

LEGAL OPINION

Analysis of the bilateral safeguard mechanism in the EU-Mercosur Partnership Agreement

This legal opinion was commissioned by Climate Action Network (CAN) Europe.

OVERVIEW

In the context of the ratifying process of the EU-Mercosur Partnership Agreement (“**EMPA**”), this legal opinion is to examine whether the bilateral safeguards chapter contained in the Interim Trade Agreement (“**ITA**”)¹ would provide sufficient protection for EU agricultural sectors most vulnerable to increased imports of Mercosur products. This note provides a preliminary analysis of the bilateral safeguard mechanism and of the European Commission’s legislative proposal to operationalise it through EU law.

KEY FINDINGS

The analysis shows that the ITA’s safeguards regime is highly demanding, lacks legal certainty, and fails to adequately address concerns for the agricultural sector:

- Unlike other sectors in the EMPA (e.g. automotive) or other EU trade agreements (e.g. with Japan, Korea, Kenya), which include more flexible or quasi-automatic safeguard mechanisms for agricultural goods, the ITA does not provide tailored rules for agriculture.
- Farming sectors are instead subject to the general regime, which requires a high threshold of “serious injury” and “exceptional circumstances” that places a heavier burden on EU producers and lacks legal certainty.
- While the Commission’s proposed implementation of the bilateral safeguard clause may support rapid response, it remains of limited value, as the quantitative thresholds it provides would (i) only serve to trigger investigations and provisional safeguards, without constituting conclusive grounds for imposing final safeguard measures, (ii) not bind in any way the Mercosur partners (since these thresholds are not part of the EMPA), and (iii) there may be practical limitations in terms of measurement and implementation.

¹ ITA, Chapter 9, accessible [here](#). The ITA is to be repealed and replaced by the EMPA once the EMPA is fully ratified and enters into force.

- Moreover, safeguard measures are temporary in nature (max. 2 years + 2), and can only be applied during a 12-year transitional period. They offer only partial and reactive – rather than preventive – protection.

1. BACKGROUND

The EMPA has raised significant concerns within the agricultural sector about the potential influx of imports produced under less stringent environmental and sanitary norms than those applicable within the EU, as a result of the scheduled tariff reductions. These concerns focus on the risk of unfair competition for EU farmers.

The agricultural sector has regularly called for the inclusion of “mirror measures” to ensure a level playing field, requiring imported products to comply with EU production standards ².

Several Member States have echoed these concerns at the political level. France, in particular, has repeatedly expressed its opposition to the agreement in its current form, calling for the EMPA “to be complemented in order to effectively protect the agricultural sector and uphold European standards”, citing risks to farmers and environmental standards.³ Similar reservations have been voiced by Poland and Italy.

After the agreement in principle in 2019,⁴ the text was finalised on 6 December 2024, without reopening the issue of bilateral safeguards, despite earlier calls for stronger protective mechanisms. In 2020, experts mandated by the French government indeed warned the agreed global and bilateral safeguard mechanisms were insufficient and recommended a specific safeguard regime for agriculture.⁵

On 3 September 2025, the Commission officially launched the ratification process, and – in order to ease concerns for agriculture – simultaneously made political commitments as to how it intends to operationalise the safeguard clause.⁶

² See e.g. Interbev (French interprofessional organisation for livestock and meat) Press Release, “Interbev dénonce l’absence de mesures miroirs dans l’agenda stratégique de l’UE 2024-2029” (3 July 2024), available [here](#)

³ See Joint Statement by France and Poland, “The EU-Mercosur agreement has to be complemented in order to effectively protect the agricultural sector and uphold European standards” (7 July 2025), available [here](#).

⁴ <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/3bc87341-e6b2-4842-9584-4efa61643486/details?download=true>

⁵ S. Ambec *et al.*, Report to the French Prime Minister: “Dispositions et effets potentiels de la partie commerciale de l’Accord d’Association entre l’Union européenne et le Mercosur en matière de développement durable” (April 2020), p. 29, available [here](#).

⁶ The legislative proposals for the signing and conclusion of the EMPA and the ITA are accessible [here](#). The Commission’s political commitments are available [here](#).

The Commission opted to split the EMPA, submitting the trade pillar as a separate ITA for approval by a qualified majority in the Council and consent by the European Parliament, thereby excluding national parliaments from the ratification process. According to recent indications, the signature of the EMPA and ITA is expected to take place on 5 December in Brazil, with the Council discussion scheduled for 3 December.

On 8 October 2025, the Commission published a proposal for a regulation on the implementation of the bilateral safeguard clause of the EMPA and the ITA for agricultural products (the “**Regulation Proposal**”), formalising its earlier commitments.⁷

2. ANALYSIS OF THE BILATERAL SAFEGUARD MEASURES

Article 9.3(1) of the ITA, which sets out the conditions under which bilateral safeguard measures may be imposed, reads as follows:

“Without prejudice to the rights and obligations referred to in Chapter 8, a Party may, in exceptional circumstances, for goods other than vehicles classified under HS headings 8703 and 8704, apply bilateral safeguard measures under the conditions established in this Section if, after the date of entry into force of this Agreement, imports from the other Party of a product under preferential terms have increased in such quantities, absolute or relative to domestic production or consumption and under such conditions as to cause or threaten to cause serious injury to its domestic industry of the like or directly competitive products.”

In addition, the ITA provides that **safeguard measures may not be applied for a period longer than 2 years**, with a possible reconduction of 2 years provided certain conditions are met (Articles 9.8 and 9.9). They may only be imposed through the “transitional period”, namely during 12 years after the entry into force of the agreement (Article 9.4).

The Commission’s Regulation Proposal would transpose those provisions into EU law and establish detailed procedural rules for implementation by the Commission.

The analysis will first focus on issues relating to conditions triggering safeguard measures under the ITA (2.1) and on the deficiencies of the Regulation Proposal (2.2), but safeguard measures also present more general limitations in effectively protecting EU farmers (2.2).

⁷ Proposal for a Regulation of the European Parliament and of the Council implementing the bilateral safeguard clause of the EU-Mercosur Partnership Agreement and the EU-Mercosur Interim Trade Agreement for agricultural products, [COM\(2025\) 639 final](#) (8 October 2025).

2.1. Conditions for imposing safeguard measures under the ITA

Under Article 9.3(1) of the ITA, safeguard measures may be imposed if three basic conditions are met: there must be (i) an increase in import in the product concerned (ii) under preferential terms and (iii) “in such quantities” and in “under such conditions” as to cause or threaten to cause “serious injury” to the domestic industry.

This legal test closely mirrors WTO concepts.⁸ A “serious injury” is defined under Article 9.2(e) as a “significant overall impairment in the position of a domestic industry” – a standard identical to Article 4.1(a) of the WTO Agreement on Safeguards.⁹ The ITA does not provide further specifications, such as quantitative thresholds, which could have increased legal certainty. **As a result, the required threshold remains vague and open to interpretation, and should be construed in light of WTO case law.**

In particular, the WTO Appellate Body stated that the phrase “in such increased quantities” means that “it is not enough for an investigation to show simply that imports of the product this year were more than last year”; the increased quantities must be “such” as to fulfil the requirement of “serious injury”.¹⁰ Accordingly, the Appellate Body requires that “the increase in 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’”.¹¹

In addition, the Appellate Body stressed that safeguard action under Article XIX GATT should remain “extraordinary” and that this should be taken into account “when construing the prerequisites for taking such actions”, such as the “serious injury” standard.¹² It further noted that:

“... Article XIX:1(a) requires that a product be imported “*in such increased quantities and under such conditions as to cause or threaten serious injury* to domestic producers”. (emphasis added) Clearly, this is not the language of ordinary events in routine

⁸ Under the WTO Agreement on Safeguards, a Member may apply an MFN-based safeguard only where a product is being imported “in such increased quantities” and “under such conditions” as to cause or threaten “serious injury” to the domestic industry, with causation demonstrated and measures limited in time; provisional measures are permissible in critical circumstances, and compensation/retaliation disciplines apply.

⁹ In addition, the term “domestic industry” refers to “the producers as a whole of the like or directly competitive products operating in the territory of a Party or, failing that, those whose collective output of the like or directly competitive products normally constitutes more than 50 % (fifty percent) and in exceptional circumstances not less than 25 % (twenty-five percent) of the total production of such products” (Article 9.2(b)).

¹⁰ WTO Appellate Body Report, *Argentina - Footwear*, [WT/DS121/AB/R](#) (14 December 1999), para. 131.

¹¹ Ibid.

¹² AB Report, *Argentina - Footwear*, paras 93-95.

commerce. In our view, the text of Article XIX:1(a) of the GATT 1994, read in its ordinary meaning and in its context, demonstrates that safeguard measures were intended by the drafters of the GATT to be matters out of the ordinary...”

However, there is one notable difference with the WTO compared to the ITA. Under the WTO Agreement on Safeguards, safeguard action is subject to demonstrating that the increase in imports results from “unforeseen developments”. This is a high evidentiary hurdle, as confirmed by WTO case law.¹³

By contrast, the ITA refers to “exceptional circumstances”. The omission of the term “unforeseen” is welcome (as it may be difficult to qualify as “unforeseen” or unexpected an increase in imports resulting from preferential quotas). This means that a panel under the ITA might not require a “recent, sudden, sharp and significant” increase of imports like the Appellate Body does. Yet, the legal requirements in Article 9.3(1) must be read in light of the notion of “exceptional circumstances”, which remains undefined and **still implies a very high threshold** – especially for agricultural products where market fluctuations are frequent but do not necessarily qualify as “exceptional”.

Therefore, the language used in Article 9.3(1) suggests a high bar, which in practice may make it challenging to successfully demonstrate that agricultural safeguard measures are justified in the event of a dispute.

It is also revealing to assess how the ITA compares with other agreements concluded by the EU, as there are several instances of more flexible mechanisms to protect sensitive agricultural goods or other vulnerable sectors:

- In trade agreements with Japan and South Korea, the EU accepted the introduction of specific safeguard clauses in the agricultural sector – designed primarily to benefit the trade partners rather than EU producers. For example, the EU-Korea FTA established a simplified safeguard mechanism for certain sensitive agricultural goods, with pre-determined additional duties for each product that can be triggered when import volumes exceed a specified threshold.¹⁴ The EU-Japan EPA contains specific safeguards to protect Japanese farmers under an equivalent mechanism. This enables rapid, quasi-automatic activation when import volumes exceed the agreed thresholds – thereby lowering evidentiary burdens compared with the standard “serious injury” test.

¹³ See e.g. AB Report, *Argentina - Footwear*, paras 93-95.

¹⁴ EU-Korea FTA, Article 3.6(1): “A Party may apply a measure in the form of a higher import duty on an originating agricultural good listed in its Schedule included in Annex 3, consistent with paragraphs 2 through 8, if the aggregate volume of imports of that good in any year exceeds a trigger level as set out in its Schedule included in Annex 3”.

- Similarly, the EU-Kenya EPA states that safeguard measures may be taken in cases where import surges cause or threaten to cause, not only “serious injury” to the domestic industry, but also “disturbances in a sector of the economy”, and specifically “disturbances in the markets of like or directly competitive agricultural products”.¹⁵ This signals a lower threshold than the “serious injury” standard.
- The ITA itself provides a more flexible safeguard regime for the car industry. Instead of requiring proof of “serious injury”, the invoking party must only demonstrate an “injury” (i.e. “material injury”) to a domestic industry.¹⁶

By contrast, the ITA contains no specific safeguard provisions for agriculture – it has no quantitative trigger, requires a full serious injury/threat finding and causation before any measure can be applied. This suggests that the EU did not seek, or failed to obtain, more protective mechanisms for sensitive agricultural goods, as experts highlighted.¹⁷

2.2. The Commission’s Regulation Proposal to operationalise the ITA bilateral safeguard clause

On 8 October 2025, the Commission published the Regulation Proposal to operationalise the bilateral safeguard clause for agricultural products under the ITA. This follows established EU practice, as Regulation (EU) 2019/287 already transposes bilateral safeguard clauses from several FTAs into EU law. The legislative proposal intends to formalise the Commission’s commitments made on 3 September 2025 through a distinct legal instrument, tailored to the specific issues raised by the EMPA.¹⁸

The Regulation Proposal incorporates the safeguard provisions of the ITA and complements them with detailed procedural rules. In general, it provides that:

- Investigations are initiated by the Commission upon request from Member States or industry, where there is sufficient *prima facie* evidence of serious injury (Article 5(1)), and within a month of receiving the request (Article 5(6)).¹⁹

¹⁵ EU-Kenya EPA, Article 50.2(2).

¹⁶ ITA, Article 9.1(2) and Annex 9-A, Article 1(d) and 2(1).

¹⁷ S. Ambec et al., above n 4.

¹⁸ Similar to Regulation (EU) 2019/287, which already transposes FTA bilateral safeguard clauses into EU law.

¹⁹ Upon initiation of the investigation, the Commission shall publish a “notice of initiation” in the EU Official Journal (Article 5(6)).

- Provisional measures may be imposed “in critical circumstances” where immediate action is necessary to prevent damage, provided the Commission finds sufficient *prima facie* evidence of serious injury (Article 9(1)); such measures may not exceed 200 calendar days (Article 9(5));
- Investigations must be concluded within six months from their initiation, with a possible extension of three months “in exceptional circumstances” (Article (7(3)));
- Both the assessment of *prima facie* evidence and the final determination of serious injury are based on the factors listed in Article 7(5), which refers to “all relevant factors of an objective and quantifiable nature” (e.g. rate and amount of the import surge in absolute and relative terms, share of domestic market taken by the increased imports, changes of the EU industry position on the market). This aligns with WTO law, as Article 4.2(a) of the Agreement on Safeguards likewise requires consideration of “all relevant factors” to assess whether the import surge causes “overall” significant impairment to the domestic industry.

In addition, the Regulation Proposal introduces specific rules for “**sensitive products**” – which are listed in an annex and include *inter alia* beef (fresh and frozen), high-quality bovine meat (fresh, chilled and frozen), pigmeat, poultry meat and cheese –²⁰ aiming to ensure enhanced monitoring and rapid response measures:

- The Commission will “regularly monitor” the market of sensitive products and “rapidly assess” the impact of imports of sensitive products under preferential treatment, with reports every six months (Article 4);
- Investigations must be initiated without delay when monitoring reveals *prima facie* evidence of serious injury (Article 6(1)) and the Commission must treat the examination of *prima facie* evidence as a priority (Article 6(2));
- Pre-determined thresholds are set as benchmarks for *prima facie* evidence: as a rule, (i) a >10% year-on-year increase in imports or a >10% year-on-year price decrease of imports, combined with (ii) a ≥10% price gap compared with the “relevant” domestic price for TRQ-subject products, will be treated as *prima facie* evidence (Article 6(3-4));
- Provisional measures must be adopted “without delay and in any event within a maximum of 21 days” from the initiation of the investigation (Article 9(3)); in

²⁰ Annex to the Regulation Proposal, available [here](#). The Commission may amend the Annex to update the list of sensitive products (Articles 1 and 16 of the Regulation Proposal).

urgent cases, the Commission must respond within five working days to any Member State request for immediate intervention (Article 9(4));

- Investigations concerning sensitive products should be concluded “as soon as possible”, with the aim of reaching a final decision within 4 months of initiation (Article 7(3));
- Extension of safeguard measures for sensitive products is allowed without needing to prove industry adjustment, as required for other agricultural products (Article 12(2)).

However, while these provisions are a good step to ensure swift action, the thresholds serve only as benchmarks for establishing *prima facie* evidence of serious injury to initiate investigations and justify provisional measures.²¹ They are **not determinative criteria for the final decision** on whether safeguard measures are appropriate; the legal test remains “serious injury” in accordance with the treaty, which must be assessed based on the objective and quantifiable factors listed in Article 7(5) of the ITA. Moreover, the Commission does not set any absolute fixed volume or price levels above or below which the clause should be activated.

In any event, these thresholds – even if formalised in EU legislation – remain unilateral in nature and **are not part of the ITA**. They merely indicate how the EU intends to exercise its rights to safeguard measures, without prejudice to the measures’ legality under the ITA or to the reaction of Mercosur partners. Therefore, unless these indicative criteria ultimately satisfy the “serious injury” threshold within the meaning of the agreement, they will carry little weight in any potential dispute.

The Commission’s monitoring may also face practical constraints. Organisations have noted that even with thresholds, measurement at the product level can be imperfect or impossible. For instance, the Veblen Institute observed that high-value beef cuts (e.g. sirloin) lack distinct CN codes ²², making it difficult to track volume or price surges accurately. It also stressed that the concept of a “relevant” EU price as a

²¹ The Regulation Proposal does not expressly link Article 9(3), which governs provisional safeguard measures for sensitive products, to the *prima facie* thresholds set out in Article 6(3) and (4). In addition, Article 9(1) only refers to the factors listed in Article 7(5) for the Commission’s preliminary determination. It is therefore unclear whether the thresholds in Article 6(3) and (4) are intended solely to trigger investigations, or also to establish *prima facie* evidence for the imposition of provisional measures for sensitive products under Article 9. However, in the absence of explicit differentiation, the thresholds should logically apply uniformly wherever the regulation refers to “*prima facie* evidence” in the context of sensitive products.

²² CN codes (Combined Nomenclature codes) are standardised EU customs codes used to classify goods for import/export and statistical purposes.

comparator lacks a clear definition, potentially raising challenges from Mercosur countries.²³

2.3. Other limitations of safeguard measures

The effectiveness of bilateral safeguard measures is further constrained by several inherent limitations.

It should first be noted that safeguard measures may only take the form of targeted tariff measures on the product concerned – either a suspension of tariff concessions or a reduction of the tariff preference back up to the lower of the MFN applied rate or the base rate (Article 9.6). Indeed, by contrast with WTO safeguards,²⁴ the ITA bilateral safeguards – like any bilateral safeguard measures under a preferential trade agreement – are only targeted at preferential imports from Mercosur and aimed at rolling back preferences rather than restricting all sources.

Second, safeguard measures are strictly temporary, since safeguards may be applied for a maximum of 2 years, with a possible reconduction of 2 years (Articles 9.8 and 9.9), and are limited to the “transitional period” – namely, during 12 years after the entry into force of the agreement (Article 9.4). This short-term nature means they are ill-suited to address long-term structural challenges faced by domestic sectors, particularly in agriculture.

Finally, **safeguard measures are curative rather than preventive, and do not tackle underlying or systemic issues.** The mechanism overall does not provide a structural solution to the broader issue of uneven production (sanitary and environmental) standards.

²³ Veblen Institute, “Déclaration unilatérale de la Commission européenne adossée à l’accord UE-Mercosur : Quelles nouvelles garanties pour les agriculteurs ?” (9 September 2025), available [here](#).

²⁴ Which allow divergence from Most Favourite Nation (MFN) rates and other WTO baseline obligations.