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Can U.S. Safeguard Actions Survive WTO Review?: Section 201 Investigations in International Trade Law

DANIEL B. PICKARD* & TINA POTUTO KIMBLE**

I. INTRODUCTION

A “Section 201” investigation is one of the strongest fundamental trade remedy actions available under U.S. law.¹ This provision of the Trade Act of 1974 authorizes the U.S. International Trade Commission (“ITC”) to examine whether a particular import is causing or threatening to cause serious injury to a domestic industry.² Once an import is deemed harmful, Section 201 provides the President with a range of remedies to restore balanced competition to the marketplace.³ Recent decisions by the World Trade Organization (“WTO”) have not only undermined the effectiveness of this significant trade remedy action, but have also raised important questions concerning U.S. obligations under international law. As anti-dumping measures come under increasing attack, the availability of safeguard provisions to preserve competitive trade is becoming increasingly

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1. Letter from the Hon. Jay Rockefeller, U.S. Senator from West Virginia, to the Hon. Robert B. Zoellick, United States Trade Representative (Oct. 23, 2003) (on file with author), *available at* <http://www.senate.gov/~rockefeller/news/2003/pr102303.html>.

2. 19 U.S.C. § 2252(b)(1)(A) (2000).

3. *Id.* § 2253(a)(3)(2000).

important. Even critics of anti-dumping measures acknowledge that “a better way to protect industries adjusting to increased competition would be through the increased use of ‘safeguard [actions].’”⁴

Trade remedy actions are of particular importance in the negotiations of the Doha Round.⁵ The United States would be wise to use this opportunity to push its trading partners to re-examine, clarify, and reach a consensus regarding these safeguard actions. Other nations have challenged the findings of several Section 201 investigations before the WTO.⁶ To date, the result is the same every time: the WTO strikes down every Section 201 safeguard measure.⁷ The WTO consistently finds that the ITC’s positions under U.S. law regarding the definition of “unforeseen developments” and application of the causation standard, are contrary to the United States’ international legal obligations.⁸ Similarly, various special provisions in U.S. trade law pertaining to NAFTA countries have been found to be contrary to the United States’ international obligations.⁹

II. OVERVIEW OF SECTION 201

As early as 1934, the United States acknowledged that an increase in imports resulting from liberalized trade policies could harm U.S. producers.¹⁰ As liberalization moved forward and trade

4. N. Gregory Mankiw & Phillip L. Swagel, *Antidumping: The Third Rail of Trade Policy*, FOREIGN AFFAIRS, July-Aug. 2005, at 118.

5. See, e.g., World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002).

6. See, e.g., Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R (May 1, 2001) [hereinafter *Lamb Meat Appellate Body Report*]; Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R (Nov. 10, 2003) [hereinafter *Steel Products Appellate Body Report*].

7. See, e.g., *Lamb Meat Appellate Body Report*, *supra* note 6; *Steel Products Appellate Body Report*, *supra* note 6.

8. See, e.g., *Steel Products Appellate Body Report*, *supra* note 6; see also Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten From the European Communities*, WT/DS166/AB/R (Dec. 22, 2000) [hereinafter *Wheat Gluten Appellate Body Report*].

9. See, e.g., *Steel Products Appellate Body Report*, *supra* note 6; see also *Wheat Gluten Appellate Body Report*, *supra* note 8.

10. STAFF OF H. COMM. ON WAYS AND MEANS, 105TH CONG., OVERVIEW AND COMPILATION OF U.S. TRADE STATUTES 99 (Comm. Print 1997).

expanded across the globe, U.S. policymakers identified a need for flexibility in adjusting to new import levels.¹¹ Even if foreign exporters did not necessarily engage in unfair trade practices, legislators recognized that some form of relief should be provided to the sectors of the economy harmed by the increased competition.¹² Accordingly, in the 1940s, the United States began to enter into trade agreements that included “escape clause” or “safeguard” mechanisms to provide this type of relief.¹³

These escape clause mechanisms are now firmly rooted in U.S. law.¹⁴ In the wake of the Second World War, the United States signed on to the General Agreement on Tariffs and Trade (“GATT”), which 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 that 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 the 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.¹⁵

Pursuant to this provision, Congress included Section 201 in the Trade Act of 1974.¹⁶ Commonly known as the “escape clause,”¹⁷ Section 201 mirrors GATT Article XIX and allows the President to protect a seriously injured domestic industry as it adjusts to increased import competition.¹⁸

The federal agency responsible for conducting Section 201 safeguard investigations is the ITC, an independent federal agency

11. SENATE FINANCE COMMITTEE REPORT ON THE TRADE ACT OF 1974, S. REP. NO. 93-1298, at 119 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 7186, 7263.

12. STAFF OF H. COMM. ON WAYS AND MEANS, 105TH CONG., *supra* note 10.

13. *Id.*

14. *See* S. REP. NO. 93-1298, at 119.

15. General Agreement on Tariffs and Trade art. XIX(1)(a), Oct. 30, 1947, 61 Stat. A-58, 55 U.N.T.S. 258 [hereinafter GATT].

16. *See* 19 U.S.C. § 2252 (2000).

17. Y.S. Lee, *Reflections on U.S. International Trade Law and Practice - Compatibility with the WTO Rules and Call for Modification*, 12 CURRENTS: INT'L TRADE L.J. 31, 31 (2003).

18. STAFF OF H. COMM. ON WAYS AND MEANS, 105TH CONG., *supra* note 10.

with quasi-judicial authority.¹⁹ The ITC is charged with determining whether “an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article.”²⁰ A substantial cause is defined as “a cause which is important and not less than any other cause.”²¹ Consequently, both the injury and causal standards are higher in a Section 201 investigation as compared to an anti-dumping or countervailing duty case.²² If the ITC makes an affirmative injury determination under Section 201, the investigation proceeds to a remedy phase. During the remedy phase, ITC recommends specific actions to address the serious injury to the domestic industry.²³

Once the ITC issues its recommendations, the President has sixty days²⁴ to “take all appropriate and feasible action. . . [to] facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs.”²⁵ Some actions that the President may authorize include increasing or imposing duties, imposing a tariff-rate quota, modifying or imposing quantitative restrictions, implementing adjustment measures, withdrawing or modifying concessions provided to U.S. trading partners,²⁶ and commencing negotiations with foreign governments to limit exports into the United States.²⁷

III. OVERVIEW OF WTO DISPUTE SETTLEMENT PROCESS

Before the creation of the WTO, the GATT provisions were the only generally available multilateral mechanism for the resolution of trade remedy disputes. The Uruguay Round of global trade negotiations in the late 1980s and early 1990s gave birth not only to the WTO, but also to a new set of rules regarding

19. *Id.*

20. 19 U.S.C. § 2252(b)(1)(A).

21. *Id.* § 2252(b)(1)(B).

22. Charles Owen Verrill, Jr., Partner, Wiley Rein & Fielding LLP, An Introduction to Trade Remedies Available Under U.S. Law (Apr. 1, 1999), http://www.wrf.com/publication.cfm?publication_id=8009. See also 19 U.S.C. § 1677.

23. 19 U.S.C. § 2252(e).

24. *Id.* § 2253(4)(a).

25. See *id.* § 2251.

26. GATT, *supra* note 15, art. XXVII. See also 19 U.S.C. § 2253.

27. 19 U.S.C. § 2253.

safeguard actions and a new process for resolving disputes that arise under them, including the establishment of a permanent dispute resolution body.²⁸

The principal U.S. objective in the safeguards negotiations at the Uruguay Round was to develop an agreement that would clarify the obligations and procedures for a safeguard action and that would “encourage WTO members to use rather than by-pass safeguard rules.”²⁹ Unfortunately, it is doubtful that either objective was achieved.³⁰ Nonetheless, the resulting *Agreement on Safeguards* greatly improved the legal groundwork laid by the GATT, incorporating many elements taken directly from Section 201 and including provisions concerning: (1) determinations of injury and increasing imports, (2) procedures to ensure transparency, (3) an eight-year maximum duration, (4) progressive liberalization of safeguard restrictions (“degressivity”),³¹ and (5) the right to re-impose safeguard restrictions at a later date.

The WTO’s Dispute Settlement Understanding (“DSU”)³² addresses the United States’ “strong interest in having an effective process to enforce U.S. rights under the Uruguay Round Agreements” and provides the framework for the resolution of disputes arising under the *Agreement on Safeguards*.³³ When such a

28. See generally Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125 (1994).

29. THE URUGUAY ROUND AGREEMENTS ACT, STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 103-316, at 286 (1994), as reprinted in 1994 U.S.C.C.A.N. 4040, 4261.

30. As discussed below, initially many thought that the new agreement supplanted rather than supplemented the GATT, thereby eliminating the “unforeseen developments” requirement with respect to escape clause actions. However, the Appellate Body has indicated that the Agreements must be read conterminously, and that the “unforeseen developments” requirement is still in effect. Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, paras. 82, 84, 90, WT/DS98/AB/R (Dec. 22, 1999). This has only perpetuated the uncertainty that existed prior to 1994. More tragically, the fact that the WTO has stricken every single U.S. safeguard action that it has reviewed only creates further international tensions.

31. H.R. DOC. NO. 103-316, at 287; see also Agreement on Safeguards, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 154 arts. 4, 7(3)-(6), 33 I.L.M. 1125, in WORLD TRADE ORGANIZATION, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 315-24 (1994) [hereinafter *Safeguards Agreement*].

32. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter *DSU*].

33. H.R. DOC. NO. 103-316, at 339.

dispute arises, the complaining state must first seek to resolve the issue through consultations with the offending state.³⁴ If the offending state does not respond to the request for consultations, or if the parties are unable to reach a satisfactory settlement within sixty days (twenty days for urgent cases or cases involving perishable goods), the complaining party may submit a complaint to the Dispute Settlement Body (“DSB”) of the WTO, a panel charged with governing the dispute process on behalf of all WTO member governments.³⁵ Once a complaint is submitted for settlement, the DSB will establish a panel to hear the dispute.³⁶ WTO panels typically consist of three panelists who have expertise in international trade law.³⁷ Panelists are chosen on an *ad hoc* basis to resolve a particular dispute,³⁸ although the WTO Secretariat does maintain a list of qualified panelists.³⁹ After a panel receives written and oral submissions from both the parties to the dispute as well as interested third parties,⁴⁰ it will draft an interim report and circulate it to the parties for comment.⁴¹ These comments will then be considered by the panel as it drafts its final report.⁴²

Once the panel issues the final report, the parties to the dispute may appeal.⁴³ If they choose not to appeal, the panel report will be adopted as binding on the parties unless the DSB decides by consensus that it should not be.⁴⁴ Appeals are limited to issues of law discussed in the panel report⁴⁵ and are heard by the Appellate Body, a standing panel of seven experts in international trade law.⁴⁶ Unlike panelists, persons serving on the Appellate Body cannot have any governmental affiliation.⁴⁷ The Appellate Body will typically hear and report on the appeal within sixty

34. DSU, *supra* note 32, art. 4.3.

35. *Id.* art. 2.1.

36. *Id.* arts. 4.3, 4.7, 4.8.

37. *Id.* arts. 8.1-8.5. A panel may be composed of five panelists if the parties to the dispute so agree.

38. *Id.* arts. 8.6-8.7.

39. *Id.* art. 8.4.

40. *Id.* art. 10.1. For an overview of WTO panel working procedures, see generally *id.* App. 3.

41. *Id.* arts. 15.1-15.2.

42. *Id.* art. 15.3.

43. *Id.* art. 17.4.

44. *Id.* art. 16.4.

45. *Id.* art. 17.6.

46. *Id.* art. 17.3.

47. *Id.*

days,⁴⁸ and may uphold, reverse, or modify the panel's legal analysis.⁴⁹ The Appellate Body does not have the ability to remand cases to the panels.⁵⁰ If it finds that the panel report provides an adequate factual record, the Appellate Body may complete its analysis of a claim on which it has reversed the panel.⁵¹ Unless the DSB decides otherwise by consensus, it adopts the Appellate Body Report.⁵² If a party fails to implement the recommendations within a reasonable amount of time, the aggrieved party may request negotiations to determine mutually acceptable compensation.⁵³ If these negotiations prove fruitless, the aggrieved party may suspend the application of certain trade concessions or obligations under the WTO agreements with respect to the non-compliant party.⁵⁴

The WTO dispute settlement system cannot order a country to change its laws.⁵⁵ A state that loses a dispute at the WTO may choose to change its laws, may offer trade "compensation," or may decide to do nothing.⁵⁶ In the latter case, the complaining state may retaliate by suspending trade concessions that are equivalent to the trade benefits it has lost.⁵⁷

IV. THE PROBLEMS WITH SECTION 201 IN LIGHT OF WTO REVIEW

A. Background: The Steel Case

As previously noted, the United States has lost every safeguard action challenged at the WTO. One recent loss, the *United States – Steel* case, involved arguably the largest safeguard investigation ever undertaken by the ITC, and serves as a good example of the difficulties that the United States is encountering in coordinating its Section 201 actions with its international

48. *Id.* art. 17.5.

49. *Id.* art. 17.13.

50. *See id.*

51. Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, para. 78 & nn. 48-49, WT/DS135/AB/R (Mar. 12, 2001).

52. DSU, *supra* note 32, art. 17.14.

53. *Id.* art. 22.2. The reasonable period of time is either a time period proposed by the party and accepted by the DSB, a period of time agreed upon by the parties to the dispute, or a period of time determined by binding negotiation. *Id.* art. 21.3.

54. *Id.* art. 22.2-22.4.

55. THE URUGUAY ROUND AGREEMENTS ACT, STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 103-316 at 339 (1994), as reprinted in U.S.C.C.A.N. 4040, 4300.

56. H.R. DOC. NO. 103-316, at 340.

57. *Id.*

obligations. The backlash from this case and others like it may have serious anti-WTO repercussions in the United States.

In June 2001, President Bush initiated a Section 201 investigation to determine whether certain steel articles were being imported into the United States in such increased quantities as to cause or threaten substantial injury to the domestic industry.⁵⁸ The Commission conducted numerous days of hearings, and the parties submitted tens of thousands of pages in pleadings. The ITC concluded that twelve steel import products (out of thirty-three categories) were a cause of serious injury, or threat thereof, to the domestic industry.⁵⁹ Several nations challenged the ITC's determination at the WTO and won at both the panel and the Appellate Body.⁶⁰ The final report of the Appellate Body found that the ITC's determination failed to satisfy the requirements of the *Agreement on Safeguards*, specifically with respect to, *inter alia*, the unforeseen developments requirement, the causation standard applied, and the parallelism doctrine. This section will analyze each of these three elements.

B. Unforeseen Developments

Under Article XIX(1)(a) of the GATT, in order to serve as the basis for a safeguard action, a flood of damaging imports must be "a result of unforeseen developments."⁶¹ Both the GATT 1947 and the GATT 1994 include this "unforeseen developments" requirement, but the *Agreement on Safeguards*—which entered into force at the same time as the GATT 1994 and was intended to clarify it—conspicuously omits any mention of unforeseen developments.⁶² This omission is particularly glaring in Article 2.1 of the *Agreement on Safeguards*, which otherwise closely reflects the language of Article XIX(1)(a) of the GATT.⁶³ Indeed, many

58. U.S. Int'l Trade Comm'n, Steel, Investigation No. TA-201-73, USITC Pub. 3479 (Dec. 2001).

59. Press Release, U.S. Int'l Trade Comm'n, ITC Details Its Determinations Concerning Impact of Imports of Steel on U.S. Industry (Oct. 23, 2001), available at <http://www.usitc.gov/er/nl2001/ER1023Y1.pdf> [hereinafter ITC Determination].

60. Panel Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R (July 11, 2003) [hereinafter Steel Products Panel Report]; Steel Products Appellate Body Report, *supra* note 6.

61. GATT, *supra* note 15, art. XIX(1)(a).

62. Safeguards Agreement, *supra* note 31, art. 4.2(b).

63. *Compare id.* ("A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product

believed that the “unforeseen developments” requirement was consciously eliminated in the negotiations for the *Agreement on Safeguards*.⁶⁴ The conflict between the GATT and the *Agreement on Safeguards* had thus created doubt as to whether a Member implementing a safeguard action under the *Agreement on Safeguards* was still required to demonstrate that the damaging imports were the result of unforeseen developments.

The panel decisions in *Korea – Dairy* and *Argentina – Footwear* squarely addressed the omission of the unforeseen developments requirement from the *Agreement on Safeguards*.⁶⁵ The panel on *Argentina – Footwear* found that “the express omission of the criterion of unforeseen developments in the new agreement (which otherwise transposes, reflects and refines in great detail the essential conditions for the imposition of safeguard measures provided for in Article XIX of GATT) must, in our view, have meaning.”⁶⁶ The panel concluded that a demonstration of unforeseen developments was not required, since “conformity with the explicit requirements and conditions embodied in the Safeguards Agreement must be sufficient for the application of safeguard measures within the meaning of Article XIX of GATT.”⁶⁷ The panel on *Korea – Dairy* reached a similar conclusion.⁶⁸

The Appellate Body in *Korea – Dairy*, however, disagreed, concluding instead that “any safeguard measure imposed after the entry into force of the *WTO Agreement* must comply with the provisions of both the *Agreement on Safeguards* and Article XIX of the GATT 1994,” including the unforeseen developments

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.”), with GATT art. XIX(1)(a), *supra* note 15 (that the imported products be “a result of unforeseen developments”).

64. See, e.g., Christy Ledet, *Causation of Injury in Safeguards Cases: Why the U.S. Can't Win*, 34 LAW & POL'Y INT'L BUS. 713, 717, 731 (2003).

65. Panel Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, para. 7.33-7.48, WT/DS98/R (June 21, 1999) [hereinafter *Dairy Products Panel Report*]; Panel Report, *Argentina – Safeguard Measures on Imports on Footwear*, WT/DS121/R (June 25, 1999) [hereinafter *Footwear Panel Report*].

66. *Footwear Panel Report*, *supra* note 65, para. 8.58 (emphasis in original).

67. *Id.* para. 8.67.

68. *Dairy Products Panel Report*, *supra* note 65, para. 7.33-7.48.

requirement.⁶⁹ In reaching its conclusion, the Appellate Body relied on Article 11.1(a) of the *Agreement on Safeguards*, which states that “[a] Member shall not take or seek any emergency action on imports of particular products *as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement.*”⁷⁰ In *Korea – Dairy* and *Argentina – Footwear*, the Appellate Body also began to address the question of what exactly a member must show in order to satisfy the unforeseen developments requirement. First, “the developments . . . must have been ‘unexpected.’”⁷¹ Second, the Appellate Body concluded that although the clause does not “[establish] independent *conditions* for the application of a safeguard measure,” it does “[describe] certain *circumstances* which must be demonstrated as a matter of fact in order for a safeguard measure to be applied consistently with the provisions of Article XIX of the GATT 1994.”⁷² However, this is as far as the Appellate Body went in its explanation of the unforeseen developments requirement. Because the panel made no factual findings on the issue of unforeseen developments, and because the facts were contested by the parties, the Appellate Body refused to decide whether the requisite showing was made, leaving a number of questions unanswered for future decisions to resolve.⁷³

In the *United States – Steel* safeguard proceeding, the WTO panel admitted that “there is no reference to unforeseen developments in the *Agreement on Safeguards.*”⁷⁴ However, following its decisions in *Korea – Dairy* and *Argentina – Footwear*, the panel explained that the *Agreement on Safeguards* and the

69. Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, para. 77, WT/DS98/AB/R (Dec. 14, 1999) [hereinafter Dairy Products Appellate Body Report] (emphasis in original; footnote in original omitted); see also Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, para. 84, WT/DS121/AB/R (Dec. 14, 1999) [hereinafter Footwear Appellate Body Report].

70. Safeguards Agreement, *supra* note 31, art. 11.1(a) (emphasis added). The Appellate Body also sought support from the Safeguards Agreement, which provides: “This Agreement establishes rules for the application of *safeguard measures* which shall be understood to mean *those measures provided for in Article XIX of GATT 1994.*” *Id.* art. 1 (emphasis added).

71. Footwear Appellate Body Report, *supra* note 69, paras. 91-94; Dairy Products Appellate Body Report, *supra* note 69, paras. 84-87.

72. Footwear Appellate Body Report, *supra* note 69, para. 92; Dairy Products Appellate Body Report, *supra* note 69, para. 85.

73. Dairy Products Appellate Body Report, *supra* note 69, para. 92.

74. Steel Products Panel Report, *supra* note 60, para. 10.36.

GATT must be read conterminously and required the United States to show that the flood of imports at issue resulted from unforeseen developments.⁷⁵ The ITC found that unforeseen developments, such as the economic crises in Russia and Asia, the continued strength of the U.S. economy, and the persistent appreciation of the U.S. dollar, caused the increase in steel imports.⁷⁶ Even though the panel agreed that these represented “a plausible set of unforeseen developments that may have resulted in increased imports to the United States from various sources,” it held that the ITC’s Report “[fell] short of demonstrating that such developments actually resulted in increased imports into the United States causing serious injury to the relevant domestic producers.”⁷⁷ Because the ITC only demonstrated that unforeseen developments caused a general increase in steel imports but not how unforeseen developments led to increased imports of specific products, the panel determined that the Section 201 action was inconsistent with both the GATT and the *Agreement on Safeguards*. The Appellate Body upheld this ruling on appeal.⁷⁸

C. *The Non-Attribution Requirement of Injury Causation*

To serve as a basis for a safeguard action, U.S. law requires the ITC to find that the increase in imports is “a substantial cause of serious injury, or threat thereof, to the domestic industry producing an article like or directly competitive with the imported article.”⁷⁹ Article 4.2(b) of the *Agreement on Safeguards* also requires the aggrieved party to demonstrate “the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof.”⁸⁰ However, the ITC and the WTO interpret this requirement quite differently. The ITC concept of causation requires that there be a causal link between increased imports and injury to the domestic industry; it must be determined that imports are no less important than any other potential source of injury.⁸¹ Alternatively, the WTO’s interpretation effectively requires the ITC to identify and

75. *Id.* paras. 10.36-10.37.

76. *Id.* para. 10.4.

77. *Id.* para. 10.122.

78. Steel Products Appellate Body Report, *supra* note 6, para. 513(a).

79. 19 U.S.C. § 2251(a) (2000).

80. Safeguards Agreement, *supra* note 31, art. 4.2(b).

81. Ledet, *supra* note 64, at 721.

systematically rule out *all* of the possible alternative causes of injury other than the increase of imports at issue.⁸² Commentators criticize this requirement, pointing out that this type of separation and quantification of possible causes of injury is “realistically impossible.”⁸³

The Appellate Body stated that Article 4.2(b) does *not* require that increased imports be the sole cause of the serious injury.⁸⁴ The Appellate Body found that the language in Article 4.2(b) forbidding the attribution of injury caused by “factors other than increased imports” to increased imports does *not* mean that the existence of such factors will prevent a party from meeting the causation standard.⁸⁵ Rather, the Appellate Body agreed only with the panel’s interpretation of this language to mean that “the effects caused by increased imports must be *distinguished from* the effects caused by other factors.”⁸⁶ Thus, the Appellate Body found that there may be several factors contributing simultaneously to the injury suffered by the domestic industry, and that subject imports need not be the *only* source of injury, but rather a *sufficient* one.⁸⁷

According to the procedure laid out by the Appellate Body in *Wheat Gluten*, the first step in the causation analysis is to distinguish the injurious effects caused to the domestic industry by the imports from the injurious effects caused by other factors.⁸⁸ Second, the competent authorities must examine the injury caused by imports, as distinct from the injury caused by all of the other

82. *Id.*

83. *Id.*

84. Wheat Gluten Appellate Body Report, *supra* note 8, paras. 66-79.

85. *Id.* paras. 67-69.

86. *Id.* paras. 66, 79.

87. *Id.* para. 69. The Appellate Body also relied on Article 2.1 of the Safeguards Agreement for its interpretation of Articles 4.2(a) and 4.2(b). *Id.* para. 75. According to this provision, “a safeguard measure may be applied if a ‘product is being imported . . . *in such increased quantities . . . and under such conditions as to cause . . .*’ serious injury.” *Id.* para. 76 (emphasis in original). The Appellate Body reasoned that this implies that factors causing injury separate from the import increase do not prevent a finding of causation. *Id.* paras. 77-78. See *Wheat Gluten*, para. 69. The Appellate Body also relied on Article 2.1 of the *Agreement on Safeguards* for its interpretation of Articles 4.2(a) and 4.2(b). *Id.* para. 75. According to this provision, “a safeguard measure may be applied if a ‘product is being imported . . . *in such increased quantities . . . and under such conditions as to cause . . .*’ serious injury.” *Id.* para. 76 (emphasis in original). The Appellate Body reasoned that this implies that factors causing injury separate from the import increase do not prevent a finding of causation. *Id.* paras. 77-78.

88. See *Wheat Gluten Appellate Body Report*, *supra* note 8, para. 69.

different factors.⁸⁹ It is noteworthy that the Appellate Body did not suggest that the injury caused by the different factors needs to be individually accounted for, but must simply be distinguished from that caused by the imports.⁹⁰ Finally, the authority must determine “whether ‘the causal link’ exists between increased imports and serious injury, and whether this causal link involves a genuine and substantial relationship of cause and effect between these two elements, as required by the *Agreement on Safeguards*.”⁹¹

However, the Appellate Body arguably did not practice what it preached. In completing its analysis of causation, it concluded that increases in the average available capacity of U.S. producers of wheat gluten were occurring at the same time that imports were increasing.⁹² The Appellate Body suggested that increases in average capacity may have caused injury to the domestic industry,⁹³ which could be attributed to injury caused by increased imports. The Appellate Body suggested that increases in average capacity may have caused injury to the domestic industry, which could have been attributed to the injury caused by increased imports.⁹⁴ The Appellate Body therefore concluded that the ITC did not adequately demonstrate, as required by Article 4.2(b), that any “injury” caused to the domestic industry by increases in average capacity was not attributed to increased imports.⁹⁵ Consequently, the ITC could not establish the existence of the requisite causal link between the increased imports and the serious injury.⁹⁶

At best, the Appellate Body’s decision in *Wheat Gluten* may be seen as a partial victory for both sides of the causation standard dispute: the Appellate Body generally affirmed the United States’ approach and interpretation of the causation standard in safeguard actions, while ultimately ruling in favor of the EU and finding the determination of the ITC to be inadequate in this particular case. At worst, the WTO paid lip service to the United States by theoretically refusing to adopt the insurmountable standard that the panel attempted to establish, while effectively maintaining such a standard through its analysis. Indeed, although the

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* paras. 81-88.

94. *Id.* paras. 90-91.

94. *Id.*

95. *Id.* para. 91.

96. *Id.*

Appellate Body has at times upheld certain U.S. interpretations of the non-attribution standard, in the end it has struck down every single ITC safeguard action that has been challenged, including *Steel*.

D. NAFTA Provisions/Doctrine of Parallelism

The Doctrine of Parallelism provides, in essence, that all imports included in an injury analysis in a safeguard case must also be covered by the safeguard remedy.⁹⁷ This requirement has proven to be yet another stumbling block for the ITC at the WTO with respect to its determinations affecting nations that have signed free trade agreements with the United States, such as the North America Free Trade Agreement (“NAFTA”) co-signatories. Specifically, the WTO disagrees with the provision under U.S. law which allows the President to exclude from a safeguard remedy those imports from NAFTA countries which do not account for a substantial share of total imports or do not “contribute importantly to the serious injury, or threat thereof, found by the [ITC].”⁹⁸

In *Wheat Gluten*, the ITC determined that increased imports of wheat gluten from all sources were causing or threatening to cause serious injury to the domestic industry.⁹⁹ However, pursuant to 19 U.S.C. § 3372, the ITC excluded Canadian imports from the safeguard remedy.¹⁰⁰ Although the ITC included Canada in its initial investigation, it went on to separately examine the impact of imports from Canada on the domestic industry and concluded “that imports from Canada are not contributing importantly to the serious injury caused by imports.”¹⁰¹ The WTO panel faulted the ITC’s methodology and found that “the United States acted inconsistently with Articles 2.1 and 4.2 [of the *Agreement on Safeguards*] by excluding imports from Canada from the application of the safeguard measure.”¹⁰²

97. See *Steel Products Panel Report*, *supra* note 60, paras. 10.589-10.591.

98. 19 U.S.C. § 3372(a)-(b) (2000).

99. Panel Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten From the European Communities*, para. 2.8, WT/DS166/R (July 31, 2000) [hereinafter *Wheat Gluten Panel Report*].

100. *Id.*

101. *Id.* para. 8.162.

102. *Id.* para. 8.182.

On appeal, the United States argued that 19 U.S.C. § 3372 is not inconsistent with its obligations under the *Agreement on Safeguards*.¹⁰³ The United States noted that “Article 9.1 of the *Agreement* . . . requires that imports from developing countries be excluded from the application of a safeguard measure,” and, similar to the NAFTA provisions, “does not provide for the exclusion of such imports from the investigation, or require any finding that the imports subject to the measure, ‘in and of themselves’ cause serious injury.”¹⁰⁴ The United States also pointed out that the panel failed to take the ITC’s “separate and subsequent examination” concerning Canadian imports into account.¹⁰⁵

Dismissing the United States’ analogical arguments regarding Article 9.1 of the *Agreement on Safeguards* in a footnote,¹⁰⁶ the Appellate Body instead focused on the language of Articles 2.1 and 2.2 in its analysis. The Appellate Body ruled that including imports from all sources in the injury determination and then “exclud[ing] imports from one source from the application of the measure would give the phrase ‘product being imported’ a different meaning in Articles 2.1 and 2.2,” and thus would be “incongruous and unwarranted.”¹⁰⁷ Therefore, imports included in the injury determination under Articles 2.1 and 4.2 must correspond exactly to the imports included in the application of the measure under Article 2.2.

The Appellate Body further found that, although the ITC examined the importance of Canadian imports separately, it did not make any explicit determination that increased imports *excluding imports from Canada* were causing injury pursuant to Articles 2.1 and 4.2.¹⁰⁸ The Appellate Body thus concluded that the exclusion of Canadian imports prevented the ITC from meeting the causation standard set out in Article 4.2(b). It is important to note, however, that although the Appellate Body held that the United States acted inconsistently with its obligations under the *Agreement on Safeguards*, it did not find that the U.S. NAFTA

103. Wheat Gluten Appellate Body Report, *supra* note 8, paras. 9-11.

104. *Id.* para. 13.

105. *Id.* paras. 93-94 (quoting Wheat Gluten Panel Report, *supra* note 99, para. 8.161).

106. Wheat Gluten Appellate Body Report, *supra* note 8, para. 96 n.96. The Appellate Body agreed with the EU’s argument that Article 9.1 is an exception to the general rules that applies only to developing countries, and as such is not relevant to the appeal.

107. *Id.*

108. *Id.* para. 98 (emphasis in original).

legislation itself was inconsistent with the *Agreement* or the GATT.¹⁰⁹

The WTO's decision in *United States – Steel* essentially affirmed the *Wheat Gluten* holding that imports included in the injury determination must correspond with those products covered in the remedy. If there is a “gap” between the imports that were determined to have caused injury and those covered in the remedy, then the relevant authority must explicitly demonstrate that the imports included in the safeguard remedy are, in and of themselves, sufficient to satisfy all of the conditions for a safeguard action.¹¹⁰

In *Steel*, as in *Wheat Gluten*, certain aspects of the United States' safeguard remedy excluded imports from certain countries (here, Canada, Mexico, Israel, and Jordan). After learning its lesson in *Wheat Gluten*, the ITC in *Steel* issued a report specifically demonstrating that the imports from non-NAFTA countries alone, considered separately from those of NAFTA countries, were a substantial cause of serious injury to domestic flat-rolled producers.¹¹¹ Despite the ITC's seeming compliance with the WTO's earlier rulings, the panel nevertheless refused to accept the conclusions of the ITC report. The panel reasoned that the ITC's determination that non-NAFTA imports had the *same characteristics* as all imports (which were found to be a cause of serious injury) was not equivalent to a determination that non-NAFTA imports had the identical *effects* as these other imports: “The United States' explanation does not address the possibility that, unlike all imports, non-NAFTA imports are not a cause of serious injury in the sense of having a genuine and substantial relationship of cause and effect.”¹¹² Thus, the panel concluded that the *Steel* safeguard action was inconsistent with both the parallelism and the non-attribution requirements of the *Agreement on Safeguards* because it failed to ensure that the injury caused by other factors was not attributed to non-NAFTA imports.

109. The Appellate Body agreed with the panel that “this dispute does not raise the issue of whether, as a general principle, a member of a free-trade area can exclude imports from other members of that free-trade area from the application of a safeguard measure.” *Id.* para. 99.

110. Steel Products Panel Report, *supra* note 60, para. 10.591.

111. *Id.* para. 10.593.

112. *Id.* para. 10.603.

V. CONCLUSION

Section 201 is an important and potentially very useful trade remedy tool, and has many strong supporters in the United States.¹¹³ However, given that the WTO has struck down every single safeguard action taken by the United States, there is much concern regarding the ability of the WTO's trade dispute resolution procedures to function in harmony with this remedy, or even to coexist with it. There is, at best, a questionable level of political motivation to amend U.S. domestic law to bring it into line with Appellate Body safeguard decisions. Similarly, it is highly unlikely that the *Agreement on Safeguards* or the Dispute Settlement Understanding will be amended to align with current ITC practice.

Certain U.S. industries that have considerable input into U.S. trade policy have candidly expressed concerns regarding the WTO's lack of deference and the potential political backlash should it continue. Further decisions by the WTO striking down U.S. safeguard actions, whether fair or not, may have significant and long-reaching negative political effects, both in the United States and in the international trading system. Even critics of anti-dumping measures acknowledge the necessity of safeguard negotiations at the WTO. They admit that a "series of WTO rulings has indeed made it difficult for the ITC to find that imports hurt an American industry at least as much as any other cause."¹¹⁴ A useful tool in future negotiations would be to clarify the rules governing safeguards in the WTO to facilitate their temporary use.¹¹⁵ The United States and the WTO need to work together to improve the existing system so that the ITC may bring valid safeguard actions that will not automatically be struck down, while the WTO retains its power to strike actions that do not comply with the agreed upon criteria. This opportunity will not last indefinitely; the United States should bring these issues to the fore as quickly as possible.

113. Mankiw & Swagel, *supra* note 4, at 107.

114. *Id.* at 118.

115. *Id.*

