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Committee on Safeguards

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NOTIFICATIONS OF LAWS, REGULATIONS AND ADMINISTRATIVE PROCEDURES RELATING TO SAFEGUARD MEASURES

BRAZIL

The following communication was received on 20 March 1996 from the Permanent Mission of Brazil.

With reference to Article 12.6 of the Agreement on Safeguards, and in addition to the information contained in document G/SG/N/1/BRA/2, please find attached herewith a copy of Decree 1488 of 11 May 1995. As stated in document G/SG/N/1/BRA/2, Decree 1488, establishes administrative procedures for the application of safeguard measures in Brazil.

DECREE NO. 1488/95, 11 May 1995

Regulates the Norms which Govern Administrative
Procedures regarding the Application of Safeguard Measures

The President of the Republic, by virtue of the powers vested in him by Article 84, Sections IV and VI, of the Constitution and taking into consideration the provisions of the Agreement on Safeguards, approved by Legislative Decree No. 30, dated 15 December 1994, and promulgated by Decree No. 1.355, dated 30 December 1944, and the General Agreement on Tariffs and Trade - GATT, adopted by Law No. 313, dated 30 July 1948, decrees:

CHAPTER I

Conditions for Application

Article 1

Safeguard measures may be applied to a product if an investigation shows, in accordance with the provisions of this Regulation, that such product is being imported in such increased quantities, absolute or relative to national production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive goods.

Article 2

It is the competence of the Minister of Industry, Commerce and Tourism and of the Minister of Finance to apply, by joint action, the safeguard measures that are governed by this Regulation.

- 2.1 The application of safeguard measures will be preceded by an investigation conducted by the Foreign Trade Secretariat - SECEX, of the Ministry of Industry, Commerce and Tourism.
- 2.2 Decisions regarding the application, suspension or modification of the time periods for application of the safeguard measures will be made based on the report by SECEX, after having heard the Ministry of External Relations and, whenever the case, the Ministries whose area of competence the decisions regard, which must be published in the Official Diary.

Article 3

The request for the application of a safeguard measure may be presented by:

- (i) SECEX;
 - (ii) other interested organs and agencies of the Federal Government;
 - (iii) companies or associations which are representative of companies that produce the product which is the object of the request.
- 3.1 Requests for the application of safeguard measures must be submitted in writing, in accordance with a form prepared by SECEX, and contain sufficient elements of evidence which demonstrate the increase in imports, the serious injury or the threat of serious injury that they have caused and the causal link between both circumstances.

- 3.2 The decision regarding the initiation of the investigation, which will deliberate on the application of safeguard measures, will be the object of a SECEX circular letter, published in the Official Diary, it being the task of the Ministry of External Relations to transmit the pertinent information to the Committee on Safeguards of the World Trade Organization - WTO.
- 3.3 Interested parties will be heard at a hearing within 30 days, where they will have the opportunity to present elements of evidence and their views on the allegations made by the other interested parties. Requests for hearings are to be submitted in writing to SECEX.
- 3.4 Adequate opportunity will be granted for prior consultation with any Government that has a substantial interest as an exporting country of the product in question, with a view to examine the information supplied by the petitioner, to exchange opinions on the measure and to seek an understanding on ways to achieve the objective of maintaining the equivalent level of rights and obligations under the terms of GATT 1994.
- 3.5 The determination of the authorities which are cited in the opening paragraph of Article 2 will be the subject of an interministerial directive, which will contain the decisions of fact and of law, with a detailed analysis of the case and a demonstration of the relevance of the factors that have been examined.
- 3.6 All confidential information submitted by the involved parties in a safeguard investigation shall, by means of prior justification, be classified as such by SECEX and shall not be made public without the express permission of the party which submitted it.
- 3.7 SECEX may invite the parties that have submitted confidential information to present a non-confidential summary of the same, and should it be indicated that the information cannot be summarized, the reasons for this impossibility should be provided..
- 3.8 Should SECEX decide that a request for confidentiality is not warranted, and if the party that submitted the information is unwilling to make it public, nor authorizes its public disclosure in whole or in part, SECEX reserves the right not to take it into consideration, unless it has been demonstrated to its satisfaction and from appropriate sources that the information is correct.

CHAPTER II

Provisional Safeguard Measures

Article 4

A provisional safeguard measure may be applied under critical circumstances in cases where delay could cause damage which would be difficult to repair, pursuant to a preliminary determination that there is clear evidence that increased imports have caused or are threatening to cause serious injury to domestic industry. Consultations with any Government involved must be initiated immediately after such application.

- 4.1 The provisional safeguard measure will have a maximum duration of 200 days, and may be suspended by interministerial decision prior to the final date established.
- 4.2 When the adoption of a definitive safeguard measure is decided upon, the period of its provisional application will be counted as part of the total time of the duration of the measure.

- 4.3 Provisional safeguard measures will be charged independently of any obligation of fiscal nature, through the application of an *ad valorem* duty, of a specific duty or by a combination of both and collected as compensatory receipts, in accordance with the provision of Article 3, sole paragraph, of Law No. 4.320, dated 17 March 1964.
- 4.4 The amount corresponding to the provisional safeguard measure may be collected or remain on deposit as a guarantee. The eventual compensation will be made in cash, preserving the real value of the deposits made.
- 4.5 Immediate refund will always be made if the investigation determines that a definitive safeguard measure will not be applied.

CHAPTER III

Non-Selectivity

Article 5

Provisional safeguard measures will be applied to the imported product independently of its sources, except in cases provided for in the transitory provisions applicable to textile products (Chapter XI).

CHAPTER IV

Serious Injury and Threat of Serious Injury

Article 6

For the purposes of the present Regulation, it is understood as:

- (i) "serious injury": the significant overall impairment in the position of a domestic industry;
- (ii) "threat of serious injury": the serious injury that is clearly imminent, based on facts and not merely on allegation, conjecture or remote possibility;
- (iii) "domestic industry": the producers as a whole of the like or directly competitive products, operating in the Brazilian territory, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total national production of such products.

CHAPTER V

The Investigation

Article 7

The investigation to determine serious injury or threat thereof as a result of increased imports of a certain product shall take into consideration all relevant factors of an objective and quantifiable

nature having a bearing on the situation of the domestic industry being affected, particularly the following:

- (i) the amount and rate of the increase in imports of the product concerned in absolute and relative terms;
 - (ii) the share of the domestic market taken by increased imports;
 - (iii) the price of the imports, especially in order to determine if there has been a significant underpricing in relation to the price of the similar domestic product;
 - (iv) the consequent impact on the domestic industry of the like or directly competitive products, evidenced by changes in economic factors such as: production, capacity utilization, stock, sales, market share, prices (decrease in prices or lack of increase in prices, which could have occurred in the absence of imports), profits and losses, return on invested capital, cash flow and employment;
 - (v) other factors that, although not related to the evolution of imports, have a causal relationship with the injury or the threat of injury to the domestic industry in question.
- 7.1 Determination of serious injury or the threat of serious injury shall be based on objective evidence, that demonstrates the existence of a causal link between the increased imports of the product concerned and the alleged serious injury or threat of serious injury.
- 7.2 When factors other than increased imports are causing threat of injury or serious injury to the domestic industry in question at the same time, such serious injury shall not be attributed to increased imports.
- 7.3 When there is an alleged threat of serious injury, SECEX shall examine whether it is clearly predictable that the case may become one of serious injury, taking into account factors such as the growth rate of exports to Brazil and the export capacity of the country of production or of origin, either existent or potential, and the probability that the resulting exports of that capacity will be destined to the Brazilian market.

CHAPTER VI

The Application of Definitive Safeguard Measures

Article 8

Safeguard measures will be applied only to the extent necessary to prevent the threat of injury or to remedy the serious injury and facilitate adjustment. Such measures may be adopted under the form of:

- (i) *ad valorem* duties, application of a specific duty, or a combination of both;
 - (ii) quantitative restrictions.
- 8.1 In cases of quantitative restrictions, such measures shall not reduce the volume of imports below the level of a recent period, which shall be the average of the imports of the last three representative years for which statistical data is available, unless clear justification is given

that a different level is necessary to prevent the threat of serious injury or to remedy the serious injury.

- 8.2 In cases where quotas are used, the Brazilian Government may seek agreements with the Governments of the countries directly interested in supplying the product, regarding quota distribution among them.
- 8.3 Should an agreement not be feasible, a quota shall be allocated for each country having a substantial interest, based on the relative share of each country, in terms of the value or the quantity of the imports of the product, taking into consideration a representative prior period and due account being taken of any special factors which may be affecting trade of this product.
- 8.4 Other criteria may be adopted for the allocation of quotas, through consultation with the Governments of the interested countries, made under the auspices of the Committee on Safeguards of the WTO, if the Committee finds that clear demonstrations is provided that the imports from certain countries have increased in greater proportion than the total increase of imports of the product concerned, in the representative period of time, and that the conditions for application of these criteria are equitable to all suppliers of the product concerned. Measures of this nature may be applied only in cases of determination of serious injury and will have a maximum duration limited to the four-year period established in paragraph 1 of Article 9.

CHAPTER VII

Duration

Article 9

Safeguard measures shall be applied only during the period necessary to prevent or to remedy the serious injury and to facilitate adjustment.

- 9.1 Safeguard measures shall not be applied for a period exceeding four years, unless an extension in terms of paragraph 2 occurs.
- 9.2 The period for application of the safeguard measures may be extended if the authorities referred to in the opening paragraph of Article 2 decide, in accordance with the provisions of this Regulation, and based on a determination by SECEX, that such application continues to be necessary to prevent or remedy the serious injury, and that there is evidence that the industry is undergoing adjustment, in the terms of the commitment signed with the Government, with due observance of the provisions of the WTO regarding consultations and notifications.
- 9.3 The total duration of the safeguard measure, including the initial application period and the entire extent of the same, shall not exceed ten years, as provided for in paragraph 2 of Article 9 of the Agreement on Safeguards.
- 9.4 Safeguard measures which application period is over one year shall be progressively liberalized, at regular intervals during the period of application.
- 9.5 If the duration of the safeguard measure exceeds three years, SECEX, at the latest by mid-term of the application period, shall examine the concrete effects which have resulted from the safeguard measure and, if appropriate, shall prepare a demonstrative finding proposing to the

authorities referred to in the opening paragraph of Article 2 the revocation of the measure or the acceleration of the liberalization process.

- 9.6 Measures extended shall not be more restrictive than those which were in effect at the end of the initial period and shall continue to be liberalized.
- 9.7 In exceptional cases, to be determined by the authorities referred to in the opening paragraph of Article 2, based on a finding by SECEX, the liberalization process may be initiated after the second year.
- 9.8 No safeguard measure shall be applied again to the same product, before the at least 2 years have elapsed from the end of the duration of a previous safeguard measure.
- 9.9 If the safeguard measure has been applied for a period of more than 4 years, the prohibition referred to in the preceding paragraph is applied to half of the period of its duration.
- 9.10 Notwithstanding the provisions of the preceding paragraphs, safeguard measures may again be applied to imports of the same product for a maximum period of 180 days, if:
- (a) at least 1 year has elapsed since the date of application of the safeguard measure on the import of that product;
 - (b) such a measure has not been applied on the same product more than twice within the 5 years immediately preceding the date of introduction of the safeguard measure.

CHAPTER VIII

Monitoring and Suspension of the Measure

Article 10

SECEX will monitor the situation of the injured industry during the period of application of the safeguard measure, and it may propose to the authorities referred to in the opening paragraph of Article 2, based on a founded determination, the suspension of the measure as long as it is established that the efforts to bring about the desired adjustment and changes in the circumstances which originally gave rise to the application of the measure are insufficient or inadequate.

CHAPTER IX

Level of Concessions and other Obligations under GATT 1994

Article 11

When applying safeguard measures or extending the period of their duration, the Brazilian Government shall endeavour to maintain the equilibrium of its tariff concessions and other obligations under GATT 1994.

- 11.1 For the purposes of this article, agreements may be made regarding any adequate means of trade compensation for the adverse effects of the safeguard measure on trade.

- 11.2 In taking the decision to introduce a safeguard measure, the Brazilian Government shall also consider the fact that, in cases in which there is no agreement concerning adequate compensation, the interested Governments may, under the terms of the Agreement on Safeguards, suspend substantially equivalent concessions under GATT 1994, as long as such suspension is not disapproved by the WTO Council for Trade in Goods.
- 11.3 The right to suspend equivalent concessions shall not be exercised during the first 3 years that the safeguard measure is in effect, provided that it has been adopted as the result of an absolute increase in imports.

CHAPTER X

Differential Treatment for Developing Countries

Article 12

Safeguard measures shall not be applied to a product originating in a developing country:

- (i) when its share of the imports of the product concerned does not exceed 3 per cent; and
- (ii) when developing countries with individual shares that are less than 3 per cent of the imports do not account, collectively, a total of more than 9 per cent of the imports of the product concerned.

CHAPTER XI

Transitory Provisions Relating to Textile Products

Article 13

During the transition period for integration of the textile and clothing sector established by the Agreement on Textiles and Clothing, "transitional safeguards" may be applied to products that have not been integrated by Brazil into GATT - 1994 and for which the Brazilian Government has retained the rights to have use such measures.

- 13.1 Transitional safeguard may be taken under the present provisions when, by determination of the authorities mentioned in the opening paragraph of Article 2, and based on a finding by SECEX, it is demonstrated that a particular product is being imported in such increased quantities as to cause serious damage, or actual threat thereof, to the domestic industry producing like and/or directly competitive products.
- 13.2 It is the responsibility of SECEX to demonstrate that the serious damage or actual threat thereof are caused by the such increase in the total imports of the product and not by such other factors as technological changes or changes in consumer preference.
- 13.3 In issuing its finding with a determination of serious damage or the actual threat of serious damage, SECEX shall examine the effects of those imports on the particular domestic industry, as reflected in changes in such relevant economic variables such as output, productivity, utilization of capacity, inventories, market share, exports, wages, employment levels, domestic

prices, profits and investments; none of which, either alone or combined with other factors can necessarily give decisive guidance.

- 13.4 Any measure invoked pursuant to the provisions of this article shall be applied on a country by country basis.
- 13.5 The determination of the country or countries of origin to which the serious damage or actual threat thereof are attributed shall be made on the basis of a sharp and substantial increase, actual or imminent, in the imports from these countries considered individually, and on the basis of the level of imports as compared with imports from other sources, market share, and import and domestic prices at a comparable stage of commercial transaction; none of these factors, either alone or combined, can necessarily give decisive guidance.
- 13.6 The imminent increase shall be measurable and its occurrence shall not be determined to exist on the basis of allegation, conjecture or mere possibility, resulting, among other factors, from the existence of production capacity on the part of the exporting members.
- 13.7 A transitional safeguard shall not be applied to exports of any country whose exports of the particular product are already subject to restraint under other provisions of the Agreement on Textiles and Clothing.
- 13.8 The period of validity for the entire determination of the serious damage or of the actual threat of serious damage for the purposes of invoking safeguard measures shall not exceed 90 days from the date of the initial notification.
- 13.9 In the application of the transitional safeguard, particular account shall be taken of the interests of exporting countries in the following terms:
 - (a) least-developed countries, Members of the WTO, shall be accorded treatment significantly more favourable than that provided to other groups of Members referred to in this paragraph, preferably in all its elements but, at least, in overall terms;
 - (b) when establishing the economic terms provided for in this article, differential and more favourable treatment shall be accorded to WTO Members whose total volume of exports of textiles and clothing is small, in comparison with the total volume of exports of other Members, and who account for only a small percentage of total imports of that product and, with respect to such suppliers, due account will be taken of the future possibilities for the development of their trade and the need to allow commercial quantities of imports from them;
 - (c) with respect to wool products from developing countries whose economies and textiles and clothing trade consist almost exclusively of those products and whose volume of textile and clothing trade in the domestic market is comparatively small, special consideration shall be given to the export needs of such countries when considering quotas levels, growth rates and flexibility.
 - (d) more favourable treatment shall be accorded to re-imports of textile and clothing products that have been exported to another country for processing and subsequent re-export to Brazil, and subject to satisfactory control and certification procedures, when these products have been re-imported by a country for which this type of trade represents a significant proportion of its total exports of textiles and clothing.

- 13.10 When proposing the adoption of a transitional safeguard, the Ministry of External Relations shall seek consultation with the Government of the country or countries which would be affected by such a measure.
- 13.11 The request for consultation shall be accompanied by specific and relevant factual information, as up-to-date as possible, particularly in regard to:
- (a) the factors referred to in paragraph 3 on which the determination of serious injury or the actual threat of serious injury is based;
 - (b) the factors referred to in paragraph 5, on the basis of which the Brazilian Government proposes to invoke the measure with respect to the country or countries concerned.
- 13.12 In respect of requests for consultation, the information shall be related as closely as possible to the identifiable segments of production and to the reference period set out in paragraph 16.
- 13.13 The Brazilian Government shall also indicate the specific level at which imports of the product in question from the country or countries concerned are proposed to be restrained; such level shall not be lower to that referred to in paragraph 16.
- 13.14 At the same time, the Ministry of External Relations shall communicate to the Chairman of the Textiles Monitoring Body - TMB the request for consultations, including all the relevant factual data outlined in paragraphs 3 and 5, together with the proposed restraint level.
- 13.15 The country or countries concerned shall respond to the request promptly and consultations shall be held without delay and will normally be concluded within a period of 60 days from the date on which the request was received.
- 13.16 If, in the consultations, there is mutual understanding that the situation calls for restraint on the exports of the particular product from the country or countries concerned, such a restraint shall be fixed at a level not lower than the actual level of exports or imports from the country concerned during the 12-month period terminating 2 months preceding to the month in which the request for consultation was made.
- 13.17 Details of the agreed restraint measure shall be communicated to the TMB within 60 days from the date of the conclusion of the agreement. The TMB shall determine whether the agreement is justified in accordance with provisions of the Agreement on Textiles and Clothing.
- 13.18 If, after the expiry of the period of 60 days from the date on which the request for consultations was received, there has been no agreement reached between the countries involved, the Brazilian Government may apply the restraint by date of import or date of export, in accordance with the provisions of this Regulation, within 30 days following the period of 60 days for consultations, and at the same time refer the matter to the TMB.
- 13.19 Any of the involved countries, according to the provisions of Agreement on Textiles and Clothing, may refer the matter to the TMB before the expiry of the period of 60 days. The TMB shall make recommendations to the countries concerned within 30 days.
- 13.20 In highly unusual and critical circumstances, where delay would cause damage which would be difficult to repair, the action provided for in paragraph 18 may be taken provisionally on the condition that the request for consultations and the notification to the TMB shall be effected within no more than 5 working days after taking the action.

- (a) if no agreement is reached during the consultations, the TMB shall be notified at the conclusion of consultations within a maximum period of 60 days from the date of the implementation of the action.
 - (b) the TMB, in accordance with the provisions of the Agreement on Textiles and Clothing, shall promptly conduct an examination of the matter and make recommendations to the countries concerned within 30 days.
 - (c) should an agreement be reached during the consultations, the Ministry of External Relations shall notify the TMB of the conclusion of the consultations within a period of 90 days from the date of the application of the measure.
13. 21 The measures invoked pursuant to these provisions may remain in effect for a maximum period of three years without extension, or until the product is integrated into GATT 1994, whichever comes first.
- 13.22 Should the restraint measure remain in force for a period of more than 1 year, the restraint level for the subsequent years shall be the level specified for the first year increased each year by a growth rate of not less than 6 per cent, unless some other coefficient is justified before the TMB.
- 13.23 The restraint level for the product in question may be exceeded in one or the other of any of the 2 subsequent years, by carryforward of 5 per cent or carryover of 10 per cent, or by both.
- 13.24 No quantitative limits shall be imposed on the combined use of carryover, carryforward and the provision in the following paragraph.
- 13.25 When the Brazilian Government, based on these provisions, places under restraint more than one product coming from another country, the agreed level of restraint, pursuant to these provisions, may be exceeded by 7 per cent for each of these products, provided that the total exports subject to restraint do not exceed the total of the levels established for all of the restrained products, on the basis of agreed common units. When the periods of application of the restraints on these products do not coincide, this provision shall be applied to any overlapping period on a *pro rata* basis.
- 13.26 When the authorities mentioned in the opening paragraph of Article 2, based on a finding from SECEX, decide to apply a restraint in accordance with these provisions to a product for which these are not applied due to Article 2 of the Agreement on Textiles and Clothing, appropriate measures shall be adopted that:
- (a) take full account of factors such as established tariff classification and quantitative units based on normal commercial practices in export and import operations, both as regards the composition of fibres composition and in terms of competing for the same segment of its domestic market;
 - (b) avoid over-categorization.
- 13.27 For the purposes of this Regulation, the term "industry" also includes the activities related to agriculture.
- 13.28 The authorities referred to in the opening paragraph of Article 2 shall give the necessary instructions for the compliance with the provisions of this Decree.

- 13.29 These transitory provisions regarding textile products shall remain in effect until the first day of the 121st month that the WTO Agreement is in effect, on which date the textiles and clothing sector shall be fully integrated into GATT 1994.

Article 14

This Decree takes effect on the date of its publication.

Brazil, 11 May 1995; 174th year of Independence and 107th year of the Republic.

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