

Beggar-Thy-Neighbor? Why the WTO Appellate Body’s Enforcement of a Rigorous “Parallelism Requirement” Limits the Exemption of Regional Trade Agreement Partners from the Application of Safeguard Measures

By

Jordan Taylor*

Abstract

The recent WTO Appellate Body decision in *U.S. – Steel Safeguards* provided a new wrinkle in the AB’s treatment of Regional Trade Agreement members who seek to exempt each other from the application of safeguard measures. Previously, the AB had supported a rigorous “parallelism requirement” compelling Members to equate the scope of the countries investigated with the scope of the countries upon which the safeguard measures would be applied before it would consider whether Article XXIV provided an affirmative defense permitting the exclusion of RTA partners from the application of such measures. Where there was an impermissible “gap” as between the scope of the investigation and ultimate application, the AB would refuse to rule on whether an Article XXIV defense was permissible. In *U.S. – Steel Safeguards*, however, the AB went a step further and announced that even where RTA partners are excluded from the injury and causation investigation all together, the Member seeking to impose safeguard measures must still take into account imports from RTA partners as “other factors” under the non-attribution principle in order to exempt its RTA partners. This ruling is, in fact, a new additional obligation and is contrary previous AB decisions as it finds the requirements of Article XIX and the Agreement on Safeguards to be more important than the requirements under Article XXIV.

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I. Introduction

On March 5, 2002, President Bush announced the implementation of certain safeguard measures¹ on a wide range of steel products.² Pursuant to his authority under § 312(a) of the NAFTA Implementation Act and the individualized Free Trade Agreements with Jordan and Israel,³ the President declared, however, that the steel safeguard measures would apply to all countries except Canada, Mexico, Jordan and Israel.⁴ Countries all over the world expressed great displeasure over the imposition of the steel safeguards hailing the measures as a return to protectionism.⁵ In response to the steel safeguards, the European Union, together with Brazil,

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¹ See Agreement on Safeguards, Apr. 14, 1994, Article 2.1 [hereinafter “Agreement on Safeguards”] (authorizing imposition of Safeguard measures under the General Agreement on Tariffs and Trade (“GATT”) Article XIX and the World Trade Organization (“WTO”) Agreement on Safeguards, where Members are permitted to raise tariffs for a limited period of time on specific products if they can demonstrate that an emergency situation exists where those products have been imported in such increased amounts so as to cause serious injury or threaten to cause such injury to a domestic industry).

² See Presidential Proclamation 7529: To Facilitate Positive Adjustment To Competition From Imports of Certain Steel Products (March 5, 2002) at ¶ 7 [hereinafter Steel Proclamation] (describing different steel products upon which tariffs will be raised, including carbon and alloy steel hot bar, cold bar, welded tubular products, carbon and alloy flat-rolled steel, and stainless steel fittings, among others), *available at* 2002 WL 340836.

³ 19 U.S.C. 3372(a) (1993).

⁴ See Steel Proclamation at ¶ 11 (excluding Canada, Mexico, Israel and Jordan, all of whom have signed Free Trade Agreements with the United States, from the application of steel safeguards).

⁵ See Edmund L. Andrews, *Angry Europeans to Challenge U.S. Steel Tariffs at W.T.O.*, March 6, 2002, N.Y. TIMES (citing a drop in steel imports in the years leading up to the implementation of safeguards as one reason the Europeans feel the measure promotes protectionism, and describing

China, Japan, New Zealand, Norway, South Korea, and Switzerland filed separate complaints at the World Trade Organization (“WTO”), which ultimately resulted in an Appellate Body (“AB”) decision finding the steel safeguards inconsistent with certain Articles of the General Agreement on Tariffs and Trade (“GATT”) and WTO Agreements.⁶

One of the key allegations against the U.S. in the steel safeguards case was that WTO rules prohibit the exemption of partners in a Regional Trade Agreement (“RTA”) from the application of safeguard measures.⁷ In addressing this issue, this Comment posits that past WTO Panels and the Appellate Body (“AB”) have created a rigorous “parallelism requirement” whereby WTO Members are bound to match the scope of the safeguards injury investigation to the scope of the application of safeguards before a Panel or the AB will even consider whether RTA partners can exclude each other from the imposition of such measures. Moreover, the AB in *U.S. – Steel Safeguards* added an additional obligation requiring Members to apply a non-attribution standard to RTA partner imports when those imports are completely excluded from the injury and causation analysis of a safeguards investigation. By endorsing this demanding “parallelism requirement,” Panels and the AB have been able to evade the true policy consideration at issue: whether RTA partners can exclude each other from the injury and

South Korean steel producers complaints that the U.S. was engaging in arbitrary discrimination by excluding Mexico and Canada from the imposition of steel safeguards).

⁶ See *U.S. - Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248-49, 251-54, 258-59/AB/R [hereinafter *U.S. - Steel Safeguards*] (outlining each complaint brought against U.S. steel safeguards).

⁷ See, e.g., *U.S. - Steel Safeguards*, WT/DS258/9 Request for the Establishment of a Panel by New Zealand (claiming the U.S. failed to meet the “parallelism requirement” inherent in the Agreement on Safeguards by excluding Canada and Mexico from the application of steel Safeguards), and *U.S. - Steel Safeguards*, WT/DS259/10 Request for the Establishment of a Panel by Brazil (making the same claim as New Zealand). See also *U.S. - Steel Safeguards*, WT/DS249/6, Request for the Establishment of a Panel by Japan, and *U.S. - Steel Safeguards*, WT/DS251/7, Request for the Establishment of a Panel by Korea (arguing exclusion of NAFTA members from the application of steel safeguards violates the GATT Article I Most Favored Nation principle).

causation investigation and subsequent application of safeguard measures by using an affirmative defense under GATT Article XXIV, the provision allowing WTO Members to form regional trade alliances.

Part II of this Comment will examine the inherent conflict between Article XXIV of GATT, which allows WTO Members to form RTAs, and Article XIX and the WTO Agreement on Safeguards, which regulate the implementation of safeguard measures. In Part III, the use of Article XXIV as a defense to GATT-inconsistent measures will be analyzed by looking at past Panel and AB decisions in which such a defense has been claimed. Part IV will then discuss the AB's most recent interpretation of the parallelism requirement in *U.S. – Steel Safeguards*.

II. The Relationship between Article XXIV, Article XIX, and the Agreement on Safeguards

In order to put the issue of intra-regional safeguards application in context, it must first be understood that there is an inherent conflict between GATT Articles XIX and XXIV and the Agreement on Safeguards (“the Agreement”). Both Articles XIX and XXIV and the Agreement must be viewed as exceptions to the general purpose of the WTO found in the GATT Article I Most Favored Nation (“MFN”) clause.⁸ The relationship between these two exceptions comes into conflict when a member of an Article XXIV RTA seeks to impose an Article XIX safeguard on a product, but chooses not to enforce the measure upon other members of the same RTA. The trade creation aspects of Article XXIV, therefore, conflict with the trade-distorting protectionism of Article XIX and the Agreement on Safeguards.⁹ This section will address the problems

⁸ See General Agreement on Tariffs and Trade, Oct. 30, 1947, Article I [hereinafter GATT] (stating “with respect to customs duties and charges of any kind” imposed on imports or exports from a WTO Member, “any advantage, favor, privilege or immunity granted by a Contracting Party” must be given “immediately and unconditionally to the like product” going to, or coming from any other WTO Member).

⁹ See Legal Problems of International Economic Relations: Cases, Materials, and Text 465 (Jackson, John H., Davey, William J., and Sykes, Alan O. Jr. eds., 3d ed. 1995) (explaining

created by the inherent conflict between these two exceptions to the general trade-creation notions included in the formation of the WTO.¹⁰

A. Article XXIV: Regionalism and Trade Creation

Many commentators, as supported by WTO policy, believe that regionalism and the creation of RTAs will assist in laying the groundwork for a more integrated global economy.¹¹ As trade-creation is the main goal of the WTO, it would be contradictory if the WTO were to disallow regional trading blocs that seek to liberalize trade between Members.¹² It is important to note, however, that since 1995, the Committee on Regional Trade Agreements (“CRTA”) at the WTO, which is charged with overseeing RTA compliance with Article XXIV, has failed to approve a single RTA.¹³ The WTO, however, has allowed Members to negotiate and operate RTAs without the approval of the CRTA.¹⁴

trade-creation as it relates to RTAs as a theory whereby WTO Members can take advantage of more efficient suppliers within a regional bloc, and that trade-diverting practices, such as a ban on regional trading agreements, would lead firms to use inefficient suppliers from WTO Member countries to take advantage of certain trade preferences).

¹⁰ See World Trade Organization, Apr. 14, 1994, Agreement Establishing the World Trade Organization [hereinafter WTO] (describing objectives of creating the WTO as the lowering of tariffs and other barriers to trade and to eliminate discriminatory treatment in global trade, thus creating more trade throughout the world).

¹¹ See Jackson, Davey, & Sykes, *supra* note 9, at 467 (arguing regional integration should be seen as a “building block” and not a “stumbling block” to a more integrated world economy); *see also id.* at 465 (explaining positive aspects of trade-creation policies).

¹² See WTO, *supra* note 10 (stating trade liberalization as a goal of the WTO).

¹³ See Work of the Committee on Regional Trade Agreements (CRTA) at http://www.wto.org/english/tratop_e/region_e/regcom_e.htm (describing responsibilities of the CRTA and noting a lack of consensus as the reason why no RTAs have yet been approved).

¹⁴ See Regional Trade Agreements at http://www.wto.org/english/tratop_e/region_e/region_e.htm (listing 143 RTAs as notified to the WTO under Article XXIV and allowing all of them to operate without CRTA approval).

GATT Article XXIV allows WTO Members to form Free Trade Areas (“FTAs”)¹⁵ or Customs Unions (“CUs”),¹⁶ whereby “duties and other restrictive regulations of commerce . . . are eliminated with respect to *substantially all trade* between the constituent territories.”¹⁷ By allowing WTO Members to form FTAs or CUs, Article XXIV provides an explicit exception to the MFN clause of GATT Article I since those Members that are party to an RTA will apply lower tariff rates and reduce other trade regulations between them, but still maintain similar trade-distorting policies as to other WTO Members.¹⁸

Article XXIV:8, however, includes a list of “exceptions” to the general trade-creation rule of Article XXIV, including Articles XI, XII, XIII, XIV, XV, and XX, permitting RTA members to impose, where necessary, measures increasing “duties and other restrictive regulations” against other RTA members.¹⁹ Conspicuously absent from these exceptions is Article XIX, and, thus, the Agreement on Safeguards.²⁰ Questions have arisen within the WTO and before Panels and the AB regarding those GATT provisions that do not appear as listed exceptions.²¹ RTA members have argued that their right to exclude members from the

¹⁵ See GATT Article XXIV:8(b) (explaining an FTA to be a group of separate customs territories that eliminate duties and other restrictive regulations between them).

¹⁶ See GATT Article XXIV:8(a) (defining a CU as a single customs territory created from separate customs territories where one set of duties and regulations will apply to all imports and exports to and from the CU).

¹⁷ GATT Article XXIV:8 (emphasis added).

¹⁸ See Jackson, Davey, & Sykes, *supra* note 9, at 465 (explaining the difference between policies favoring trade-creation and those that create trade-distortion); *see also* GATT Article XXIV:4 (discussing relations between RTAs and third-party WTO Members).

¹⁹ GATT Article:8(a)(i) and (b).

²⁰ See Robert E. Hudec and James D. Southwick, *Trade Rules in the Making: Challenges in Regional and Multilateral Negotiations* 66 (Miguel Rodriguez Mendoza, Patrick Low, Barbara Kotschwar eds., 1999) (discussing those GATT Articles, including Article XIX, that were left off the exceptions list in Article XXIV:8).

²¹ See *id.* at 68 (explaining the ramifications of each of the listed exceptions, and noting that in addition to Article XIX, Article XXI, the general national security exception to compliance with GATT, is also absent from the list of exceptions in Article XXIV:8, but that it would be absurd if

application of safeguards exists because Article XIX does not appear on the list of exceptions and, therefore, RTA members are expected not to apply safeguard measures against each other as such measures would be an increase in “duties and other restrictive regulations.”²² To supporters of intra-regional safeguards exemptions, the list of exceptions in Article XXIV:8 represents only those GATT provisions that must be imposed on RTA partners when applied at all.²³

Opponents to the exclusion of RTA partners from the application of safeguard measures argue that GATT Article XIX and the Agreement on Safeguards require a parallelism as between the investigation of the imports thought to cause or threaten serious injury and the ultimate application of safeguard measures upon those imports.²⁴ It would, therefore, violate both Article XIX and the Agreement to conduct an investigation of all imports, including those from RTA members, and then exclude RTA partners from the application of safeguard measures.²⁵

During the Uruguay Round WTO negotiations on Article XXIV, a paper was circulated discussing the inherent conflict between Articles XXIV and XIX.²⁶ Although the language was rejected as being “too permissive,” the negotiators recognized that “it should be demonstrated [in injury investigations] that the serious injury giving rise to the invocation of Article XIX is caused

RTA members were not be able to escape from obligations for national security reasons); *but see id.* at 67 (noting a GATT Secretariat document stating the drafting history of Article XXIV:8 demonstrates that Article XIX was left out of the listed exceptions on purpose).

²² *Id.* at 68 (stating one of the arguments by proponents of RTA exemptions is that the list of exceptions in Article XXIV:8 represents only those GATT provisions that must be imposed on RTA partners when applied at all); *see also* Mathis, James H., *Regional trade agreements in the GATT-WTO: Article XXIV and the internal trade requirement* 242 (2002) (recognizing an argument that as Article XIX is not a listed exception, RTA members should not be allowed to include each other in the application of Safeguard measures).

²³ Mathis *supra* note 22 at 246.

²⁴ Hudec & Southwick, *supra* note 20, at 68.

²⁵ *Id.*

²⁶ *See id.* at 68 (discussing a draft decision on Article XXIV proposed on September 24, 1990).

by imports from non-members [of an RTA].”²⁷ Combined with the arguments proffered by opponents to exemptions for RTA partners, this language would suggest that the WTO as a whole supports a “parallelism requirement,” whereby those countries included in a safeguards injury investigation should be the same countries to which the safeguard measures are applied. Instead of endorsing the “parallelism requirement” as a limitation on the investigatory procedures of RTA members, however, the AB, as will be explained in Part III, uses it more as a hurdle to Members who attempt to argue an affirmative defense under Article XXIV to allow RTA exemptions. This tactic may be the result of a conscious decision by the AB to avoid having to decide whether an RTA has complied with Article XXIV, a duty assigned to the CRTA not the AB.

B. Article XIX and the Agreement on Safeguards: Emergency Actions Only

GATT Article XIX, as clarified by the later negotiated Agreement on Safeguards (the “Agreement”), can also be viewed as an exception to Article I MFN. By allowing WTO Members to remedy problems with “fair trade,”²⁸ Article XIX and the Agreement together seek to permit increased tariffs for a limited period of time on specific products in emergencies when surges in imports are the result of unforeseen developments that were the direct cause of the

²⁷ *Id.* at 69; *see also id.* at 71 (arguing as with Antidumping and Countervailing Duty actions, “protective” GATT-inconsistent measures such as Safeguards should only be applied to those countries causing the injury and, thus, RTA partners should be exempted from the application of such trade-distorting measures if they are not causing the injury).

²⁸ Meaning a legal increase in imports of a specific product (i.e. those imports that have not been spurred on by illegal dumping practices or government subsidies) has caused “serious injury” to the domestic industry. *See U.S. - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, Appellate Body Decision at Para. 80 [hereinafter *U.S. - Line Pipe Safeguards*] (explaining when safeguard measures are permitted, they should be used only to combat problems with “fair” trade).

increased level of imports.²⁹ WTO Panels and the AB have concluded that the purpose of Article XIX and the Agreement on Safeguards is to give WTO Members the ability to create an “effective remedy” to protect a domestic industry when faced with an “extraordinary emergency situation.”³⁰

At the close of the Uruguay Round negotiations, the Agreement on Safeguards emerged to provide greater detail than Article XIX as to permissible procedures for the investigation and implementation of safeguards.³¹ The chapeau to the Agreement on Safeguards clearly reads that the Agreement seeks only to “clarify and reinforce” the provisions under Article XIX.³² It is important to note, however, that as set down in Annex 1A to the WTO Agreement, when there is a conflict between an original GATT provision, such as Article XIX, and one of the Multilateral Agreements of the WTO, such as the Agreement on Safeguards, the provision included in the Agreement must prevail over the GATT provision.³³

Within the Agreement on Safeguards, there are three relevant provisions to the debate over whether RTA partners may exempt each other from the application of safeguards. First, Article 2.1 of the Agreement states that a Member is only allowed to impose safeguard measures where it has determined that the increased imports of a product have caused or threatened to cause serious injury to a domestic industry.³⁴ Although the text of this Article has not raised

²⁹ See GATT Article XIX (allowing safeguard measures when a product is being imported “in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers”); See also *supra* note 1 (defining safeguard measures).

³⁰ See *U.S. - Line Pipe Safeguards*, WT/DS202/AB/R, Appellate Body Report at Para. 82-83 (finding a “natural tension” to exist between the right to impose safeguards remedies and the obligation not to impede “fair trade” beyond what is necessary to cure an emergency situation).

³¹ See WTO *supra* note 10 (discussing creation of the WTO and the separate agreements including the Agreement on Safeguards following the Uruguay Round of GATT negotiations).

³² Agreement on Safeguards, preamble.

³³ WTO, Annex 1A.

³⁴ Agreement on Safeguards, Article 2.1.

much controversy, it is the footnote to this provision that affects the imposition of intra-regional safeguards.

Footnote 1 to Article 2.1 reads:

A customs union may apply a safeguard measure as a single unit or on behalf of a member State. When a customs union applies a safeguard measure as a single unit, all the requirements for the determination of serious injury or threat thereof under this Agreement shall be based on the conditions existing in the customs union as a whole. When a safeguard measure is applied on behalf of a member State, all the requirements for the determination of serious injury or threat thereof shall be based on the conditions existing in that member State and the measure shall be limited to that member State. *Nothing in this Agreement prejudices the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994.* (emphasis added).

Both sections of footnote 1 to Article 2.1 have been subject to intense scrutiny by Panels and the AB.³⁵ The first part of the footnote discusses the application of safeguards by a CU and has been used by Panels and the AB to form the “parallelism requirement.”³⁶ The second part of the footnote reads: “[n]othing in this Agreement prejudices the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994.”³⁷ As will be discussed in Part III, the meaning of this footnote has been the subject of a great deal of litigation, but from the text it can be observed that the drafters of the Agreement, at the very least, recognized the inherent conflict between Article XXIV and Article XIX and felt that it was an issue to be resolved at a later date either by future WTO negotiations or by the AB.

³⁵ See Sections III.B-D *infra* (describing Panel and AB decisions scrutinizing Section 2.1 of the Safeguards Agreement).

³⁶ See Mathis *supra* note 22 at 250 (noting that the last sentence of footnote 1 to Article 2.1 requires parallelism in the investigation and application of safeguards); see also *Argentina - Safeguard Measures on the Import of Footwear*, WT/DS121/R, Panel Report at Para. 8.80 [hereinafter *Argentina - Footwear*] (describing a parallelism to exist as between the scope of the countries investigated and the scope of the eventual application of safeguard measures).

³⁷ Agreement on Safeguards, Article 2.1, fn 1.

The second important provision of the Agreement on Safeguards is Article 2.2, which reads: “[s]afeguard measures shall be applied to a product being imported irrespective of its source.”³⁸ This provision is a direct contradiction to the theory that the Agreement permits the exclusion of RTA partners from the application of safeguard measures.³⁹ Until the WTO or the AB chooses to settle the issue of whether RTA members can exclude each other from safeguard measures using an affirmative defense under Article XXIV, this provision will continue to permit a cause of action by third parties to an RTA when RTA partners are exempted from such measures. Article 2.2, therefore, will continue to place the burden on the RTA member invoking the safeguard measure to demonstrate why it should be able to exclude its RTA partners from the application of safeguard measures.⁴⁰

The last relevant provision of the Agreement on Safeguards deals with the actual injury investigation conducted by a Member. Article 4.2(a) of the Agreement uses the term “increased imports” three times, leading opponents to the exclusion of RTA partners from safeguard measures to conclude that *all imports* must be included in the investigation stage, and thus imports from RTA members cannot be excluded from either the investigation stage or the ultimate implementation of safeguard measures.⁴¹

³⁸ Agreement on Safeguards, Article 2.2.

³⁹ See Mathis *supra* note 22 at 241 (arguing that due to the MFN implications of Article 2.2, even if a safeguards investigation were found to meet the “parallelism requirement,” an Article XXIV defense would have to be invoked by the RTA member imposing the safeguard in order to exclude its partners from the application of the measure).

⁴⁰ See *Turkey - Restrictions on Imports of Textiles and Clothing Products*, WT/DS34/R, Panel Report at Para. 9.57 [hereinafter *Turkey - Textiles*] (noting that the burden of proof in WTO disputes is well settled in that the complaining party must first demonstrate a *prima facie* case of a violation of a WTO provision, and then the opposing party may invoke an exception or affirmative defense, such as Article XXIV:8, where it must prove the conditions for such a claim are met).

⁴¹ Agreement on Safeguards, Article 4.2. See *U.S. - Line Pipe Safeguards*, WT/DS202/R, Panel Decision at Para. 7.162 (framing Korea’s argument as a failure by the U.S. to meet the

Both WTO Panels and the AB, when faced with an affirmative defense under Article XXIV arguing for the exemption of RTA partners, have favored enforcement of the “parallelism requirement” stemming from Article XIX and Articles 2.1, 2.2 and 4.2 of the Agreement on Safeguards to limit such exemptions. The leading cases on Article XXIV defenses will be discussed next.

III. The “Parallelism Requirement” and Permissible Defenses Under Article XXIV

As stated in the footnote to Article 2.1 the drafters of the Agreement on Safeguards did not make an explicit clarification of the relationship between GATT Articles XXIV:8 and XIX. The interpretation of this relationship must, therefore, be decided upon either in further negotiations at the WTO or a by the AB. Prior to *U.S. – Steel Safeguards* four cases have come before Panels and the AB in which a WTO Member has attempted to exercise an Article XXIV defense.⁴² All such attempts failed.⁴³ The AB, however, has refused to make a definitive ruling on whether RTA members can be excluded from the application of safeguard measures.⁴⁴ Although it could be argued that the AB appeared to be leaning toward making an authoritative

“parallelism requirement” by including Canada and Mexico in the injury investigation but later excluding them from the application of safeguard measures).

⁴² See *Turkey - Textiles*, WT/DS34/AB/R, Appellate Body Report, *Argentina - Footwear*, WT/DS121/AB/R, Appellate Body Report, *U.S. - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* [hereinafter *U.S. - Wheat Gluten*], WT/DS166/AB/R, Appellate Body Report, *U.S. - Line Pipe Safeguards*, WT/DS202/AB/R, Appellate Body Report (evaluating use of Article XXIV as a defense to the exclusion of RTA partners from the application of safeguard measures).

⁴³ But see *U.S. - Line Pipe Safeguards*, WT/DS202/R, Panel Report at Para. 7.150 (finding that Korea’s inability to prove that the U.S. failed to meet the “parallelism requirement” meant that the U.S. had in fact met that requirement). The AB later refused to rule on whether the defense existed and declared the Panel’s findings on the issue “moot” and of “no legal consequence.” *U.S. - Line Pipe Safeguards*, WT/DS202/AB/R, Appellate Body Report at Para. 199.

⁴⁴ See, e.g., *U.S. - Line Pipe Safeguards*, WT/DS202/AB/R, Appellate Body Report at Para. 199 (refusing to rule on whether RTA members may exclude each other from the application of safeguard measures).

judgment on the issue,⁴⁵ in *U.S. – Steel Safeguards* the AB instead added a new obligation for RTA members when excluding their RTA partners from the safeguards investigation all together requiring them to apply the non-attribution standard to “account for the fact that excluded imports may have some injurious impact on the domestic industry.”⁴⁶ The addition of the non-attribution requirement in the investigation stage will likely have the effect of allowing the AB to refuse to find that a Member has met the “parallelism requirement” in all future cases. The AB, thus, will be able to continue to sidestep the issue of whether an RTA should be permitted to use an affirmative defense under Article XXIV to exclude its RTA partners from the application of safeguard measures.

Prior to evaluating panel and AB decisions regarding intra-regional safeguard exemptions, two important points must be acknowledged about procedure and interpretation used in the WTO. When discussing WTO Panel and AB decisions it is always important to keep in mind that *stare decisis* is not followed. Both Panels and the AB, however, do often lend great weight to past decisions.⁴⁷ In addition, it begs attention to note that neither Panels nor the AB has differentiated between permissible application of intra-regional safeguards within a CU versus an FTA, and this Comment will assume for the argument of using an Article XXIV defense, that such a defense would be available to all RTA partners whether members of a CU or an FTA.⁴⁸

⁴⁵ *See id.* at Para. 198 (finding an RTA member may meet the “parallelism requirement” when it 1) excludes RTA members from the safeguards investigation, or 2) provides a “reasoned and adequate explanation” as to why the RTA members should be excluded from the application of safeguards when they were included in the investigation).

⁴⁶ *U.S. – Steel Safeguards*, WT/DS248-49, 251-54, 258-59/AB/R, Appellate Body Report at Para. 437.

⁴⁷ *See Jackson, Davey, & Sykes, supra* note 9, at 263 (noting a principle of public international law is not to follow a doctrine of precedent but rather to strive to obtain consistency).

⁴⁸ *See Mathis, supra* note 22, at 240 (arguing that Article XXIV:8 on its face does not differentiate between FTAs and CUs by necessitating the creation of a “separate legal regime” in order to form an FTA, and therefore both CUs and FTAs will be considered as the same in

A. Turkey - Textiles: Article XXIV as a Defense to Certain GATT Provisions

The first case to come before a WTO Panel to discuss Article XXIV as a defense was *Turkey - Restrictions on Imports of Textiles and Clothing Products*⁴⁹ (“*Turkey - Textiles*”). Here, India complained that quantitative restrictions placed on textile exports to Turkey adopted in order to form a CU between Turkey and the European Union were in violation of GATT Articles XI and XIII and the Agreement on Textiles.⁵⁰ Turkey did not deny the existence of the quantitative restrictions, but instead stated what the Panel considered to be an affirmative defense under Article XXIV,⁵¹ claiming that the existence of a valid EU-Turkey CU would justify the measures at issue.⁵²

The Panel first looked to whether the measures at issue were justified by the formation of a CU. Here the Panel concluded that nothing in Article XXIV addresses the ability of WTO Members to orchestrate their customs or duties regulations in a GATT-inconsistent manner with respect to other WTO Members.⁵³ As to the present case, the Panel concluded that Turkey was not authorized by Article XXIV:8(a)(ii) to put in place new GATT-inconsistent quantitative restrictions on textile and clothing products in order to form a CU with the EU.⁵⁴

claims made under Article XXIV, not separate forms of an RTA); *see also id.* at 242 (referring to arguments in favor of intra-regional safeguards exemptions as applicable to both FTAs and CUs).

⁴⁹ WT/DS34/R, Panel Report.

⁵⁰ *See Turkey - Textiles*, WT/DS34/R, Panel Report at Para. 6.30 (explaining India’s argument that WTO Members forming a CU under Article XXIV still had to recognize Article XI:1 with respect to trade with third party Members).

⁵¹ *See id.* at Para. 9.57 (noting that the burden of proof in WTO disputes is well settled where the complaining party must first demonstrate a *prima facie* case of a violation of a WTO provision, and then the opposing party may invoke an exception or affirmative defense and prove the conditions for such a claim are met); *see also id.* at Para. 9.90 (choosing to analyze Turkey’s argument as an affirmative defense).

⁵² *Id.* at Para. 9.88.

⁵³ *Id.* at Para. 9.156.

⁵⁴ *Id.*

On appeal to the AB, Turkey's argument was again construed to be an affirmative defense under Article XXIV.⁵⁵ Turkey claimed that the Panel erred in finding that it was not allowed to introduce the quantitative restrictions at issue upon the formation of a CU with the European Communities.⁵⁶ The AB upheld the Panel's final determination that the measures at issue could not be instituted, but used different reasoning, finding that Article XXIV could be used in this case as a defense where the measures were necessary to the formation of a CU. Thus, where Article XXIV is used as an affirmative defense to a GATT-inconsistent measure, the AB found that the party invoking the defense must first demonstrate that the RTA has met the requirements of Article XXIV, and second show that the measure was necessary to the formation of the RTA.⁵⁷ By upholding the Panel's final determination, however, the AB decided it was not necessary to evaluate whether the proposed CU met the requirements of Article XXIV.⁵⁸ Although Turkey never argued that Article XXIV could be used as defense *per se*, the definitive finding by the AB that Article XXIV may, in certain circumstances, be invoked as a defense to GATT-inconsistent measures has important ramifications for future cases regarding the application of safeguard measures as between RTA partners.⁵⁹

⁵⁵ See *Turkey - Textiles*, WT/DS34/AB/R, Appellate Body Report at Para. 42 (referring to Turkey's argument under Article XXIV as an affirmative defense).

⁵⁶ *Id.* at Para. 6.

⁵⁷ *Id.* at Para. 58.

⁵⁸ See *id.* at Para. 59 (noting that the Panel assumed the CU met the requirements of Article XXIV without an explicit evaluation).

⁵⁹ See *id.* at Para. 45 (stating GATT 1994 "shall not prevent" the formation of a CU, and "thus, the chapeau makes it clear that Article XXIV may, under certain conditions, justify the adoption of a measure which is inconsistent with certain other GATT provisions, and may be invoked as a possible 'defense' to a finding of inconsistency"); see also *id.* at fn 13:

"We note that legal scholars have long considered Article XXIV to be an 'exception' or a possible 'defence' to claims of violation of GATT provisions. An early treatise on GATT law stated: '[Article XXIV] establishes an exception to GATT obligations for regional arrangements that meet a series of detailed and complex criteria.' (emphasis added)

B. Argentina - Footwear: The Introduction of “Parallelism”

1. Panel Decision

Where the issue in *Turkey - Textiles* involved a CU in the formation stage, in *Argentina - Safeguard Measures on the Import of Footwear*⁶⁰ (“*Argentina - Footwear*”), the Panel faced the issue of whether a member of a CU already notified to the WTO could exclude its RTA partners from the application of safeguard measures. Among other complaints against the imposition of Argentine safeguards on footwear imports, the European Union claimed that Argentina violated the Safeguards Agreement by including imports from MERCOSUR in the injury and causation analysis, but ultimately excluded MERCOSUR members from that application of the safeguard measures.⁶¹

At issue in *Argentina - Footwear*, according to the Panel, was whether there should be “*parallelism* between, on the one hand, the *investigation* leading to and, on the other hand, the *application* of safeguard measures.”⁶² The Panel came to the conclusion that the text of the footnote to Article 2.1 reading, “[w]hen a safeguard measure is applied on behalf of a member State [by a CU as a whole], all the requirements for the determination of serious injury or threat thereof shall be based on the conditions existing in that member State and the measure shall be limited to that member State” concerns “*by whom*” a safeguard measure may be imposed not “*to*

(citations omitted) We note also the following statement in the unadopted panel report in *EEC - Member States' Import Regimes for Bananas*, DS32/R, 3 June 1993, para. 358: ‘The Panel noted that Article XXIV:5 to 8 permitted the contracting parties to deviate from their obligations under other provisions of the General Agreement for the purpose of forming a customs union ...’. (emphasis added)”

⁶⁰ WT/DS121/R, Panel Report.

⁶¹ *Id.*

⁶² *Id.* at Para. 8.80 (emphasis added by the Panel).

whom” it may be applied.⁶³ The Panel, therefore, rejected Argentina’s argument that the footnote to Article 2.1 permitted it to exclude MERCOSUR partners from the application of safeguard measures as the footnote was interpreted to state which countries may apply the safeguards, not which countries the safeguards may be imposed upon.

The Panel then turned its attention to whether, pursuant to footnote 1 to Article 2.1 of the Agreement on Safeguards, a Member is permitted to include RTA partners in the investigation portion of a safeguards measure, yet exclude those partners from the application of the measure.⁶⁴ According to the Panel, the footnote to Article 2.1 must be looked at in the context of Article 2.2, which provides that “[s]afeguard measures shall be applied to a product being imported irrespective of its source.”⁶⁵ In analyzing Article 2.2, the Panel concluded that when an RTA conducts a Member-Specific investigation, any safeguard measures resulting from that investigation must be applied on a non-discriminatory basis against products from all sources, regardless of whether they originate from inside an RTA to be in accordance with the MFN principle of GATT Article I.⁶⁶ The Panel also rejected Argentina’s argument that the footnote to Article 2.1 should be considered an exception to Article 2.2 by concluding that if the drafters of the Safeguards Agreement had wanted it to be an exception they would have made it explicit as they did in Article 9, the exception in which developing countries are exempted from the application of safeguards.⁶⁷

In concluding the MFN analysis, the Panel for the first time gave definitive support for the idea of a “parallelism requirement.” By reading the footnote to Article 2.1 in light of the

⁶³ *Id.* at Para. 8.83 (emphasis added by the Panel).

⁶⁴ *Id.* at Para. 8.84.

⁶⁵ *Id.*

⁶⁶ *Argentina - Footwear*, Panel Report WT/DS121/R at Para. 8.84.

⁶⁷ *Id.* at Para. 8.85.

requirements of Article 2.2, the Panel found in the text support for an “implied *parallelism* between the scope of a safeguard *investigation* and the scope of the *application* of safeguard measures.”⁶⁸

Argentina also argued before the Panel, based on the findings in *Turkey - Textiles*, that Article XXIV prohibited it from imposing safeguard measures on imports from MERCOSUR members.⁶⁹ As the last sentence of the footnote to Article 2.1 of the Safeguards Agreement states that the Agreement does not prejudice any interpretation as between GATT Articles XIX and XXIV:8, and since Article XIX is not a listed exception in Article XXIV:8(a)(i) to eliminate “duties and other restrictive regulations” between members of a CU, Argentina argued it should be allowed to exempt MERCOSUR members from the imposition of safeguard measures.⁷⁰ The Panel was not swayed by this argument and concluded that Article XXIV:8 does not prohibit Argentina from applying safeguard measures to its RTA partners in MERCOSUR.⁷¹ The Panel then came to the final conclusion that in the case of a Member-State Specific investigation and application of safeguard measures, where RTA partners are included in the injury and causation investigation, those RTA members may not be exempted from the imposition of safeguards, and thus, Argentina was in violation of Article 2 of the Safeguards Agreement by excluding other MERCOSUR members from the application of its safeguard measures.⁷²

2. Appellate Body Decision

⁶⁸ *See id.* at Para. 8.87 (stating that where a member-state-specific investigation includes imports from all sources, that member may not exclude RTA partners, but where a CU-wide investigation finds serious injury, safeguards may only be applied to extra-regional Members as the intra-regional imports would have been considered part of the domestic industry in the investigation).

⁶⁹ *Id.* at Para. 8.93.

⁷⁰ *See id.* (arguing Article XXIV:8 prevented it from applying safeguard measures to other members of MERCOSUR).

⁷¹ *Id.* at Para. 8.101.

⁷² *Argentina - Footwear*, Panel Report WT/DS121/R at Para. 8.102.

On appeal, the AB agreed with the Panel's conclusion that Argentina could not include MERCOSUR members in its injury and causation investigation but then exclude them from the application of safeguard measures, although the AB offered different legal reasoning.⁷³ Argentina claimed that the Panel had erred by imposing a "parallelism requirement" on the application of safeguard measures taken by members of a CU.⁷⁴ Looking at the present facts, the AB first noted that the safeguards at issue were not taken by MERCOSUR *on behalf of* Argentina, but rather the measures and investigation were undertaken solely by Argentina.⁷⁵ As it was Argentina, and not MERCOSUR, that was a signatory to the WTO, and therefore the Agreement on Safeguards, the AB found that the footnote to Article 2.1 of the Agreement did not apply to the safeguards at issue.⁷⁶ The AB then reversed the legal reasoning and findings of the Panel, concluding that the footnote to Article 2.1 did not apply in the present case.⁷⁷ As to Article XXIV, the AB concluded that since the Panel's reasoning on the Safeguards Agreement was not applicable, an analysis of a permissible defense under Article XXIV was not necessary as to the safeguards at issue.⁷⁸

As to the principle of whether an Article XXIV defense could be proffered at all, the AB began a trend of refusing to rule on that issue.⁷⁹ Here, the AB agreed with the Panel that the

⁷³ *Argentina - Footwear*, WT/DS121/AB/R, Appellate Body Report at Para. 99.

⁷⁴ *Id.*

⁷⁵ *Id.* at Para. 106-07.

⁷⁶ *Id.* at Para. 108-109.

⁷⁷ *Id.*

⁷⁸ *See id.* at Para.109 (noting that in *Turkey - Textiles*, although the AB found that Article XXIV could be a defense to certain GATT-inconsistent measures, the defense was only proper when invoked by a Member claiming the measure was adopted during the formation of a CU and that it was necessary to form the CU).

⁷⁹ *See, e.g., U.S. - Line Pipe Safeguards*, WT/DS202/AB/R, Appellate Body Report at Para. 199, and *U.S. - Wheat Gluten*, WT/DS162/AB/R, Appellate Body Report at Para. 99 (refusing to rule on the general principle of whether RTA members are permitted to exclude each other from the application of safeguards).

injury and causation analysis undertaken by Argentina, which included imports from MERCOSUR members, could only result in the application of safeguard measures upon all imports, not just those outside of MERCOSUR.⁸⁰ The AB narrowed its ruling, however, by stating that since it did not agree with the Panel’s reasoning where the current issue dealt with a CU imposing safeguards *on behalf of* an RTA member, the AB refused to rule on the general principle of whether an RTA member can exclude RTA partners from the application of safeguard measures.⁸¹

C. U.S. - *Wheat Gluten*: More Support for the “Parallelism Requirement”

1. Panel Decision

As noted above, both *Turkey - Textiles* and *Argentina - Footwear* dealt with the relationship of GATT Articles XIX and XXIV and the Agreement on Safeguards as applied to CUs. In *U.S. - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*⁸² (“*U.S. - Wheat Gluten*”), a Panel and then the AB would apply the “parallelism requirement” to a situation where members of an FTA were excluded from the application of safeguard measures.

Here, the EC claimed that the U.S. violated the “parallelism requirement” as set out in *Argentina - Footwear* by excluding NAFTA members from the application of safeguard measures when Canada had been included in the injury and causation investigation.⁸³ The U.S. defended its actions by claiming that the United States International Trade Commission (“USITC”) had engaged in a two-step investigation as required by the Agreement on safeguards and NAFTA

⁸⁰ *Argentina - Footwear*, WT/DS121/AB/R, Appellate Body Report at Para. 113.

⁸¹ *Id.* at Para. 114.

⁸² WT/DS166/R, Panel Report.

⁸³ *U.S. - Wheat Gluten*, WT/DS166/R, Panel Report at Para. 8.155-156.

Article 802.⁸⁴ The U.S. argued first, that the USITC determined the domestic wheat gluten industry suffered serious injury due to a surge in imports from all countries⁸⁵ in 1996 and 1997.⁸⁶ Second, as is required under NAFTA Article 802, the U.S. argued that the USITC had looked at Canadian imports of wheat gluten alone and determined that they did not cause a serious injury to the domestic market.⁸⁷ The U.S. then concluded that this procedure fulfilled the notion of a “parallelism requirement” set out by the AB in *Argentina -Footwear* as the U.S. believed that the Agreement on Safeguards allowed for independent investigations of FTA partners, and does not require a single causation analysis that included all WTO Members.⁸⁸

The Panel defined the present issue as whether the U.S., after completing an investigation including imports from all Members, was allowed to exclude Canadian wheat gluten imports based upon a second subsequent investigation, finding that although Canadian imports constituted a “substantial share” of total imports, they did not “contribute importantly” to the serious injury caused by the imports.⁸⁹ In its initial analysis of the applicable WTO provisions, the Panel again came to the conclusion that Articles 2.1 and 4.2 of the Agreement on Safeguards

⁸⁴ *Id.* at Para. 8.157.

⁸⁵ *Id.* The U.S. originally argued that this first step produced data confirming that imports from the EC were enough to cause serious injury. Later in oral arguments, as outlined in footnote 157 to the Panel Decision, the U.S. acknowledged that an affirmative determination of serious injury under 202(b)(1)(A) of the U.S. Trade Act of 1974 included imports from *all* countries in order to determine whether imports have increased.

⁸⁶ *Id.* at 8.157.

⁸⁷ *Id.*

⁸⁸ *See id.* at Para. 8.157-158 (outlining portion of U.S. argument where it was claimed that the relationship of GATT Articles XIX and XXIV:8 and Article 2 of the Agreement on Safeguards does not stipulate the “sequencing, or number of causation analyses that may be undertaken” in a safeguards investigation).

⁸⁹ *U.S. - Wheat Gluten*, WT/DS166/R, Panel Report at Para. 8.160; *see also* NAFTA Implementation Act § 311, codified at 19 U.S.C. § 3371 (1994) (requiring the USITC to exclude NAFTA members from the application of safeguard measures if it is determined that their imports do not constitute a “substantial share” of all imports and do not “contribute importantly” to the serious injury or threat thereof).

require symmetry between the scope of the products investigated and the scope of the products to which a safeguards measure is applied (i.e. the “parallelism requirement”).⁹⁰ The Panel concluded, however, that since Canadian imports were included in the original serious injury determination, their later exclusion based on the fact that they did not “contribute importantly” to the injury was not enough to prove imports from other countries were still causing serious injury to the domestic industry as required by Article 4.1 of the Agreement on Safeguards.⁹¹ The Panel’s ultimate finding on this issue was that the U.S. could not exclude Canada from the safeguard measures based on an initial investigation finding serious injury that included imports from all sources taking account of Canadian imports, regardless of what a second subsequent investigation found.⁹²

In addition to the argument under the Agreement on Safeguards, the U.S. also offered a defense under Article XXIV to its exclusion of Canada from the wheat gluten safeguard measures.⁹³ Here, the U.S. claimed that its exclusion of Canada was consistent with Article XXIV and the footnote to Article 2.1 of the Agreement on Safeguards, arguing the terms on which RTA members treat each other to be determined by Article XXIV not Article XIX or the Agreement on Safeguards.⁹⁴ The Panel began its analysis by acknowledging that WTO obligations under Article XIX and the Agreement on Safeguards are cumulative, i.e. any safeguards imposed after the implementation of the Agreement on Safeguards must comply both

⁹⁰ See *U.S. - Wheat Gluten*, WT/DS166/R, Panel Report at Para. 8.167-170 (citing the text of Articles 2 and 4.2 of the Agreement on Safeguards and the *Argentina - Footwear* AB decision for support).

⁹¹ *Id.* at Para. 8.175.

⁹² *Id.* at Para. 8.177.

⁹³ *Id.* at Para 8.178.

⁹⁴ See *id.* (acknowledging the U.S. position that the MFN requirement of Article 2.2 does not apply to safeguard measures accorded by CUs or FTAs on goods originating within the RTA).

with Article XIX and the Agreement.⁹⁵ It was also acknowledged by the Panel that Article XXIV, in some circumstances, may provide a defense to actions that are inconsistent with provisions of the GATT, and may also provide a defense to WTO Agreements if Article XXIV is found to be incorporated into that Agreement.⁹⁶

Despite the fact that the U.S. argued Article XXIV provides a general defense to GATT-inconsistent measures and not specifically to the Agreement on Safeguards, the Panel stated that it did not find the last sentence of the footnote to Article 2.1 of the Agreement to only refer to Articles XIX and XXIV, and that the symmetry required by the Panel must include reference to Articles 2.1 and 4.2 of the Agreement on Safeguards in addition to Article XIX.⁹⁷ The Panel's final ruling was that the exclusion of Canadian imports from the imposition of safeguard measures was inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards as the USITC would have had to complete a separate injury investigation excluding Canadian imports all together in order to exempt Canada from the application of safeguard measures.⁹⁸ Once again the panel made note that it was deciding not to rule on the general principle of whether a member of an RTA can exclude imports from its RTA partners from the imposition of safeguard measures.⁹⁹

2. Appellate Body Decision

On appeal, the U.S. claimed that the Panel incorrectly interpreted Articles 2.1 and 4.2 of the Agreement on Safeguards, and that it failed to take "sufficient account" of the second

⁹⁵ *Id.* at 8.179.

⁹⁶ *U.S. - Wheat Gluten*, WT/DS166/R, Panel Report at Para. 8.180; *see also Turkey - Textiles*, WT/DS34/AB/R, Appellate Body Report at Para. 45 (finding chapeau of Article XXIV:5 only to incorporate provisions of GATT 1994, and not separate WTO Agreements).

⁹⁷ *U.S. - Wheat Gluten*, WT/DS166/R, Panel Report at Para 8.181.

⁹⁸ *Id.* at Para. 8.182.

⁹⁹ *Id.* at Para. 8.183.

subsequent investigation of Canadian imports.¹⁰⁰ The U.S. also argued that the Panel erred in declining to address the legal significance of the footnote to Article 2.1 of the Agreement on Safeguards.¹⁰¹ Before analyzing the claims by the U.S., the AB observed that the word “product” as it appears in both Articles 2 and 4 of the Agreement should be ascribed the same meaning, and thus, “[t]o include imports from all sources in the determination that increased imports are causing serious injury, and then to exclude imports from one source from the application of the measure, would be to give the phrase ‘product being imported’ a *different* meaning in Articles 2.1 and 2.2 of the *Agreement on Safeguards*.”¹⁰² The AB, therefore, found that under general circumstances, imports included in the investigations conducted under Articles 2.1 and 4.2 should correspond to the imports included in the application of safeguard measures under Article 2.2, again supporting the “parallelism requirement.”¹⁰³

In coming to its final decision, the AB found that although the USITC provided a separate investigation of Canadian imports, it did not make any explicit determinations that increased imports from sources outside NAFTA satisfied the requirements of Articles 2.1 and 4.2 of the Agreement on Safeguards.¹⁰⁴ The AB then concluded that the second subsequent investigation of Canadian imports was not sufficient to support an exclusion of Canada from the application of the safeguard measures put in place by the U.S.¹⁰⁵ As to a general Article XXIV defense, the AB agreed with the Panel that the issue was not raised properly by the U.S., and therefore, again declined to rule on the issue.¹⁰⁶

¹⁰⁰ *U.S. - Wheat Gluten*, WT/DS166/AB/R, Appellate Body Report at Para. 94.

¹⁰¹ *Id.*

¹⁰² *Id.* at Para. 96.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at Para. 98.

¹⁰⁵ *Id.* at Para. 98.

¹⁰⁶ *U.S. - Wheat Gluten*, WT/DS166/AB/R, Appellate Body Report at Para. 100.

D. U.S. - Line Pipe Safeguards: Prerequisites to the “Parallelism Requirement”

In *U.S. - Wheat Gluten*, the AB demonstrated a dogged willingness to accept a rigorous “parallelism requirement.” A Panel was next faced, however, with the issue of defining the necessary prerequisites to meet that requirement. In *U.S. - Definitive Safeguard Measures on Imports of Circular Welded Carbon Steel Line Pipe from Korea*,¹⁰⁷ (“*U.S. - Line Pipe Safeguards*”) the Panel and AB disagreed on whether the U.S. had met the “parallelism requirement,” the AB, however, qualified the necessary conditions that would need to be met in order to comply with that requirement.¹⁰⁸

1. Panel Decision

In evaluating Korea’s claim that U.S. line pipe safeguards were illegal because they were not applied to NAFTA members, the Panel bifurcated its analysis and considered arguments under Article XIX and the Safeguards Agreement separately.¹⁰⁹ With respect to violations of Article XIX and the Agreement, Korea’s argument was that in applying safeguards in a discriminatory manner, the U.S. was violating the general MFN principle set out in GATT Article I.¹¹⁰

As to Korea’s claim of an MFN violation under Article XIX, the U.S. offered a defense under Article XXIV.¹¹¹ Here, the Panel first concluded that since the line pipe safeguards instituted a tariff-quota, they must be treated as a “duty or other restrictive regulation of commerce” under Article XXIV:8(b).¹¹² The Panel then found that Article XXIV:5 authorizes the elimination of such restrictions if NAFTA has 1) complied with Article XXIV:5(b) and

¹⁰⁷ WT/DS202/R, Panel Report.

¹⁰⁸ See Section III.D.2 (explaining the conclusions of the AB).

¹⁰⁹ *U.S. - Line Pipe Safeguards*, WT/DS202/R, Panel Report at Para. 7.135.

¹¹⁰ *Id.* at Para. 7.136.

¹¹¹ *Id.* at Para. 7.137.

¹¹² *Id.* at Para. 7.141.

(c),¹¹³ and 2) has eliminated duties and other restrictions on “substantially all” trade between members, where the burden was on the U.S. to prove these conditions prevail.¹¹⁴ Acknowledging Korea’s claim that the U.S. was not in compliance with Article XXIV:8 as the WTO CRTA had not yet issued a final decision on NAFTA, the Panel nonetheless found that the information provided by the U.S. was sufficient to establish a *prima facie* case that NAFTA was in compliance with Article XXIV:5(b) and (c), and Korea’s claim under Article XXIV:8 was not enough to rebut this assertion.¹¹⁵ The Panel, therefore, concluded that the U.S. was entitled to a defense under Article XXIV to Korea’s claim under Article XIX.¹¹⁶

Next, the Panel moved on to consider whether Article XXIV was available to the U.S. as a defense under the Agreement on Safeguards. Korea argued that the exclusion of NAFTA members from the application of line pipe safeguards violated Article 2.2 of the Agreement.¹¹⁷ Here, the Panel first concluded that as it had already found the U.S. was permitted to rely on an Article XXIV defense under Article XIX, it would be “incongruous” not to allow the U.S. to rely on a similar defense with respect to the Agreement on Safeguards.¹¹⁸ This conclusion had its

¹¹³ See GATT Article XXIV:5(b) and (c) (setting out basic prerequisites necessary to form an FTA or an interim agreement, including MFN requirements and the creation of a schedule to conclude formation).

¹¹⁴ *U.S. - Line Pipe Safeguards*, WT/DS202/R, Panel Report at Para. 7.141-142.

¹¹⁵ *Id.* at Para. 7.144.

¹¹⁶ *Id.* at Para. 7.146; see also *id.* at Para. 7.148 (explaining that in *Turkey - Textiles* the AB had conditioned an Article XXIV defense upon not only compliance with Article XXIV:5 and 8, but also upon the necessity of the measure to the formation of the CU or FTA). Here, the Panel found the second requirement not to apply to cases involving FTAs as the “elimination of ‘duties and other restrictive regulations of commerce’ between parties to a free-trade area . . . is the very *raison d’être* of any free-trade area. If the alleged violation of GATT 1994 forms part of the elimination of ‘duties and other restrictive regulations of commerce,’ there can be no question of whether it is necessary for the elimination of ‘duties and other restrictive regulations of commerce’ (in the case of an FTA).” *Id.*

¹¹⁷ *Id.* at Para. 7.149.

¹¹⁸ *Id.* at Para. 7.150.

foundation in the intimate relationship between Article XIX and the Agreement on Safeguards, which would not allow a “contrary interpretation.”¹¹⁹

For the Panel, the legal reasoning supporting the use of an Article XXIV defense to the Safeguards Agreement found its basis in the Agreement itself. The Panel noted that Article 1, “establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994,” which was found by the Panel to signify that safeguard measures taken under the Agreement are, in fact, Article XIX measures as well.¹²⁰ The Panel then found that ignoring this provision of Article 1 would deny the fact that measures taken under the Agreement and those taken under Article XIX are “essentially the one and the same thing.”¹²¹

Since the Panel found that measures taken under Article XIX and the Agreement on Safeguards were one and the same, it also concluded the last sentence of footnote 1 to Article 2.1¹²² provided evidence that Article XXIV could be used as a defense to the Agreement on Safeguards as well as Article XIX.¹²³ Here, the Panel concluded that the AB findings in *Argentina - Footwear* did not support Korea’s argument that the last sentence of footnote 1 to Article 2.1 only applied to CUs and not FTAs.¹²⁴ The Panel then found that even though the footnote was placed in Article 2.1, the words “[n]othing in this Agreement,” demonstrated that

¹¹⁹ *Id.*

¹²⁰ *U.S. - Line Pipe Safeguards*, WT/DS202/R, Panel Report at Para. 7.150.

¹²¹ *Id.*

¹²² *See* Agreement on Safeguards, Article 2.1, fn 1 (“Nothing in this Agreement prejudices the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994”).

¹²³ *U.S. - Line Pipe Safeguards*, WT/DS202/R, Panel Report at Para. 7.151.

¹²⁴ *See id.* at Para. 7.153 (holding “[t]hus, even though the first three sentences of footnote 1 address the application of safeguard measures in the context of a customs union, the broader reference in the last sentence to paragraph 8 extends the coverage of that last sentence to include the application of safeguard measures in the context of free trade areas, as defined by Article XXIV:8(b)”).

the last sentence applies to the entire Agreement on Safeguards and is not limited in its application to Article 2.1 alone.¹²⁵ A definitive finding was then made by the Panel that as it had already concluded that Article XXIV was a proper defense to certain claims brought under Article XIX, and since it found that the last sentence footnote to Article 2.1 applies to the entire Agreement on Safeguards, including Article 2.2, Article XXIV can therefore provide a defense to claims under Article 2.2 of the Agreement.¹²⁶

The Panel then turned its attention to Korea's claim that the U.S. failed to fulfill the "parallelism requirement" by including NAFTA members in the injury and causation investigation, but then excluded them from the application of the safeguard measures.¹²⁷ In its defense, the U.S. offered evidence in the form of footnote 168 to the USITC's injury and causation determination, which stated that the Commission would have reached the same conclusion had it excluded NAFTA imports from its investigation.¹²⁸ Korea's response was restricted in that it claimed only that footnote 168 "has no legal significance."¹²⁹ Perplexed by the limited argument proffered by Korea, the Panel, citing to the AB decision in *U.S. - Wheat Gluten*, concluded that it could only uphold Korea's claim of a "parallelism requirement" violation if Korea could make out a *prima facie* case that the U.S. "had excluded imports from Canada and Mexico from the line pipe measure, without establishing explicitly that imports from

¹²⁵ *Id.* at Para. 7.157.

¹²⁶ *See id.* at Para. 7.158 (noting that any other conclusion would not allow Article XXIV to be a defense to Article 2.2 of the Agreement, which would be antithetical to the conclusion that the last sentence of footnote 1 to Article 2.1 prohibits Article 2.2 from having such an effect); *see also id.* at Para. 7.160 (discussing Korea's argument that an Article XXIV defense to the Agreement on Safeguards would violate the general interpretive note of Annex 1A to the WTO Charter, and inferring the last sentence of footnote 1 to Article 2.1 to mean that Article 2.2 cannot affect the ability of a Member to claim an Article XXIV defense to claims under that Article).

¹²⁷ *Id.* at Para. 7.162.

¹²⁸ *Id.* at Para. 7.169.

¹²⁹ *U.S. - Line Pipe Safeguards*, WT/DS202/R, Panel Report at Para. 7.170.

sources other than Canada and Mexico satisfied the conditions for the application of a safeguard measure.”¹³⁰ Since Korea had failed to make an adequate rebuttal, arguing only that footnote 168 had “no legal significance,” the Panel rejected Korea’s claim that the U.S. had violated the “parallelism requirement,” and thus allowed the U.S. to prevail on an Article XXIV defense.¹³¹

2. Appellate Body Decision

On appeal Korea claimed that the Panel used a “flawed” standard by which to evaluate its *prima facie* case that the U.S. had not met the “parallelism requirement.”¹³² In addressing this claim, the AB first noted that the “parallelism requirement” is derived from the parallel language found in Articles 2.1 and 2.2 of the Agreement on Safeguards referring to “product[s] . . . being imported.”¹³³ The AB then went through the reasoning behind the “parallelism requirement” explaining:

As we then stated in *US – Wheat Gluten*, “the imports included in the determinations made under Articles 2.1 and 4.2 should correspond to the imports included in the application of the measure, under Article 2.2.” We added that a gap between imports covered under the investigation and imports falling within the scope of the measure can be justified only if the competent authorities “establish explicitly” that imports from sources covered by the measure “satisf[y] the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the *Agreement on Safeguards*.” And, as we explained further in *US – Lamb*, in the context of a claim under Article 4.2(a) of the *Agreement on Safeguards*, “establish[ing] explicitly” implies that the competent authorities must provide a “*reasoned and adequate explanation* of how the facts support their determination.”¹³⁴

The defense proffered by the U.S. centered on the fact that Korea had failed to establish a *prima facie* case that footnote 168 the USITC’s determination did not satisfy the “parallelism

¹³⁰ *Id.* at Para. 7.171.

¹³¹ *Id.*

¹³² *U.S. - Line Pipe Safeguards*, WT/DS202/AB/R, Appellate Body Report at Para. 184.

¹³³ *Id.* at Para. 179-80; *see also supra* Section III.C.2 (discussing conclusions of AB in *U.S. - Wheat Gluten*).

¹³⁴ *U.S. - Line Pipe Safeguards*, WT/DS202/AB/R, Appellate Body Report at Para. 181 (emphasis added by the AB).

requirement” as set out by the AB.¹³⁵ In analyzing the facts, the AB first noted that the USITC had included imports from *all sources* in its injury investigation, yet had excluded NAFTA members from the application of safeguard measures, thus creating the impermissible “gap” between the imports used in the investigation of serious injury and the imports affected by the measure at issue.¹³⁶ The AB, therefore, concluded that the existence of such a gap as proven by Korea was sufficient to make out a *prima facie* case that the U.S. had violated the “parallelism requirement.”¹³⁷

After assessing the contents of footnote 168, the AB concluded that it did not “establish *explicitly*” that increased imports from outside of NAFTA could have caused serious injury or threat of serious injury on their own.¹³⁸ It was also found that footnote 168 failed to “provide a *reasoned and adequate explanation*” of facts that could establish imports from non-NAFTA members were causing serious injury or threatened to cause such injury to the relevant domestic market.¹³⁹ To be *explicit*, the AB explained, “a statement must express distinctly all that is meant; it must leave nothing merely implied or suggested; it must be clear and unambiguous.”¹⁴⁰ The AB then concluded that footnote 168 could not be considered to have met either the “explicit” or “reasoned and adequate explanation” obligation necessary to demonstrate that only

¹³⁵ *Id.* at Para. 185.

¹³⁶ *Id.* at Para. 186.

¹³⁷ *Id.* at Para. 187. The AB also found that placing the burden on Korea to rebut the information found in footnote 168 of the USITC’s determination would be an impossible burden to fulfill as neither Korea, nor any other Member in a similar situation, would have the resources available to conduct a separate injury and causation investigation. *Id.*

¹³⁸ *Id.* at Para. 194.

¹³⁹ *Id.*

¹⁴⁰ *U.S. - Line Pipe Safeguards*, WT/DS202/AB/R, Appellate Body Report at Para. 194.

imports from non-NAFTA countries caused or threatened to cause serious injury to the domestic line pipe market, and therefore the U.S. failed to rebut the *prima facie* made out by Korea.¹⁴¹

In its final conclusions on the appeal by Korea, the AB found that the U.S., by failing to rebut Korea's *prima facie* case had violated Articles 2 and 4 of the Agreement on Safeguards as the line pipe safeguards were not applied in a manner consistent with the "parallelism requirement."¹⁴²

As the issue of whether a member of an RTA could exclude other RTA partners from the application of safeguard measures became moot under the reasoning applied to the rebuttal offered by the U.S., the AB refused to rule on whether Article XXIV is a permissible defense to Article 2.2 in such situations.¹⁴³ The AB did, however, note two circumstances where Article XXIV could be considered an exception to Article 2.2, including: 1) where the imports exempted from the application of the safeguard measures are not considered in the injury and causation investigation, or 2) the exempted imports are included in the investigation, but the Member seeking to impose the safeguards has "established *explicitly*, through a *reasoned and adequate explanation*, that imports from sources outside the free-trade area, alone, satisfied the conditions for the application of a safeguard measure, as set out in Article 2.1 and Article 4.2."¹⁴⁴

Based upon its conclusions the AB chose not to rule on the issue of whether an Article XXIV defense was available to the U.S. as to the exemption of NAFTA members from the application of the line pipe safeguards.¹⁴⁵ By modifying the conclusions of the panel as to the

¹⁴¹ *Id.* at Para. 195.

¹⁴² *Id.* at Para. 197.

¹⁴³ *Id.* at Para. 199.

¹⁴⁴ *Id.* at Para. 198 (emphasis added).

¹⁴⁵ *Id.* at 199.

relationship of Article XXIV to the Agreement on Safeguards, and the Article XXIV defense in general, the AB decided to declare those findings “moot and as having no legal effect.”¹⁴⁶

E. The State of the “Parallelism Requirement” Prior to *U.S. – Steel Safeguards*

An analysis of the above Panel and AB decisions on safeguards exemptions for RTA partners provides three main themes. First, both Panels and the AB have construed the Agreement on Safeguards to require parallelism as between the scope of the countries involved in the safeguards investigation and the application of any measures resulting from that investigation.¹⁴⁷ Second, Panels and AB have also confirmed that Article XXIV, under certain circumstances, may provide a defense to measures that are GATT-inconsistent.¹⁴⁸ And third, the AB has made several explicit refusals to rule on whether Article XXIV can provide a defense in the form of an exception from obligations arising under Article 2.2 of the Agreement on Safeguards.¹⁴⁹

As is clearly stated by the AB in *U.S. – Line Pipe Safeguards*, an affirmative defense under Article XXIV, where Article XXIV can be viewed as an exception to Article 2.2 of the Agreement, is available under two circumstances.¹⁵⁰ First, where an RTA member excludes its RTA partners from the investigation of imports that may cause serious injury, Article XXIV may provide an affirmative defense allowing exclusion of RTA partners from safeguard measures.

¹⁴⁶ *U.S. - Line Pipe Safeguards*, WT/DS202/AB/R, Appellate Body Report at Para. 199.

¹⁴⁷ *See, e.g., U.S. - Line Pipe Safeguards*, WT/DS202/AB/R, Appellate Body Report at Para. 181 (defining the “parallelism requirement” and explaining the impermissible “gaps” as between the scope of the investigation and implementation of safeguard measures).

¹⁴⁸ *See, e.g., Turkey – Textiles*, WT/DS34/AB/R, Appellate Body Report at Para. 45 (concluding that Article XXIV can be used as a defense to certain GATT-inconsistent measures).

¹⁴⁹ *See, e.g., U.S. - Line Pipe Safeguards*, WT/DS202/AB/R, Appellate Body Report at Para. 199, and *U.S. - Wheat Gluten*, WT/DS162/AB/R, Appellate Body Report at Para. 99 (refusing to rule on the general principle of whether RTA members are permitted to exclude each other from the application of safeguards).

¹⁵⁰ *U.S. - Line Pipe Safeguards*, WT/DS202/AB/R, Appellate Body Report at Para. 198.

Second, if there is a “gap” between the scope of the countries involved in the investigation and the subsequent WTO Members upon which safeguard measures are imposed¹⁵¹ the Member must *explicitly* establish that imports from outside RTA caused or threatened to cause serious injury through a *reasoned and adequate explanation* in order to exempt its RTA partners.¹⁵²

No case has come before a Panel, however, where a Member has been found to meet the above stated rigorous “parallelism requirement.”¹⁵³ Moreover, the AB continues to refuse to rule on whether, even if a country met the “parallelism requirement,” Article XXIV could then be used as defense to allow the exemption of RTA partners from the application of safeguard measures.¹⁵⁴ Were a Member to meet the “parallelism requirement,” however, it is reasonable to assume that the qualifications for applying an Article XXIV defense as laid out in *Turkey - Textiles* would be in effect.¹⁵⁵ This would mean that the Member would have to demonstrate 1) that the RTA seeking to exclude members has met the requirements of Article XXIV:(5)(a) and

¹⁵¹ *See id.* at Para. 181 (explaining the impermissible “gap” between the investigation and the implementation of safeguard measures).

¹⁵² *Id.* at Para. 198; *See also* Mathis *supra* note 22 at 250 (arguing a “parallelism requirement” opens the door to an argument where the exclusion of RTA partners from the application of safeguard measures would not harm non-members to the RTA).

¹⁵³ *But see U.S. - Line Pipe Safeguards*, WT/DS202/R, Panel Report at Para. 7.171 (finding that the U.S. to have met the “parallelism requirement” as Korea failed to rebut the proposition that non-NAFTA imports were causing or threatening to cause serious injury). This conclusion was modified and found moot and of no legal effect on appeal to the Appellate Body. *See U.S. - Line Pipe Safeguards*, WT/DS202/AB/R, Appellate Body Report at Para. 199.

¹⁵⁴ *See, e.g., U.S. - Line Pipe Safeguards*, WT/DS202/AB/R, Appellate Body Report at Para. 199, *U.S. - Wheat Gluten*, WT/DS162/AB/R, Appellate Body Report at Para. 99 (refusing to rule on the general principle of whether RTA members are permitted to exclude each other from the application of safeguards); *see also* Mathis *supra* note 22 at 241 (noting exclusion of RTA partners from the imposition of Safeguards members, whether or not there is parallelism as between the investigation and application of the measures, requires the RTA member invoking the measure to claim an Article XXIV defense to prevail in front of a WTO Panel).

¹⁵⁵ *Turkey - Textiles*, WT/DS34/AB/R, Appellate Body Report at Para. 58.

(8)(a) (i.e. the RTA is generally in compliance with Article XXIV), and 2) show that the formation of the RTA would have been blocked had the measure at issue not been included.¹⁵⁶

As mentioned above in Part II.A, the refusal by the AB to rule on the ability of Members to utilize Article XXIV as a defense may result from a fear that a decision concluding that a Member has met the “parallelism requirement” would then require the AB to inquire as to whether the RTA has complied with Article XXIV under the *Turkey - Textiles* test. As the CRTA has not been able to reach a consensus on the issue of whether *any* RTA has met all Article XXIV requirements, the AB may be uneasy about making any conclusions not yet reached by that committee.

IV. U.S. - Steel Safeguards and the “Parallelism Requirement”

A. Steel Safeguards, the “Parallelism Requirement,” and an Article XXIV Defense

The most recent injury investigation of the U.S. domestic steel industry conducted by the USITC looked at a total of thirty-three steel products to see whether increased imports were causing or threatening to cause serious injury.¹⁵⁷ Pursuant to § 311 of the NAFTA Implementation Act, the Commission made affirmative determinations that seven Mexican products and five Canadian products accounted for a “substantial share” and “contributed importantly” to the injury found in the U.S. steel industry.¹⁵⁸ In addition, the USITC found steel imports from Israel and Jordan to be so small so as not to affect the “reasoned analysis” required

¹⁵⁶ *Id.*; see also *Argentina - Footwear*, WT/DS121/AB/R, Appellate Body Report at Para. 109 (reaffirming use of an Article XXIV affirmative defense as reasoned in *Turkey - Textiles*).

¹⁵⁷ USITC Press Release, *ITC Details its Determinations Concerning Impact of Imports of Steel on U.S. Industry*, October 23, 2001, available at <http://www.usitc.gov/er/nl2001/ER1023Y1.PDF>

¹⁵⁸ *Id.*

under Article 3.1 of the Safeguards Agreement and, thus, should be excluded from the investigation and subsequent application of any safeguard measures.¹⁵⁹

Throughout the Commission's report, injury determinations were made with respect to each steel product followed by a separate and distinct section delineating the Commission's findings as to whether imports from Mexico and Canada constituted a "substantial share" and "contributed importantly" to the injury.¹⁶⁰ The specificity of the USITC steel investigation as to the effect of NAFTA imports marks a drastic change in the injury determination process under § 311 that was applied in the investigations at issue in *U.S. - Wheat Gluten* and *U.S. - Line Pipe Safeguards*, which included a second subsequent investigation of Canada and a simple explanation contained in a footnote, respectively.¹⁶¹

As is permitted under § 312 of the NAFTA Implementation Act, the President expanded the exemption of products from NAFTA members with respect to the application of safeguard measures by excluding all steel products from those countries.¹⁶² In response, all eight complaints against the U.S. steel safeguards at the WTO argued that the U.S. has failed to meet the "parallelism requirement" in the application of the steel safeguards in violation of the

¹⁵⁹ *U.S. - Steel Safeguards*, WT/DS248-249, 251-254, 258-259, Executive Summary of the U.S. First Written Submission, October 11, 2001 at Para. 82.

¹⁶⁰ *See generally* USITC Investigation No. TA-201-73 STEEL at 2-225 (examining steel imports from NAFTA members pursuant to § 311 of the NAFTA Implementation Act and whether they caused or threatened to cause serious injury where a "substantial share" of imports from NAFTA members would occur if a producer was considered to be "among the top 5 suppliers" of the products in question during the last three years and whether those products "contributed importantly" to the injury by looking to see if they were "an important cause, but not necessarily the most important cause"); *see also U.S. - Steel Safeguards*, WT/DS248-249, 251-254, 258-259, Written Rebuttal of the U.S., November 26, 2002 at Para. 151 (stating in its injury investigation the USITC "expressly separated and distinguished the price and volume effects of non-NAFTA imports from those of NAFTA imports as an integral part of the [*sic*] its parallelism analysis").

¹⁶¹ *See supra* Sections III.C.1, III.D.1 (discussing investigations undertaken by the USITC resulting in the exclusion of Mexico and Canada from the application of safeguards in each case).

¹⁶² *Supra* note 4.

Agreement on Safeguards and GATT Article XIX:1.¹⁶³ The complaining parties argue that the President’s determination “failed to respect the requirement of parallelism between the scope of the investigation of injury and the scope of the safeguard measures.”¹⁶⁴

In answering the complaints, the U.S. argued that the USITC’s determination with separate and distinct sections delineating the effects of NAFTA steel imports complies with the “parallelism requirement” and, thus, allows the U.S. to exclude those imports from the application of safeguard measures.¹⁶⁵ The U.S. claimed that the USITC made the necessary determinations that: 1) for each product, imports from outside NAFTA caused serious injury or threat thereof; 2) for those imports from countries other than Canada and Mexico causing or threatening to cause injury, the USITC provided a description of the increase in such imports and linked them to the cause or threat of serious injury to the domestic steel industry; and 3) for the particularized causation analysis, the USITC did not take into account imports from NAFTA members and still found a causal-link between non-NAFTA imports and serious injury or threat thereof.¹⁶⁶ As a result, the U.S. claimed that it satisfied the “parallelism requirement” under the Agreement on Safeguards as stated by the AB in *U.S. - Line Pipe Safeguards*, as the USITC completed a “reasoned and adequate explanation” of why NAFTA members should be excluded from the application of the steel safeguards.¹⁶⁷

¹⁶³ See *supra* note 7 (explaining complaints filed at WTO against U.S. steel safeguards).

¹⁶⁴ See *U.S. - Steel Safeguards*, WT/DS248-249, 251-254, 258-259, Request for the Establishment of a Panel by Brazil, China, EC, Japan, Korea, New Zealand, Norway, and Switzerland (claiming that the U.S. violated the “parallelism requirement” as set out in the Agreement on Safeguards and Article XIX).

¹⁶⁵ *U.S. - Steel Safeguards*, WT/DS248-249, 251-254, 258-259, Written Rebuttal of the U.S., November 26, 2002 at Para. 158.

¹⁶⁶ *Id.* at Para. 160-161.

¹⁶⁷ *Id.* at Para. 166.

In addition to the “parallelism requirement” challenges to the steel safeguards, assertions from Japan and Korea stated that MFN principles in the WTO prevent the exclusion of RTA partners from the application of safeguards remedies.¹⁶⁸ In reply, the U.S. has proffered an affirmative defense under Article XXIV, which it claims creates an exception to Article I MFN and thus allows the exemption of RTA partners from safeguards applications.¹⁶⁹ The U.S. relied on two arguments. First, the U.S. asserted that since the last sentence of footnote 1 to Article 2.1 of the Agreement on Safeguards, which refuses to prejudge any interpretation of the relationship between Articles XXIV and XIX, does not make the exclusion of NAFTA imports inconsistent with the GATT or the Agreement.¹⁷⁰ Moreover, the U.S. argued that the USITC complied with § 311 of the NAFTA Implementation Act, which permits exclusion of NAFTA imports from safeguard measures if they do not account for a “substantial share” of imports and do not “contribute importantly” to the finding of serious injury.¹⁷¹

B. Panel Decision

Basing its decision on past Panel and AB reports, the *U.S. – Steel Safeguards* panel concluded that the U.S. violated the parallelism requirement by excluding imports from Canada, Mexico, Israel and Jordan from the application of safeguard measures after including imports from those countries in its investigation without establishing explicitly with a reasoned and adequate explanation why those imports did not cause or threaten injury to the domestic steel industry.¹⁷² In addition, the Panel found that the U.S. should have applied the non-attribution

¹⁶⁸ *U.S. - Steel Safeguards*, WT/DS248-249, 251-254, 258-259, Executive Summary of the U.S. First Written Submission, October 11, 2001 at Para. 118.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at Para. 119.

¹⁷² *U.S. – Steel Safeguards*, WT/DS248-249, 251-254, 258-259/R, Panel Report at Paras. 10.601-10.696.

principle to imports excluded from the application of safeguard measures.¹⁷³ According to the panel:

“[t]he obligation of non-attribution comprises the obligation to separate and distinguish the respective effects of increased imports and other factors to discern whether there is a genuine and substantial relationship of cause and effect between increased imports and serious injury . . . the effects of increased imports *from all sources* and the effects of increased imports *only from a subset of sources* will not necessarily be the same. Therefore, it potentially makes a difference whether one compares the effects of all increased imports or the effects of only some increased imports with the effects of other factors. . . The competent authority is under an obligation to account for the fact that excluded (FTA) imports contributed to the serious injury suffered by the domestic industry in establishing whether imports from sources covered by the measure satisfy the requirement of causing serious injury.”¹⁷⁴

It can be understood from this language that the panel would not distinguish between the two situations discussed in *U.S. – Line Pipe Safeguards* as to the application of the non-attribution principle. The USITC, therefore, would be required to engage in a non-attribution discussion whether it 1) excluded all U.S. RTA partners from its safeguards investigation from the beginning; or 2) attempted to establish explicitly with a reasoned and adequate explanation as to why U.S. RTA partners that were included in the injury investigation were excluded from the application of safeguard measures.

C. Appellate Body Decision

On appeal the U.S. argued the Panel had erred in its final decision by relying on “two general conclusions in its introductory analytical section that served as the basis for its product-

¹⁷³ See *id.* at Para. 10.604 (finding, “the requirement of causation in Articles 2.1 and 4.2(b) of the Agreement on Safeguards, including the requirement of non-attribution, has not been satisfied.”)

¹⁷⁴ *Id.* at Paras. 10.605-10.606 (emphasis in original).

specific analyses.”¹⁷⁵ The first of these general conclusions was the requirement of a non-attribution inquiry to “account for the fact that excluded imports may have some injurious impact on the domestic industry.”¹⁷⁶ The second general conclusion, that the U.S. was required to establish explicitly that imports from the countries upon which the safeguard measures were applied satisfy the conditions to apply such measures, was misconstrued by the Panel to require the USITC to make “redundant findings” for each product. Before addressing the issues on appeal, the AB started by noting that the USITC did, in fact, consider imports from all countries during its investigation yet ultimately excluded Canada, Mexico, Jordan and Israel from the application of the safeguard measures.¹⁷⁷ The USITC, according to the AB, therefore, was required to establish explicitly that imports from countries outside NAFTA, Jordan and Israel alone satisfied the requirements for the application of safeguard measures.¹⁷⁸

The first issue addressed by the AB was whether the Panel erred by concluding that the USITC was required to account for the fact that excluded imports, i.e. those from Canada, Mexico, Jordan and Israel, may have an injurious effect on the domestic steel industry.¹⁷⁹ The AB understood the U.S. to be arguing that the panel had gone “further” than the requirement laid out in *U.S. – Line Pipe Safeguards* by establishing a requirement that had no basis in the Safeguards Agreement for “a separate analysis of imports from sources not subject to the safeguards measure, according to which the competent authority must ‘affirmatively account for

¹⁷⁵ *U.S. - Steel Safeguards*, WT/DS248-249, 251-254, 258-259/AB/R, Appellate Body Report at Para. 437.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at Para. 444.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at Para. 446.

the effect of such imports.’”¹⁸⁰ Thus, the U.S. argued that the Panel, by requiring the USITC to “account for the fact that excluded imports may have some injurious impact on the domestic industry,” was adding an “extra analytical step with respect to parallelism,” and that nothing in the Safeguards Agreement requires a “distinct or explicit analysis of imports from sources *not* subject to the measure.”¹⁸¹

The AB began its analysis of the issue by discussing the non-attribution requirement as found in Article 4.2(b) of the Safeguards Agreement. Here, the AB noted that the last sentence of Article 4.2(b) requires the competent authority, when determining a causal link between increased imports and serious or threatened serious injury to the domestic industry, must not attribute factors other than increased imports determined to cause injury to the increased imports.¹⁸² The AB, therefore, determined that imports excluded from the application of safeguard measures must be considered factors *other than* increased imports under Article 4.2(b), and, thus, the “possible injurious effects that these excluded imports may have on the domestic industry must not be attributed to imports included in the [application of] safeguard measure[s].”¹⁸³

The AB went on to find that the non-attribution requirement is part of the “overall requirement incumbent on the competent authority” to establish a “causal link” between increased imports and serious injury. As the AB understood *U.S. – Line Pipe Safeguards*, under the last sentence of Article 4.2(b), the competent authorities must “establish explicitly, through a

¹⁸⁰ *Id.*; See also *id.* at FN 439 (noting Canada’s third party submission as supporting the U.S. argument that the panel erred in “reading *US – Line Pipe* to mean that parallelism necessarily requires the competent authority to account for the fact that excluded imports may have some injurious impact on the domestic industry.”).

¹⁸¹ *U.S. – Steel Safeguards*, WT/DS248-249, 251-254, 258-259/AB/R, Appellate Body Report at Para. 447 (emphasis in original).

¹⁸² *Id.* at Para. 449.

¹⁸³ *Id.* at Para. 450.

reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to [the] increased imports.”¹⁸⁴ Thus, “[i]n order to provide such a reasoned and adequate explanation, the competent authority must explain how it ensured that it did not attribute the injurious effects of *factors other than included imports* - which subsume ‘excluded imports’ - to the imports included in the measure,” and if the competent authority fails to provide such an explanation it has failed to comply with the non-attribution requirement of Article 4.2(b).¹⁸⁵ The AB, therefore, concluded that the Panel did not err in its interpretation of the non-attribution requirement of the Safeguards Agreement.

Next the AB went on to discuss whether the USITC was required to make “redundant findings” by establishing for each product covered by the safeguard measures that imports from outside Canada and Mexico, Jordan or Israel, alone, caused or threatened serious injury. In reading the USITC’s report, the AB found that instead of making one determination that imports from outside the excluded countries alone caused or threatened injury, the USITC “made *two separate determinations* - one determination that the exclusion of imports from *Canada and Mexico* would not change the ‘injury analysis’ of the USITC, and another *separate* determination that the exclusion of imports from *Israel and Jordan* would not change the conclusions of the USITC.”¹⁸⁶ The AB then came to the conclusion that in place of the two separate determinations made by the USITC, excluding either Canada or Mexico, or in the alternative, Israel or Jordan, the agency should have provided a “single joint determination” supported by a reasoned and adequate explanation explicitly establishing that imports from countries other than Canada, Mexico, Jordan *and* Israel, alone, satisfied the conditions for imposing the safeguard

¹⁸⁴ *Id.* at Para. 451.

¹⁸⁵ *Id.* at Para. 452.

¹⁸⁶ *Id.* at Para. 465 (emphasis in original).

measures.¹⁸⁷ As the U.S. failed to follow the directions from the AB in *U.S. – Wheat Gluten* and *U.S. – Line Pipe Safeguards*, whereby a competent authority is required to establish, with a reasoned and adequate explanation, and “*in a way that leaves nothing merely implied or suggested,*” that imports from sources covered by the measure, alone, satisfy the requirements for the application of a safeguard measure, the AB found that the Panel had not required to the USITC to make “redundant findings,” but instead required the agency only to make the one requisite finding regarding imports from Canada, Mexico, Jordan and Israel.¹⁸⁸

C. Non-attribution as an Additional Analytical Step to the Parallelism Requirement

As mentioned above, the non-attribution principle with respect to a safeguards investigation has its roots in the last sentence of Article 4.2(b) of the Safeguards Agreement. The AB elaborated on the meaning of this sentence in *U.S. – Lamb Safeguards*¹⁸⁹ finding:

As part of th[e] determination [of the existence of a causal link], Article 4.2(b) states expressly that injury caused to the domestic industry by factors other than increased imports ‘shall not be attributed to increased imports.’ In a situation where *several factors* are causing injury ‘at the same time,’ a final determination about the injurious effects caused by *increased imports* can only be made if the injurious effects caused by all the different causal factors are distinguished and separated. Otherwise, any conclusion based exclusively on an assessment of only one of the causal factors – increased imports – rests on an uncertain foundation, because it *assumes* that the other causal factors are *not* causing the injury which has been ascribed to increased imports. The non-attribution language in Article 4.2(b) precludes such an assumption and, instead, requires that the competent authorities assess appropriately the injurious effects of the other factors, so that those effects may be disentangled from the injurious effects of the increased imports. In this way, the final determination rests,

¹⁸⁷ *Id.* at Para 468.

¹⁸⁸ *Id.* at Para. 472 (emphasis in original).

¹⁸⁹ *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177, 178/AB/R, Appellate Body Report [hereinafter *U.S. – Lamb Meat Safeguards*].

properly, on the genuine and substantial relationship of cause and effect between increased imports and serious injury.¹⁹⁰

The AB in *U.S. – Steel Safeguards* interpreted this language and Article 4.2(b) of the Safeguards Agreement to mean that imports from RTA partners must be investigated for their possible injurious effects by the competent authority as an “other factor,” whether or not they are included in the injury and causation investigation. This interpretation is reasonable when applied to the situation where imports of RTA partners are included in the injury investigation but subsequently excluded from the ultimate imposition of safeguard measures. As the AB found in *U.S. – Line Pipe Safeguards*, in this situation, the competent authority must have “established explicitly, through a *reasoned and adequate explanation*, that imports from sources outside the free-trade area, alone, satisfied the conditions for the application of a safeguard measure, as set out in Article 2.1 and Article 4.2” in order for imports from RTA partners to be excluded from the safeguard measures.¹⁹¹

Where, however, imports from RTA partners are *not* included in the injury investigation, the AB in *U.S. – Line Pipe Safeguards* did not explicitly require the competent authority to investigate RTA partner imports. The decision of the AB not to require an investigation of RTA partner imports in this situation likely stems from the fact that such a finding would indicate that meeting the requirements of the Safeguards Agreement is more important than respecting the elimination of “duties and other restrictive regulations” requirement of Article XXIV.¹⁹² By

¹⁹⁰ See *U.S. – Steel Safeguards*, WT/DS248-249, 251-254, 258-259/AB/R, Appellate Body Report at FN 449 (quoting from *U.S. – Lamb Meat Safeguards* at Para. 179) (emphasis in original).

¹⁹¹ *U.S. – Line Pipe Safeguards*, WT/DS202/AB/R, Appellate Body Report at Para. 198 (emphasis added).

¹⁹² See *id.* (declining to prejudge whether Article 2.2 allows Members to exclude RTA partner imports from the scope of a safeguards measure).

asserting that imports from RTA partners always be considered “other factors,” whether or not such imports are included in the injury investigation, the AB in *U.S. – Steel Safeguards*, therefore, has, in fact, added an additional analytical step to the parallelism requirement.

According to the non-attribution standard of Article 4.2(b) of the Safeguards Agreement coupled with past AB decisions, it may be reasonable to assume the *U.S. – Steel Safeguards* AB decision was correct in asserting that imports from RTA partners must always be considered “other factors” under the non-attribution standard as laid out in *U.S. – Lamb Meat Safeguards*. This interpretation, however, undermines past AB decisions regarding the “parallelism requirement” and GATT Article XXIV by supporting the non-attribution requirement in favor of the ability of WTO Members to effectively create and administer RTAs. By not including RTA partners in the injury and causation investigation and the subsequent application of safeguard measures, the Member imposing the measures must be considered to have complied with the “parallelism requirement” as no impermissible “gap” between the scope of the investigation and the scope of the application of the measures would exist. According to past AB decisions Article XXIV should be available as an affirmative defense to GATT-inconsistent measures (e.g. where MFN is violated by applying safeguards measures only to Members outside an RTA) when a Member has met the “parallelism requirement.”¹⁹³

As the AB found in *U.S. – Line Pipe Safeguards*, Members should be afforded the opportunity to present an affirmative defense under Article XXIV to exclude imports from RTA partners from the investigation and ultimate application of safeguard measures where they can

¹⁹³ See, e.g., *Turkey – Textiles*, WT/DS34/AB/R, Appellate Body Report at Para. 45 (concluding that Article XXIV can be used as a defense to certain GATT-inconsistent measures), *U.S. – Line Pipe Safeguards*, WT/DS202/AB/R, Appellate Body Report at Para. 198 (affirming that Article XXIV can be used to argue an exception to Safeguards Agreement Article 2.2 in two circumstances).

fulfill the requirements of Article 4.2(b) of the Safeguards Agreement by demonstrating that imports from non-RTA member countries, alone, are causing or threatening to cause serious injury to a domestic industry.¹⁹⁴ As discussed in *Turkey - Textiles*, such a defense would require the Member to demonstrate: 1) that the RTA seeking to exclude members has met the requirements of Article XXIV:(5)(a) and (8)(a), and 2) show that the formation of the RTA would have been blocked had the measure at issue not been included.¹⁹⁵ Again, this situation may pose a problem for the AB because if it finds that a Member has complied with the “parallelism requirement” it would then have to inquire into whether the RTA meets the requirements of Article XXIV.

The obligation that Members respect the non-attribution standard even where RTA partner imports have been excluded from the injury and causation investigation will allow the AB to again evade the true issue of whether the RTA meets the requirements of Article XXIV. By following *U.S. – Steel Safeguards*, the AB now has the ability to decide that the competent authority, even though it excluded RTA partner imports from the injury and causation investigation and subsequently found that imports from sources outside the RTA, alone, met the requirements for imposing safeguard measures, failed to “establish explicitly through a reasoned and adequate explanation” that imports from RTA partners *did not* significantly factor into the injury suffered by the domestic industry. This additional step leaves the door open for the AB to rule that a Member has failed to meet the “parallelism requirement” as the competent authority

¹⁹⁴ *U.S. – Line Pipe Safeguards*, WT/DS202/AB/R, Appellate Body Report at Para. 198.

¹⁹⁵ *See Turkey - Textiles*, WT/DS34/AB/R, Appellate Body Report at Para. 58 (finding an Article XXIV affirmative defense to a GATT-inconsistent measure to include 1) the party invoking the defense must first demonstrate that the RTA has met the requirements of Article XXIV, and 2) that party must also show the measure was necessary to the formation of the RTA).; *See also Argentina - Footwear*, WT/DS121/AB/R, Appellate Body Report at Para. 109 (reaffirming Article XXIV affirmative defense as reasoned in *Turkey - Textiles*).

did not consider imports from RTA partners as “other factors.” The AB can, therefore, once again decide that it cannot rule on whether the Member can be afforded an Article XXIV defense allowing the exclusion of RTA partners from safeguard measures as the Member failed to meet the “parallelism requirement.”

IV. Conclusion

As has been demonstrated, three themes can be gleaned from Panel and AB Reports regarding the ability of RTA partners to exclude each other from the application of safeguard measures. First, there must not be an impermissible “gap” between those countries involved in a safeguards investigation and those countries upon which the measures are applied unless a “reasoned and adequate explanation” for the exclusion is provided. Second, Article XXIV, under certain circumstances, may provide a defense to measures that are GATT-inconsistent. And third, the AB has made several explicit refusals to rule on whether Article XXIV can provide a defense to the Agreement on Safeguards.

The AB in *U.S. – Steel Safeguards*, however, departed from the above themes, at least as to the situation where RTA partner imports are excluded from the safeguards injury and causation investigation all together, by requiring the competent authority to consider RTA imports as “other factors” under the non-attribution standard. In future attempts by RTA partners to exclude each other from the application of safeguards measures, therefore, the AB has the ability to again refuse to rule on whether there is an Article XXIV defense available if the RTA member has not “established explicitly through a reasoned and adequate explanation” that the imports from its RTA partners were not attributed to the injurious effects of the imports being investigated, a tough and ambiguous standard to say the least.

The Article XXIV defense appears not to be a policy consideration the AB is willing to rule on anytime soon. Although the WTO continues to support the formation of new RTAs and allows old ones to operate without technical approval of the CRTA, the AB has decided not to extend to them the ability to exclude each other from the application of safeguard measures. By continuing to accept the rigorous “parallelism requirement,” the AB has been able to evade ruling on a tough issue that has increasing implications throughout the WTO as more and more Members seek to regionalize trade.