a reference to the 26 April Submission in Table 2: Submissions Received of the Statement,¹ there is no reference to the arguments we have previously

¹ Page 14 of the Statement

raised. It is particularly striking that there is no reference to the WTO jurisprudence arising from the Safeguards Agreement, which should inform how TRID carries out the increased quantities test. Similarly, there is no explanation in the Statement for why the period 2017-2019 was used as the relevant period for applying the developing country exemption.

By virtue of regulation 18(2) of the Safeguarding Regulations 2019, the TRA (and prior to its establishment, TRID), must “have regard to information supplied to it by an applicant UK producer, an interested party, a contributor or any other person from whom it has requested information, provided that the information—

- (a) is verifiable;
- (b) has been appropriately submitted such that the TRA may use the information without undue difficulty;
- (c) has been supplied to it within any applicable time limit; and
- (d) where relevant, has been supplied to it in a form that it has requested.

We consider that the lack of response in the Statement to the arguments contained in our 26 April Ssubmission to be a breach of the statutory obligation in regulation 18(2) above. Quite simply, there is nothing in the Statement to demonstrate that any of our arguments were taken into consideration.

We ask TRID to cure this defect by considering, and responding to, each of the arguments we raise in the 26 April Submission and this further submission.

Fully considered, the arguments we have raised should lead TRID to change the recommendations in the Statement from varying the category 20 and 21 safeguards to revoking them.

TRID’s finding of a significant increase in imports is inconsistent with the data and the relevant case law

TRID concluded that “*the evidence shows that there is a significant increase in imports within the POI*” for product categories 20 and 21.² However, this finding is inconsistent with the import data cited in The Statement and the definition of a “significant” increase in imports based on international jurisprudence and the WTO approach.

The relevant tests

As explored in the 26 April Ssubmission, the first test to be applied by TRID in deciding whether to continue or revoke the TRQs is the increased quantities test. In particular, it is necessary for TRID to establish whether:

1. The category 20 and 21 products were imported into the UK in increased quantities, in terms of absolute or relative volumes, during the EU’s POI eriod of Investigation (“POI”) of 2013-2017; and
2. Whether any increase in quantity imported is significant during the POI.³

² The Statement, paragraph 50.

³ Paragraph 1 of Schedule 5 to the Taxation (Cross-Border Trade) Act 2018 and Part 2 of the Safeguard Regulations.

The UK Safeguard Regulation does not provide a precise definition of what constitutes a “significant” increase in the imports of goods, beyond that TRID should pay regard to the rates and volume of the imports and foreseeability.⁴

Accordingly, in undertaking this analysis TRID should be guided by the wording of Article 4.2 of the WTO Safeguards Agreement, which states in relevant part: “*the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature (...) 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 ...*”⁵

TRID should also be guided by the jurisprudence concerning the interpretation of the terms “rate and amount of increase in imports”. In particular, the panel in *Argentina – Footwear* stated that:

“[W]e recall Article 4.2(a)'s requirement that 'the rate and amount of the increase in imports' be evaluated. **In our view this constitutes a requirement that the intervening trends of imports over the period of investigation be analysed. We note that the term 'rate' connotes both speed and direction, and thus intervening trends (up or down) must be fully taken into consideration.** Where these trends are mixed over a period of investigation, this may be decisive in determining whether an increase in imports in the sense of Article 2.1 has occurred. In practical terms, we consider that **the best way to assess the significance of any such mixed trends in imports is by evaluating whether any downturn in imports is simply temporary, or instead reflects a longer-term change.**” (emphases added).⁶

The view of the panel was upheld by the Appellate Body. It stated notably, that , “we do not dispute the Panel's view and ultimate conclusion that **the competent authorities are required to consider the trends in imports over the period of investigation (rather than just comparing the end points)** under Article 4.2(a).” (emphasis added).⁷

Overall, this highlights that it is important to measure the trend of imports over the period of investigation and verify whether changes reflect temporary fluctuations or are indicative of a longer-term change. Determining that there has been a significant increase in imports as a result of a one-year increase which is quickly reversed (as TRID appears to have done) is a significant departure from the relevant jurisprudence and Article 4.2 of the WTO.

There was no material absolute increase in imports of the relevant products during the period of investigation

TRID found that there was an absolute increase⁸ in imports for both product categories 20 and 21, and the these increases were “recent, sudden, and sharp”.⁸ However, contrary to TRID’s conclusion, based on the available data and the

⁴ Regulation 5 of the Safeguard Regulations

⁵ WTO Agreement on Safeguards

⁶ Panel Report, *Argentina – Footwear* (EC), para. 8.159

⁷ Appellate Body Report, *Argentina – Footwear* (EC), para. 129.

⁸ The Statement, paragraphs 47 and 48.

relevant jurisprudence there does not appear to have been a material increase in absolute imports of product categories 20 or 21 during the POI.

The conclusion that there was an absolute increase in imports for product category 20 and 21 appears to rest on short-lived, transient increases in imports of the product categories in one year. In arguing that imports have increased significantly, TRID states that “For product categories 1, 2, 4, 5, 7, 13, 15, 19, 20, 21, 25A and 25B significant absolute increases were found over a period of one year, ranging from 24% to 206%”.⁹ For categories 20 and 21, this appears to relate to the year 2014, where imports increase by 65% and 28% respectively when compared to 2013. This is illustrated in **Figure 1** below.

Figure 1 Change in absolute imports over previous year, in %

Product category	2014	2015	2016	2017
20. Gas Pipes	65%	-33%	22%	-21%
21. Hollow Sections	28%	-18%	-2%	11%

Source: Frontier calculations, based on Table 6 of The Statement

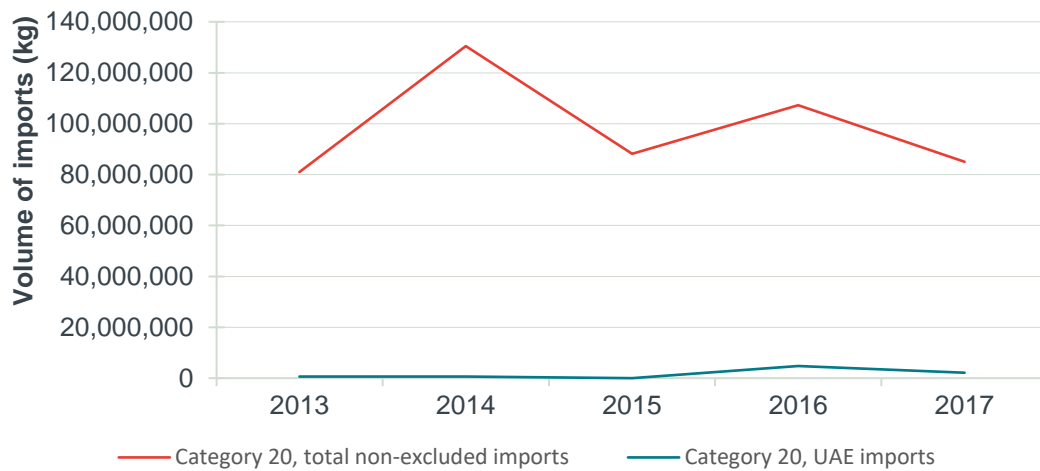
However, these temporary increases in imports were quickly reversed and were not indicative of the broader trend, as shown in **Figure 1**. Every increase in imports was followed by a notable decrease the following year, and the overall growth in imports over the POI was limited.

- For product category 20, the one year 65% increase in imports in 2014 was followed by a 33% decrease in 2015. Similarly, the 22% increase in 2016 was followed by a 21% decrease in 2017. Overall, the annual variation in imports resulted in a fairly flat trend in imports over the POI, with imports in 2017 only 7% higher than in 2013. This is an average annual growth rate of 1.7% over the POI.
- For product category 21, the 28% increase in imports in 2014 was immediately followed by an 18% fall in imports in 2015. This was in turn followed by a further drop of 2% in 2016, before rising slightly in 2017 by 11% when compared to 2016. Overall, the annual variation in imports resulted in a limited change in imports over the POI, with imports in 2017 only 14% higher than in 2013. This is an average annual growth rate of 3.3% over the POI.

This is further illustrated in **Figure 2** and **Figure 3** below, which were previously submitted as part of [the 26 April Submission](#)~~[add ref to previous submission]~~. As can be seen in these figures, the trend in imports of product categories 20 and 21 into the UK was flat over the POI. Moreover, these figures illustrate that imports from the UAE were very limited during the POI, with imports of category 20 averaging less than 2% of total imports over the period and imports of category 21 averaging close to 0%.

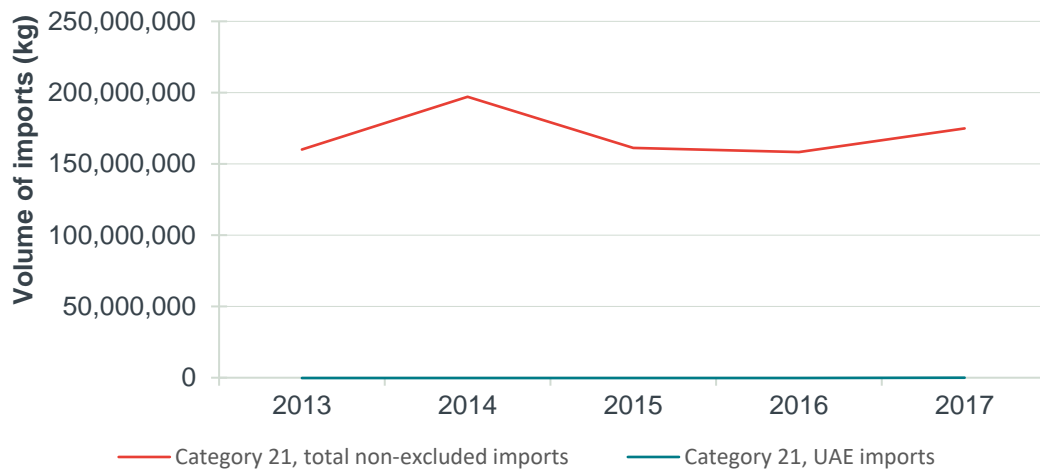
⁹ The Statement, paragraph 44.

Figure 2 Total and UAE imports of product category 20, 2013-17



Source: Frontier calculations, based on Eurostat data

Figure 3 Total and UAE imports of product category 21, 2013-17



Source: Frontier calculations, based on Eurostat data

TRID's findings are therefore incompatible with the jurisprudence on the "increased quantities" test. A transient one-year increase in imports is not sufficient to conclude that imports have increased over the period in question, and TRID should not have concluded that there was a significant increase in absolute imports for category 20 or 21 goods based on a one-year increase in absolute imports. As can be seen in **Figure 2** and **Figure 3** above, there is no discernible upwards trend in imports of the relevant products over the POI, with changes from year to year appearing to represent random fluctuations as opposed to any material increase.

There was no material relative increase in imports of the relevant products during the period of investigation

For category 21, TRID did not find a discernible change in imports relative to domestic production and based its conclusion of a significant increase solely on the perceived increase in absolute imports driven by short-lived variations in imports from one year to the next. However, for category 20, TRID concluded that there was “[b]oth an absolute increase in imports and relative increase imports” when compared to domestic production.

There were notable increases in imports of product category 20 (relative to the previous year) in 2014 and 2016, as shown in **Figure 4** below. However, as was the case with absolute imports, these increases were immediately followed by noticeable drops in imports relative to domestic production.

Figure 4 Change in absolute imports over previous year, in %

Product category	2014	2015	2016	2017
20. Gas Pipes	59%	-27%	32%	-16%
21. Hollow Sections	14%	-19%	4%	7%

Source: Frontier calculations, based on Table 6 of The Statement

Moreover, the overall trend in relative imports for product category 20 was primarily driven by decreases in domestic production as opposed to a change in the absolute level of imports. While relative imports were 29% higher in 2017 for category 20 products when compared to 2013, this is largely the result of domestic production declining by 17% over the same period.¹⁰ As can be seen in **Figure 5** below, domestic production of category 20 products is very limited when compared to imports. This means that small fluctuations in domestic production (the denominator in relative imports) will necessarily lead to a noticeable change in relative imports, even if there is no meaningful change in imports or domestic production. As a result, despite there only having been a small increase in imports of category 20 products and a small decrease in domestic production in 2017 when compared to 2013, relative imports appears to have increased noticeably when comparing those two years. These e-apparent increases in relative imports are -is therefore misleading, and does not appear to be an accurate indicator of either a general upwards trend in imports or harm to domestic producers.

Figure 5 Estimated UK production and relative imports of category 20 products, 2013-2017

	Imports into the UK (kg)	Estimate of UK production (kg)	Relative imports
2013	80,972,900	56,624,406	143%
2014	130,440,000	57,210,526	228%
2015	88,129,900	53,090,301	166%
2016	107,228,300	48,962,694	219%
2017	85,108,200	46,004,432	185%

Source: Frontier calculations, based on Eurostat data and Table 7 of The Statement. UK production has been estimated using Eurostat data on (non-excluded) global imports and the data from Table 7 of the Statement. Relative imports is directly from Table 7.

¹⁰ From Table 57 of The Statement.

As explained below, the majority of UK production is exported, with sales on the domestic market the residual element. Consequently, fluctuations in these sales, in both absolute terms and relative to imports, can be expected. Moreover, the purpose of the analysis of changes in import shares is to attribute a causal relationship between these changes and injury allegedly suffered by domestic industry. As noted by the panel in *Ukraine-Passenger Cars* in rejecting the authorities' safeguards determination on the basis of relative increases, "*it is not sufficient for the competent authorities to have merely noted the percentage of the relative increase without explaining what inferences were drawn from it with regard to the likely development of imports in the imminent future.*" (emphasis added). In this particular case, given the limited nature of UK production for domestic markets, and the fluctuations observed in relative- (and absolute) shares, it is difficult to infer anything on developments in imports solely on the basis of the percentage shares reported.¹¹

UK production of product categories 20 and 21 for domestic consumption was limited over the POI

Even if imports of product categories 20 and 21 had experienced a significant increase in quantities during the POI (which, based on the definition of increased quantities from the jurisprudence, they did not) there still appears to be limited prospect of harm to UK producers of these products. This is due to the fact that production of these products in the UK is largely exported, meaning they do not compete with imports within the UK.

The Statement reports imports as a percentage of domestic production for the relevant product categories. Using this information alongside Eurostat data on exports and imports, we have estimated the implied share of domestic production which is exported (as opposed to sold domestically in the UK). These estimates are shown in **Figure 6** below for product category 20, and **Figure 7** for product category 21.

Figure 6 Estimated proportion of UK production of category 20 products which is produced for export, 2013-2017

	Estimate of UK production (kg)	UK exports to world (kg)	Estimate of % of UK production which is exported
2013	56,624,406	35,519,300	63%
2014	57,210,526	39,311,700	69%
2015	53,090,301	38,935,700	73%
2016	48,962,694	35,486,600	72%
2017	46,004,432	35,990,200	78%
Average 2013-2017	52,378,472	37,048,700	71%

Source: Frontier calculations, based on Eurostat data and Table 7 of The Statement. UK production has been estimated using Eurostat data on (non-excluded) global imports and the data from Table 7 of the Statement.

¹¹ Panel Report, Ukraine – Passenger Cars, paras. 7.254-7.255.

Figure 7 Estimated proportion of UK production of category 21 products which is produced for export, 2013-2017

	Estimate of UK production (kg)	UK exports to world (kg)	Estimate of % of UK production which is exported
2013	285,955,000	197,326,100	69%
2014	307,839,844	213,033,700	69%
2015	309,911,538	200,984,400	65%
2016	293,045,370	178,694,900	61%
2017	301,438,621	193,698,200	64%
Average 2013-2017	299,638,075	196,747,460	66%

Source: Frontier calculations, based on Eurostat data and Table 7 of The Statement. UK production has been estimated using Eurostat data on (non-excluded) global imports and the data from Table 7 of the Statement.

These estimates show that product categories 20 and 21 were largely produced for export markets during the POI. More than 60% of the products in these categories were exported for sale outside the UK in every year of the POI, with ca. 70-80% of domestically produced products exported in some years.

This demonstrates that UK producers largely manufacture category 20 and 21 products for export. As a result, competition between UK producers and imports of category 20 and 21 products is limited, and UK producers should not be materially harmed by these imports. This is particularly true for imports from the UAE, which represented a very small share of imports over this period.

The appropriate period for determining the developing country exception

TRID has used data from 2017-2019 to consider whether the UAE should be granted a developing country exception. As such, imports from the UAE of category 20 and 21 products were assessed to have been higher than 3%.¹²

Table 51: Developing Country Non-Exemptions by Product Category

Product category	Developing country non-exemptions (incl. 2017-2019 import share in %)
1	Turkey (10.1%)
2	Brazil (4.5%), India (7.8%), Ukraine (4.6%), Vietnam (5.3%)
4*	China (6.9%), India (5.0%), Turkey (4.8%)
5	n/a
13	Turkey (23.7%), Ukraine (10.1%)
15	n/a
19*	n/a
20	India (12.5%), Turkey (53.1%), United Arab Emirates (7.9%)
21	Turkey (71.6%), United Arab Emirates (4.7%)
26	China (9.3%), India (3.7%), Turkey (17.2%), United Arab Emirates (23.5%)

¹² See page 99 of the Statement.

The developing country exception is set out in Article 9(1) of the WTO Safeguard Agreement, and given effect in UK law by the Safeguards Regulations.¹³ UK legislation provides that, where TRID was making the initial determination to transition EU steel safeguards, the determination must exclude:

“goods originating from a developing country member of the WTO that is a low volume exporter provided the imports, during such periods as the TRA determines appropriate, from all such members who are low volume exporters collectively account for no more than 9 per cent. of the total imports of such goods into the United Kingdom.”¹⁴

We consider that it was neither appropriate, nor rational in public law terms, for TRID to use import data from 2017-2019 as the relevant period for the developing country exception when the POI was from 2013-17.

This choice is particularly concerning because of its effect. As set out in further detail in our 26 April Submission, imports of both category 20 and 21 products from the UAE during the POI were under the 3% threshold:

- Imports of category 20 products from the UAE amounted to only 1.7% of in-scope imports over the POI.
- Imports of category 21 products from the UAE amounted to less than 0.01% of imports over the POI.

It follows that the safeguards against UAE imports of category 20 and 21 products would have been revoked if the POI had been used as the relevant period for the developing country exception.

The use of 2017- 2019 data to determine the developing country exception is neither appropriate, nor rational in public law terms, given that:

- The POI covered the period 2013-2017.
- The entire economic logic of safeguard action is based on detecting a causal link between imports and damage caused-; the aim of the safeguard being to remedy the damage.
- Using a different period from the POI for assessing the developing country exception amounts to an artificial application of Article 9(1) of the WTO Safeguard Agreement, and leads to anomalous results, as in this instance. UAE imports of category 20 and 21 products are considered by TRID to have sufficiently increased during the POI, yet the developing country safeguard, which would have exempted UAE from safeguards on the basis of the relevant data during the POI, is based on a different period.
- The result renders TRID’s choice of the relevant period for the application of the developing country threshold at significant risk of appearing self-serving.

We therefore submit that the appropriate period for considering the developing country exception was the POI.

¹³ Regulation 43 of the Safeguard Regulations

¹⁴ Regulation 46(7) of the Safeguard Regulations

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Should TRID maintain that 2017-2019 is an appropriate period to use, we would be grateful for a detailed explanation in TRID's final Determination as to

- why this period, rather than the POI, was chosen; and
- why TRID considers its choice to be appropriate.