

**Government of the Republic of Korea**  
**Comments on Intended Preliminary Decision in the UK Transition Review of**  
**Safeguard Measures Regarding Certain Categories of Steel Products (TF0006)**

**I. INTRODUCTION AND EXECUTIVE SUMMARY**

1. The Government of the Republic of Korea ("Korean government") hereby submits its comments on the intended preliminary decision published by the Trade Remedies Investigations Directorate ("TRID") on 19 May 2021 in relation to its transition review of the safeguard measures on certain steel products.

2. In summary, the key points that the Korean government wishes to communicate are as follows:

- The application of safeguard measures following 31 December 2020 and the TRID's transition review violate the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and the WTO Agreement on Safeguards ("WTO SGA"). As such the UK should:
  - immediately terminate the current safeguard measures that are in place;
  - immediately terminate the present transition review as it cannot serve as the basis for the extension of safeguard measures on certain product categories going forward.
- In any case, should safeguard measures be extended on certain product categories as proposed by the TRID, then:
  - the extension of the safeguard measures should be applied for a period of one year;
  - the liberalisation rate should be increased to 5%;
  - the tariff-rate quotas ("TRQs") should be managed annually rather than quarterly; and
  - the TRID should clarify precisely which commodity codes in product category 4B are to be revoked as the preliminary decision is inconsistent in this respect.

**II. THE APPLICATION OF SAFEGUARD MEASURES AND THE TRID'S TRANSITION REVIEW VIOLATE WTO RULES**

3. Under established WTO law, safeguard measures are "extraordinary" remedies which are intended to be temporary in nature and should only be applied in "extraordinary" emergency situations.<sup>1</sup> This is reflected in the provisions of the WTO SGA, which set a high bar for the imposition and retention of safeguard measures and which must be given "their full meaning and full legal effect".<sup>2</sup> Indeed, as a result of their extraordinary nature, safeguard measures can only be imposed in very specific and clearly defined circumstances.

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<sup>1</sup> WTO Appellate Body Reports, *US – Line Pipe*, paras. 80-84, *Argentina – Footwear (EC)*, para. 94, *US – Steel Safeguards*, para. 347 and *Korea – Dairy*, para. 86.

<sup>2</sup> WTO Appellate Body Report, *Argentina – Footwear (EC)*, para 95.

4. Pursuant to WTO rules, the right to apply safeguard measures only arises if the substantive conditions set forth in Article XIX:1(a) of the GATT 1994 and the WTO SGA are fulfilled. According to Article 2.1 of the WTO SGA, a Member may apply a safeguard measure if it has determined that a “product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products”. In accordance with Article XIX:1 of the GATT 1994, it must also be determined that the increase in imports is the result of unforeseen developments.

5. Furthermore, Article 4 of the WTO SGA makes it explicit that the determination of injury and increase in imports should be based on positive evidence and objectively examine both the volume of imports and the effect of those imports on the Member’s domestic market. In doing so, the competent authorities must demonstrate a causal relationship between the imports into that Member’s territory and the injury to the Member’s domestic industry.

6. The WTO Appellate Body in *Argentina – Footwear (EC)*, which examined “whether ... there is an implied ‘parallelism between the scope of a safeguard investigation and the scope of the application of safeguard measures,’”<sup>3</sup> explained that “[t]aken together, the provisions of Articles 2.1 and 4.1(c) of the Agreement on Safeguards demonstrate that a Member of the WTO may only apply a safeguard measure after that Member has determined that a product is being imported into its territory in such increased quantities and under such conditions as to cause or threaten to cause serious injury to its domestic industry within its territory.”<sup>4</sup> The Appellate Body added that “all of the relevant aspects of a safeguard investigation must be conducted by the Member that ultimately applies the safeguard measure, on the basis of increased imports entering its territory and causing or threatening to cause serious injury to the domestic industry within its territory.”<sup>5</sup> This interpretation is made explicit in Article 3 of the WTO SGA, which provides that “[a] Member may apply a safeguard measure only following an investigation by the competent authorities of that Member”.

7. Thus, in order for the UK to legally apply safeguard measures in its territory it must determine in accordance with Article XIX of the GATT and Articles 2 and 4 of the WTO SGA, that as a result of (i) unforeseen developments and of the effect of obligations incurred, the product under investigation is being (ii) imported in such increased quantities and under such conditions as (iii) to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.<sup>6</sup>

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<sup>3</sup> WTO Appellate Body Report, *Argentina – Footwear (EC)*, para 111.

<sup>4</sup> WTO Appellate Body Report, *Argentina – Footwear (EC)*, para 111. Emphasis added.

<sup>5</sup> WTO Appellate Body Report, *Argentina – Footwear (EC)*, para 111.

<sup>6</sup> WTO Appellate Body Report, *US – Steel Safeguards*, para 331.

8. The UK's conduct with respect to both the maintenance of the EU's steel safeguard measures and the present transition review, however, manifestly fails to meet these WTO requirements as the UK illegally assumes that it can transition the EU steel safeguard measures. However, these measures are still attributable to the EU so that they cannot be, at the same time, attributed to the UK.<sup>7</sup> The UK's departure from the EU does not allow the UK to claim that the EU steel safeguard measures could be continued by the UK separately<sup>8</sup> without conducting a safeguard investigation in accordance with the provisions of the WTO SGA.

9. First, the UK'S application of safeguard measures following 31 December 2020 was determined without any prior investigation and is therefore in breach of the WTO rules laid out above. The UK could not simply rely on the EU's original investigation imposing the EU steel safeguard measures,<sup>9</sup> as the WTO SGA requires that the UK establishes that there are increased imports into *the UK's territory* and the existence of serious injury or threat thereof to *the UK's domestic industry*.<sup>10</sup> The EU's original investigation examined these requirements only with respect to the EU-28 as a whole, but no separate investigation was ever performed specifically with respect to the UK before the UK applied safeguard measures on its own initiative.

10. The TRID's own findings in the preliminary decision illustrate the practical consequences of the illegality of applying safeguard measures without first assessing the criterion justifying the application of such measures. Indeed, the TRID is intending to revoke safeguard measures on several product categories<sup>11</sup> on the bases that there was no domestic UK production during the period of investigation ("POI")<sup>12</sup> and that there was no increase or no significant increase in imports during the POI.<sup>13</sup> This demonstrates that the criteria for applying safeguard measures on these product categories in the UK could not ever have been met. Yet, the UK has applied safeguard measures on these product categories since 1 January 2021.

11. Furthermore, the illegality of the UK's application of safeguard measures is demonstrated by the fact that it now intends on imposing safeguard measures on imports from the EU.<sup>14</sup> However, imports from the EU to the UK were not taken into account by the Commission in the initial investigation as they formed part of the domestic industry. Clearly, the UK should have first conducted its own complete safeguard investigation, and not simply transitioned the EU's steel safeguard measures, so that the current safeguard measures in place should be immediately terminated.

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<sup>7</sup> Article 3, ILC Draft articles on the responsibility of international organizations, 2011.

<sup>8</sup> See for a similar analogy with regard to the secession of part of a State, ILC Draft articles on Succession of States in respect of Treaties with commentaries, Article 15. See also, M. G. Kohen, *Secession, International Law Perspectives*, Cambridge, p. 208, available [here](#).

<sup>9</sup> The legality of which itself is under challenge in the panel proceedings in DS595 *EU – Safeguard Measures on Certain Steel Products*.

<sup>10</sup> WTO Appellate Body Report, *Argentina – Footwear (EC)*, para 111. Emphasis added.

<sup>11</sup> Preliminary decision, Annex B.

<sup>12</sup> Certain commodity codes within product categories 4B, 19 and 28.

<sup>13</sup> Product categories 6, 12, 14, 16, 17 and 27 and 28.

<sup>14</sup> Preliminary Decision, Tables 46-48.

12. Second, the transition review conducted by the TRID cannot itself serve as the basis for the application/extension of certain of the EU's safeguard measures going forward, as proposed in the preliminary decision. Indeed, the transition review does not meet the criteria to impose safeguard measures as it does not constitute a *de novo* safeguard investigation.

13. Firstly, the POI considered in the transition review is not the period immediately preceding the initiation of the TRID's investigation, as required under WTO law,<sup>15</sup> but rather mirrors "the period of the original European Commission's (EC) investigation in connection with the EU tariff rate quotas", namely, the period 2013-2017.<sup>16</sup> As explained by the WTO Appellate Body, "the relevant investigation period should not only end in the very recent past, the investigation period should be the recent past".<sup>17</sup> While the TRID used 1 January 2018 to 30 June 2020 data to assess trends in the most recent past, such data was only used to determine whether the safeguard measures should "be reduced or extended in the UK"<sup>18</sup> and not warranted in the first place. As a consequence, the TRID did not examine whether there had been a significant increase in imports with respect to a sufficiently recent period, in breach of WTO requirements.

14. Secondly, the TRID did not apply the appropriate test as regards injury and causality for the determination of whether the application/extension of a safeguard measure was warranted. Indeed, TRID considered whether there was a likelihood of serious injury to UK producers if goods belonging to a product category were no longer subject to a tariff rate quota.<sup>19</sup> Once it concluded that the UK industry was in "a fragile position"<sup>20</sup>, the TRID established that "there was a temporal link between increased imports during the POI and serious injury experienced by [the] domestic industry".<sup>21</sup> On this basis, the TRID concluded that the "UK market faced a similar threat of serious injury in 2018" as that concluded by the Commission in the EU's original investigation in 2018,<sup>22</sup> and that there was a "likelihood of serious injury should the goods be no longer subject to the tariff rate quotas" as first determined by the EU.<sup>23</sup> However, to comply with WTO law, the TRID should have determined serious injury or a threat thereof to the domestic industry and the causal relationship with increased imports on the basis of its own investigation with regard to data at the time of that investigation, without relying on the EU's underlying determinations and conclusions.

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<sup>15</sup> See for example, WTO Appellate Body Reports, *Argentina – Footwear (EC)*, para 130; and Appellate Body Report in *US – Steel Safeguards*, paras 249, 251-254, 258-259 and 388.

<sup>16</sup> Preliminary decision, para 5.

<sup>17</sup> WTO Appellate Body Report, *Argentina – Footwear (EC)*, fn 130 to para 130.

<sup>18</sup> Preliminary Decision, para 6.

<sup>19</sup> Preliminary Decision, paras 84 and 135.

<sup>20</sup> Preliminary Decision, para 135.

<sup>21</sup> Preliminary Decision, para 136.

<sup>22</sup> Preliminary Decision, paras 139 and 140.

<sup>23</sup> Preliminary Decision, para 140.

15. Finally, the TRID did not determine that the increased imports resulted from unforeseen developments, such as the “historic increase in global capacity, as well as the background of trade measures by numerous countries, including most notably US measures under section 232 of Trade Act 1962”<sup>24</sup> at the time of the TRID’s investigation but relied on the Commission’s findings dating from 2017/2018.<sup>25</sup> Indeed, while TRID reviewed those developments for the purposes of determining whether the withdrawal of the safeguard measures in place would be “likely to lead to a recurrence of imports in increased quantities”,<sup>26</sup> it did not assess whether there were unforeseen developments leading to the increase in imports as of the initiation of the investigation in accordance with Article XIX:1 of the GATT.

16. In light of the above, there was no legal basis for the UK to maintain the EU’s steel safeguard measures following 31 December 2020, so that the current safeguard measures should be immediately terminated. Moreover, since the TRID’s transition review does not constitute a *de novo* safeguard investigation for the reasons laid out above, in violation of WTO rules, the extension of the EU’s safeguard measures proposed in the preliminary decision lack legal basis and should thus not be applied by the UK.

### **III. IN ANY CASE, SHOULD THE UK EXTEND THE SAFEGUARD MEASURES AS PROPOSED, THEY SHOULD BE AMENDED**

17. Notwithstanding their manifest illegality, should certain of the safeguard measures nevertheless be extended as proposed by the TRID in the preliminary decision, the Korean government requests that they be amended in the following ways.

18. First, given that safeguard measures are “extraordinary” remedies which are intended to be temporary in nature,<sup>27</sup> the Korean government requests that the extension of the safeguard measures only be applied for a period of one year and not for a period of 3 years as the TRID suggests.<sup>28</sup> This request is warranted in light of the fact that Article 7.1 of the WTO SGA requires that “[a] Member shall apply safeguard measures only for such period of time as may be necessary to prevent or remedy serious injury”. In this regard, as explained in the section above, the TRID’s assessment of injury or threat thereof to the UK’s domestic industry was based on a remote POI. Moreover, the TRID concluded that “imports generally increased across the POI before falling in the MRP, after the imposition of [the] EU [steel safeguard] measures”<sup>29</sup> Thus, insofar as imports decreased in the most recent past and that the situation of the UK industry improved, the imposition of safeguard measures is not justified, let alone for a period of three years.

<sup>24</sup> Preliminary Decision, para 41.

<sup>25</sup> Preliminary Decision, paras 38-42.

<sup>26</sup> Preliminary Decision, paras 51 and 81.

<sup>27</sup> WTO Appellate Body Reports, *US – Line Pipe*, paras. 80-84, *Argentina – Footwear (EC)*, para. 94, *US – Steel Safeguards*, para. 347 and *Korea – Dairy*, para. 86.

<sup>28</sup> Preliminary decision, para 304.

<sup>29</sup> Preliminary Decision, para 79.

19. Second, the Korean government requests that the liberalisation rate be increased to 5%, rather than the proposed 3%.<sup>30</sup> Article 7.4 of the WTO SGA sets out that the Member applying the safeguard measure “shall progressively liberalize it at regular intervals during the period of application” and that the pace of liberalisation should be increased if measures are extended following a review. Thus, should the UK extend the safeguard measures as proposed by the TRID, it is required to increase the pace of liberalisation from the 3% adopted by the EU in the investigation underlying the UK’s measures. The practical need to increase the liberalisation rate is demonstrated by the fact that average annual imports over the 2017-2019 period for many of the product categories proposed to be extended either exceeded the current 2021 TRQs or came close to doing so.<sup>31</sup>

20. While the preliminary decision argues that an increase in the liberalisation rate is more likely to cause an over-supply on the UK market because domestic demand levels were depressed during 2020 due to the COVID-19 pandemic, the Korean government notes that the preliminary decision only examines domestic demand levels for the first two quarters of 2020,<sup>32</sup> such that current levels of demand are not established. Moreover, even if demand levels were temporarily depressed due to the COVID-19 pandemic, the TRID fails to consider the fact that the UK steel demand for 2021 and 2022 is predicted to be continuously on the rise due to “pent-up demand and government recovery programs.”<sup>33</sup> In this context, maintaining the same liberalisation rate for the *whole duration* of the extended safeguard measures would certainly slow down the recovery of the downstream industries and that of the UK economy as well.

21. Third, the Korean government requests that the TRQs be managed annually, rather than quarterly as proposed by the TRID.<sup>34</sup> The quarterly management of the TRQs was originally introduced by the European Commission in June 2020 in light of possible geographical asymmetries in the speed and timing of recovery from the COVID-19 pandemic and the concern that stronger exporters would “frontload sales” in order to “empty the market” to the detriment of other market participants.<sup>35</sup> The Korean government notes that the TRID’s preliminary decision reproduces the same reasoning to justify its position but fails to recognise that the situation is not the same as it was in June 2020. While the COVID-19 pandemic has not yet fully abated, it is a matter to which national economies have all had to adapt so that the possible concern of particular geographical asymmetries in recovery is no longer sufficient to justify the quarterly management of quotas.

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<sup>30</sup> Preliminary decision, para 159.

<sup>31</sup> Preliminary decision, Table 28 on page 65.

<sup>32</sup> Preliminary decision, Table 28 on page 106.

<sup>33</sup> Worldsteel, *Short Range Outlook April 2021-Overview*, Table 1.

<sup>34</sup> Preliminary decision, para 155.

<sup>35</sup> Commission Implementing Regulation (EU) 2020/894 of 29 June 2020 amending Implementing Regulation (EU) 2019/159 imposing definitive safeguard measures against imports of certain steel products, OJ L206/27, 30.6.2020 (available [here](#)), recitals 22-27.

22. Moreover, as the UK itself is moving beyond the COVID-19 pandemic, additional flexibility is called for in order to best facilitate the recovery of UK downstream industries. Indeed, annually managed TRQs benefit downstream industries in terms of supply chain security, particularly for projects that are concentrated in certain parts of the year and takes into account that demand for steel products is not linear throughout the year. It also gives more security to importers in terms of timing of deliveries insofar as delays are less likely to lead to the imports arriving once a TRQ has been exhausted. However, the question of quarterly versus annual management of TRQs was not taken into account by the TRID as part of its consideration of whether the proposed extension of the safeguard measures met the UK's "economic interest test".<sup>36</sup>

23. Finally, the TRID should clarify precisely which commodity codes in product category 4B are to be revoked as the intended preliminary decision is inconsistent in this respect. In particular, according to Table 34 in the intended preliminary decision,<sup>37</sup> safeguard measures are to be revoked for commodity code 7210 30 00, yet the same commodity code appears in Table 37<sup>38</sup> among the product categories for which the safeguard measures are to be retained. The Korean government assumes that safeguard measures for this commodity code are to be revoked, because it is listed separately in the intended preliminary decision as one of the products for which there is no UK domestic production.<sup>39</sup> This should nonetheless be clarified by the TRID.

#### **IV. FINAL REMARKS**

24. The Korean government wishes to remind the TRID that the Korean government reserves the right to suspend obligations under the GATT 1994 as stipulated in Article 8 of the WTO SGA if the UK government decides to extend any UK safeguard measures beyond 30 June 2021 (i.e., the three-year term of the EU steel safeguard measures). Since the UK takes the view that the UK safeguard measures are in essence extensions of the EU safeguard measures due to the fact that the UK was part of the EU during the two and a half years of the imposition of the EU measures, the Korean government is ready to suspend its obligations under the GATT 1994 with respect to the UK pursuant to the notification to the WTO Council for Trade in Goods in the context of the EU safeguard measures on 2 April 2019.

25. The Korean government would also like to emphasize the spirit of the Korea-UK FTA. As stated in the preamble of the agreement, the two parties have signed the agreement with the goal to "create an expanded and secure market for goods and services and a stable and predictable environment for investment".<sup>40</sup> The safeguard measures in their current form and level, as applied to Korean imports, may contradict the spirit of the Korea-UK FTA, and should be reviewed as requested in this submission. The Korean government believes that the integration objectives spelled out in the Korea-UK FTA and the trade restrictive effects of the safeguard measures will be duly considered

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<sup>36</sup> Considered in section E of the preliminary decision.

<sup>37</sup> Preliminary decision, page 85.

<sup>38</sup> Preliminary decision, page 87.

<sup>39</sup> Preliminary decision, Table 3, page 17.

<sup>40</sup> Korea-UK FTA, Preamble.

during the TRID's review procedure.

26. As a final comment, the Korean government would like to stress that the extension of the safeguard measures is concerning in terms of their WTO-inconsistency, outlined above. They would also negatively impact Korea-UK bilateral relations, which have only recently been strengthened by the Korea-UK FTA, and both Korea's and the UK's economic interests. The Korean government also notes that the extension of the safeguard measures runs counter to the UK's commitment to uphold open, multilateral, rules-based trade principles. Indeed, such principles are enshrined in the UK's strategic foreign policy framework, which was recently published in the Global Britain interim review.<sup>41</sup>

27. In light of the longstanding and strong partnership between our two countries and the spirit of the Korea-UK FTA, the Korean government respectfully requests that the TRID duly take into account Korea's concerns raised in this submission. The Korean government is willing to work closely with the TRID to resolve this matter in an amicable way.

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<sup>41</sup> Global Britain in a competitive age The Integrated Review of Security, Defence, Development and Foreign Policy, March 2021, page 44.