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Test of Multilateralism in International Trade: U.S. Steel Safeguards

*Y.S. Lee**

I. INTRODUCTION¹

A multilateral trading system, as currently embodied by the World Trade Organization ("WTO"), operates based on mutually agreed concessions among trading nations. The success of this system depends on the observation of those trade concessions previously negotiated and agreed upon among the members of the WTO ("Members").² Under certain conditions, the GATT/WTO rules authorize trade measures that restrict imports unilaterally, beyond the bounds of those concessions.³ The

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¹ Safeguard measures in international trade have received growing academic attention in recent years. The author has published several articles and books on various issues of safeguard measures in international trade. See, e.g., Y.S. LEE, SAFEGUARD MEASURES IN WORLD TRADE: THE LEGAL ANALYSIS (2003) (forthcoming 2d ed. 2004) [hereinafter LEE, SAFEGUARD MEASURES]; Y.S. Lee, *Destabilization of the Discipline on Safeguards?: Inherent Problems with the Continuing Application of Article XIX After the Settlement of the Agreement on Safeguards*, 35 J. WORLD TRADE 1235 (2001).

² The creation of the WTO is memorialized in the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND (1994), 33 I.L.M. 1125 [hereinafter Final Act] and the Marrakesh Agreement Establishing the WTO, April 15, 1994, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND (1994), 33 I.L.M. 1141 (1994) [hereinafter WTO Agreement]. Before the WTO, maximum tariff rates for each product classification were provided in the Schedule of Concessions of Members. See General Agreement on Tariffs and Trade, Oct. 30, 1947, art. II, T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter GATT]. After a series of multilateral trade negotiations, tariff rates for most non-primary products have been substantially reduced. Since the Uruguay Round negotiations, the average tariff rate on non-primary products of industrial countries has dropped to a mere 3.9%. JOHN H. JACKSON, THE WORLD TRADING SYSTEM 74 (1997).

³ The WTO sets conditions for so-called administered protection measures in trade, such as countervailing, safeguard and antidumping measures, in an annex and a related

problem with unilateral import restrictions, such as safeguard measures,⁴ is that they upset the balance of concessions that was previously negotiated between the importing and exporting Members.⁵ The multilateral framework upon which the current international trading system is built is designed to maintain the balance of those concessions. The history of safeguard measures recently applied by the United States to its imports of steel products (“U.S. steel safeguards” or “steel safeguards”)⁶ demonstrates how unilateral trade measures, motivated by internal domestic politics and without strong legal justifications under the GATT/WTO rules, may affect this multilateral framework and potentially lead to the destabilization of the trading system.

On March 20, 2002, in response to the repeated requests of the ailing U.S. steel industry, the Bush Administration applied controversial safeguard measures.⁷ Among the most controversial and significant trade measures in recent history, these import restrictions were comprised of tariff increases of up to 30% *ad valorem* as well as a tariff-quota applying to imports of a range of steel products.⁸ It was the first instance of a major economy

agreement. See Multilateral Agreements on Trade in Goods, Apr. 15, 1994, WTO Agreement, *supra* note 2, Annex 1A, LEGAL INSTRUMENTS, vol. 27, 33 I.L.M. 1154 (1994) [hereinafter Agreements on Trade in Goods] (including the Agreement on Subsidies and Countervailing Measures, and the Agreement on Safeguards, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 154 (1994) [hereinafter Safeguards Agreement]); Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 15, 1994, Agreement on Trade in Goods [hereinafter Antidumping Agreement].

⁴ Safeguard measures are emergency import restraints that are applicable where increased imports cause or threaten to cause serious injury to a domestic industry. The rules governing safeguard measures are provided by the Safeguards Agreement and Agreements on Trade in Goods, *supra* note 3; GATT, *supra* note 2, art. XIX.

⁵ The antidumping and countervailing measures are distinguishable from safeguard measures because they attempt to remedy injury caused by unfair trade practices, such as dumping and illegal subsidies. Therefore, they are not considered to disrupt the balance of concessions among the exporting and importing countries. The term “balance of concessions” is used in international trade circles, to describe trading nations’ maintaining the import concessions they agreed upon during the trade negotiations.

⁶ *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, Report of the Appellate Body, WT/DS248–DS259/AB/R, (Nov. 10, 2003), 43 I.L.M. 410 (2004) [hereinafter Report of the Appellate Body]; *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, Report of the Panel, WT/DS248–DS259/R (Jul. 11, 2003), available at http://www.wto.org/english/tratop_e/distabase_e.htm, [hereinafter Report of the Panel].

⁷ These measures were announced in Proclamation No. 7529, 67 Fed. Reg. 10,553, (Mar. 5, 2002), and Memorandum: Action Under Section 203 of the Trade Act of 1974 Concerning Certain Steel Products, 67 Fed. Reg. 10,593 (Mar. 5, 2002).

⁸ The products subject to the U.S. safeguard measures included: certain carbon flat-rolled steel; hot-rolled, cold-rolled, and other corrosion-resistant, coated flat steel; carbon and alloy hot-rolled or cold-finished bar; carbon and alloy rebar; carbon and alloy welded tubular

applying safeguard measures to one of the most traded products in the world, with provisions affecting as many as 1.31 billion tons of steel trade per year. Since the inception of the WTO in 1995, no trade measure has ever provoked more intense criticism and extensive resistance throughout the world.⁹ The U.S. steel safeguards were perceived as a major protectionist attempt by the United States, implemented to serve its political interests without clear legal justifications under the GATT/WTO rules.¹⁰

The response of various steel-exporting Members to the U.S. steel safeguards was swift and resolute. Within a mere two days of the United States announcement of the steel safeguards, the European Communities filed a complaint with the WTO Dispute Settlement Body ("DSB"), and began preparing a list of U.S. products subject to its retaliation. Several other Members, including Japan, South Korea, Switzerland, Venezuela, Norway and China, also formally joined the European Communities in this dispute. The effect of the U.S. steel safeguards seems to have gone even beyond the membership of the WTO, affecting Russia's decision to ban imports of poultry from the United States.¹¹ Consultations between the United States and steel exporting countries did not produce any resolution of the dispute, and a WTO established a dispute settlement panel to determine whether the measures complied with GATT/WTO rules.¹²

Why did the United States apply such controversial safeguard measures despite the worldwide criticism and resistance? What was the political cause for those extraordinary measures and what were the legal issues in the application of those measures? Safeguard measures are applied as import restrictions where increased imports cause or threaten to cause serious injury to a domestic industry.¹³ Safeguard measures are intended to assist Members in handling acute, short-term problems, such as unemployment, associated with the rapid increase in imports by authorizing

products; carbon and alloy fittings; stainless steel bar and rod; carbon and alloy tin mill products; and stainless steel wire. Proclamation No. 7529, *supra* note 7.

⁹ The U.S. steel safeguard measures attracted significant public attention worldwide, making headlines all over the world and inviting strong objections from dozens of governments, from Brasilia to London and from Seoul to Sidney.

¹⁰ See *infra* Section II. (discussing the political reasons behind the application of these U.S. safeguards, as well as their inconsistencies with the relevant GATT/WTO rules).

¹¹ According to a media report, this decision came two days after Russian steel producers requested that their government block U.S. chicken imports, worth about \$660 million last year, if the Bush administration imposed sanctions on Russian steel. Warren Vieth & Melinda Fulmer, *Playing Chicken With Steel Imports Trade*, L.A. TIMES, Mar. 5, 2002, at C1.

¹² *U.S. Steel Safeguards* is considered the largest WTO panel case to date, with most of the major economies of the world participating as direct parties in the case, including the European Community, China, Japan, Brazil, Switzerland and New Zealand. Appellate Body Report, *supra* note 6, at 410-11.

¹³ Safeguards Agreement, *supra* note 3, art. 2.1.

temporary import restraints until their domestic industry adjusts to competition from imports. Political considerations are an important factor in applying safeguard measures.¹⁴ Nonetheless, the measures will be upheld as long as they are consistent with the requirement of the GATT/WTO rules. The next section discusses the background and development of the U.S. steel safeguards. The remainder of this paper addresses the legal issues raised in the U.S. steel safeguards, considers how the multilateral framework of the current international trading system operated to resolve the dispute, and attempts to draw lessons for the future application of trade measures such as safeguards.

II. BACKGROUND AND DEVELOPMENT OF THE U.S. STEEL SAFEGUARDS¹⁵

A. The State of the U.S. Steel Industry

The U.S. steel industry, which once symbolized the might of American industrial power, is an industry in crisis. During the latter half of the 20th century, the U.S. steel industry lost its competitive edge against foreign steel producers, who employed advanced production technologies and built better facilities.¹⁶ Because they enjoyed dominance in the domestic market for a long time through oligopoly, U.S. steel producers did not make necessary investments to modernize their aging steel production facilities.¹⁷ As a result, the cost efficiency of U.S. steel production fell significantly below that of its competitors by the 1970s.¹⁸ Excessive labor costs have also played a role in the decreased competitiveness of U.S. steel. By 1958, the U.S. steel industry had already faced the highest unit labor costs in the world, which continued to increase throughout the latter half of the 20th century, greatly exceeding actual labor productivity.¹⁹ Further, by 2001, affected by worldwide over-production, steel prices dropped to their lowest point in twenty years.²⁰ The U.S. steel producers sustained significant

¹⁴ *Id.* at 10-14.

¹⁵ This section is developed based on the author's own previous work. LEE, SAFEGUARD MEASURES, *supra* note 1, at 83-92.

¹⁶ WILLIAM H. BARRINGER & KENNETH J. PIERCE, PAYING THE PRICE FOR BIG STEEL: 30 YEARS OF THE INTEGRATED STEEL COMPANIES' CAPTURE OF U.S. TRADE POLICY 25-34 (2000).

¹⁷ *Id.*

¹⁸ The unit cost per metric ton of steel in the United States was lower than that in Japan in 1958 but became twice as high as that in Japan by 1976. *Id.* at chart I-1.

¹⁹ *Id.* at 35-38.

²⁰ *A Tricky Business: Steel Companies Feel the Heat*, ECONOMIST, June 30, 2001, available at <http://www.people.fas.harvard.edu/~hiscox/TrickyBusiness.htm>

losses, and no fewer than eighteen U.S. steel companies filed for bankruptcy between January 1998 and June 2001. This declining state of the U.S. steel industry resulted in significant job loss, as many as 5,000 in average a year since 1990.²¹

The job loss and the downward pressure on prices were not unique in the U.S. steel industry, but were prevalent throughout the world due to the substantial increased productivity. Smaller mills became unprofitable and economies of scale induced them to merge into more sizable ones, which then led to excess production capacity. Over-production, which was known to exceed needed capacity as much as 20%,²² caused a long-term downward trend in prices and made the condition of the steel industry particularly vulnerable to the demand fluctuations that typically occur during economic recessions.

Facing this crisis, the well-organized U.S. steel producers petitioned the federal government for assistance. The U.S. government, affected by the significant political influence of the steel unions and producers, offered extensive aid, including various trade protection measures and financial subsidies. Steel products have received more protection from trade measures, such as numerous antidumping actions and countervailing duties, than any other U.S. industry.²³ The financial support that resulted from negotiations with the federal government included tens of billions of dollars in aid,²⁴ comprised of pension bailouts, tax refunds, environmental regulation exemption subsidies, "Buy America" requirements and emergency loan guarantee schemes.²⁵

The recent U.S. steel safeguards were considered yet another attempt in a long line of protections offered to this troubled industry, delaying rather than accelerating the industry's inevitable structural adjustment. The application of the U.S. safeguard measures was considered particularly improper. Such measures are predicated on an increase in imports that causes or threatens to cause serious injury to the domestic industry, but steel

²¹ *Id.*

²² *Id.*

²³ For example, in 2002, the U.S. government applied about half of the existing 264 antidumping actions to the imports of steel products, although steel accounts for only two percent of total imports. In addition, as many as thirty-five countervailing measures were also applied to steel products at the same time. U.S. Int'l Trade Admin., *Antidumping and Countervailing Duty Statistics* (Antidumping and Countervailing Duty Orders in effect as of July 26, 2002), at <http://ia.ita.doc.gov/stats/ad-1980-2003.html> (last modified Feb. 6, 2004).

²⁴ A recent study revealed that the steel lobby had won at least \$16 billion (\$21.8 billion in constant 1999 dollars) in federal subsidies for domestic steel makers from U.S. taxpayers with additional billions received from state and local governments. BARRINGER & PIERCE, *supra* note 16, at 25-34.

²⁵ *Id.*

imports had declined in recent years in most categories.²⁶ Many believed that the U.S. steel safeguards were motivated primarily by the Bush Administration's pursuit of political support from the steel union for the upcoming Congressional elections as well as its pursuit of support for a Congressional bill giving the President trade negotiating ("fast-track") authority.²⁷

B. Development of U.S. Steel Safeguards

As mentioned above, the U.S. steel safeguards faced strong and open opposition from United States' major trading partners.²⁸ What was alarming during the initial stages of the application of the U.S. steel safeguards was that the United States seemed to have made little effort to avoid trade disputes with its concerned trading partners through adequate consultations. The Agreement on Safeguards ("Safeguards Agreement" or "SA") requires a Member proposing to adopt such a measure to provide an adequate opportunity for prior consultations with those Members having a substantial export interest.²⁹ A Member proposing to apply a safeguard measure must provide an opportunity for consultation with a view toward developing a discourse regarding the measure in which affected Members participate in order to achieve a balance in the previously negotiated concessions to be upset by the application of the safeguard.³⁰

As discussed below, the United States did not provide adequate consultation opportunities sufficiently prior to its application of the steel safeguards. Nevertheless, in attempting to influence the United States, major steel exporting Members rushed to the consultations with the United States but failed to resolve the growing dispute. The United States' major trading partners, including the European Communities, China, Korea, Japan, New Zealand, Switzerland, Norway and Brazil, requested the establishment of a panel to review the consistency of the U.S. steel safeguards with GATT/WTO rules. The panel was subsequently

²⁶ According to the U.S. Census Bureau, U.S. imports of steel products decreased substantially from 34,433,707 metric tons in 2000 to 27,350,808 metric tons in 2001. U.S. Census Bureau, U.S. Imports for Consumption of Steel Products, Exhibit 1, *available at* <http://www.census.gov/foreign-trade/Press-Release/2001pr/12/steel/steelf.pdf> (last modified Feb. 21, 2002).

²⁷ In fact, after the Congressional vote on the trade promotion authority legislation, the Administration granted a large number of exemptions from the measures, which seems to provide support for this view. These exemptions were criticized by U.S. steel producers and unions. Barry C. Lynn, *The Real Steel Deal*, THE AMERICAN PROSPECT, Dec. 30, 2002, at 17.

²⁸ Canada and Mexico, however, did not raise any objections to the U.S. steel safeguards since their steel exports were exempted from the safeguard list.

²⁹ Safeguards Agreement, *supra* note 3, art. 12.3.

³⁰ *Id.* For further discussion of this issue, see LEE, SAFEGUARD MEASURES, *supra* note 1, ch. 11.3.

established to review the biggest trade dispute in recent history.³¹ In addition, several Members, including the European Communities, Japan, China, Switzerland and Norway also proposed extensive retaliations prompted by the U.S. steel safeguards.³²

The danger of a worldwide trade war, which could have been triggered by the adoption of a series of retaliatory measures, was narrowly averted by later negotiations. When the United States agreed to reduce restrictions on a number of steel products, as much as twenty-five percent in terms of tonnage, from its safeguards list,³³ talk of retaliatory measures temporarily ceased. Had the United States conducted consultations seriously enough to accommodate the concerns of the steel exporting countries in its implementation of the steel safeguards, rather than waiting until it was threatened with retaliation, this dangerous confrontation might not have

³¹ WTO Secretariat, *Definitive Safeguard Measures on Imports of Certain Steel Products, Constitution of the Panel Established at the Request of the European Communities, Japan, Korea, China, Switzerland, Norway, New Zealand and Brazil*, WT/DS248/15, WT/DS249/9, WT/DS251/10, WT/DS252/8, WT/DS253/8, WT/DS254/8, WT/DS258/12, WT/DS259/11 (Aug. 12, 2002), available at http://www.wto.org/english/docs_e/docs_e.htm.

³² WTO Counsel for Trade in Goods, Committee on Safeguards, *Immediate Notification Under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed Suspension of Concessions and Other Obligations Referred to in Paragraph 2 of Article 8 of the Agreement on Safeguards, European Communities*, G/SG/43 (May 15, 2002); WTO Counsel for Trade in Goods, Committee on Safeguards, *Immediate Notification Under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed Suspension of Concessions and Other Obligations Referred to in Paragraph 2 of Article 8 of the Agreement on Safeguards, Japan*, G/SG/44 (May 21, 2002); WTO Counsel for Trade in Goods, Committee on Safeguards, *Immediate Notification Under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed Suspension of Concessions and Other Obligations Referred to in Paragraph 2 of Article 8 of the Agreement on Safeguards, Norway*, G/SG/45 (May 21, 2002); WTO Counsel for Trade in Goods, Committee on Safeguards, *Immediate Notification Under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed Suspension of Concessions and Other Obligations Referred to in Paragraph 2 of Article 8 of the Agreement on Safeguards, The People's Republic of China*, G/SG/46 (May 21, 2002); WTO Counsel for Trade in Goods, Committee on Safeguards, *Immediate Notification Under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed Suspension of Concessions and Other Obligations Referred to in Paragraph 2 of Article 8 of the Agreement on Safeguards, Switzerland*, G/SG/47 (May 22, 2002), all available at http://www.wto.org/english/docs_e/docs_e.htm.

³³ WTO Counsel for Trade in Goods, Committee on Safeguards, *Notification Pursuant to Article 12.1(C) of the Agreement on Safeguards Upon Taking a Decision to Apply a Safeguard Measure, United States*, G/SG/N/10/USA/6/Suppl.7, G/SG/N/11/USA/5/Suppl.7 (Sept. 17, 2002), available at http://www.wto.org/english/docs_e/docs_e.htm. Despite the position of the U.S. government that the exclusion was based on U.S. consumer need and on the determination that the exclusion would not undermine the effectiveness of the safeguard measure, it was widely considered that the purpose of the exclusion was to avoid serious trade conflict with the major trading partners of the United States. See Jeffrey Sparshott, *E.U. Retaliatory Trade Barriers Go Up*, WASH. TIMES, May 1, 2004, at C10.

taken place.³⁴

The WTO panel found that the U.S. steel safeguards were not consistent with the relevant GATT/WTO rules.³⁵ The United States appealed this panel decision, and the Appellate Body upheld the panel decision, albeit with some modification,³⁶ which was subsequently accepted and implemented by the United States. As a result, the proposed retaliatory measures against U.S. exports were never put into effect, and the United States subsequently withdrew the steel safeguards.³⁷

While the U.S. concessions and final withdrawal of the steel safeguards prevented a direct trade war, the controversial U.S. steel safeguards triggered protectionism in other countries. Fearing possible diversion of steel products from the protected U.S. market, some Members, including the European Communities, China and Hungary, applied provisional safeguard measures against their own steel imports while initiating investigations for definitive safeguard measures.³⁸ The European Communities have made an affirmative injury determination and decided to apply a definitive safeguard measure on imports of seven steel products.³⁹

³⁴ On the other hand, such accommodation in the initial consultations may not have been politically palatable, as the Bush Administration had tried to garner political support from steel producing regions by implementing effective steel safeguards.

³⁵ Report of the Panel, *supra* note 6. The author also expressed a view that the U.S. steel safeguards were inconsistent with the relevant GATT/WTO rules. LEE, SAFEGUARD MEASURES, *supra* note 1, at 166-68.

³⁶ Report of the Panel, *supra* note 6.

³⁷ WTO Committee on Safeguards, *Notification Pursuant to Article 12.1(C) of the Agreement on Safeguards Upon Taking a Decision to Apply a Safeguard Measure, United States*, G/SG/N/10/USA/6/Suppl.8 (Dec. 12, 2003), available at http://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm.

³⁸ WTO Committee on Safeguards, *Notification Under Article 12.1(A) of the Agreement on Safeguards on Initiation of an Investigation and the Reasons for it, Notification Under Article 12.4 of the Agreement on Safeguards Before Taking a Provisional Safeguard Measure Referred to in Article 6, Notification Under Article 9, Footnote 2 of the Agreement on Safeguards, European Communities*, G/SG/N/7/EEC/1 (Apr. 2, 2002); WTO Committee on Safeguards, *Notification Under Article 12.1(A) of the Agreement on Safeguards on Initiation of an Investigation and the Reasons for it, Notification Under Article 12.4 of the Agreement on Safeguards Before Taking a Provisional Safeguard Measure Referred to in Article 6, and Notification Under Article 9, Footnote 2 of the Agreement on Safeguards, The People's Republic of China*, G/SG/N/7/CHN/1 (May 23, 2002); WTO Committee on Safeguards, *Notification Under Article 12.1(A) of the Agreement on Safeguards on Initiation of an Investigation and the Reasons for it, Notification Under Article 12.4 of the Agreement on Safeguards Before Taking a Provisional Safeguard Measure Referred to in Article 6, Notification Under Article 9, Footnote 2 of the Agreement on Safeguards, Hungary*, G/SG/N/7/HUN/1 (May 23, 2002), all available at http://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm.

³⁹ Commission Regulation 1694/2002 of September 27 Imposing Definitive Safeguard Measures Against Imports of Certain Steel Products, 2002 O.J. (L 261). See also WTO Committee on Safeguards, *Notification Under Article 12.1(B) of the Agreement on*

Hungary and China also applied their own safeguards.⁴⁰ Canada, whose steel exports were not subject to the U.S. steel safeguards, also initiated an investigation for the application of a safeguard measure and subsequently made a positive injury determination.⁴¹ Several other Members, including Chile, the Czech Republic, Mexico, Poland and Bulgaria have also initiated investigations for safeguard measures against steel products, creating a danger of the worldwide steel protections.

The worst scenario, leading to a chaotic sprawl of “protections,” one after another, was clearly in sight. Thus, a significant threat to multilateralism in the world trading system had emerged. The current trading system is based on the mutual commitments on trade concessions and on the respect for the multilateral legal framework. Surely, multilateralism in international trade will not be sustainable in an environment where unilateral protectionism is rampant. Use of safeguard measures in the absence of adequate legal justifications may tempt other trading nations to respond in kind in order to protect domestic producers. It is therefore necessary to review the legal justifications for the U.S. steel safeguards under the WTO rules. The next section does so with reference to the relevant GATT/WTO rules, namely Article XIX of the GATT and the WTO Agreement on Safeguards.⁴²

Safeguards on Finding a Serious Injury or Threat Thereof Caused by Increased Imports, Notification Pursuant to Article 12.1(C) of the Agreement on Safeguards, European Communities, G/SG/N/8/EEC/1, G/SG/N/10/EEC/1 (Sept. 11, 2002), available at <http://www.wto.org>.

⁴⁰ WTO Committee on Safeguards, *Notification Under Article 12.1(C) of the Agreement on Safeguards on Finding a Serious Injury or Threat Thereof Caused by Increased Imports, Notification Pursuant to Article 12.1(B) of the Agreement on Safeguards, Notification Under Article 9, Footnote 2 of the Agreement on Safeguards, Hungary, G/SG/N/10/HUN/1* (Apr. 7, 2003), available at <http://www.wto.org>; WTO Committee on Safeguards, *Notification Under Article 12.1(B) of the Agreement on Safeguards on Finding a Serious Injury or Threat Thereof Caused by Increased Imports, Notification Pursuant to Article 12.1(C) of the Agreement on Safeguards, Notification Under Article 9, Footnote 2 of the Agreement on Safeguards, People's Republic of China, G/SG/N/10/CHN/1* (Nov. 5, 2002), available at <http://www.wto.org>.

⁴¹ WTO Committee on Safeguards, *Notification Under Article 12.1(A) of the Agreement on Safeguards on Initiation of an Investigation and the Reasons for it, Canada, G/SG/N/6/CAN/1* (Apr. 2, 2002), available at <http://www.wto.org>; WTO Committee on Safeguards, *Notification Under Article 12.1(B) of The Agreement on Safeguards on Finding a Serious Injury or Threat Thereof Caused by Increased Imports, Canada, G/SG/N/8/CAN/1* (July 19, 2002), available at <http://www.wto.org>. However, Canada did not decide to apply the safeguard measure.

⁴² GATT, *supra* note 2, at art. XIX.

III. LEGAL ISSUES IN THE APPLICATION OF THE U.S. STEEL SAFEGUARDS

A. Unforeseen Developments

Paragraph 1(a) of Article XIX of the GATT provides,

If, *as a result of unforeseen developments* and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.⁴³

The “unforeseen developments” clause was not included in the subsequent Agreement on Safeguards,⁴⁴ and a question arose as to whether this particular clause imposes any substantive legal requirement on a Member applying a safeguard measure.⁴⁵ This question was posed to the

⁴³ GATT, *supra* note 2, art. XIX, ¶ 1(a) (emphasis added).

⁴⁴ Article 2.1 of the Agreement on Safeguards, which lays out the general conditions for the application of a safeguard measure, does not include this “unforeseen development clause.” It provides,

A Member may apply a safeguard measure to a product only if that Member has determined that such 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.

Safeguards Agreement, *supra* note 3, art. 2.1 (Footnote omitted).

⁴⁵ This question was first raised in the WTO panel cases. See *Korea – Definitive Safeguard Measure on the Imports of Certain Dairy Products*, Report of the Panel, WT/DS98/R (June 21, 1999) [hereinafter *Panel Report on Korea – Dairy Products*]; *Korea – Definitive Safeguard Measure on the Imports of Certain Dairy Products*, Report of the Appellate Body, WT/DS98/AB/R (Dec. 14, 1999) [hereinafter *Appellate Body Report on Korea – Dairy Products*]; *Argentina – Safeguard Measure on the Imports of Footwear*, Report of the Panel, WT/DS121/R (June 25, 1999) [hereinafter *Panel Report on Argentina – Footwear*]; *Argentina – Safeguard Measure on the Imports of Footwear*, Report of the Appellate Body, WT/DS121/AB/R (Dec. 14, 1999) [hereinafter *Appellate Body Report on Argentina – Footwear*], all available at <http://www.wto.org>. See also the following WTO cases (concerning safeguard measures referenced throughout this paper): *United States – Definitive Safeguard Measures on Imports of Wheat Gluten From the European Communities*, Report of the Panel, WT/DS166/R (July 31, 2000) [hereinafter *Panel Report on United States – Wheat Gluten*]; *United States – Definitive Safeguard Measures on Imports of Wheat Gluten From the European Communities*, Report of the Appellate Body,

Appellate Body of the WTO DSB, which ruled that a Member adopting a safeguard measure must demonstrate as a matter of fact the existence of “unforeseen developments” leading to an increase in imports that caused serious injury or its threat to the domestic industry, pursuant to paragraph 1(a) of Article XIX.⁴⁶

There has been a controversy as to whether this “unforeseen developments” clause should be interpreted to impose any legal requirement *at all*. In fact, the panels in *Korea – Dairy Products* and *Argentina – Footwear* ruled that the “unforeseen developments” clause in Article XIX creates no legal obligation.⁴⁷ Furthermore, the justification of the Appellate Body ruling on this issue has been questioned.⁴⁸ Despite this controversy, the Appellate Body’s position has remained unchanged, and the subsequent panels have followed this precedent.⁴⁹

In their complaint filed with the WTO, the countries opposing the U.S.

WT/DS166/AB/R (Dec. 22, 2000) [hereinafter *Appellate Body Report on United States – Wheat Gluten*]; *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, Report of the Panel, WT/DS177/R, WT/DS178/R (Dec. 21, 2000) [hereinafter *Panel Report on United States – Lamb Meat*]; *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, Report of the Appellate Body, WT/DS177/AB/R, WT/DS178/AB/R (May 1, 2001) [hereinafter *Appellate Body Report on United States – Lamb Meat*]; *United States – Definitive Safeguard Measures on Imports of Steel Wire Rod and Circular Welded Carbon Quality Line Pipe*, Report of the Panel, WT/DS202/R (Oct. 29, 2001) [hereinafter *Panel Report on United States – Line Pipe*], *United States – Definitive Safeguard Measures on Imports of Steel Wire Rod and Circular Welded Carbon Quality Line Pipe*, Appellate Body Report, WT/DS202/AB/R (Feb. 15, 2002) [hereinafter *Appellate Body Report on United States – Line Pipe*]; *Chile–Price Band System and Safeguard Measures relating to Certain Agricultural Products*, Report of the Panel, WT/DS207/R (May 3, 2002) [hereinafter *Panel Report on Chile – Agricultural Products*] (the issues in the case relating to safeguards were not appealed); *Argentina – Definitive Safeguard Measure on Imports of Preserved Peaches*, Report of the Panel, WT/DS238/R (Feb. 14, 2003) [hereinafter *Panel Report on Argentina – Preserved Peaches*] (the panel rulings were not appealed); all available at <http://www.wto.org>; Report of the Panel, *supra* note 6; Report of the Appellate Body, *supra* note 6.

⁴⁶ *Appellate Body Report on Korea – Dairy Products*, *supra* note 45, ¶ 90; *Appellate Body Report on Argentina – Footwear*, *supra* note 45, ¶ 97; *Appellate Body Report on United States – Lamb Meat*, *supra* note 45, ¶¶ 72, 73.

⁴⁷ *Panel Report on Korea – Dairy Products*, *supra* note 45, ¶ 7.42; *Panel Report on Argentina – Footwear*, *supra* note 45, ¶ 8.69. As discussed above, the Appellate Body reversed those panel positions and ruled that the “unforeseen developments” clause does create an affirmative legal obligation to prove the existence of “unforeseen developments.” *Appellate Body Report on Korea – Dairy Products*, *supra* note 45, ¶ 90; *Appellate Body Report on United States – Lamb Meat*, *supra* note 45, ¶¶ 72, 73.

⁴⁸ See LEE, SAFEGUARD MEASURES, *supra* note 1, at 101-107 (concerning the controversy regarding the “unforeseen developments” clause and the applicability of Article XIX).

⁴⁹ Pursuant to the Appellate Body ruling, the recent panel in *Argentina – Preserved Peaches* recognized Members’ obligation to demonstrate “unforeseen developments.” *Panel Report on Argentina – Preserved Peaches*, *supra* note 45, ¶ 7.12.

steel safeguards argued that the United States had failed to adequately demonstrate the existence of “unforeseen developments.”⁵⁰ The United States disagreed, claiming that it had in fact sufficiently identified unforeseen developments.⁵¹ The panel considered this issue, following the standard of review previously affirmed by the Appellate Body⁵² that “the Panel must examine whether the United States demonstrated in its published report, through a reasoned and adequate explanation, that unforeseen developments and the effects of tariff concessions resulted in increased imports causing or threatening to cause serious injury to the relevant domestic producers.”⁵³

The United States argued that it had identified the financial crises that engulfed Southeast Asia and the former U.S.S.R., the continued strength of the United States’ market and persistent appreciation of the U.S. dollar, and the confluence of all of these events, as unforeseen developments.⁵⁴ The complainants responded that, neither standing alone, nor in combination did these events amount to an unforeseen development, as the United States should have foreseen them.⁵⁵ The issue was further complicated by the fact that the original report of the United States International Trade Commission (“USITC”),⁵⁶ which included a discussion of the Asian and Russian crises, did not specifically address the question of “unforeseen developments” and the Second Supplementary Report was subsequently produced to address this issue.⁵⁷ The complainants argued that the Supplementary Report should have been disregarded, as it did not comprise the original USITC report and was an *ex post* attempt to demonstrate the existence of “unforeseen developments.”⁵⁸

Article 3.1 of the SA provides, in relevant part, “The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.” The strictly literal interpretation of this clause seems to indicate that the national

⁵⁰ Report of the Panel, *supra* note 6, ¶ 10.32.

⁵¹ *Id.* ¶ 10.33.

⁵² Appellate Body Report on *United States – Lamb Meat*, *supra* note 45, ¶¶ 103-06.

⁵³ Report of the Panel, *supra* note 6, ¶ 10.38 (footnote omitted). Also citing the previous Appellate Body rulings, the Panel stated that it would examine whether the competent authorities “considered all the relevant facts and had adequately explained how the facts supported the determinations that were made.” *Id.* ¶ 10.39. (Footnote omitted). The Appellate Body subsequently affirmed this Panel approach. See Report of the Appellate Body, *supra* note 6, ¶ 279.

⁵⁴ Report of the Panel, *supra* note 6, ¶ 10.40.

⁵⁵ *Id.*

⁵⁶ U.S. International Trade Commission, *Steel*, USITC Pub.3479, Inv. No. TA-201-73 (Dec. 2001), at <http://www.usitc.gov> (last modified Aug. 25, 2004).

⁵⁷ *Id.* ¶ 10.47.

⁵⁸ *Id.*

authority must publish a comprehensive single report to explain its decision on a safeguard measure. Multiple reports do not seem consistent with this provision.⁵⁹ With respect to the multiple investigation reports produced by the United States, the Panel considered that the national authority's report may be produced in parts as long as they form a coherent and integrated explanation providing satisfaction with the requirements of Article XIX and the Agreement on Safeguards.⁶⁰

In the Panel's view, the timing of the demonstration of "unforeseen developments" is adequate as long as it is made *prior to* the application of a safeguards measure in accordance with the earlier Appellate Body decision.⁶¹ As the Supplementary Report was published *before* the application of the U.S. steel safeguards, the demonstration of unforeseen developments was timely,⁶² although its adequacy was a separate issue. The Panel, therefore, accepted the Supplementary Report as part of the investigation report for its examination and considered the adequacy of the USITC analysis on "unforeseen developments" based on this Report.

In assessing the adequacy of the USITC's explanation of the unforeseen developments, the Panel first considered its explanation of *why* the events were unforeseen and then moved on to consider the explanation of *how* the unforeseen developments resulted in increased imports.⁶³ These considerations were applied to each of the four events listed in the USITC report and to the confluence of those events as explained in the report.

The Panel's holdings as to the basis for the events being unforeseen were as follows: As to the Asian financial crisis, the Panel ruled that the event was not foreseen due to its having taken place well after the conclusion of the Uruguay Round.⁶⁴ As to the Russian financial crisis, the unforeseen developments identified by the USITC were the "unanticipated financial difficulties," in the form of "intense financial disruptions and currency fluctuations" between 1996 and 1999, resulting from the dissolution of the Soviet Union.⁶⁵ The Panel accepted, *arguendo*, that there may have been unforeseen financial disruptions and currency fluctuations between 1996 and 1999 that were thus unforeseen at the conclusion of the Uruguay Round.⁶⁶

⁵⁹ For a further discussion of the adequacy of an investigation report, see LEE, SAFEGUARD MEASURES, *supra* note 1, at 144-45.

⁶⁰ Report of the Panel, *supra* note 6, ¶ 10.50.

⁶¹ Appellate Body Report on United States – Lamb Meat, *supra* note 45, ¶ 72.

⁶² Report of the Panel, *supra* note 6, ¶ 10.54.

⁶³ *Id.* ¶ 10.69.

⁶⁴ The parties agreed that the point in time at which developments should have been unforeseen is that of the completion of the Uruguay Round. *Id.* ¶ 10.74.

⁶⁵ *Id.* ¶ 10.83.

⁶⁶ *Id.* ¶ 10.85.

With respect to the strength of the U.S. market as well as the appreciation of the U.S. dollar vis-à-vis other foreign currencies, the Panel was of the view that the USITC considered neither of those factors to be stand-alone “unforeseen developments,” but considered them along with the other alleged unforeseen developments and as part of a set of world events which *together* constituted unforeseen developments.⁶⁷ Therefore, the Panel did not reach the issue of whether such factors could individually constitute unforeseen developments.⁶⁸ The United States, however, argued that the Panel acknowledged that the confluence of those factors could be considered unforeseen within the context of Article XIX.⁶⁹

In the second analytical prong of the unforeseen development issue (i.e., *how* the unforeseen developments resulted in increased imports), the Panel probed the logical connection between the unforeseen developments and the increased imports.⁷⁰ To pass this prong of the test, the authority must make a coherent demonstration of a direct connection between unforeseen developments and increased imports. In the Panel’s review, the logical connection was not properly drawn in the USITC Report. The initial USITC Report did not identify or discuss the unforeseen events in terms of an explanation of a resulting increase in injurious imports. Thus, the Panel ruled that the explanation failed to establish the link between the unforeseen developments and the increase in imports.⁷¹

The Panel reasoned that the Secondary Supplementary Report only stated the *overall effects* of the Asian and Russian financial crises, together with the strong U.S. dollar and economy, to displace steel to other markets without any specific data to support this USITC conclusion.⁷² In affirming the Panel decision, the Appellate Body emphasized the national investigating authority’s obligation to provide reasoned conclusions with respect to unforeseen developments, stating that it is not for panels to find support for such conclusions “by cobbling together disjointed references scattered throughout a competent authority’s report.”⁷³

The Panel acknowledged that the USITC Report described a plausible set of unforeseen developments that may have resulted in increased imports to the United States from various sources, but in the Panel’s view, the USITC failed to demonstrate that such developments actually resulted in

⁶⁷ *Id.* ¶¶ 10.89, 10.93.

⁶⁸ Report of the Panel, *supra* note 6, ¶ 10.94.

⁶⁹ *Id.* ¶ 10.100.

⁷⁰ Report of the Panel, *supra* note 6, ¶ 10.104.

⁷¹ *Id.* ¶ 10.116. The Panel also noted that the initial USITC Report does not even specifically refer to the issue of unforeseen developments, and there are only *ad hoc* references to the Asian and Russian financial crises. *Id.* ¶¶ 10.116 -10.118.

⁷² *Id.* ¶¶ 10.121-10.123.

⁷³ Report of the Appellate Body, *supra* note 6, ¶ 326.

increased steel imports into the United States injurious to the domestic producers.⁷⁴ On appeal, the United States argued that the Panel had failed to consider relevant data appearing in other sections of the USITC Report that supported the USITC's finding that "unforeseen developments" had resulted in increased imports. The Appellate Body denied that the Panel had such an obligation, as it is for the national investigating authority and not for the Panel to provide the adequate, coherent reasoning.⁷⁵

In sum, the USITC's determination of "unforeseen developments" was inadequate since it did not outline the logical connection between the unforeseen developments and injury to the domestic industry with respect to the specific steel products at issue.⁷⁶ A consideration of the relevant steel products would have been necessary, since the steel producers in the United States were of the view that the effect of the developments was different on different steel products at issue.⁷⁷ The Appellate Body also affirmed the Panel's holding that the investigating authority must demonstrate "unforeseen developments" with each product subject to a safeguard measure.⁷⁸

Despite the Panel and Appellate Body decisions, it is not altogether clear that the requirement of "unforeseen developments," which the Appellate Body imported from the old Article XIX and not from the SA, has a legitimate place in safeguard jurisprudence. The history of the Uruguay Round negotiations on the safeguard rules suggests that the negotiators did not intend to include the "unforeseen developments" clause as a legal requirement in the new safeguard measures because it did not appear in the draft agreement, while they repeated all important provisions in the new Agreement.⁷⁹ In fact, there has been an argument as to whether the old safeguard rules under Article XIX are still applicable *at all*, even after the settlement of the Agreement on Safeguards.⁸⁰

The ambiguous nature of the "unforeseen developments" clause is another problem. The term used in the original clause is "*unforeseen*" and

⁷⁴ Report of the Panel, *supra* note 6, ¶¶ 10.121, 10.123.

⁷⁵ Report of the Appellate Body, *supra* note 6, ¶ 329.

⁷⁶ Report of the Panel, *supra* note 6, ¶¶ 10.124-10.126.

⁷⁷ *Id.* ¶¶ 10.127.

⁷⁸ Report of the Appellate Body, *supra* note 6, ¶ 316.

⁷⁹ In the initial draft agreement, the "unforeseen developments" clause was included, and a 1990 draft amplified it by specifying the obligation to establish an "unforeseen, sudden and significant increase." By mid-1990, this clause was removed from the text altogether since both the United States and European Communities objected this terminology of being too difficult and restrictive to apply. PIERRE DIDIER, *LES PRINCIPAUX ACCORDS DE L'OMC ET LEUR TRANSPOSITION DANS LA LOI COMMUNAUTAIRE EUROPÉENNE* (1997), at 271-272. For further discussions of the history of safeguard rules, see LEE, *SAFEGUARD MEASURES*, *supra* note 1, ch. 3.

⁸⁰ LEE, *SAFEGUARD MEASURES*, *supra* note 1, ch. 8.1.

not “*unforeseeable*,” which refers to the subjective, rather than objective, state of perception about the future event. The Appellate Body, having acknowledged this subjectivity, made a distinction between “unforeseen” and “unforeseeable.”⁸¹ Nonetheless, the Panel in *U.S. Steel Safeguards* opined that the standard is not what the specific negotiators at trade negotiations making import concessions had in mind, but rather what they could have reasonably expected,⁸² which seems to blur the earlier distinction made by the Appellate Body between “unforeseen” and “unforeseeable.” It is doubtful that there can be any clear standard to determine “unforeseen developments,” without deviating from the language in the provision, which indicates that the subjective state of foresight, or lack thereof is difficult to determine by objective standards.⁸³ Certain provisions in the SA also seem to have been drafted on the presumption the SA is the sole articulation of the international rules on safeguards.⁸⁴ The controversies surrounding the requirement of “unforeseen developments” under old Article XIX will likely continue beyond *U.S. Steel Safeguards*.

B. Increase in Imports

To be legitimate, safeguard measures must be predicated on increased imports. Article 2.1 of the SA provides in the relevant part,

A Member may apply a safeguard measure to a product *only if* that Member has determined that such 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.⁸⁵

The increase in imports is also one of the eight factors to consider in the injury determination under Article 4.2(a) of the SA, discussed below.

The U.S. steel safeguards were controversial in part because the alleged increase in steel imports was disputed. General steel import statistics show decreasing rather than increasing import trends toward the end of the investigating period. For instance, according to the U.S. Census Bureau, steel product imports decreased significantly from 34,433,707

⁸¹ *Appellate Body Report on Korea – Dairy Products*, *supra* note 45, ¶ 84.

⁸² Report of the Panel, *supra* note 6, ¶ 10.43.

⁸³ For more discussion, see Y.S. Lee, *Destabilization of the Discipline on Safeguards? – Inherent Problems with the Continuing Application of Article XIX after the settlement of the Agreement on Safeguards*, *supra* note 1, at 1236-42.

⁸⁴ See *id.*

⁸⁵ Safeguards Agreement, *supra* note 3, art. 2.1 (emphasis added).

metric tons in 2000 to 27,350,808 metric tons in 2001.⁸⁶ The Panel reviewed the United States determination on the increased imports with respect to the steel products subject to the U.S. steel safeguards.

Following the Appellate Body's *Argentina – Footwear* ruling, the Panel held that the increase in imports must reflect "a certain degree of recentness, suddenness, sharpness and significance."⁸⁷ The increase in imports needs not continue up to the period immediately preceding the imposition of safeguards, nor up to the very end of the period of investigation.⁸⁸ Would a decrease in imports at the end of the period of investigation prevent a finding of increased imports? According to the Panel, that would depend on the duration and the degree of the decrease, as well as the nature of the increase that took place.⁸⁹ An investigating authority is not obligated to consider any data that becomes available after it has made its determination.⁹⁰

The Panel reviewing the U.S. steel safeguards made measure-by-measure assessments of the USITC determinations, focusing on each specific product. Due to decreasing import trends toward the end of the investigation period, the Panel ruled that no adequate and reasoned explanation was offered to prove an increase in imports for certain carbon flat-rolled steel products (CCRFS), hot-rolled bar, and stainless steel rods, and that the claimed increases in imports were not sufficiently recent.⁹¹ The Appellate Body, emphasizing the national investigating authority's responsibility to examine import trends, affirmed.⁹²

On the other hand, the Panel found that the USITC had provided an adequate and reasoned explanation of increased imports with respect to cold-finished bar, rebar, welded pipe, fittings, flanges and tool joints (FFTJ) and stainless steel bar where there were significant increases in imports in the recent past from the determination as supported by the overall trends. The difference from the products noted above was that imports of these products reflected sharp increases followed by relatively insignificant

⁸⁶ U.S. Census Bureau, U.S. Imports for Consumption of Steel Products, *supra* note 26, at Ex. 1.

⁸⁷ Report of the Panel, *supra* note 6, ¶ 10.167. The Appellate Body subsequently confirmed this Panel position. Report of the Appellate Body, *supra* note 6, ¶ 361.

⁸⁸ Report of the Panel, *supra* note 6, ¶ 10.162.

⁸⁹ *Id.* ¶ 10.163.

⁹⁰ *Id.* ¶ 10.173.

⁹¹ *Id.* ¶¶ 10.178-10.187, 10.201-10.210, 10.264-10.277.

⁹² Report of the Appellate Body, *supra* note 6, ¶¶ 369, 376, 383, 399. The Appellate Body disagreed with the Panel's conclusion regarding stainless steel rods, but it nonetheless supported the Panel finding that the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination of increased imports of this product. *Id.* ¶¶ 395-99.

drops.⁹³

Where the USITC Commissioners had made divergent findings on the increased imports, as in the case of tin mill products and stainless steel wire, the Panel ruled that it was impossible to reconcile these findings, given that they were based on differently defined products.⁹⁴ The Panel considered that a Member is not allowed to base under Articles 2.1 and 3.1 of the Agreement on Safeguards a safeguard measure “on a determination supported by a set of explanations each of which is different and impossible to reconcile with the other.”⁹⁵ Here, the Appellate Body disagreed with the Panel and reversed its decision, concluding that the affirmative findings based on different product groupings are not necessarily mutually exclusive.⁹⁶ The Appellate Body was of the view that nothing in the SA prevents the national investigating authority from setting out multiple findings to support its determination and that it is the Panel’s obligation to consider each of them to assess if any one of them provides a reasoned and adequate explanation of its final determination.⁹⁷

This Appellate Body decision raises questions. The Appellate Body stated, “the Panel should have continued its enquiry by examining the views of the three Commissioners separately, in order to ascertain whether one of these sets of findings contained a reasoned and adequate explanation for the USITC’s ‘single institutional determination’ on tin mill products.”⁹⁸ Does this language suggest that the investigating authority has provided a reasoned conclusion when multiple interpretations are not reconciled with one another, but only one of them is found adequate and reasonable to support the determination? If so, is this position consistent with the relevant requirement under the SA?

⁹³ Report of the Panel, *supra* note 6, ¶¶ 10.214-10.215, 10.224, 10.233, 10.244, 10.253-10.254. The panel confined its analysis of the existence of import increases to basic economic statistics, leaving the examination of causation for a later prong of the test of safeguards’ validity, that of Article 4.2(b), as discussed *infra. Id.* ¶ 10.255.

⁹⁴ *Id.* ¶ 10.194. Some Commissioners believed that those products should be included together in a larger category of products and the others considered them separate products. The Commissioners’ views also diverged regarding injury determinations. The Panel further explained, “For the purposes of the Agreement on Safeguards, with regard to, for instance, the question of whether imports have increased, it makes a difference whether the product at issue is tin mill or a much broader category called CCFRS and containing tin mill products. The difference is that the import numbers for different product definitions will not be the same.” *Id.* ¶ 10.195. *See also, id.* ¶ 10.261 (regarding stainless steel wire).

⁹⁵ *Id.* ¶¶ 10.195, 10.262

⁹⁶ The Appellate Body stated, “We do not believe that an affirmative finding with respect to a broad product grouping, on the one hand, and an affirmative finding with respect to one of the products contained in that broad product grouping, on the other hand, are necessarily, mutually exclusive.” Report of the Appellate Body, *supra* note 6, ¶ 413.

⁹⁷ *Id.* ¶ 414.

⁹⁸ *Id.* ¶ 416.

Article 3.1 provides, “The competent authorities shall publish a report setting forth their findings and *reasoned* conclusions reached on all pertinent issues of fact and law.”⁹⁹ How can such reasoned conclusions be made if the explanations offered for the “single institutional determination”¹⁰⁰ cannot be reconciled with one another? The Appellate Body opined that the SA does not necessarily bar safeguards whose justification relies on multiple explanations that are not reconciled with one another. Nonetheless, what is subject to judicial review is the adequacy of the explanations offered by the national investigating authority and not that of each explanation by the individual members of these authorities.

This raises the issue of the Panel’s role in evaluating the explanation of import increases proffered by an investigating authority. The Panel does not bear the burden of justifying a safeguard measure based on an adequate and reasonable explanation. That proof is for the country imposing the safeguard. However, the Panel seems to be placed in just that position, given that Article 3.1 does not require the investigating authority to justify its own decisions *after* internally reconciling whatever disagreements that the members within the authority may have. Further judicial clarification would seem necessary on this point.

C. Parallelism

One of the most important policy provisions of the SA is the elimination of discriminatory and arbitrary import restrictions.¹⁰¹ The question of whether a Member should be allowed to apply a safeguard measure selectively on the basis of the origin of the imported product was the subject of much discussion during the Uruguay Round.¹⁰² After lengthy negotiations, the participants agreed to allow safeguards regardless of the source of imports to prevent arbitrary trade discrimination. The finally agreed language is as follows: “Safeguard measures shall be applied to a product being imported *irrespective of its source*.”¹⁰³ This provision affirms the MFN application of safeguard measures and does not in principle allow Members to discriminate among exporters in applying safeguards.

On the other hand, for imports from countries with which a Member has free trade agreements (“FTAs”), the Member may well wish to exempt such products from safeguards. In the steel safeguards, the United States

⁹⁹ Safeguards Agreement, *supra* note 3, art. 3.1 (emphasis added).

¹⁰⁰ Report of the Appellate Body, *supra* note 6, ¶ 416.

¹⁰¹ These restrictions, called “gray-area measures,” were prevalent during 1970s and 1980s, and Article 11 of the SA prohibits *all kinds* of gray-area measures. See LEE, SAFEGUARD MEASURES, *supra* note 1, chs. 3.2 and 8.4 (discussing gray-area measures).

¹⁰² See *id.* at ch. 3 (discussing the negotiation process for the settlement of the SA).

¹⁰³ Safeguards Agreement, *supra* note 3, art. 2.2 (emphasis added).

exempted steel imports from Canada, Mexico, Israel and Jordan, pursuant to its NAFTA obligations.¹⁰⁴ Prior to the U.S. steel safeguards, WTO panels and the Appellate Body had already made it clear that the most-favored-nation ("MFN") requirement (non-discriminatory application of safeguards) of Article 2 does not allow a Member to consider injury based on imports from all sources and then exempt the imports from some countries from the scope of its safeguard measure.¹⁰⁵ In *Line Pipe*, the Appellate Body ruled that any gap between the scope of injury assessment and the scope of safeguard measure is justified *only if* the Member establishes explicitly that imports from sources covered by the measure satisfy the conditions for the application of a safeguard measure under Articles 2.1 and 4.2 of the SA.¹⁰⁶ This requirement ensures parallelism between the scope of injury assessment and the scope of the application of the safeguard.

Thus, under the applicable WTO precedent, the exemptions in the U.S. steel safeguards would run afoul of Article 2.2's parallelism requirement under normal circumstances. However, if the U.S. investigative body were to make a positive injury determination based solely on imports from countries that were not exempt from its safeguards it would arguably comply with Article 2.2.¹⁰⁷ The *U.S. Steel Safeguards* Panel found that when the determination and the eventual measure do not correspond in terms of scope, to uphold the safeguard, Members must explicitly establish that imports from the sources studied satisfy the conditions for safeguard action.¹⁰⁸

What evidence, then, is required to establish that subjecting imports to safeguard measures with exemptions is legal?¹⁰⁹ The United States argued that a formal conclusion by the competent authority as to whether non-FTA imports have caused serious injury is sufficient, and would not require a recitation of each step of the analytical process leading to that conclusion.¹¹⁰ The Panel disagreed, ruling that beyond deference to a finding by domestic authorities, an adequate, reasoned explanation of the conclusions would be

¹⁰⁴ Proclamation No. 7529, *supra* note 7, ¶¶ 8, 11.

¹⁰⁵ *Panel Report on United States – Wheat Gluten*, *supra* note 45, ¶¶ 8.176-8.178, *Appellate Body Report on United States – Wheat Gluten*, *supra* note 45, ¶¶ 98-100; *Appellate Body Report on United States – Line Pipe*, *supra* note 45, ¶¶ 178-181.

¹⁰⁶ *Appellate Body Report on United States – Line Pipe*, *supra* note 45, ¶ 183.

¹⁰⁷ In *U.S. Steel Safeguards*, the U.S. contended that the USITC's analysis in the Second Supplementary Report, read in conjunction with the initial USITC Report, satisfies the requirement of parallelism. *See Report of the Panel*, *supra* note 6, ¶ 10.587.

¹⁰⁸ *Report of the Panel*, *supra* note 6, ¶ 10.592. The United States argued that there is no requirement for the explicit establishment in the SA, but the Appellate Body affirmed the Panel position. *Report of the Appellate Body*, *supra* note 6, ¶ 444.

¹⁰⁹ *Id.* ¶ 10.594.

¹¹⁰ *Id.* ¶ 10.592.

required to support a determination that the products covered in the measure alone have caused serious injury to the domestic industry.¹¹¹

Making measure-by-measure assessments to determine whether the United States fulfilled the requirement of parallelism, the Panel concluded it had not. In all product categories, the Panel found that the United States had failed to explicitly establish that imports fulfilled the conditions for the application of a safeguard measure. In fact, the United States failed to prove the elements required under the SA to show that the non-exempt imports caused injury to the domestic industry. A few conclusory paragraphs in the Second Supplementary Report commenting on the effect of the exclusion were insufficient.¹¹² The Panel also stressed that the causal effects of excluded imports were not adequately addressed under Article 4.2(b) of the SA.¹¹³

On appeal, the United States argued that nothing in the SA required a distinct or explicit analysis of imports from sources *not* subject to the measure.¹¹⁴ The Appellate Body affirmed the Panel decision, finding that the possible injurious effects that excluded imports may have on the domestic industry must not be attributed to imports included in the safeguard measure pursuant to Article 4.2(b).¹¹⁵ The Appellate Body was also of the view that the Member must make a single joint determination of injurious impact during the investigative phase, rather than making separate

¹¹¹ *Id.* ¶¶ 10.195-10.196.

¹¹² With respect to CCFRS, the Panel opined that there were analytical flaws in the USITC report. First, the causal effects of the excluded products were not adequately considered. Second, the USITC discussion of “non-NAFTA imports” still included the imports from Israel and Jordan, which were excluded from the U.S. steel safeguards and therefore should have been excluded along with NAFTA imports in the USITC analysis. *Id.* ¶¶ 10.601–10.609. The Panel made the same conclusions with respect to the other eight product categories. *Id.* ¶¶ 10.623, 10.633, 10.643, 10.653, 10.660, 10.670, 10.680, 10.692. The split of opinions among the USITC Commissioners with respect to tin mill products and stainless steel wire were also noted. The Panel did not make the causation analysis on stainless steel rod, but the Panel also concluded that the USITC’s implicit and cursory determination did not amount to the reasoned and adequate explanation required under arts. 2 and 4 of the SA. Appellate Body Report, *supra* note 6, ¶ 10.699.

¹¹³ Article 4.2(b) of the SA provides that:

The [injury] determination . . . shall not be made unless the investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.

Safeguards Agreement, *supra* note 3, art. 4.2(b). See *infra* Section III.D.2. (discussing the issue of causation).

¹¹⁴ Report of the Appellate Body, *supra* note 6, ¶ 447.

¹¹⁵ *Id.*

and partial determinations. To make such a determination, the investigative body must not take into account imports from any country that was excluded from the safeguards, although imports from some of those countries are very small and almost non-existent.¹¹⁶

The Panel and Appellate Body decisions on parallelism impose considerable analytical burdens on a Member applying a safeguard measure involving the exclusion of imports from some select sources. For instance, the United States has a treaty obligation to exempt the imports of some of its trading partners from duties.¹¹⁷ The *Steel* Panel and the Appellate Body decisions seem to indicate that a Member may in fact exempt imports from certain countries from the safeguard measure as long as the requirement of the parallelism is met.

It is noteworthy that the existence of a free trading agreement is not required as a prerequisite to the legal imposition of selective safeguards. If the current rule is that a Member may target imports from a small number of countries, provided the Member explicitly establishes that the imports from those countries alone cause or threaten to cause serious injury, application of MFN safeguards is thrown into question. It is still arguable that this selective application of a safeguard measure is different from the arbitrary and discriminatory application of gray-area measures in the past since the Member will still have to satisfy the injury and causation requirements under the SA.

On the other hand, the Panel in *Line Pipe* found that the authorization of a free trading area under GATT Article XXIV is legal ground for an exclusion: the exclusion is permissible among Members bound by mutual FTAs.¹¹⁸ The Appellate Body, however, avoided ruling on this question, stating that it did not want to “prejudge” an Article XXIV issue.¹¹⁹ The Panel’s analysis of Article XXIV appears correct. Exclusion of imports from a country not party to an FTA could perhaps violate the parallelism requirement under Article 2.2 because it would not have the Article XXIV justification limited to the members of free trade areas. In fact, permitting selective applications of a safeguard measure against imports from one or a small number of countries without any justifying apparatus such as an FTA significantly undermines the agreement on MFN safeguards.¹²⁰

¹¹⁶ *Id.* ¶ 468.

¹¹⁷ NAFTA Implementation Act of 1993, Pub. L. No. 103-182, § 302, 107 Stat. 2057, 2115 (1993).

¹¹⁸ *Panel Report on the United States – Line Pipe*, *supra* note 45, ¶¶ 7.135-163.

¹¹⁹ *Appellate Body Report on the United States – Line Pipe*, *supra* note 45, ¶ 198.

¹²⁰ See LEE, SAFEGUARD MEASURES, *supra* note 1, at ch. 3 (for an account of the long negotiation process of the SA).

D. Injury Assessment

1. *Consideration of injury factors*

A safeguard measure is predicated on the existence or threat of serious injury to a domestic industry caused by increase in imports.¹²¹ The injury determination is not a precise science and cannot avoid certain degree of subjectivity. Nonetheless, clear guidelines for the injury determination can reduce arbitrariness in the injury determination. The SA attempts to provide such criteria for the injury determination. Article 4.2(a) provides:

In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, 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, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.*¹²²

Unlike its predecessor, Article XIX, the SA specifies eight factors, underlined above, relevant to the analysis of injury.¹²³ Because, on its face, the statute requires competent authorities to evaluate all relevant factors including those enumerated in the statute, previous panels and the Appellate Body have interpreted it to mean that consideration of every factor is mandatory.¹²⁴

In applying the U.S. steel safeguards, however, the USITC failed to consider some of the injury factors specified in Article 4.2(b). For instance, the changes in productivity were not analyzed in the USITC investigation report.¹²⁵ Such an analysis would have been relevant due to the United States' reliance on the argument that a steel sector employment decrease indicated injury to the domestic steel industry.¹²⁶

Any change in productivity should have been analyzed as it may have affected the injury determination. Curiously, the complainants did not raise

¹²¹ Safeguards Agreement, *supra* note 3, art. 2.1.

¹²² *Id* at art. 4.2(a) (emphasis added).

¹²³ These specific injury factors were modeled after the U.S. Trade Act of 1974, 19 U.S.C. 2317 §§ 202(c)(1)(A)-(B).

¹²⁴ *Panel Report on Korea – Dairy Products*, *supra* note 45, ¶ 7.55; *Panel Report on Argentina – Footwear*, *supra* note 45, ¶ 8.206; *Appellate Body Report on Argentina – Footwear*, *supra* note 45, ¶ 136.

¹²⁵ *Steel*, *supra* note 56.

¹²⁶ For further discussion, see *supra* Section II.A.

this issue in the panel and the Appellate Body proceedings; if they had, the omission would likely have constituted a violation of Article 4.¹²⁷

Unlike in Article 4.2(a), productivity is not a listed factor in the U.S. Trade Act of 1974, after which the injury factors in Article 4 were modeled.¹²⁸ This absence perhaps explains why the USITC did not analyze productivity. The injury factors need not be identical between the national legislation and the SA to achieve conformity with WTO requirements. For instance, the safeguard provisions of the European Communities include more injury factors than those of the SA.¹²⁹ Raising the standards beyond the SA to make it more difficult to adopt safeguard measures thus conforms to the WTO requirements. The opposite, however, may be considered an instance of non-compliance with the SA. The USITC should have considered all the factors specifically listed under Article 4.2(a), regardless of whether comparable domestic legislation required so extensive an investigation.

2. Causation

The application of a safeguard measure will hardly be justifiable unless the injury to the domestic industry is in fact caused by the increase in imports. The SA requires a Member applying a safeguard measure to establish a causal link between the injury and the increase in imports. Article 4.2(b) of the SA provides:

The determination referred to in subparagraph (a) (injury determination) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.¹³⁰

Previous panel and Appellate Body decisions have provided interpretive guides to this provision requiring causation. In *Argentina-Footwear*, the Panel prescribed a three-pronged test for the determination of causation.¹³¹ The first prong of the test requires the coincidence between an

¹²⁷ *Supra* note 124.

¹²⁸ On the other hand, productivity is included with respect to a threat of serious injury. See *supra* note 123.

¹²⁹ European Union Council Regulation No. 3285/94 of Dec. 22, 1994, 1994 O.J. (L 349) at art. 10.

¹³⁰ Safeguard Agreement, *supra* note 3, art. 4.2(b) (explanations added).

¹³¹ *Panel Report on Argentina—Footwear*, *supra* note 45, ¶ 8.229. The Appellate Body affirmed this test. *Appellate Body Report on Argentina – Footwear*, *supra* note 45, ¶¶ 140-46. This test was also followed by the subsequent Panel in the *Panel Report on United States*

upward trend in imports and downward trends in the injury factors. If no such coincidence is found, there must be a reasoned explanation as to why the data nevertheless show causation. The second prong is whether objective evidence regarding the conditions of competition in the domestic market demonstrates a causal link between the imports and any injury. Lastly, the Panel must assess whether other relevant factors have been analyzed, including whether the country imposing safeguards properly examined alternative explanations for the injury (also termed the “non-attribution requirement”). In the presence of factors *other than* increased imports that may have also contributed to injury, safeguard measures may be justified on the basis that an increase in imports made a sufficiently clear contribution to the demonstrated injury, in other words, a country imposing safeguards need not show that the increase in imports *alone* caused the injury.¹³²

The Panel in *U.S. Steel Safeguards* found that the causal link between increased imports and injury was insufficient for all product categories except one.¹³³ The Panel ruled that the USITC failed to establish the coincidence between the increasing trends in imports and decreasing trends in the injury factors and also failed to provide any other compelling argument as to *why* the causal link nevertheless existed.¹³⁴ In particular, the USITC improperly disregarded a number of relevant factors that affected its injury, namely, declining domestic demand, domestic capacity increases, intra-industry competition and legacy costs in its non-attribution analysis although it acknowledged that those factors had some injurious effect on the industry.¹³⁵

– *Wheat Gluten*, *supra* note 45, ¶ 8.91.

¹³² *Appellate Body Report on United States – Wheat Gluten*, *supra* note 45, ¶ 67. According to the Appellate Body, the last sentence of Article 4.2(b) (non-attribution requirement) requires the national authorities to examine the existence of “a genuine and substantial relationship of cause and effect” between the increase in imports and the injury and distinguish injurious effects caused by the other factors from that by the increase in imports. *Id.* ¶ 69. See LEE, SAFEGUARD MEASURES, *supra* note 1, at 48-49, 132-34 (discussing the causation test).

¹³³ The Panel held that the causation requirement was not met with respect to CCFRS, tin mill products, hot-rolled bar, cold-finished bar, rebar, welded-pipe, FFTJ, stainless steel bar, stainless steel wire. Report of the Panel, *supra* note 6, ¶¶ 10.419, 10.422, 10.445, 10.469, 10.487, 10.503, 10.536, 10.569, 10.573. For stainless steel rod, the Panel considered that the USITC’s causation analysis was not inconsistent with the requirement under Article 4.2(b). *Id.* ¶ 10.586.

¹³⁴ For CCFRS, the Panel did not consider that the USITC’s selective use of data of the constituent items of the CCFRS and not the whole CCFRS was adequate without establishing that those selective items were representative of the whole CCFRS. *Id.* ¶¶ 10.378-380. The Panel provided measure-by-measure analyses for all product categories. *Id.* ¶¶ 10.361-10.586.

¹³⁵ *Id.* Regarding tin mill products and stainless steel wire, the Panel noted that there were conflicting opinions among the USITC Commissioners as to the existence of the

E. Notification and Consultation

As safeguard measures are not applied to unfair trade practices,¹³⁶ invoking them will inevitably upset the balance of concessions between the exporting and importing Members. From the standpoint of the exporting Members, notice of possible changes affecting their ability to export products is critical, including information on the investigation and the application of safeguard measures. Article 12 of the SA requires Members to notify the WTO Committee on Safeguards at various stages of a safeguard investigation: at the initiation of the investigation (Article 12.1(a)); upon the finding of serious injury or threat thereof (Article 12.1(b)); and finally, upon the decision to apply or extend a safeguard measure (Article 12.1(c)).

Under Article 12.1(c), notification must be made well before the measure is implemented, since the purpose of notification is to allow exporting Members sufficient time to prepare and enter into consultations *prior to* the safeguard's effective date.¹³⁷ Article 12.3 provides:

A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned, with a view to, *inter alia*, reviewing the information under paragraph 2, exchanging views on the measure and reaching an understanding on ways to achieve the objective set out in paragraph 1 of Article 8.¹³⁸

Consultations are an essential procedural aspect of safeguard applications. They enable importing and exporting Members to negotiate the proposed measure to reach a mutually satisfactory agreement and to maintain the balance of concessions. The timing of consultation is

requisite causation based on the different product definitions. The Panel found that "a Member is not permitted to base its safeguard measures on an explanation that consists of alternative explanations which, given the different products upon which such explanations are based, cannot be reconciled as a matter of substance." Report of the Panel, *supra* note 6, ¶¶ 10.422, 10.572. Here, the Appellate Body, without deciding whether the USITC's explanation of the causation was adequate, ruled that the Panel's dismissal of the USITC's analysis based on the Commissioners' divergent opinions was not justifiable, applying the same reasoning that it did in the discussion of the increased imports with respect to those two product categories. Report of the Appellate Body, *supra* note 6, ¶¶ 492-93. The same concern about this Appellate Body ruling as expressed in that discussion is also applicable here.

¹³⁶ The application is subject to the general condition under Article 2 of the SA as well as the other requirements under the SA and GATT Article XIX.

¹³⁷ *Appellate Body Report on United States – Wheat Gluten*, *supra* note 45, ¶¶ 8.205-8.207.

¹³⁸ Safeguards Agreement, *supra* note 3, art. 12.3.

important to achieve those ends. Members are not required to modify or withdraw their measures following the consultations, but an effort to accommodate the interests and concerns of the Members affected by the safeguards minimizes the potential for disputes and retaliations.¹³⁹

The adequacy of consultations is a recurring issue in cases where the validity of safeguards is under dispute. A nation adopting safeguards must provide the exporting countries with adequate time to prepare and enter into consultations.¹⁴⁰ In *Line Pipe*, the United States waited only eighteen days between announcing a final measure and implementing the measure, after having significantly changed the terms of the safeguard post-consultation. The Appellate Body ruled that eighteen days was insufficient time to adequately consult after the changes were made, disregarding the United States' arguments that the complaining party would have been able to request new consultations after the announcement of the final measure.¹⁴¹

In the U.S. steel safeguards, the safeguard measures took effect only 15 days after the United States announced the measures had been adopted.¹⁴² Surprisingly, the issue of timeliness of consultation was not raised by the complainants in the panel proceedings. Had the issue been before the Panel, this inadequately short time between announcement and the implementation would almost certainly have been ruled a violation of Article 12. In fact, the lack of the genuine effort to provide adequate consultation opportunity and to reach a mutually agreeable settlement contributed to the rapid escalation of crisis after the application of the steel safeguards, as manifested by the several retaliation proposals from the exporting Members.

F. Concluding Legal Analysis of the U.S. Steel Safeguards

The U.S. steel safeguards demonstrated fundamental flaws with respect to various major requirements for the application of a safeguard measure under Article XIX and the SA. The Panel and the Appellate Body did not find the increase in imports in most product categories. The MFN application requirement under Article 2.2 of the SA was violated. The injury analysis under Article 4 was also considered inadequate and the required causation was not found in most product categories. The United States also failed to make demonstration of "unforeseen developments" under Article XIX, although the requirement itself is controversial.

In addition, although the complainants did not raise these issues in the panel proceedings, the United States did not provide adequate consultation

¹³⁹ See LEE, SAFEGUARD MEASURES, *supra* note 1, at ch. 11.2 and 11.3.

¹⁴⁰ Appellate Body Report on *United States – Line Pipe*, *supra* note 45, ¶¶ 102-113.

¹⁴¹ *Id.* ¶¶ 107-108.

¹⁴² See also LEE, SAFEGUARD MEASURES, *supra* note 1, at 167-68.

opportunities as required under Article 12.1 prior to the application of its steel safeguards. In sum, the U.S. steel safeguards failed to comply with major substantive and procedural requirements of safeguards applications under the SA.

IV. CONCLUSION – TEST OF MULTILATERALISM IN INTERNATIONAL TRADE

Safeguard measures are widely considered the most protective of all trade measures due to their unilateral applicability without the requirement of any unfair trade practice on the part of the exporters. Safeguard measures will inevitably upset the balance of concessions reached among Members during the previous trade negotiations. For this reason, safeguard measures are prone to invite disputes and potential retaliations, particularly where the legal justifications under the relevant WTO rules are weak and where adequate efforts to reach a satisfactory settlement between the exporting and importing Members are not made. To minimize the danger of this potentially very abusive measure, a multilateral framework is in place, including the prior consultation requirement.

Did this multilateral framework work in the U.S. steel safeguards? It did not seem to initially. There was serious doubt as to whether the United States had complied with the requirements of the SA. As discussed above, the United States applied a series of safeguard measures to a wide range of steel products where it was not even clear that the basic premises for the application of a safeguard measure, such as an increase in imports and causation between the injury and imports, existed at all. It was widely believed that political needs, rather than the economic necessities backed by the legal justifications, prompted the application of the steel safeguards.¹⁴³ Political motivations do not necessarily make safeguards incompatible with the requirements of the SA and Article XIX, but the lack of essential legal conditions do.

The subsequent crisis in the U.S. steel safeguards, which gave rise to the danger of a worldwide trade war, began with the rushed manner in which the U.S. government applied its safeguards and continued on in the U.S.' disregard for the adequate consultation requirement.¹⁴⁴ Such events suggested that the U.S. government did not seriously contemplate the need

¹⁴³ A renowned economist has opined that the steel safeguards would not improve the condition of the U.S. steel industry. See Robert J. Barro, *Big Steel Doesn't Need Any More Popping Up*, BUS. WK., Apr. 1, 2001, at 24. It has been also reported that the U.S. Treasury Secretary Paul H. O'Neill stated in the off-the-record comments after a dinner speech at the Council on Foreign Relations that the steel safeguards would cost more jobs in the United States than it would save. N.Y. TIMES, Mar. 16, 2002, at A1. See *supra* Section II.A. (discussing the political background of the U.S. steel safeguards).

¹⁴⁴ See the discussion of notifications and consultations in Section III.E. *supra*.

of those consultations under Article 12 of the SA and the possible consequences of neglecting them. Although internal political pressures played a role in the rush and neglect,¹⁴⁵ a high political price was also paid for them in the form of strong worldwide condemnations of the U.S. measures, the filing of WTO complaints by more nations than in any other dispute in the GATT/WTO history as well as proposal of several retaliations by major economies around the world.¹⁴⁶

As the dispute progressed, the multilateral framework in place within the world trading system was called upon to avert the crisis. The retaliation proposals by exporting Members were made in accordance with the relevant SA provisions, and the exporting Members refrained from applying retaliations until the conclusion of WTO panel and the Appellate Body proceedings.¹⁴⁷ Facing several retaliation proposals, the United States also entered into consultations with some exporting Members and agreed to reduce steel products from its safeguard list.¹⁴⁸ The multilateral framework proved operational and resolved this dispute when the United States accepted the WTO DSB decision, although it ruled against its measures.¹⁴⁹

The development of the U.S. steel safeguards has demonstrated how important it is for Members to adhere to the multilateral framework of the international trading system including due compliance with the WTO legal requirements. The initial neglect of the multilateral framework in the application of the U.S. steel safeguards brought the international community into a major trade dispute. Although the United States' negotiations *subsequent* to its application of safeguards helped resolve the crisis,¹⁵⁰ such crisis may never have developed had the United States respected the multilateral framework and conducted adequate prior consultations required under Article 12.

Pursuing a process of adopting safeguards without complying with WTO requirements may also drive other Members to do the same in order to protect their own export interests, as witnessed subsequent to the application of the U.S. steel safeguards,¹⁵¹ creating a chain of worldwide

¹⁴⁵ An immediate and comprehensive import relief was demanded by the steel industry. Recommended Action to Solve the Steel Import Crisis, May 9, 2001, Proposal by the Steel Manufacturers Association.

¹⁴⁶ See *supra* Section II.B.

¹⁴⁷ Understanding on Rules and Procedures Governing the Settlement of Disputes ("Dispute Settlement Understanding" or "DSU") governs the proceedings of the panel as well as of the Appellate Body. WTO, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS, 404-33 (1994).

¹⁴⁸ See the relevant discussions in section II.B *supra*.

¹⁴⁹ The exporting Members also followed the suit, and the proposed retaliations were never applied.

¹⁵⁰ See *supra* Section II.B.

¹⁵¹ As discussed above, some Members including European Communities and China also

protectionism.

U.S. Steel Safeguards is a notable example of politically motivated trade measures applied in the absence of clear legal justifications under WTO rules and without due regard to the multilateral framework of the safeguards, which could have been led to a full scale trade war.¹⁵² Nonetheless, a consolation may be found in that the successful resolution of this highly publicized dispute has in fact strengthened rather than weakened the multilateral framework of the WTO. Furthermore, the dispute in the U.S. steel safeguards has left us a clear lesson that the failure to duly recognize and respect the multilateral framework of international trade in the application of a trade measure, including its legal requirements, will invite costly disputes down the road.

applied safeguard measures against their import of steel products subsequent to the U.S. steel safeguards to prevent “diversion” of steel exports from the U.S. market protected from the steel safeguards. *Id.*

¹⁵² See *supra* Section II.B.