

Test of Multilateralism in International Trade:

U.S. Steel Safeguards

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Abstract

The highly publicized safeguard measures applied by the United States to an array of steel products in 2002 became one of the biggest and the most controversial trade disputes in recent history. Virtually all major trading nations in the world, including European Communities, Japan, China, Brazil, Korea, New Zealand, Switzerland and Norway were the direct parties to this dispute with the United States. The contentious legal grounds of the U.S. safeguard measures as well as the lack of adequate consultations between the United States and its trading counterparts have brought the international community close to a full-scale trade war. This paper considers the important legal issues debated in *U.S. Steel Safeguards* and discusses how the multilateral framework in the international trading system affected resolution of this case. It also draws lessons for the future application of trade measures such as safeguards under the multilateral framework of international trading system.

I. INTRODUCTION¹

A multilateral trading system, as currently represented by the World Trade Organization (“WTO”), operates based on mutually agreed concessions among trading nations, and its success would depend on their observance of those trade concessions previously negotiated and agreed upon among the members of the WTO system (“Members”).² The GATT/WTO rules under certain conditions authorize trade measures that restrict imports unilaterally

¹ Safeguard measures in international trade have received a growing academic attention in recent years. The author has published several articles and books on various issues of safeguard measures in international trade as the following:

Reflections on the Agreement on Safeguards in the WTO 21(6) *WORLD COMPETITION* 25-31 (co-authored with Jai S. Mah) (1998); *Review of the First WTO Panel Case on the Agreement on Safeguards: Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products and Its Implications for the Application of the Agreement* 33(6) *JOURNAL OF WORLD TRADE* 27-46 (1999); *Emergency Safeguard Measures under Article X in GATS – Applicability of the Concepts in the WTO Agreement on Safeguards* 33(4) *JOURNAL OF WORLD TRADE* 47-59 (1999); *The WTO Agreement on Safeguards: Improvement on the GATT Article XIX?*, 14(3) *International Trade Journal* 284-298 (2000); *Critical Issues in the Application of the WTO Rules on Safeguards – In the Light of the Recent Panel Reports and the Appellate Body Decisions*, 34 *JOURNAL OF WORLD TRADE* 131-147 (2000); *Destabilization of the Discipline on Safeguards? – Inherent Problems with the Continuing Application of Article XIX after the settlement of the Agreement on Safeguards* 35 *JOURNAL OF WORLD TRADE* 1235-1246 (2001); *Revival of Gray-Area Measures? - The U.S.-Canada Softwood Lumber Agreement: Conflict with the WTO Agreement on Safeguards*, 36 *JOURNAL OF WORLD TRADE* 155-166 (2002); *Specific Safeguard Mechanism in the Protocol on China’s Accession to the WTO – A Serious Step Backward from the Achievement of the Uruguay Round* 5 *JOURNAL OF WORLD INTELLECTUAL PROPERTY* 219-231 (2002); *Safeguard Measures: Why Are They Not Applied Consistently with the Rules? - Lessons for Competent National Authorities and Proposal for the Modification of the Rules on Safeguards*, 36 *JOURNAL OF WORLD TRADE* 641-673 (2002); *SAFEGUARD MEASURES IN WORLD TRADE: THE LEGAL ANALYSIS* (first edition 2003; second edition, forthcoming, 2004); *The Agreement on Safeguards*, *THE KLUWER GUIDE TO THE WORLD TRADE ORGANIZATION* (forthcoming, 2004).

² Article II of the General Agreement on Tariffs and Trade (“GATT”) provides the Schedule of Concessions of Members, which sets the maximum tariff rates for each product classification. As the result of a series of multilateral trade negotiations, tariff rates for most non-primary products have been substantially reduced. The average tariff rate on non-primary products of industrial countries has been dropped to mere 3.9 percent after the Uruguay Round negotiations. JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* (1997), at 74.

beyond the bounds of those agreed concessions.³ The problem with unilateral import restrictions such as safeguard measures (of “safeguards”)⁴ is that such restrictions upset the balance of concessions previously negotiated between the importing and exporting Members.⁵ Maintaining balance of these concessions constitutes the core of the multilateral framework of the current international trading system. The publicized safeguard measures recently applied by the United States to its imports of steel products (“*U.S. Steel Safeguards*”)⁶ have demonstrated how unilateral trade measures, motivated by internal politics without strong legal justifications under the GATT/WTO rules, may affect this multilateral framework and potentially lead to the destabilization of the trading system.

On March 20, 2002, in response to the repeated requests from the ailing U.S. steel industry, the Bush Administration finally applied controversial safeguard measures.⁷ These measures

³ So-called administered protection, such as antidumping measures, countervailing measure, and safeguard measures are the examples of those trade measures. The GATT/WTO rules, *reprinted in* WTO, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXT (1994), set the conditions for the trade measures.

⁴ Safeguard measures are an emergency import restraint that is applicable where increased imports cause or threaten to cause serious injury to a domestic industry. The WTO Agreement on Safeguards as well as Article XIX of the GATT provides the rules on safeguards. *See* WTO, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXT, *supra* note 2, at 315-324, 518-519.

⁵ Antidumping measures and countervailing measures are considered distinguished from safeguards, as those measures attempt to remedy injury caused by unfair trade practices such as dumping and illegal subsidy and therefore are not considered disrupting the balance of concessions among the exporting and importing countries.

⁶ *United States – Definitive Safeguard Measures on Imports of Certain Steel Products* (“*United States – Steel Safeguards*” or “*U.S. Steel Safeguards*”), WT/DS248~DS259/R (Report of the Panel, dated July 11, 2003), WT/DS248~DS259/AB/R (Report of the Appellate Body, dated November 10, 2003).

⁷ These measures were announced in the *Proclamation 7529 of March 5, 2002 - To Facilitate Positive Adjustment to Competition from Imports of Certain Steel Products* (“*Proclamation*”)

comprised of tariff increases up to thirty percent *ad valorem* as well as a tariff-quota, to its imports of a range of steel products.⁸ These measures are among the most controversial and significant trade measures in its implications on world trade. It was the first safeguard measures applied by a major economy against one of the most traded products in the world, affecting as much as 1.31 billion tons of steel trade per year. Since the beginning of the World Trade Organization (“WTO”) in 1995 has no other trade measure ever provoked a more intense criticism and extensive resistance throughout the world.⁹ The U.S. steel safeguards were indeed perceived as a major protectionist attempt by the United States to serve its political interests without clear legal justifications under the GATT/WTO rules.¹⁰

The response of various steel-exporting Members to the U.S. steel safeguards was swift and resolute. Only within two days after the U.S. announcement of the *Steel Safeguards*, the European Communities (“EC”) filed a complaint with the WTO Dispute Settlement Body (“DSB”), already preparing a list of U.S. products subject to its retaliation. Several other Members including Japan, South Korea, Switzerland, Venezuela, Norway and China also formally joined the EC in this dispute shortly afterwards. The effect of the *U.S. Steel*

and the *Memorandum of March 5, 2002 - Action Under Section 203 of the Trade Act of 1974 Concerning Certain Steel Products by the President of the U.S.* (“Memorandum”), *Federal Register* Vol. 67, No. 45 (Mar. 7 2002).

⁸ The products subject to the U.S. safeguard measures included slabs, flat steel, hot-rolled bar, cold-finished bar, rebar, certain welded tubular products, carbon and alloy fittings, stainless steel bar, stainless steel rod, tin mill products and stainless steel wire. *Id.*

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

¹⁰ The political reasons behind the application of these U.S. safeguards as well as their inconsistencies with the relevant GATT/WTO rules legal problems are discussed *infra*.

Safeguards seem to have gone even beyond the membership of the WTO, and it also seems to have affected Russia's decision to ban imports of poultry from the United States.¹¹ The subsequent consultations between the United States and the steel exporting countries have not produced any settlement on this dispute, and the WTO dispute settlement panel ("panel") was established to review the U.S. measures and determine their consistency with the GATT/WTO rules.¹²

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

¹¹ According to the media report, this decision came two days after Russian steel producers requested the government to block U.S. chicken imports, worth about \$660 million last year, if the Bush administration imposed sanctions on Russian steel. LOS ANGELES TIME, March 2, 2002.

¹² The *U.S. Steel Safeguards* is considered the largest WTO panel case to date with most of the major economies in the world including the United States, European Communities, China, Japan, Brazil, Switzerland and New Zealand as the direct parties to the case.

¹³ Article 2.1 of the Agreement on Safeguards, reprinted in WTO, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXT, *supra* note 2, at 315. The author's treatise on safeguards, SAFEGUARD MEASURES IN WORLD TRADE: THE LEGAL ANALYSIS (2003), *supra* note 1, also offers a detailed account of the conditions for the application of a safeguard measure.

safeguard measure¹⁴. Nonetheless, the measures will be justified as long as they are consistent with the requirement of the GATT/WTO rules on safeguards. The next section provides a discussion of the background and development of *U.S. Steel Safeguards*. Then, the remainder of this paper addresses those legal issues raised in the application of the U.S. Steel Safeguards, considers how the multilateral framework of the current international trading system operated to resolve the dispute and attempts to draw lessons for the future application of trade measures such as safeguards.

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

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

The U.S. steel industry, which once symbolized the might of the U.S. industrial power, has been considered an industry in crisis. During the latter half of the 20th century, the U.S. steel industry lost its competitive edge against foreign steel producers who employed advanced production technologies and better facilities.¹⁶ The U.S. steel producers, having enjoyed the dominance in the domestic market for a long time through oligopoly did not make necessary investments to modernize their aging steel production facilities.¹⁷ As the result, the cost efficiency of U.S. steel production fell significantly below that of its competitors by 1970s.¹⁸

¹⁴ Y.S. LEE, *SAFEGUARD MEASURES IN WORLD TRADE: THE LEGAL ANALYSIS* (2003), *supra* note 1, chapter 1.3, at 10-14.

¹⁵ This section is developed based on the author's own previous work, *SAFEGUARD MEASURES IN WORLD TRADE: THE LEGAL ANALYSIS*, *supra* note 1, at 83-92.

¹⁶ WILLIAM H. BARRINGER AND KENNETH J. PIERCE, *PAYING THE PRICE FOR BIG STEEL* (American Institute for International Steel, 2000), at 25-34.

¹⁷ *Id.*

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

Excessive labor costs also have been pointed out as another reason for the perceived inefficiency of the U.S. steel industry. By 1958, the U.S. steel industry had already faced the highest unit labor costs in the world, which continued to increase throughout the latter half of the 20th century, well exceeding the actual labor productivity.¹⁹ The outdated and inefficient production facilities particularly at old and smaller mills, coupled with excessive labor costs, drove the industry into the critical stages. By 2001, affected by the worldwide over-production capacity, the steel price also dropped down to their lowest for twenty years.²⁰ The U.S. steel producers sustained significant losses, and no fewer than 18 U.S. steel companies filed for bankruptcy between January 1998 and June 2001. This declining state of the U.S. steel industry resulted in significant job losses, as many as 5,000 in average a year since 1990.²¹

The job losses and the downward pressure on prices were not unique in the U.S. steel industry but prevalent throughout the world due to the substantial increase in productivity and the resulting over-capacity. Smaller mills became unprofitable and the economies of scale induced them to merge into more sizable ones, which then led to the excess production capacity. The existence of over-capacity, which was known to exceed as much as 20 percent²², caused a long-term downward trend in prices and made the condition of the steel industry particularly vulnerable to the demand fluctuations during general economic recessions.

¹⁹ *Id.*, at 35 – 38.

²⁰ “A tricky business,” *Economist*, June 28, 2001.

²¹ *Id.*

²² *Id.*

Facing this crisis, the well-organized U.S. steel producers asked the government for assistance. The U.S. government, affected by the significant political influence of the steel unions and producers, offered extensive assistance including various measures of trade protection as well as financial subsidies. Steel products have undoubtedly been more protected by trade measures such as numerous antidumping actions and countervailing duties than any other.²³ In addition to the trade protection, the U.S. government granted enormous financial support to the steel industry in tens of billions of dollars²⁴, which also included pension bailouts, tax refunds, environmental regulation exemption subsidies, “Buy America” requirements and emergency loan guarantee schemes.²⁵

The recent *U.S. Steel Safeguards* were considered yet another protection attempt in a long line of protections offered to this troubled industry, which delayed, rather than accelerated, the needed structural adjustment. The application of the U.S. safeguard measures was considered particularly improper as safeguard measures are predicated on an increase in imports that

²³ For instance, in 2002, the U.S. government applied about a half of the existing 264 antidumping actions to the imports of steel products, although steel accounts for only 2 percent of total imports. In addition, as many as 35 countervailing measures were also applied to steel products at the same time. United States International Trade Administration, Antidumping and Countervailing Duty Statistics, Antidumping and Countervailing Duty Orders in effect as of July 26, 2002. <<http://ia.ita.doc.gov/stats>>

²⁴ A recent study revealed that the steel lobby had won at least \$16 billion (\$21.8 billion in constant 1999 dollars) in federal subsidies for domestic steel makers from US taxpayers with additional billions received from state and local governments. The steel industry also received additional billions from state and local governments. BARRINGER AND PIERCE, *PAYING THE PRICE FOR BIG STEEL*, *supra* note 16.

²⁵ *Id.*

causes or threatens to cause serious injury to the domestic industry, but the steel imports were reported as declining in recent years in most categories.²⁶ Many believed that the *U.S. Steel Safeguards* were motivated primarily by the Bush Administration's need for political support from the steel union for the upcoming Congressional elections as well as from the representatives of the steel producing regions for the Congressional bill giving the President trade negotiating ("Fast-Track") authority.²⁷

2. Development of *U.S. Steel Safeguards*

As mentioned above, *U.S. Steel Safeguards* faced strong and open oppositions from the major trading partners of the United States.²⁸ What was alarming during the initial stages of the application of *U.S. Steel Safeguards* was that the United States seemed to have made little effort to avoid trade disputes with its concerned trading partners through adequate consultations. The Agreement on Safeguards ("Safeguards Agreement" or "SA") requires a Member proposing to apply a safeguard measure provide an adequate opportunity for prior consultations with those Members having a substantial interest.²⁹ The consultation is required with a view to

²⁶ According to the U.S. Census Bureau, U.S. imports of steel products decreased substantially from 34,433,707 metric tons in 2000 to 27,350,808 metric tons in 2001. U.S. Census Bureau, U.S. Imports for Consumption of Steel Products, Exhibit 1: All Steel Products (released February 21, 2002).

²⁷ In fact, after the Congressional vote on the trade promotion authority legislation, the Administration granted a large number of exemptions from the measures, which seems to provide support for this view. These exemptions were criticized by U.S. steel producers and unions. *Bush Scales Back Tariffs on Steel*, N.Y. TIMES, Aug. 23, 2002, at A1.

²⁸ Canada and Mexico did not raise any objection against *U.S. Steel Safeguards* since their steel exports were exempted from the safeguard list.

²⁹ The Agreement on Safeguards, art. 12.3, *supra* note 13.

exchanging views on the measure and reaching an understanding on ways to achieve the balance of concessions to be upset by the application of the safeguard.³⁰

As discussed below, the United States did not provide adequate consultation opportunities *sufficiently prior to* its application of the steel safeguards. Nevertheless, major steel exporting Members rushed to the consultations with the United States but failed to resolve the dispute between them. The United States' major trading partners including, EC, China, Korea, Japan, New Zealand, Switzerland, Norway and Brazil requested an establishment of a panel to review the consistency of *U.S. Steel Safeguards* with the GATT/WTO rules, and the panel was subsequently established to review the biggest trade dispute in recent history.³¹ In addition, several Members, including the EC, Japan, China, Switzerland and Norway also proposed extensive retaliations against *U.S. Steel Safeguards*.³²

The danger of a worldwide trade war, which could have been triggered by the application of a series of retaliatory measures, was averted as the United States subsequently agreed to reduce a number of steel products, as much as 25% in terms of tonnage, from its safeguards list,³³ and in

³⁰ *Id.* See Y.S. LEE, SAFEGUARD MEASURES IN WORLD TRADE, *supra* note 14, chapter 11.3 for more discussions on this issue.

³¹ WTO docs WT/DS248/15, WT/DS249/9, WT/DS251/10, WT/DS252/8, WT/DS253/8, WT/DS254/8, WT/DS258/12, WT/DS259/11 (August 12, 2002)

³² WTO docs G/SG/43 (May 15, 2002), G/SG/44 (May 21, 2002), G/SG/45 (May 21, 2002), G/SG/46 (May 21, 2002), G/SG/47 (May 22, 2002)

³³ WTO docs G/SG/N/10/USA/6/Suppl.7, G/SG/N/11/USA/5/Suppl.7 (September 17, 2002). Despite the position of the U.S. government that the exclusion was based on the U.S. consumer need and on the determination that the exclusion would not undermine the effectiveness of the safeguard measure, it was widely considered that the purpose of the

consideration of these U.S. concessions, the application of retaliatory measures were suspended. The WTO panel subsequently found that *U.S. Steel Safeguards* were not consistent with the relevant GATT/WTO rules.³⁴ The United States appealed this panel decision, and the Appellate Body largely upheld the panel decision *albeit* with some modifications³⁵, which was subsequently accepted by the United States. As the result, the proposed retaliatory measures against the U.S. exports were never put into effect, and the United States subsequently withdrew the *Steel Safeguards*.³⁶

While the U.S. concessions and final withdrawal of the *Steel Safeguards* prevented a direct trade war, the controversial *U.S. Steel Safeguards* have also triggered protectionism in other countries. Fearing possible diversion of steel products from the protected U.S. market, Members including the EC, China and Hungary applied provisional safeguard measures against their own steel products while initiating investigations for definitive safeguard measures.³⁷ The EC has made an affirmative injury determination and also decided to apply a definitive safeguard measure on imports of seven steel products.³⁸ Hungary and China also applied their own safeguards.³⁹

exclusion is to avoid serious trade conflict with the major trading partners of the United States. *Tariff Exemptions Expanded*, WASHINGTON POST, August 23, 2002, at E02.

³⁴ Report of the Panel, *supra* note 6. The author also expressed a view that *U.S. Steel Safeguards* were inconsistent with the relevant GATT/WTO rules. Y.S. LEE, SAFEGUARD MEASURES IN WORLD TRADE, *supra* note 14, at 166-168.

³⁵ Report of the Appellate Body, *supra* note 6

³⁶ WTO doc. G/SG/N/10/USA/6/Suppl.8 (December 12, 2003)

³⁷ WTO docs G/SG/N/7/EEC/1 (April 2, 2002); G/SG/N/7/CHN/1 (May 23, 2002); G/SG/N/7/HUN/1 (May 23, 2002)

³⁸ Commission Regulation (EC) No 1694/2002 of September 27, 2002 imposing definitive safeguard measures against imports of certain steel products. *See also* the EC notification to the Committee on Safeguards, G/SG/N/8/EEC/1, G/SG/N/10/EEC/1 (September 11, 2002).

Canada, whose steel exports were not subject to *U.S. Steel Safeguards*, also initiated an investigation for the application of a safeguard measure and subsequently made a positive injury determination.⁴⁰ Several other Members, including Chile, the Czech Republic, Mexico, Poland, and Bulgaria have followed their lead and also initiated investigations for safeguard measures against steel products, creating the danger of the “worldwide steel protections”.

The worst scenario, which leads to a downward sprawl of “protections” one after another, were clearly in sight. This dangerous sign of the worldwide protectionism, triggered by *U.S. Steel Safeguards*, created a significant concern for preserving the multilateralism in the world trading system for freer trade, which consists of the respect for mutual concessions and the multilateral legal framework. Surely, the multilateralism in international trade will not be sustainable in an environment where unilateral protectionism is rampant. Particularly, the successful application of a safeguard measure in the absence of adequate legal justifications may tempt other trading nations to do the same in order to protect their own domestic producers, in fact causing the worldwide protectionism. Therefore, it is necessary to review the legal justifications for *U.S. Steel Safeguards* under the WTO rules. The next section does so with reference to the relevant GATT/WTO rules, namely Article XIX of the GATT and the WTO Agreement on Safeguards⁴¹.

³⁹ WTO docs G/SG/N/10/HUN/1 (April 7, 2003), G/SG/N/CHN/1 (November 5, 2002)

⁴⁰ WTO docs G/SG/N/6/CAN/1 (April 2, 2002), G/SG/N/8/CAN/1 (July 19, 2002). However Canada did not decide to apply the safeguard measure.

⁴¹ *Supra* note 4.

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

1. Unforeseen Developments

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

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

The underlined “unforeseen developments” clause is not included in the subsequent Agreement on Safeguards⁴², and a question rose as to whether this particular clause imposes any substantive legal requirement on a Member applying a safeguard measure.⁴³ In response

⁴² Article 2.1 of the Agreement on Safeguards, which lays out the general conditions for the application of a safeguard measure, does not include this “unforeseen development clause”. It provides,

“A Member may apply a safeguard measure to a product only if that Member has determined that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.” (Footnote omitted.)

⁴³ This question was first raised in the WTO panel cases, *Korea - Definitive Safeguard Measure on the Imports of Certain Dairy Products* (“*Korea – Dairy Products*”), WT/DS98/R, (Report of the Panel, dated June 21, 1999), WT/DS98/AB/R, (Report of the Appellate Body, dated December 14, 1999); *Argentina - Safeguard Measure on the Imports of Footwear* (“*Argentina – Footwear*”), WT/DS121/R, (Report of the Panel, dated June 25, 1999), WT/DS121/AB/R, (Report of the Appellate Body, dated 14, 1999). The following WTO dispute cases also concern safeguard measures, which are referenced throughout this paper: *United States – Definitive Safeguard Measures on Imports of Wheat Gluten From the European Communities* (“*United States – Wheat Gluten*”), WT/DS166/R, (Report of the Panel, dated July 31, 2000), WT/DS166/AB/R, (Report of the Appellate Body, dated December 22, 2000); *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* (“*United States – Lamb Meat*”), WT/DS177/R, WT/DS178/R (Report of the Panel, dated December 21, 2000), WT/DS177/AB/R, WT/DS178/AB/R (Report of the Appellate Body, dated May 1, 2001); *United States –*

to this question, the Appellate Body of the WTO DSB (“Appellate Body”) ruled that a Member applying a safeguard measure must demonstrate as a matter of fact the existence of “unforeseen developments” that led to the increase in imports causing serious injury or its threat to the domestic industry, in pursuant to paragraph 1(a) of Article XIX.⁴⁴

There has been a controversy as to whether this “unforeseen developments” clause should be considered imposing any legal requirement *at all*. In fact, the panels in *Korea – Dairy Products* and *Argentina – Footwear* did not consider that the “unforeseen developments” clause in Article XIX creates any legal obligation,⁴⁵ and the justification of the Appellate Body

Definitive Safeguard Measures on Imports of Steel Wire Rod and Circular Welded Carbon Quality Line Pipe (“*United States – Line Pipe*”), WT/DS202/R (Report of the Panel, dated October 29, 2001), WT/202/AB/R (Report of the Appellate Body, dated February 15, 2002); *Chile – Price Band System and Safeguard Measures relating to Certain Agricultural Products* (“*Chile – Agricultural Products*”), WT/DS207/R (Report of the Panel, dated May 3, 2002) (the issues in the case relating to safeguards were not appealed); *Argentina – Definitive Safeguard Measure on Imports of Preserved Peaches* (“*Argentina – Preserved Peaches*”), WT/DS238/R (Report of the Panel, dated February 14, 2003) (the panel rulings not appealed); *United States – Definitive Safeguard Measures on Imports of Certain Steel Products* (“*United States – Steel Products*”), WT/DS248~DS259/R (Report of the Panel, dated July 11, 2003), WT/DS248~DS259/AB/R (Report of the Appellate Body, dated November 10, 2003).

⁴⁴ *Korea – Dairy Products*, Report of the Appellate Body, *supra* note 43, para. 90, *Argentina – Footwear*, Report of the Appellate Body, *supra* note 43, para. 97, *United States – Lamb Meat*, Report of the Appellate Body, *supra* note 43, paras 72 and 73.

⁴⁵ *Korea – Dairy Products*, Report of the Panel, *supra* note 43, para. 7.42, *Argentina – Footwear*, Report of the Panel, *supra* note 43, para. 8.69. As discussed above, the Appellate Body reversed those panel positions and ruled that the “unforeseen developments” clause does create an affirmative legal obligation to prove the existence of “unforeseen developments”. *Id.*

ruling on this issue has been questioned.⁴⁶ Despite this controversy, the Appellate Body's position remained unchanged, and the subsequent panels also had followed this ruling.⁴⁷

The complainants argued that the United States had failed to comply with this requirement to demonstrate “unforeseen developments”.⁴⁸ The United States disagreed and claimed that it had identified the unforeseen developments and therefore complied with this requirement.⁴⁹

The Panel considered this issue, following the standard of review previously affirmed by the Appellate Body⁵⁰ that “the Panel must examine whether the United States demonstrated in its published report, through a reasoned and adequate explanation, that unforeseen developments and the effects of tariff concessions resulted in increased imports causing or threatening to cause serious injury to the relevant domestic producers.”⁵¹ (Footnote omitted.)

The United States argued that it identified the financial crises that engulfed Southeast Asia (Asian crisis) and the former USSR (Russian crisis), the continued strength of the United

⁴⁶ For the controversy about the “unforeseen developments” clause and the applicability of Article XIX, see Y.S. Lee, SAFEGUARD MEASURES IN WORLD TRADE: THE LEGAL ANALYSIS, *supra* note 1, at 101-107.

⁴⁷ Pursuant to the Appellate Body ruling, the recent panel in *Argentina – Preserved Peaches* recognized Members’ obligation to demonstrate “unforeseen developments”.

⁴⁸ *United States – Steel Products*, Report of the Panel, *supra* note 43, para. 10.32.

⁴⁹ *Id.*, para. 10.33.

⁵⁰ *United States – Lamb Meat*, Report of the Appellate Body, *supra* note 43, paras 103-106.

⁵¹ *United States – Steel Products*, Report of the Panel, *supra* note 43, para. 10.38. Citing also the previous Appellate Body rulings, the Panel stated that it would also examine, in application of its standard of review, whether the competent authorities “considered all the relevant facts and had adequately explained how the facts supported the determinations that were made.” (Footnote omitted.) *Id.* para. 10.39. The Appellate Body subsequently affirmed this Panel approach. *United States – Steel Products*, Report of the Appellate Body, *supra* note 43, para. 279.

States' market and persistent appreciation of the US dollar, and the confluence of all of these events as unforeseen developments.⁵² The complainants considered that none of these events constituted unforeseen developments nor did any combination of them.⁵³ The issue was further compounded by the fact that the original report of the United States International Trade Commission (“USITC”)⁵⁴, which included a discussion of the Asian and Russian crises, did not specifically address the issue of “unforeseen developments”, and the Second Supplementary Report was subsequently issued to address this issue.⁵⁵ The complainants argued that this supplementary report should be disregarded as it did not comprise the original USITC report and was an *ex port* attempt to demonstrate the existence of “unforeseen developments.”⁵⁶

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

⁵² *United States – Steel Products*, Report of the Panel, *supra* note 43, para. 10.40.

⁵³ *Id.*

⁵⁴ *Steel*, USITC Pub. No.3479 (December 2001).

⁵⁵ *Id.*, para. 10.47.

⁵⁶ *Id.*

basing its decision on a safeguard measure and that the multiple reports do not seem consistent with this provision.⁵⁷

With respect to the multiplicity of the investigation report, the Panel considered that the national authority's report may be produced in parts as long as they form a coherent and integrated explanation providing satisfaction with the requirements of Article XIX and the Agreement on Safeguards.⁵⁸ With respect to the issue of "unforeseen developments", the Panel, citing the previous Appellate Body decision⁵⁹, considered that the demonstration of the unforeseen developments must be made *prior to* the application of a safeguard measure, and as the Supplementary Report was published *before* the application of the U.S. steel safeguards, it believed that the demonstration of the unforeseen developments attempted in the Supplementary Report was not necessarily made in an untimely fashion⁶⁰ although its adequacy was a separate issue. The Panel, therefore, accepted the Supplementary Report as part of the investigation report for its examination.

In assessing the USITC's explanation of the unforeseen developments, the Panel first considered its explanation of *why* they were unforeseen and then moved on to consider the explanation of *how* the unforeseen developments resulted in increased imports.⁶¹ These

⁵⁷ For a further discussion of the adequacy of an investigation report, refer to Y.S. LEE, SAFEGUARD MEASURES IN WORLD TRADE, *supra* note 1, at 144-145.

⁵⁸ *Id.*, para. 10.50.

⁵⁹ *United States – Lamb Meat*, Report of the Appellate Body, *supra* note 43, para. 72.

⁶⁰ *United States – Steel Products*, Report of the Panel, *supra* note 43, para. 10.54.

⁶¹ *Id.*, para 10.69.

considerations were applied to each of the following four events and to the confluence of those events as explained by the United States, namely, the Asian financial crisis which began 1997, the Russian financial crisis, the strength of the U.S. market and the appreciation of U.S. dollar.

With respect to the Asian financial crisis, the Panel considered that the United States demonstrated that this event was not foreseen as it took place well after the conclusion of the Uruguay Round.⁶² As to the Russian financial crisis, the unforeseen developments, as identified by the USITC, were the "unanticipated financial difficulties", which, in particular, were the "intense financial disruptions and currency fluctuations" between 1996 and 1999, resulting from the dissolution of the Soviet Union.⁶³ The Panel accepted, *arguendo*, that there may have been, between 1996 and 1999, unforeseen financial disruptions and currency fluctuations linked to the USSR dissolution that were thus unforeseen at the conclusion of the Uruguay Round.⁶⁴

With respect to the strength of the U.S. market as well as the appreciation of U.S. dollars vis-à-vis other foreign currencies attracting imports, the Panel was of the view that the USITC considered neither of those factors a stand-alone "unforeseen developments" but considered them along with the other alleged unforeseen developments and as part of a set of world events

⁶² The parties agreed that the point in time at which developments should have been unforeseen is that of the completion of the Uruguay Round. *Id.*, para. 10.74.

⁶³ *Id.*, para. 10.83.

⁶⁴ *Id.* para. 10.85.

which *together* constituted unforeseen developments.⁶⁵ Therefore, the Panel did not consider that it had to determine whether or not such factors could distinctively constitute unforeseen developments.⁶⁶ The Panel acknowledged that the confluence of those factors could also be considered an unforeseen development within the context of Article XIX.⁶⁷

In the second phase assessment of the unforeseen development issue (i.e. *how* the unforeseen developments resulted in increased imports), the Panel, following the previous Appellate Body position⁶⁸, considered that the logical connection between the unforeseen developments and the increased imports must be demonstrated.⁶⁹ In the Panel's review, the logical connection was not made properly in the USITC Report. In the Panel's view, the identification and discussion of those events in the initial USITC Report were not made within the context of an explanation of whether they constituted unforeseen developments and whether they resulted in increased imports causing injury: i.e. no logically coherent explanation was made to establish the link between the unforeseen developments and the increase in imports.⁷⁰

The Panel also considered that the Secondary Supplementary Report only states the *overall effects* of the Asian and Russian financial crisis together with the strong US dollar and

⁶⁵ *Id.*, paras 10.89, 10.93.

⁶⁶ *Id.* para. 10.94.

⁶⁷ *Id.* para. 10.100.

⁶⁸ Reports of the Appellate Body, *Argentina – Footwear*, *supra* note 43, para. 92, *Korea – Daily Products*, para. 85.

⁶⁹ *United States – Steel Products*, Report of the Panel, *supra* note 43, para. 10.104.

⁷⁰ *Id.* para. 10.116. The Panel also noted that the initial USITC Report does not even specifically refer to the issue of unforeseen developments, and there are only *ad hoc* references to the Asian and Russian financial crises. *Id.* paras 10.116 - 10.118.

economy to displace steel to other markets without any specific data to support this USITC conclusion.⁷¹ In affirming the Panel decision, the Appellate Body also emphasized the national investigating authority's obligation to provide reasoned conclusions with respect to unforeseen developments and that it is not for panels to find support for such conclusions 'by cobbling together disjointed references scattered throughout a competent authority's report.'⁷²

The Panel acknowledged that the USITC Report described a plausible set of unforeseen developments that may have resulted in increased imports to the United States from various sources, but in the Panel's view, it failed to demonstrate that such developments actually resulted in increased imports into the United States causing serious injury to the domestic producers.⁷³ On appeal, the United States argued that the Panel had failed to consider the relevant data in other sections of the USITC Report to support the USITC's finding that "unforeseen developments" had resulted in increased imports. The Appellate Body denied that the Panel had such obligation as it is for the national investigating authority and not for the Panel to provide the adequate, coherent reasoning.⁷⁴

The Panel also considered that the USITC's determination of "unforeseen developments" is inadequate since it was not made with respect to the specific steel products at issue.⁷⁵ The consideration of the relevant steel products would have been necessary since the steel

⁷¹ *Id.* paras 10.121 - 10.123.

⁷² *United States – Steel Products*, Report of the Appellate Body, *supra* note 43, para. 326.

⁷³ *United States – Steel Products*, Report of the Panel, *supra* note 43, paras 10.121 and 10.123.

⁷⁴ *United States – Steel Products*, Report of the Appellate Body, *supra* note 43, para. 329.

⁷⁵ *United States – Steel Products*, Report of the Panel, *supra* note 43, paras 10.124 - 10.126.

producers in the United States were of the view that the effect was different on different steel products at issue.⁷⁶ The Appellate Body also affirmed the Panel decision that the investigating authority must demonstrate “unforeseen developments” with each product subject to a safeguard measure.⁷⁷

Despite the panel and the Appellate Body decision, it is not altogether clear that the requirement of “unforeseen developments” is justified. The history of the Uruguay Round negotiations on the safeguard rules suggests that the negotiators did not intend to include the “unforeseen developments” clause as a legal requirement in the new safeguard disciplines by not including it from the draft agreement while they repeated all important provisions in the new Agreement.⁷⁸ In fact, there has been an argument as to whether the old safeguard rules under Article XIX are still applicable even after the settlement of the Agreement on Safeguards *at all*.⁷⁹

The ambiguous nature of the “unforeseen developments” clause is another problem. The term used in the original clause is “*unforeseen*” and not “*unforeseeable*”, which refers to the

⁷⁶ *Id.*, paras 10.127.

⁷⁷ *Id.*, para. 316.

⁷⁸ In the initial draft agreement, the “unforeseen developments” clause was included, and a 1990 draft amplified it by specifying the obligation to establish an “unforeseen, sudden and significant increase”. By mid-1990, this clause was removed from the text altogether since both the United States and European Communities objected this terminology of being too difficult and restrictive to apply. PIERRE DIDIER, *LES PRINCIPAUX ACCORDS DE L’OMC ET LEUR TRANSPOSITION DANS LA COMMUNAUTÉ EUROPÉENNE* (1997), at 271-272. For further discussions of the history of safeguard rules, see Y.S. LEE, *SAFEGUARD MEASURES IN WORLD TRADE*, *supra* note 1, chapter 3.

⁷⁹ Y.S. LEE, *SAFEGUARD MEASURES IN WORLD TRADE*, *supra* note 1, chapter 8.1.

subjective, rather than objective, state of perception about the future event. The Appellate Body, having acknowledged this subjectivity, made a distinction between “unforeseen” and “unforeseeable”.⁸⁰ Nonetheless, the Panel in *U.S. Steel Safeguards* considered that the standard is not what the specific negotiators at trade concessions had in mind, rather what they could have reasonably expected,⁸¹ which seems to blur the earlier distinction made by the Appellate Body between “unforeseen” and “unforeseeable”. It is doubtful that there can be any clear standard to determine “unforeseen developments”, without deviating from the language in the provision, which indicates the subjective understanding of the event.⁸² Certain provisions in the SA also seem drafted on the presumption the SA is the sole articulation of the international rules on safeguards.⁸³ The controversies surrounding the requirement of “unforeseen developments” under old Article XIX would seem to continue beyond *U.S. Steel Safeguards*.

2. Increase in Imports

Safeguard measures are predicated on increased imports. Emergency import restraints such as safeguards would be difficult to justify without a significant increase in imports. Article 2.1 of the SA provides in the relevant part, “A Member may apply a safeguard measure to a product

⁸⁰ *Korea – Dairy Products*, Report of the Appellate Body, *supra* note 43, para. 84.

⁸¹ *United States – Steel Products*, Report of the Panel, *supra* note 43, para. 10.43.

⁸² For more discussion, see Y.S. Lee, *Destabilization of the Discipline on Safeguards? – Inherent Problems with the Continuing Application of Article XIX after the settlement of the Agreement on Safeguards*, *supra* note 1, at 1236-1242, Y.S. LEE, SAFEGUARD MEASURES IN WORLD TRADE: THE LEGAL ANALYSIS, *supra* note 1, at 101-107.

⁸³ See Y.S. Lee, *Destabilization of the Discipline on Safeguards? – Inherent Problems with the Continuing Application of Article XIX after the settlement of the Agreement on Safeguards*, *supra* note 1, at 1236-1242, Y.S. LEE, SAFEGUARD MEASURES IN WORLD TRADE: THE LEGAL ANALYSIS, *supra* note 1, at 101-107.

only if that Member has determined that such product is being imported into its territory *in such increased quantities, absolute or relative to domestic production*, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.” (Emphasis added.) The increase in imports is also a part of the injury test discussed below. “*The rate and amount of the increase in imports of the product concerned in absolute and relative terms*” is one of the eight factors to consider for the injury determination under Article 4.2(a) of the SA.

U.S. Steel Safeguards were controversial because, *inter alia*, there was a significant dispute as to the existence of such increase in steel imports. The general steel import statistics seemed to show decreasing, rather than increasing import trends toward the end of the investigating period. For instance, according to the U.S. Census Bureau, U.S. imports of steel products decreased substantially from 34,433,707 metric tons in 2000 to 27,350,808 metric tons in 2001.⁸⁴ Of course, this is aggregated statistics of all steel products, and the increase in imports needs to be considered with respect to each specific product subject to the safeguard. The Panel reviewed the U.S. determination on the increased imports with respect to the steel products subject to *U.S. Steel Safeguards*.

With respect to the increased imports, the Panel considered that the increase must indicate “a certain degree of recentness, suddenness, sharpness and significance”, following the previous

⁸⁴ U.S. Census Bureau, U.S. Imports for Consumption of Steel Products, Exhibit 1 “All Steel Products” (released February 21, 2002).

Appellate Body decision in *Argentina - Footwear*.⁸⁵ Nonetheless, the Panel, in agreement with the Panel's view in *United States – Line Pipe*, also considered that the increase in imports need not continue up to the period immediately preceding the investigating authority's determination, nor up to the very end of the period of investigation, although the increase still has to be "recent".⁸⁶ The Panel considered that the question as to whether a decrease in imports at the end of the period of investigation prevents a finding of increased imports would depend on the duration and the degree of the decrease at the end of the relevant period of investigation, as well as the nature of the increase that intervened beforehand reflected by, for instance, its sharpness and the extent.⁸⁷ The Panel also found that the national investigating authority is not obligated to consider the data made available *after* its determination of increased imports.⁸⁸

The Panel in *U.S. Steel Safeguards* made measure-by measure assessments on the USITC determinations with respect to each specific product. Regarding certain carbon flat-rolled steel (CCRFS), hot-rolled bar, and stainless steel rod, the Panel found that the USITC failed to provide an adequate and reasoned explanation of how the facts supported its determination of increased imports under Article 2.1. The decreasing import trends toward the end of investigation period, particularly the significant drop in the interim 2001 were noted, and the

⁸⁵ *United States – Steel Products*, Report of the Panel, *supra* note 43, para. 10.167. The Appellate Body subsequently confirmed this Panel position. *United States – Steel Products*, Report of the Appellate Body, *supra* note 43, para. 361.

⁸⁶ *United States – Steel Products*, Report of the Panel, *supra* note 43, para. 10.162.

⁸⁷ *Id.*, para. 10.163.

⁸⁸ *Id.*, para. 10.173.

claimed increases in imports during the investigation period were not considered recent enough.⁸⁹ The Appellate Body, emphasizing the national investigating authority's responsibility to examine import trends, agreed with the Panel findings with respect to those products.⁹⁰

On the other hand, the Panel found that the USITC provided an adequate and reasoned explanation of increased imports with respect to cold-finished bar, rebar, welded pipe, fittings, flanges and tool joints (FFTJ) and stainless steel bar where there were significant increases in imports in the recent past from the determination as supported by the overall trends (e.g. sharp increases followed by relatively insignificant drops).⁹¹ The Panel emphasized that the fulfillment of the requirement of increased imports under Article 2.1 does not mean that such increases are sufficient to *cause* serious injury to a domestic industry. The Panel considered that this question should be considered in the context of causation under Article 4.2(b) as discussed below.⁹²

With respect to tin mill products and stainless steel wire, the Panel noted that the USITC Commissioners made divergent findings that are, in the view of the Panel, impossible to

⁸⁹ *Id.*, paras 10.178 - 10.187, 10.201 -10.210, 10.264 – 10.277.

⁹⁰ *United States – Steel Products*, Report of the Appellate Body, *supra* note 43, paras 369, 376, 383, 399. The Appellate Body did not share a particular aspect of the Panel conclusion with respect to stainless steel rod, but it nonetheless supported the Panel finding that the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination of increased imports of this product. *Id.*, paras 395 – 399.

⁹¹ *United States – Steel Products*, Report of the Panel, *supra* note 43, paras 10.214 – 10.215, 10.224, 10.233, 10.244, 10.253-10.254.

⁹² *Id.*, para. 10.255.

reconcile given that they were based on differently defined products.⁹³ (Some Commissioners considered that those products should be included together in a larger category of products and the others considered them separate products. They were also divergent on injury determinations.) The Panel considered that a Member is not allowed to base under Articles 2.1 and 3.1 of the Agreement on Safeguards a safeguard measure “on a determination supported by a set of explanations each of which is different and impossible to reconcile with the other.”⁹⁴ Here, the Appellate Body disagreed with the Panel and reversed its decision, concluding that the affirmative findings based on different product groupings are not necessarily mutually exclusive.⁹⁵ The Appellate Body was of the view that nothing in the SA prevents the national investigating authority from setting out multiple findings to support its determination and that it is the Panel’s obligation to consider each of them to assess if any one of them provides a reasoned and adequate explanation of its final determination.⁹⁶

This Appellate Body decision raises certain doubt as to the proper assessment of the national authority’s determination of increased imports in the presence of divergent opinions within

⁹³ *Id.*, para. 10.194. The Panel further explained, “For the purposes of the Agreement on Safeguards, with regard to, for instance, the question of whether imports have increased, it makes a difference whether the product at issue is tin mill or a much broader category called CCFRS and containing tin mill products. The difference is that the import numbers for different product definitions will not be the same.” *Id.*, para. 10.195. With respect to stainless steel wire, *Id.*, para. 10.261.

⁹⁴ *Id.*, paras 10.195,10.262

⁹⁵ The Appellate Body stated, “We do not believe that an affirmative finding with respect to a broad product grouping, on the one hand, and an affirmative finding with respect to one of the products contained in that broad product grouping, on the other hand, are, necessarily, mutually exclusive.” *United States – Steel Products*, Report of the Appellate Body, *supra* note 43, para 413.

⁹⁶ *Id.* para. 414.

them. The Appellate Body stated, “the Panel should have continued its enquiry by examining the views of the three Commissioners *separately*, in order to ascertain whether one of these sets of findings contained a reasoned and adequate explanation for the USITC's "single institutional determination" on tin mill products.”⁹⁷ (Emphasis added.) Does this mean that the Panel should conclude that the investigating authority has provided a reasoned conclusion even if the multiple explanations offered for the same determination could not be reconciled and only one of them is found adequate and reasonable to support the determination? If so, is this position consistent with the relevant requirement under the SA?

Article 3.1 provides in the relevant part, “*The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.*” (Emphasis added.) How can such reasoned conclusions be made if the explanations offered for the “single institutional determination”⁹⁸ cannot be reconciled with one another? The Appellate Body considered that the relevant provisions in the SA may not necessarily prevent presentation of multiple explanations on the part of the national authorities. Nevertheless, what is subject to the Panel assessment is the adequacy of the explanations offered by the national investigating authority to support its own determination and not that of each explanation by the individual members of these authorities.

⁹⁷ *Id.* para. 416.

⁹⁸ *Id.*

Then, how can the national investigating authority be considered having offered an adequate and reasonable explanation if it presented multiple explanations that cannot be reconciled with each other? Should it be the Panel's responsibility to find for the national investigating authority an explanation that is adequate and reasonable among many that are not even reconciled with each other or is it within the national investigating authority's responsibility under Article 3.1 to present coherent explanations to support its own decision *after* internally reconciling whatever disagreements that the members within the authority may have? The further judicial clarification would seem necessary on this point.

3. Parallelism

One of the most important policy decisions made in the settlement of the SA is the elimination of discriminatory and arbitrary import restrictions.⁹⁹ One of the hardest questions during the Uruguay Round negotiations with respect to safeguards was whether a Member should be allowed to apply a safeguard measure selectively, according to the origin of the imported product.¹⁰⁰ After long negotiations, the participants finally agreed to apply safeguards regardless of the source of imports to prevent arbitrary discriminations. Article 2.2 of the SA provides, "*Safeguard measures shall be applied to a product being imported irrespective of its source.*" (Emphasis added.) This provision affirms the MFN application of safeguard

⁹⁹ These measures called "gray-area measures" were prevalent during 1970s and 80s, and Article 11 of the SA prohibits *all kinds* of gray-area measures. For further discussions of gray-area measures, see Y.S. LEE, SAFEGUARD MEASURES IN WORLD TRADE, *supra* note 1, chapters 3.2 and 8.4.

¹⁰⁰ For more discussions of the negotiation process for the settlement of the SA, see *Id.*, chapter 3.

measures and does not in principle allow Members to discriminate among exporters in applying safeguards.

On the other hand, a Member may well wish to exclude the imports from another Member that it has a free trade agreement (“FTA”) with. In accordance with its own free trade agreements, the United States exempted steel imports from Canada, Mexico, Israel and Jordan from its application of the *Steel Safeguards*.¹⁰¹ Prior to *U.S. Steel Safeguards*, The WTO panels and the Appellate Body had already made it clear that the MFN requirement of Article 2 does not allow a Member to consider injury based on imports from all sources and then exempt the imports from some countries from the scope of its safeguard measure.¹⁰² By this requirement, the parallelism between the scope of injury assessment and the scope of the application of the safeguard is imposed. The Appellate Body ruled that any gap between the scope of injury assessment and the scope of safeguard measure is justified *only if* the Member establishes explicitly that imports from sources covered by the measure satisfy the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the *Agreement on Safeguards*.¹⁰³

¹⁰¹ Proclamation No. 7529 of 5 March 2002, "To Facilitate Positive Adjustment to Competition from Imports of Certain Steel Products", Federal Register, Vol. 67, No. 45, 7 March 2002, paras 8 and 11.

¹⁰² *United States – Wheat Gluten*, Report of the Panel, *supra* note 43, paras 8.176-8.178, Report of the Appellate Body, *supra* note 43, paras 98-100. *United States – Line Pipe*, Report of the Appellate Body, *supra* note 43, paras 178-181.

¹⁰³ *United States – Line Pipe*, Report of the Appellate Body, *supra* note 43, para 183.

Therefore, the exemption in *U.S. Steel Safeguards* would be inconsistent with the requirement of parallelism under Article 2.2 unless the United States made a positive injury determination based *solely* on the imports from the other countries that were *not* exempted from its safeguards. The Panel also found that when the determination and the eventual measure do not correspond in terms of the scope, Members can (and must) establish *explicitly* that imports from sources covered satisfy the conditions for safeguard action.¹⁰⁴ The United States contended that the USITC's analysis in the Second Supplementary Report, read in conjunction with the initial USITC Report, satisfies the requirement of parallelism.¹⁰⁵

There was a debate as to what amounts to a finding that establishes explicitly that imports from sources covered by the measure satisfy the conditions for a safeguard measure.¹⁰⁶ The United States indicated that the competent authorities' formal conclusion as to whether non-FTA imports have caused serious injury is sufficient and not an “explicit” recitation of the results of each step of the analytical process leading to that conclusion.¹⁰⁷ The Panel disagreed and considered that the competent authorities must provide a reasoned and adequate explanation of how the facts support their determination that the products covered in the measure alone have caused serious injury to the domestic industry.¹⁰⁸

¹⁰⁴ *United States – Steel Products*, Report of the Panel, *supra* note 43, para 10.592. The United States argued that there is no requirement for the explicit establishment in the SA, but the Appellate Body affirmed the Panel position. *United States – Steel Products*, Report of the Appellate Body, *supra* note 43, para 444.

¹⁰⁵ *United States – Steel Products*, Report of the Panel, *supra* note 43, para 10.587.

¹⁰⁶ *Id.*, para. 10.594.

¹⁰⁷ *Id.* See note 104 *supra*.

¹⁰⁸ *Id.* para. 10.195-10.196.

The Panel made measure-by-measure assessments to determine whether the United States fulfilled the requirement of parallelism. With respect to all product categories, the Panel found that the United States failed to establish explicitly that imports from the sources included in the application of these measures fulfilled the conditions for the application of a safeguard measure. In fact, the United States did not take the required analytical steps under the SA to establish that the imports not exempted from the safeguards alone have caused injury to the domestic industry. A few paragraphs in the Second Supplementary Report commenting on the effect of the exclusion were considered insufficient and rather conclusory, lacking adequate reasoning and explanations.¹⁰⁹ The Panel considered in particular that the causal effects of excluded imports were not adequately addressed under Article 4.2(b) of the SA.¹¹⁰

¹⁰⁹ With respect to CCFRS, the Panel noted analytical flaws with the USITC report. First, the causal effects of the excluded products were not adequately considered. Second, the USITC discussion of “non-NAFTA imports” still included the imports from Israel and Jordan, which were excluded from the *Steel Safeguards* and therefore should have been excluded along with NAFTA imports in the USITC analysis. *Id.*, paras 10.601 – 10.609. The Panel made the same conclusions with respect to the other eight product categories. *Id.*, paras 10.623, 10.633, 10.643, 10.653, 10.660, 10.670, 10.680, 10.692. The split of opinions among the USITC Commissioners with respect to tin mill products and stainless steel wire were also noted. The Panel did not make the causation analysis on stainless steel rod, but the Panel also concluded that the USITC’s implicit and cursory determination did not amount to the reasoned and adequate explanation required under Articles 2 and 4 of the SA. *Id.*, para 10.699.

¹¹⁰ Article 4.2(b) of the SA provides, “*The determination referred to in subparagraph (a) (injury determination) shall not be made unless the investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.*” (Explanation added.) The issue of causation will be discussed further *infra*.

On appeal, the United States argued that nothing in the SA requires a distinct or explicit analysis of imports from sources *not* subject to the measure.¹¹¹ The Appellate Body affirmed the Panel position, stating that the imports excluded from the application of the safeguard measure must be considered a factor "other than increased imports" within the meaning of Article 4.2(b).¹¹² The Appellate Body found that the possible injurious effects that these excluded imports may have on the domestic industry must not be attributed to imports included in the safeguard measure pursuant to Article 4.2(b).¹¹³ The Appellate Body was also of the view that the Member must make *a single joint determination*, rather than making separate and partial determinations, of the injurious impact of the imports included in the measure by excluding imports from *all countries* that have been excluded from the safeguards, *although imports from some of those countries are very small and almost non-existent*.¹¹⁴

This Panel and Appellate Body decisions on the requirement parallelism imposes considerable analytical steps on a Member applying a safeguard measure with the exclusion of imports from some of its trading partners. For instance, the United States has a treaty obligation to exempt under certain conditions the imports from its trading partners from its safeguard measures that it has a free trading agreement with.¹¹⁵ It appears from the relevant Panel and the Appellate Body decisions that a Member may in fact exempt imports from certain countries from the safeguard measure as long as the requirement of the parallelism is met, as discussed above.

¹¹¹ *United States – Steel Products*, Report of the Appellate Body, *supra* note 43, para 447.

¹¹² *Id.*, para. 450. *See also* note 110 *supra*.

¹¹³ *Id.*

¹¹⁴ *Id.*, para. 468.

¹¹⁵ NAFTA Implementation Act, §312

This raises an interesting question with respect to the MFN application of a safeguard measure as follows. No panel and the Appellate Body decisions required the existence of free trading agreement or any other condition in addition to the parallelism as the prerequisite for the product exclusions. Then, would a Member be allowed to target imports from a small number of countries, even without the presence of a FTA with them, as long as the Member explicitly establishes that the imports from those countries *alone* cause or threaten to cause serious injury to the domestic industry? If so, would it not undermine the principle of the MFN application of safeguards? It is still arguable that this “selective application” of a safeguard measure is different from the arbitrary and discriminatory application of gray-area measures in the past since the Member will still have to satisfy the injury and causation requirements under the SA.

On the other hand, the Panel in *Line Pipe* considered that the authorization of a free trading area under GATT Article XXIV is the legal ground for such exclusion, indicating that the exclusion is permissible among Members with a FTA with one another.¹¹⁶ The Appellate Body avoided making any ruling on this issue by stating that it did not want to “prejudge” Article XXIV issue.¹¹⁷ Nevertheless, if the previous Article XXIV analysis by this Panel would be ultimately correct, the exclusion of imports from a country without the existence of a free trading agreement with it can be considered violating the parallelism requirement under Article 2.2 because it will not have the Article XXIV justification limited to the members of

¹¹⁶ *United States – Line Pipe*, Report of the Panel, *supra* note 43, paras 7.135 – 7.163.

¹¹⁷ *United States – Line Pipe*, Report of the Appellate Body, *supra* note 43, para. 198.

free trade areas. In fact, permitting selective applications of a safeguard measure against imports from one or a small number of countries without any justifying apparatus such as a FTA would seem to undermine the agreement on the MFN safeguards application that was finally reached after decades of treacherous debates and negotiations.¹¹⁸

4. Injury Assessment

a. Consideration of injury factors

A safeguard measure is predicated on the existence / threat of *serious injury* to the domestic industry caused by increase in imports.¹¹⁹ The injury determination is not a precise science and cannot avoid certain degree of subjectivity altogether. Nonetheless, clear guidelines and criteria for the injury determination can reduce arbitrariness in the injury determination. The Agreement on Safeguards attempts to provide such criteria for the injury determination. Article 4.2(a) of the SA provides,

“In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.” (Emphasis added.)

Unlike its predecessor, Article XIX, the SA specifies eight injury factors, as underlined above, for the assessment of injury. The legal nature of those injury factors was at issue: i.e. whether

¹¹⁸ For the long negotiation process of the SA, see Y.S. LEE, SAFEGUARD MEASURES IN WORLD TRADE, *supra* note 1, chapter 3.

¹¹⁹ Article 2.1 of the SA, *supra* note 42.

those factors were illustrated as examples that the national investigating authorities may consider or their consideration is mandatory. The previous panels and the Appellate Body found that the consideration of every single factor listed above is mandatory and should not be omitted.¹²⁰ These specific injury factors were modelled after the U.S. legislation¹²¹ although they are not identical to those included in the U.S. legislation.

In *U.S. Steel Safeguards*, some of the injury factors specified in Article 4.2(b) were omitted from the consideration of the USITC. For instance, the changes in productivity were not analysed in the USITC investigation report.¹²² The analysis of productivity would have been relevant in this case, as the decrease in the employment in the steel sector was widely argued as indicative of injury to the U.S. steel industry.¹²³ If, however, this alleged decrease in employment was correlated with any increase in productivity: i.e. if an improvement in labor-saving production technology actually caused the decrease in employment, the decrease in employment may have to be considered in a different light.

It is not to argue here conclusively that the decrease in employment was in fact caused by the improvement of technology. Rather, the point is that any change in productivity should have been analysed as it may have affected the injury determination. Curiously, the complainants

¹²⁰ *Korea – Dairy Products*, Report of the Panel, *supra* note 43, para. 7.55, *Argentina – Footwear*, Report of the Panel, *supra* note *supra* note 43, para. 8.206, Report of the Appellate Body, *supra* note *supra* note 43, para. 136.

¹²¹ Trade Act of 1974, §§ 202(c)(1)(A) and 202(c)(1)(B).

¹²² *Steel*, USITC Pub. No. 3479 (December 2001)

¹²³ See the relevant discussions in section II.1 *supra*.

did not raise this issue in the panel and the Appellate Body proceedings. If they had, it would have been likely that the omission of the injury factor specified in Article 4.2(a) was considered violation of Article 4, as such omissions were considered violation by the previous panels and the Appellate Body.¹²⁴

Unlike in Article 4.2(a), productivity is not found in the U.S. legislation among the listed factors with respect to serious injury.¹²⁵ This absence perhaps explains why the USITC did not analyze productivity. The injury factors need not be identical between the national legislation and the SA to achieve conformity with the WTO requirement. For instance, the safeguard provisions of the EC include more injury factors than those of the SA.¹²⁶ Raising the bar for the safeguard applications by requiring *more* than is prescribed in the SA, as has been done for the EC rules, does not render safeguard measures, that have been applied in pursuant to the domestic rules, incompatible with the WTO requirements. The opposite, however, may lead to the failure of compliance with the SA. Nothing in the U.S. legislation prohibits the USITC from considering *more* injury factors than what is specified there. Therefore, the USITC could have considered all the factors specifically listed under Article 4.2(a), regardless of their presence in the U.S. legislation.

b. Causation

¹²⁴ *Supra* note 120.

¹²⁵ On the other hand, productivity is included with respect to a threat of serious injury. *See supra* note 121.

¹²⁶ European Union Council Regulation No. 3285/94, art. 10.

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

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

The previous panels and the Appellate Body have provided interpretive guides to this provision requiring causation. The Panel in *Argentina – Footwear* prescribed a three-pronged test for the determination of causation.¹²⁷ The first prong of the test requires the coincidence between an upward trend in imports and downward trends in the injury factors. If no such coincidence is found, there must be a reasoned explanation as to why the data nevertheless show causation. The second is whether the conditions of competition in the domestic market between imported and domestic products demonstrate a causal link between the imports and any injury on the basis of objective evidence. Lastly, the Panel shall assess whether other relevant factors have been analyzed and whether it is established that any injury caused by factors other than the imports has not been attributed to the imports (non-attribution requirement). With regard to the sufficiency of causation, the Appellate Body also ruled that it

¹²⁷ *Argentina – Footwear*, *supra* note 43, Report of the Panel, para. 8.229. The Appellate Body affirmed this test, *Argentina – Footwear*, *supra* note 43, Report of the Appellate Body, paras 140-146. This test was also followed by the subsequent Panel in *United States – Wheat Gluten*, *supra* note 43, Panel Report, para. 8.91.

is enough to establish the required causal link if the increase in imports made a sufficiently clear contribution to the injury *although the increase in imports alone could have not caused the injury*.¹²⁸

The Panel in *U.S. Steel Safeguards* found that this causation requirement was not met with respect to all product categories except one.¹²⁹ The Panel considered that the USITC failed to establish the coincidence between the increasing trends in imports and decreasing trends in the injury factors and also failed to provide any other compelling argument as to *why* the causal link nevertheless existed.¹³⁰ The USITC's analysis of competition between imports and domestic products was not adequate, and it also failed to properly separate and assess the nature and extent of the injurious effects of factors other than increased imports by improperly dismissing a number of factors (i.e., declining domestic demand, domestic capacity increases,

¹²⁸*United States – Wheat Gluten*, *supra* note 43, Appellate Body Report, para. 67. According to the Appellate Body, the last sentence of Article 4.2(b) (non-attribution requirement) requires the national authorities to examine the existence of “a genuine and substantial relationship of cause and effect” between the increase in imports and the injury and distinguish injurious effects caused by the other factors from that by the increase in imports. *United States – Wheat Gluten*, *supra* note 43, Appellate Body Report, para. 69. For further discussions of the causation test, *see* Y.S. LEE, SAFEGUARD MEASURES IN WORLD TRADE, *supra* note 1, at 48-49, 132-134

¹²⁹ The Panel considered that the causation requirement was not met with respect to CCFRS, tin mill products, hot-rolled bar, cold-finished bar, rebar, welded-pipe, FFTJ, stainless steel bar, stainless steel wire. *United States – Steel Products*, *supra* note 43, Report of the Panel, paras 10.419, 10.422, 10.445, 10.469, 10.487, 10.503, 10.536, 10.569, 10.573. For stainless steel rod, the Panel considered that the USITC's causation analysis was not inconsistent with the requirement under Article 4.2(b). *Id.*, para. 10.586.

¹³⁰ For CCFRS, the Panel did not consider that the USITC's selective use of data of the constituent items of the CCFRS and not the whole CCFRS was adequate without establishing that those selective items were representative of the whole CCFRS. *Id.*, paras 10.378-10.380. The Panel provided measure-by measure analyses for all product categories. *Id.*, paras 10.361-10.586.

intra-industry competition and legacy costs) in its non-attribution analysis although it acknowledged that those factors were causing injury to the industry.¹³¹

For tin mill products and stainless steel wire, the Panel noted that there were conflicting opinions among the USITC Commissioners as to the existence of the requisite causation based on the different product definitions.¹³² The Panel found that “a Member is not permitted to base its safeguard measures on an explanation that consists of alternative explanations which, given the different products upon which such explanations are based, cannot be reconciled as a matter of substance.”¹³³ Here, the Appellate Body, without deciding whether the USITC’s explanation of the causation was adequate, ruled that the Panel’s dismissal of the USITC’s analysis based on the Commissioners’ divergent opinions was not justifiable, applying the same reasoning that it did in the discussion of the increased imports with respect to those two product categories.¹³⁴

5. Notification and Consultation

As safeguard measures are applicable unilaterally without any existence of unfair practice on the part of exporters¹³⁵, their application will inevitably upset the balance of concessions

¹³¹ *Id.*

¹³² The Panel made the same observations with regard to the increase in imports as discussed *supra*.

¹³³ *United States – Steel Products*, *supra* note 43, Report of the Panel, paras 10.422, 10.572.

¹³⁴ *United States – Steel Products*, *supra* note 43, Report of the Appellate Body, paras 492, 493. Refer to the relevant discussion in increased imports *supra*. The same concern about this Appellate Body ruling as expressed in that discussion is also applicable here.

¹³⁵ The application is subject to the general condition under Article 2 of the SA as well as the other requirements under the SA and GATT Article XIX.

between the exporting and importing Members. Therefore, from the standpoint of the exporting Members, the investigation and the application of safeguard measures need to be promptly notified so that the exporting Members are made aware of the progress of these measures which may significantly affect their export interests. Article 12 of the SA requires Members to notify the WTO Committee on Safeguards at the various stages of a safeguard investigation: at the initiation of the investigation (Article 12.1(a)); upon the finding of serious injury or threat thereof (Article 12.1(b)); and finally, upon the decision to apply or extend a safeguard measure (Article 12.1(c)). Article 12.1 also requires that the required notifications must be made *immediately* after the relevant decisions.

With respect to the timing of notifications, the previous panel considered that Article 12.1(c) notification must be made well before the implementation of the measure since the notification should provide the exporting Members with the sufficient time to prepare and enter into consultations with the Member applying the safeguard measure *prior to* its application.¹³⁶

Article 12.3 provides,

“A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned, with a view to, inter alia, reviewing the information under paragraph 2, exchanging views on the measure and reaching an understanding on ways to achieve the objective set out in paragraph 1 of Article 8.”

The consultation is an essential part of the procedural requirement of safeguards. Consultations enable the importing and exporting Members to exchange views on the proposed

¹³⁶ *United States – Wheat Gluten*, Report of the Appellate Body, *supra* note 43, paras 8.205-8.207.

measure for the prospective of reaching a mutually satisfactory settlement and maintain the balance of concessions. The timing of consultation is important to achieve those ends. Members proposing to apply a safeguard measure will need to hold those consultations well before the implementation of a safeguard measure so that the results of those consultations can be considered and incorporated in the final implementation of safeguards. Members are not required to modify or withdraw their measures following the consultations, but the adequate effort to accommodate the interests and concerns of the Members affected by the safeguards would minimize the potential for disputes and retaliations.¹³⁷

The adequacy of consultations was at issue in the previous safeguard cases. In *Line Pipe*, the Appellate Body held that the United States did not provide an adequate opportunity for consultations where the measures applied after the consultations were substantially different from those that had been informed at the consultations.¹³⁸ The United States argued that the complaining party would have been able to request new consultations after the announcement of the final measure, but the Appellate Body considered that the period of 18 days between the announcement of the final U.S. measure and its implementation was not considered sufficient for entering into new consultations.¹³⁹

¹³⁷ For more discussions in this issue, see Y.S. LEE, SAFEGUARD MEASURES IN WORLD TRADE, *supra* note 43, chapters 11.2 and 11.3.

¹³⁸ *United States – Line Pipe*, Report of the Appellate Body, *supra* note 43, paras 102 – 113.

¹³⁹ *Id.*, paras 107-108.

In *U.S. Steel Safeguards*, the United States implemented the measures only 15 days after its announcement of the measures.¹⁴⁰ This time period is even less than the one (18 days) in *Line Pipe* above, which was subsequently considered inadequately short by the Appellate Body.¹⁴¹ Surprisingly, this issue was not brought up by the complainants in the panel proceedings. Had they have done so, this inadequately short time between the announcement and the implementation would have been likely considered a violation of Article 12. In fact, the lack of the genuine effort to provide an adequate consultation opportunity and to reach a mutually agreeable settlement contributed to the rapid escalation of crisis in *U.S. Steel Safeguards*, as manifested by the several retaliation proposals from the exporting Members.

IV. CONCLUSION – TEST OF MULTILATERALISM IN INTERNATIONAL TRADE

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

¹⁴⁰ See also, Y.S. LEE, SAFEGUARD MEASURES IN WORLD TRADE: THE LEGAL ANALYSIS, *supra* note 1, at 167-168.

¹⁴¹ *Supra* note 139.

Did this multilateral framework indeed work in *U.S. Steel Safeguards*? It did not seem initially. There was serious doubt as to whether the United States had complied with the requirements of the SA. As discussed above, the United States applied a series of safeguard measures to a wide range of steel products where it was not even clear that the basic premises for the application of a safeguard measure, such as the increase in imports and the causation between the injury and imports, existed at all. It was widely believed that the political needs, rather than the economic necessities backed by the legal justifications, prompted the application of the *Steel Safeguards*.¹⁴² Political motivations do not necessarily make safeguards incompatible with the requirements of the SA and Article XIX, but the lack of essential legal conditions do.

The subsequent crisis in *U.S. Steel Safeguards*, which brought out the danger of a worldwide trade war, began with the rushed manner of the U.S. government into the rapid application of the *Steel Safeguards* without providing adequate consultation opportunities.¹⁴³ It suggested that the U.S. government did not seriously contemplate the need of those consultations under Article 12 of the SA and the possible consequences of neglecting them. Such rush and neglect

¹⁴² A renowned economist considered that the steel safeguards would not improve the condition of the U.S. steel industry. See Robert J. Barro, *Big Steel Doesn't Need Any More Popping Up*, BUSINESS WEEK, April 1, 2001, at 24. It has been also reported that the U.S. Treasury Secretary Paul H. O'Neill stated in the off-the-record comments after a dinner speech at the Council on Foreign Relations that the steel safeguards would cost more jobs in the United States than it would save. NEW YORK TIMES, March 16, 2002, at A1. Refer to the relevant discussions in the section II.1 *supra* for the political background of *U.S. Steel Safeguards*.

¹⁴³ See the relevant discussion on the issue of notifications and consultations in section III.5 *supra*.

may have been caused by internal political pressure¹⁴⁴, but they came too high a price, such as the strong worldwide condemnations against the U.S. measures, which undermined its credibility as a global leader of free trade, filing of complaints at the WTO by more nations than in any other dispute in the GATT/WTO history as well as proposal of several retaliations by major economies around the world.¹⁴⁵

As the dispute progressed, the multilateral framework in place within the world trading system was brought to function and eventually averted this crisis. The retaliation proposals by the exporting Members were made in accordance with the relevant SA provisions, and the exporting Members refrained themselves from applying retaliations until the resolution of another important multilateral device of dispute settlements, the WTO panel and the Appellate Body proceedings.¹⁴⁶ Facing several retaliation proposals, the United States also entered into consultations with some exporting Members and agreed to reduce steel products from its safeguard list.¹⁴⁷ The multilateral framework was finally shown operational and resolved this dispute when the United States accepted the WTO DSB decision, although it ruled against all of its measures, and withdrew them subsequently despite significant internal political pressure

¹⁴⁴ An immediate and comprehensive import relief was demanded by the steel industry. Recommended Action to Solve the Steel Import Crisis, May 9, 2001, Proposal by the Steel Manufacturers Association.

¹⁴⁵ See the relevant discussions in section II.2 *supra*.

¹⁴⁶ Understanding on Rules and Procedures Governing the Settlement of Disputes (“Dispute Settlement Understanding” or “DSU”) governs the proceedings of the panel as well as of the Appellate Body. WTO, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS, *supra* note 2, at 404-433.

¹⁴⁷ See the relevant discussions in section II.2 *supra*.

against it.¹⁴⁸ The respect for the multilateral framework of international trade was restored and the multilateralism endured a difficult test, which could have escalated to a worldwide trade war.

The development of *U.S. Steel Safeguards* has demonstrated how important it is for Members to adhere to the multilateral framework of the international trading system including due compliance with the WTO legal requirements. The initial neglect of the multilateral framework in *U.S. Steel Safeguards* brought the international community to a major trade dispute involving virtually all major economies in the world. The U.S. effort in negotiations *subsequent to* its application of safeguards helped resolving the crisis¹⁴⁹, but such crisis may have never been borne out in the first place had the United States considered the multilateral framework more seriously and conducted the prior consultations under Article 12 adequately with the notifications sufficiently in advance. The properly conducted Article 12 consultations may have led to the same negotiation results *albeit* without the serious disputes in progress under the threat of retaliations.

The improper application of safeguards without valid legal justifications may also tempt other Members to do the same in order to protect their own export interests by applying safeguards-

¹⁴⁸ The exporting Members also followed the suit, and the proposed retaliations were never applied.

¹⁴⁹ See the relevant discussions in section II.2 *supra*.

in-response, as witnessed in *U.S. Steel Safeguards*,¹⁵⁰ creating a chain of worldwide protectionism. Ironically, this will eventually return to undermine the export interests of the Member applying the safeguard measure in the first place. Retaliations will cause more immediate damage to the export interests of the Member applying the safeguard.¹⁵¹ In *U.S. Steel Safeguards*, the proposed retaliations were never entered into practice as the United States withdrew all its measures in acceptance of the WTO DSB decision.

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

¹⁵⁰ As discussed above, some Members including European Communities and China also applied safeguard measures against their import of steel products subsequent to *U.S. Steel Safeguards* to prevent “diversion” of steel exports from the U.S. market protected from the *Steel Safeguards*. *Id.*

¹⁵¹ As safeguards are applied without any unfair trade practice on the part of the exporters, the exporting Member is allowed to suspend, when it failed to reach agreement on compensation with the importing Member, the application of substantially equivalent concessions or other obligations under Article 1994 to the trade of the Member applying the measure (retaliatory measure). Agreement on Safeguards, art. 8.2. However, Article 8.3 suspends the right to retaliation for three years if the safeguard is applied based on an absolute increase in imports and the measure conforms to the SA. In other words, this suspension is not imposed where the safeguard is not consistent with the requirement of the SA.

¹⁵² See the relevant discussions in section II.2 *supra*.

down the road, such as the one witnessed in this case.