

## 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*

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#### I. BACKGROUND: SAFEGUARD MEASURES SUSCEPTIBLE TO DISPUTES?

On 5 March 2002, President Bush of the United States (hereinafter “US”), following the recommendation previously made by the United States International Trade Commission (USITC), announced the decision to apply a safeguard measure to imports of steel products in the form of increased tariffs up to 30 percent. This announcement immediately made headlines around the world and invited swift and furious responses from the international community.

Only two days after the US decision, the European Union (EU) filed a complaint with the Dispute Settlement Body of the World Trade Organization, also threatening to retaliate against imports from the United States. Several other countries including Japan, South Korea, Switzerland, Venezuela, Norway and China shortly afterwards joined with the EU for the complaint against the US measure. A dozen other countries, including non-WTO Members such as Russia, have criticized the US action as frustrating international efforts for free trade and expressed their intent to challenge the US decision. The strong reaction from the international community signifies the critical impact of safeguard measures on international trade.

“Safeguard measures” or “safeguards” refer to emergency import restrictions applied under the WTO Agreement on Safeguards and GATT Article XIX.<sup>1</sup> They are applied to prevent or remedy serious injury to domestic industry caused by rapid increases

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<sup>1</sup> For the discussion of safeguard measures and their significance in world trade, see author’s previous works, *Reflections on the Agreement on Safeguards in the WTO* (co-author with Prof. Jai S. Mah), 21 W. Comp. 6 (December 1998), pp. 25–31; *Emergency Safeguard Measures under Article X in GATS: Applicability of the Concepts in the WTO Agreement on Safeguards*, 33 J.W.T. 4 (August 1999), pp. 47–59; *Review of the First WTO Panel Case on the Agreement on Safeguards: Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products*, 33 J.W.T. 6 (December 1999), pp. 27–46; *Critical Issues in the Application of the WTO Rules on Safeguards*, 34 J.W.T. 2 (April 2000), pp. 131–147; *The WTO Agreement on Safeguards: Improvement on the GATT Article XIX?*, 14 Int’l Trade J. 3 (2000), pp. 284–298; *Destabilization of the Discipline on Safeguards?—Inherent Problems with the Continuing Applicability of Article XIX after the Settlement of the Agreement on Safeguards*, 35 J.W.T. 6 (December 2001), pp. 1235–1246; *Revival of Gray-Area Measures?—The US–Canada Softwood Lumber Agreement: Conflict with the WTO Agreement on Safeguards*, 36 J.W.T. 1 (February 2002), pp. 155–166; *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 J. World Intellectual Property 2 (March 2002), pp. 219–231.

in imports.<sup>2</sup> Unlike anti-dumping actions and countervailing duties, safeguard measures are applicable regardless of the existence of any unfair trade practices on the part of exporters. Safeguard measures are significant as they interfere with legitimate trade through unilateral restrictions on imports, and therefore, their abuse may well lead to the destabilization of the world trading system.

Safeguard measures were introduced in the world trading system as part of the GATT provisions. Article XIX governed the application of a safeguard measure. Article XIX comprised only five paragraphs but lacked detailed procedural and substantive rules on the application of safeguards, causing ambiguities and confusion in the discipline of safeguards.<sup>3</sup> Recognizing this problem and the critical importance of the effective discipline on import restrictions, the negotiators in the Uruguay Round agreed to establish more clear and detailed rules on safeguards, named the Agreement on Safeguards (hereinafter, "Safeguards Agreement" or "SA").<sup>4</sup>

The Safeguards Agreement has been hailed as a substantial achievement of the Uruguay Round, "indeed a heroic statement of principle".<sup>5</sup> Although the SA is a much more comprehensive and enhanced set of rules than its predecessor, Article XIX, it is nevertheless not without flaws, and the inherent ambiguities in some of its provisions have caused subsequent disputes in the application of safeguard measures.

As of March 2002, six disputes concerning the application of safeguard measures have been referred to the panels of the WTO Dispute Settlement Body ("DSB") established under Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU").<sup>6</sup> The panels and the permanent Appellate Body of the DSB have made their decisions in five disputes amongst them, finding none of the disputed measures consistent with the WTO rules on safeguards. As many as a

<sup>2</sup> WTO Agreement on Safeguards Article 2 lays out the general conditions for the application of a safeguard measure. Article 2.1 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".

<sup>3</sup> A Secretary Note of 1987 on "Work Already Undertaken in the GATT on Safeguard" revealed several problems with Article XIX: (i) lack of transparency for the application of safeguard measures; (ii) inadequacy of notifications and consultation process; (iii) uncertain time duration for safeguard measures; (iv) unclear definition of serious injury; and (v) violation of the MFN principle in the application of safeguard-type measures. GATT document MTN.GNG/NG9/W/1 (8 April 1987).

<sup>4</sup> For the negotiation process for the new rules on safeguards, see Terence P. Stewart, *The GATT Uruguay Round: A Negotiating History (1986-1992)* (Deventer: Kluwer Law & Taxation, 1993), pp. 1717-1820.

<sup>5</sup> John H. Jackson, *The World Trading System* (2nd edn, Cambridge MA: MIT Press, 1997), p. 210.

<sup>6</sup> Those disputes are: *Korea—Definitive Safeguard Measure on the Imports of Certain Dairy Products (Korea—Dairy Products)*, WT/DS98/R (Report of the Panel, 21 June 1999), WT/DS98/AB/R (Report of the Appellate Body, 14 December 1999); *Argentina—Safeguard Measure on the Imports of Footwear (Argentina—Footwear)*, WT/DS121/R (Report of the Panel, 25 June 1999), WT/DS121/AB/R (Report of the Appellate Body, 14 December 1999); *United States—Definitive Safeguard Measures on Imports of Wheat Gluten From the European Communities (US—Wheat Gluten)*, WT/DS166/R (Report of the Panel, 31 July 2000), WT/DS166/AB/R (Report of the Appellate Body, 22 December 2000); *United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia (US—Lamb Meat)*, WT/DS177/R, WT/DS178/R (Report of the Panel, 21 December 2000), WT/DS177/AB/R, WT/DS178/AB/R (Report of the Appellate Body, 1 May 2001); *United States—Definitive Safeguard Measures on Imports of Steel Wire Rod and Circular Welded Carbon Quality Line Pipe (US—Line Pipe)*, WT/DS202/R (Report of the Panel, 29 October 2001), WT/DS202/AB/R (Report of the Appellate Body, 15 February 2002); *Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/3 (Constitution of the Panel Established at the Request of Argentina, 23 May 2001).

quarter of all safeguard measures ever imposed were formerly disputed in the WTO Panel proceedings and subsequently found inconsistent with the rules on safeguards.<sup>7</sup> In contrast, less than 2 percent of anti-dumping measures were ever disputed in the WTO Panel proceedings.

The high rate of disputes and successful challenges signify the apparent inability of Members to comply with the current rules. Alternatively, the rules themselves may have been made or interpreted by the panels and the Appellate Body in such a way to cause considerable difficulties for Members to comply with them. Either way, the problem has to be addressed since the continuing failure of Members to observe the rules on safeguards would compromise the stability and integrity of the discipline on safeguards. Where necessary, the modification of the rules needs to be also considered in order to remove any significant ambiguities in the text of the relevant rules. This article discusses recurring problems in the application of safeguard measures, provides advice to competent national authorities and also makes suggestions for the modification of the rules on safeguards. This article also provides a discussion on the highly publicized US steel safeguard measure which has been recently applied.

## II. RECURRING PROBLEMS IN THE APPLICATION OF SAFEGUARDS

### A. PRELIMINARY ISSUES

#### 1. *Standard of Review*<sup>8</sup>

The defensibility of a disputed safeguard measure would be affected significantly by the degree of scrutiny applied by the Panel to the findings and conclusions of the national investigating authorities. If the Panel gives a complete deference to the national authorities' findings, there will be no significant test for the disputed safeguard measure. If, however, little or no deference is given, the measure will be subject to a close examination by the Panel. The Safeguards Agreement is silent on the issue of the standard of review.

The Panel in *Korea—Dairy Products* ruled that in the absence of provision on the standard of review in the SA, Article 11 of the DSU applies.<sup>9</sup> The Article provides, "a Panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements". The Panel found that in order to make the objective assessment as required under Article 11, it would examine the reasoning made by national investigating authorities to justify their conclusions as well as the

<sup>7</sup> See WTO, Report (2000) of the Committee on Safeguards, G/L/209 (23 November 2000) and Report (2001) of the Committee on Safeguards, G/L/494 (31 October 2001).

<sup>8</sup> See also Y.S. Lee, *Review of the First WTO Panel Case on the Agreement on Safeguards: Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products*, 33 J.W.T. 6 (December 1999), pp. 33–34.

<sup>9</sup> WTO document WT/DS98/R, para. 7.26. The Panel followed the Appellate Body decision in *European Communities—Measures Concerning Meat and Meat Products (EC—Hormones)* that the provisions of Article 11 of the DSU applies if the WTO multilateral trade agreement does not provide for a specific standard of review.

proper scope of facts considered by them.<sup>10</sup> The Panel also emphasized that it would not engage itself in a *de novo* review of the national investigating authority's investigation since it did not consider its review a substitute for the proceedings conducted by the national investigating authorities.<sup>11</sup> The Panel's position does not give the complete deference to the national authorities' decisions but does not deny their discretion to make determinations, either, as long as reasonable explanations are given.

The issue is what constitutes the adequate reasoning that the national authorities have been required to provide. The determination of the adequacy of reasoning requires rather subjective judgement, and a set of clear and objective criteria seems difficult to draw. In addition, the Appellate Body in *US—Lamb Meat* ruled that "A Panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some alternative explanation of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation."<sup>12</sup>

This ruling presents a particular difficulty for the national authorities. For instance, it is possible to draw two different conclusions from the same set of facts by employing different yet proper reasoning. A conclusion may not seem adequate in light of the other reasoning that leads to a different conclusion. Then should this conclusion be denied simply because the other reasoning does not support it? The decision seems to indicate that the national authorities should examine their conclusion in light of all alternative reasoning and defend it where necessary. Also, they will have to do all of it in their investigation report.<sup>13</sup>

The scope of facts considered by the national authorities is also subject to review by the panel. According to the Panel decision in *Korea—Dairy Products*, the authorities are required to examine all facts in their possession whether or not those facts support their conclusion.<sup>14</sup> Are national authorities obliged to examine the facts not submitted by the parties? The *US—Wheat Gluten* Panel did not believe that they are.<sup>15</sup> However,

<sup>10</sup> The Panel in *Korea—Dairy Products* considered that the requirement in Article 11 for the objective assessment of the national authority's review would entail an examination of "whether the KTC (Korea's investigating authority) had examined all facts in its possession or *which it should have obtained in accordance with Article 4.2 of the Agreement on Safeguards*, whether adequate explanations had been provided of how the facts as a whole supported the determination made and, consequently, whether the determination made was consistent with the international obligation of Korea" (emphasis and explanation added.) WT/DS98/R, para. 7.30. This Panel position was reiterated subsequently by the Appellate Body in *US—Lamb Meat*. It stated, "a panel's application of the appropriate standard of review of the competent authorities' determination has two aspects. First, a panel must review whether the competent authorities have, as a *formal* matter, evaluated *all relevant factors* and, second, a panel must review whether those authorities have, as a *substantive* matter, provided a *reasoned and adequate explanation* of how the facts support their determinations". *US—Lamb Meat*, WT/DS17/AB/R, WT/DS178/AB/R, para. 141.

<sup>11</sup> *Korea—Dairy Products*, WT/DS98/R, para. 7.30. and *Argentina—Footwear*, WT/DS121/R, para. 8.124. The subsequent panels also followed this approach. See, *US—Wheat Gluten*, WT/DS166/R, para. 8.5; *US—Lamb Meat*, WT/DS177/R, WT/DS178/R, para. 7.3.

<sup>12</sup> *US—Lamb Meat*, WT/DS17/AB/R, WT/DS178/AB/R, para. 106.

<sup>13</sup> The national authorities' explanations and reasoning for their conclusions would not be accepted unless they are already included in its original investigation report. *Korea—Dairy Products*, WT/DS98/R, para. 7.72.

<sup>14</sup> *Korea—Dairy Products*, WT/DS98/R, para. 7.30

<sup>15</sup> The Panel stated, "It is not our role to collect new data, nor to consider evidence which could have been presented to the USITC by interested parties in the investigation, but was not". *US—Wheat Gluten*, WT/DS166/R, para. 8.6.

the Appellate Body disagreed and subsequently found that it is not sufficient for the national authorities to rely only on the information submitted by the parties. It ruled that they have an affirmative duty to seek out pertinent information necessary to assess the injury to the domestic industry.<sup>16</sup>

How should national authorities conduct their investigation if the pertinent data are simply not available?<sup>17</sup> The *Korea—Dairy Products* Panel considered this issue and subsequently found that national authorities should make a reasonable estimate where actual data are not available.<sup>18</sup> It is not clear whether such estimation would be feasible in every case where relevant data could not be found. Even if estimation could be made, its accuracy and reliability would also likely be an issue.

The Appellate Body was mindful of the practical difficulty of collecting relevant data and acknowledged that the collection of data that include all domestic producers may not be practical in many instances.<sup>19</sup> It considered that the data before the competent authorities are acceptable if they are sufficiently representative to give a true picture of the domestic industry and that what is sufficient in any given case would depend on the “particularities” of the domestic industry at issue. Therefore, national authorities should present a statistically valid sample where data on all of its domestic producers could not be produced. Otherwise, they should be prepared to explain how the partial data collected and considered would be representative of the industry.

The issue of the standard of review is complex. Competent national authorities should be aware that there is a degree of subjectivity in the Panel review on the “adequacy” of their reasoning. Although the panels have repeatedly expressed that they do not intend to substitute proceedings by the national authorities with their review, they have nevertheless judged the adequacy of the national authorities’ determinations and investigations. They have done so by examining the proper scope of the data that the national authorities should have considered and by assessing their explanations for their determinations. Therefore, national authorities should constantly refer to the findings and opinions of the panels and of the Appellate Body on the issues of the adequacy of reasoning as well as on the proper scope of data. The authorities should consider those findings and opinions an essential guide to their investigations.

## 2. *Demonstration of “Unforeseen Developments” Under Article XIX*

As mentioned above, the provisions of Article XIX governed the application of safeguard measures during the previous GATT regime. The continuing applicability of Article XIX after the settlement of the Agreement on Safeguards has been

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<sup>16</sup> *US—Wheat Gluten*, WT/DS166/AB/R, paras 53–55.

<sup>17</sup> The lack of pertinent industrial data would be more apparent in developing countries where available statistics are limited.

<sup>18</sup> *Korea—Dairy Products*, WT/DS98/R, para. 7.82.

<sup>19</sup> *US—Lamb Meat*, WT/DS17/AB/R, WT/DS178/AB/R, para. 132.

controversial.<sup>20</sup> The Panel in *Korea—Dairy Products* affirmed in principle the continuing application of Article XIX.<sup>21</sup> The issue is whether there is any legal condition for the application of a safeguard measure under Article XIX that is not included in the SA.

Article XIX:1(a) 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).

While the SA adopts the general conditions for the application of a safeguard measure laid down in Article XIX:1(a), the clause above (“unforeseen developments” clause) has been omitted from the relevant text of the SA. The complainant in *Korea—Dairy Products* argued that the Member applying a safeguard measure must demonstrate under the provision of Article XIX:1(a), the existence of “unforeseen developments” that led to the increase in imports.<sup>22</sup> In response to this argument, the Panel in *Korea—Dairy Products* found that the “unforeseen developments” clause is merely “an explanation of why an Article XIX measure may be needed, taking into account the fact that at the time (1947) the contracting parties had just agreed (for the first time) on multilateral tariff bindings and on a general prohibition against quotas”.<sup>23</sup> It did not believe that the clause constitutes a legal condition for the application of a safeguard measure. The Panel in *Argentina—Footwear* arrived at the same conclusion. The majority of academia also seems to agree that the “unforeseen developments” clause does not form a legal condition.<sup>24</sup>

The Appellate Body reversed those Panel decisions and ruled that Members applying a safeguard measure must demonstrate the existence of “unforeseen developments” as a matter of fact.<sup>25</sup> The Appellate Body disagreed with the Panel’s characterization of the clause as merely “explanatory”. It considered that the clause constitutes a legal obligation on the part of the Member applying a safeguard measure. It is doubtful that the participants of the Uruguay Round would have omitted a relevant legal condition from the text of the SA.<sup>26</sup> However, the position of the

<sup>20</sup> See relevant discussions in the author’s articles, *Critical Issues in the Application of the WTO Rules on Safeguards*, 34 J.W.T. 2 (April 2000), pp. 132–137, and *Inherent Problems with the Continuing Applicability of Article XIX after the Settlement of the Agreement on Safeguards*, 35 J.W.T. 6 (December 2001), pp. 1235–1246.

<sup>21</sup> *Korea—Dairy Products*, WT/DS98/R, paras 7.38–7.39.

<sup>22</sup> *Korea—Dairy Products*, WT/DS98/R, paras 4.142–4.146, 4.149–4.168.

<sup>23</sup> *Korea—Dairy Products*, WT/DS98/R, para. 7.47.

<sup>24</sup> See M. Trebilcock and R. Howse, *The Regulation of International Trade* (2nd edn, London: Routledge, 1999), p. 228; and M. Bronckers, *Voluntary Export Restraints and the GATT 1994 Agreement on Safeguards*, in J.H.J. Bourgeois, F. Berrod and E. Fournier (eds), *The Uruguay Round Results: a European Lawyer’s Perspective* (Brussels: European Interuniversity Press, 1995), p. 275.

<sup>25</sup> *Korea—Dairy Products*, WT/DS98/AB/R, para. 85, and *Argentina—Footwear*, WT/DS121/AB/R, para. 92.

<sup>26</sup> See Y.S. Lee, *Destabilization of the Discipline on Safeguards?—Inherent Problems with the Continuing Applicability of Article XIX after the Settlement of the Agreement on Safeguards*, 35 J.W.T. 6 (December 2001), pp. 1239–1241, for the relevant discussions.

Appellate Body has remained unchanged,<sup>27</sup> and national authorities will have to demonstrate the existence of “unforeseen developments” before applying a safeguard measure.

The question is how “unforeseen developments” can be demonstrated. In the GATT safeguard case *Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement* (“*Hatters’ Fur Case*”), it was found that the term “unforeseen developments” should be interpreted to mean developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concessions could and should have foreseen at the time when the concession was negotiated.<sup>28</sup> According to this interpretation, the reasonableness of the absence of foresight, i.e. foreseeability, determines the existence of “unforeseen” developments. On the other hand, the Appellate Body in *Korea—Dairy Products* made a distinction between the terms “unforeseen” and “unforeseeable”,<sup>29</sup> the former term being a lesser threshold than the latter one.<sup>30</sup>

The ambiguous and equivocal nature of the clause caused this difference in its interpretations. The clause is not clear enough to form a specific condition for the application of a safeguard measure. Nevertheless, the current ruling of the Appellate Body requires national authorities to demonstrate the existence of the unforeseen developments. Neither the Panel nor the Appellate Body had any opportunity to assess the adequacy of such demonstration since in none of the disputed safeguard cases so far, the national authorities expressly demonstrated the existence of unforeseen developments in their investigation report. Therefore, it still remains to be seen how the future panels will examine the adequacy of the demonstration of “unforeseen developments”.

Should the Panel inquire into the reasonableness of the absence of foresight, then the question would become the issue of foreseeability, which should not be the case under the cited Appellate Body ruling. On the other hand, should the Panel give a complete deference to the explanations of the national authorities, the requirement would become a nullity. If the standard of review discussed above would also apply to the examination of “unforeseen developments”,<sup>31</sup> the Panel will examine the adequacy of the national authorities’ explanations of the circumstances where such developments were not foreseen, rather than entertaining the question whether Members actually foresaw developments leading to increases in imports.

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<sup>27</sup> The Appellate Body confirmed its earlier position on this issue subsequently in *US—Wheat Gluten* and in *US—Lamb Meat*, which was also followed by the recent Panel in *US—Line Pipe*, WT/DS202/R, para. 7.295.

<sup>28</sup> GATT Panel Report in *Withdrawal by the United States of a Tariff Concession Under Article XIX of the General Agreement*, GATT/CP/106, report adopted on 22 October 1951, GATT/CP.6/SR.19, Sales No. GATT/1951-2, at. 10, para. 9.

<sup>29</sup> *Korea—Dairy Products*, WT/DS98/AB/R, para. 84.

<sup>30</sup> See also *US—Lamb Meat*, WT/DS177/R, WT/DS178/R, paras 7.19–7.22.

<sup>31</sup> Refer to the discussion on the standard of review in II.A.1 above.

## B. GENERAL CONDITIONS FOR THE APPLICATION OF A SAFEGUARD MEASURE

### 1. *Non-discriminatory Application of a Safeguard Measure*

Article 2.1 of the SA requires that a safeguard measure must be applied in a non-discriminatory manner, irrespective of the source of imports. The question was raised in the recent cases where imports from the members of certain free trade areas or customs unions were excluded from the application of safeguard measures.<sup>32</sup> Footnote 1 of Article 2.1 of the SA allows a customs union to take a safeguard measure against non-member countries. A customs union may well adopt a policy to restrain from applying a safeguard measure among their members,<sup>33</sup> and the question is whether a member of a customs union may exempt imports from the other member countries from its application of a safeguard measure.

In *Argentina—Footwear*, the Panel found that a member of a customs union is not allowed to apply a safeguard measure against products from non-member countries only, where it considered in its injury determination imports from all sources including the other member countries.<sup>34</sup> The Appellate Body subsequently affirmed the Panel decision but did not address the question whether a member of a customs union may exclude the other member countries from its application of a safeguard measure where it considers imports from non-member countries only in its injury determination.<sup>35</sup> The issue was reiterated in *US—Wheat Gluten*, in which the Panel did not approve of excluding imports from a member of a customs union in the application of a safeguard measure where the injury determination was made again based on imports from all sources.<sup>36</sup>

Would a member of a customs union be allowed to exclude the other members from its application of a safeguard measure if it makes injury determination based on imports from the non-member countries only? The recent Panel in *US—Line Pipe* considered this question. It found that the provision of Article XXIV of the GATT

<sup>32</sup> The term, “customs union” includes “free trade area” unless indicated otherwise.

<sup>33</sup> For instance, Section 311(a) of the NAFTA (North America Free Trade Agreement) Implementation Act provides that if the Commission makes an “affirmative injury determination” in an investigation under Section 202 of the United States Trade Act, the Commission must also find whether: (i) imports of the article from a NAFTA country, considered individually, account for a substantial share of total imports; and (ii) imports of the article from a NAFTA country, considered individually or, in exceptional circumstances, imports from NAFTA countries considered collectively, contribute importantly to the serious injury, or threat thereof, caused by imports. If the conditions of (i) and (ii) above are not met, the quantitative limitation will not apply to imports from Canada or Mexico pursuant to Section 312(b) of the NAFTA Implementation Act.

<sup>34</sup> The notion of parallelism between the scope of investigation and the scope of the application of a safeguard measure was emphasized. *Argentina—Footwear*, WT/DS121/R, paras 8.72–8.92.

<sup>35</sup> *Argentina—Footwear*, WT/DS121/AB/R, paras 99–114.

<sup>36</sup> *US—Wheat Gluten*, WT/DS166/R, para. 8.178. The United States conducted a separate causal analysis between the imports from Canada and serious injury to domestic industry and subsequently determined that the imports from Canada did not reach the “substantial share” and did not “contribute importantly” to the injury. However the Panel found that once the injury determination is made based on the imports from all sources, a safeguard measure must be applied to the imports from all sources regardless of the result from such an analysis because imports from different sources may have collectively caused the injury and therefore the exclusion of the imports from a particular source from the application of a safeguard measure is not warranted. *Id.*, para. 8.176. The Appellate Body also upheld the Panel findings. WT/DS166/AB/R, paras 98–100.

allows a member of the customs union to exclude the other members from its application of a safeguard measure. According to the Panel, the provisions of Article XXIV that authorize the elimination of duties and other restrictive regulations of commerce among the members of a customs union can be also used to exempt imports from the member countries in the application of a safeguard measure.<sup>37</sup>

The Appellate Body did not make any affirmative ruling on this issue, having found that the United States already violated Articles 2 and 4 of the Agreement on Safeguards, by including imports from Canada and Mexico in its injury determination, but excluding them from its application of the safeguard measure.<sup>38</sup> The Appellate Body did affirm the requirement of the parallelism under the provisions of Article 2, which requires that the sources of products under investigation should be identical to those subject to the application of a safeguard measure. The finding on the parallelism does not answer the question whether a member of a customs union may exclude imports from the other members at all.

Do the provisions of Article XXIV provide defence to the non-discriminatory application required under Article 2.2? The attention should be given to the emergency nature of a safeguard measure. Article XXIV allows the establishment of a customs union and enables its members to provide preferential treatment among them by eliminating duties and other restrictive regulations of commerce with respect to “all” or “substantially all” trade within the territory of the customs union (Article XXIV:8(a)(i)). Article XXIV also requires that substantially the same duties and other regulations of commerce be applied by each of the members of the union to the trade of territories not included in the customs union (Article XXIV:8(a)(ii)).

It is not clear that those provisions are defence to the non-discriminatory requirement of a safeguard measure. The authorization of Article XXIV:8(a)(i) for the permanent elimination of trade barriers among members of a customs union as contemplated in Article XXIV:8(a)(i) may not be applicable to the different circumstances where trade barriers are temporarily imposed to remedy or prevent serious injury to domestic industry. In addition, where a single member of the customs union imposes a safeguard measure, the duties and other regulations of commerce applied by each of the union members will not be the same with respect to a product subject to the safeguard measure. Therefore, it is not consistent with the requirement under Article XXIV:8(a)(ii), which is the prerequisite for the application of Article XXIV:8(a)(i). It is therefore not certain that the provisions of Article XXIV can be used to justify selective applications of safeguard measures in contravention of the requirement under Article 2.2.

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<sup>37</sup> *US—Line Pipe*, WT/DS202/R, paras 7.135–7.163.

<sup>38</sup> According to the decision, the US failed to provide a reasoned and adequate explanation that establishes explicitly that imports only from non-NAFTA sources satisfied the conditions for the application of a safeguard measure. *US—Line Pipe*, WT/DS202/AB/R, paras 197–199.

## 2. *Increase in Imports*

Safeguard measures are applied based on the increase in imports (Article 2.1). Safeguards are devised as emergency measures in response to radical increases in imports which cause or threaten serious injury to domestic industry. Therefore, as a recent Appellate Body decision has provided, the increase in imports “must have been recent enough, sudden enough, sharp enough and significant enough”. Merely an increasing trend over the investigation period is not sufficient.<sup>39</sup> This decision is justifiable since gradual and long-term increases in imports are unlikely to put domestic industry in emergency that calls for the application of a safeguard measure.

There has been a concern that national investigating authorities may extract “an increasing trend in imports” by statistical manipulations. For instance, the comparison of the quantity of imports at “right” periodical points may yield an increasing trend which does not necessarily reflect the reality. The cited decision would make such statistical manipulations more difficult since national authorities would have to demonstrate the recent and sudden increase in imports. On the other hand, the previous Panel also found that increases in imports needs not be always constant through the entire investigation period; a decrease early in the period of investigation, followed by the sharp and recent increase in imports, may justify the claim for the increase in imports.<sup>40</sup>

The recent Panel decision in *US—Line Pipe* seems to have given a substantial deference to the determination of the national investigating authorities concerning the increase in imports.<sup>41</sup> It found that competent national authorities may choose a methodology to determine the increase in imports as they consider fit as long as the methodology chosen was not “inherently biased” or would have precluded the investigating authorities from “performing a reasonable evaluation of the facts in the investigation”.<sup>42</sup> The Panel affirmed that the recent imports have to be examined, but it did not believe that the investigating authorities are obligated to examine the imports during the period immediately preceding their decision. The six-month gap between the decision and the end point of the investigation was accepted.<sup>43</sup>

In *US—Line Pipe*, the absolute amount of imports actually decreased from the first semester of 1998 to the second semester of 1999, which was the last of the

<sup>39</sup> *Argentina—Footwear*, WT/DS121/AB/R, paras 130–132. The Appellate Body referred to the wording of the relevant phrase in Article 2.1, “such product is *being* imported” (emphasis added), and it interpreted the phrase as the description of the current, ongoing increase in imports.

<sup>40</sup> *US—Wheat Gluten*, WT/DS166/R, para. 8.33.

<sup>41</sup> *US—Line Pipe*, WT/DS202/R, paras 7.186–7.217.

<sup>42</sup> *US—Line Pipe*, WT/DS202/R, para. 7.206. The Panel found that the period of investigation and its breakdown for periodical comparison is left to the discretion of the investigating authorities. In this case, the United States International Trade Commission (USITC) examined the five-year period 1994–98 as well as the first semester of 1999. In its investigation, the ITC compared the figures for each full year with the preceding year, and the figures for interim 1999 with those of the first semester of 1998 for its December 1999 decision. *Id.*, paras 7.199–7.200. The Panel considered that the USITC’s choice of the investigation period was proper since it allows the USITC to focus on the recent imports and that the period selected was long enough to allow appropriate conclusions to be drawn with respect to the condition of the domestic industry. *Id.*, para. 7.204.

<sup>43</sup> *US—Line Pipe*, WT/DS202/R, para. 7.207.

investigation period. The Panel found 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.<sup>44</sup> The Panel considered that the recent decline in the amount of imports does not necessarily negate the claim for the increase in imports where the imports remain at a significantly increased level.<sup>45</sup>

It is not altogether clear that the Panel's treatment of this issue is consistent with the previous Appellate Body position. The Appellate Body did not rule on this issue in *US—Lamb Meat* since the relevant Panel decision was not appealed. Where the amount of imports decreased for a significant period of time towards the end of the investigation period, as claimed in this case, the application of a safeguard measure may not be consistent with the requirement of “sudden” and “recent” increase in imports previously laid down by the Appellate Body. Therefore, national investigating authorities have to examine whether the decrease is only the temporary fluctuation from the overall increase in imports that would still justify the application of a safeguard measure or it is the beginning of the significant downturn where the application of a safeguard may not be necessary.

In *US—Line Pipe*, the comparison between the first semester of 1998 and the first semester of 1999 revealed the decline of imports.<sup>46</sup> Therefore, the examination on the proximate time periods such as the second semester of 1998 and even the period after the first semester of 1999 would have been essential in determining the significance of the latest decline in imports.<sup>47</sup> The Panel did not consider whether such examination was necessary.

### 3. *Determination of Serious Injury/Threat of Serious Injury*

As safeguard measures are applied to remedy or prevent serious injury to domestic industry (Article 2.1), the injury determination is a core stage in the process for the application of a safeguard measure. National investigating authorities are required to examine all relevant injury factors under the provision of Article 4.2(a). The Article provides:

“In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to domestic industry, the authorities are now required to 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 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).

<sup>44</sup> *US—Line Pipe*, WT/DS202/R, para. 7.210.

<sup>45</sup> *US—Line Pipe*, WT/DS202/R, para. 7.213.

<sup>46</sup> *US—Line Pipe*, WT/DS202/R, para. 7.209.

<sup>47</sup> The United States argued that even if there had been a decline in the absolute amount of imports, the application of a safeguard measure would have been still justifiable based on the increase in the amount of imports relative to domestic production under the provision of Article 2.1. However, the existence of the relative increase in imports in 1999 interim was also disputed. *US—Line Pipe*, WT/DS202/R, para. 7.216.

The Article specifies eight injury factors for the examination by national investigating authorities, and the question was raised whether the examination of those listed injury factors is mandatory. The Panel did not consider that all of the eight factors would be relevant in assessing injury to the domestic industry in every case. However, it ruled that the language in the provision such as “in particular” requires the authorities to consider each and every factor listed under Article 4.2(a) before dismissing some of them as not having a bearing on the situation of that industry.<sup>48</sup> The examination result of every injury factor need not point to serious injury, and the investigating authorities may assign different weights to each factor as appropriate.<sup>49</sup> In any rate, the final analysis of all relevant factors should indicate an overall impairment of the domestic industry.<sup>50</sup>

The currency of injury has been also emphasized. The Panel in *US—Wheat Gluten* ruled, “it is essential that current serious injury be found to exist, up to and including the very end of the period of investigation”.<sup>51</sup> The Appellate Body subsequently decided that national investigating authorities should not limit their examinations to the eight injury factors listed under Article 4.2(a) or rely solely on the information submitted by the interested parties.<sup>52</sup> They will have to make their case by seeking out and examining all relevant factors beyond those listed under Article 4.2(a).<sup>53</sup> Concerning the methodology of the injury examination, the Panel in *Korea—Dairy Products* considered that the injury analysis on segments of industry is acceptable if each injury factor is examined for all segments. Alternatively, the factors could be considered for select segment(s), with an explanation given of how the segment(s) chosen represent the whole industry.<sup>54</sup>

The injury assessment has been a recurring problem in disputes on safeguards. In *US—Line Pipe*, questions have been raised with respect to various issues of the injury assessment. Concerning the methodology, the complainant challenged the USITC’s allocation of company-wide fixed costs on line pipe based on its turnover where the company produces other products as well. The Panel considered that such allocation was inevitable since the cost analysis is required under the provision of Article 4.2(a).<sup>55</sup>

<sup>48</sup> *Korea—Dairy Products*, WT/DS98/R, para. 7.55. This position was also affirmed by the subsequent panel and Appellate Body decisions in *Argentina—Footwear*, WT/DS121/R, para. 8.206 and WT/DS121/AB/R, para. 136.

<sup>49</sup> *Korea—Dairy Products*, WT/DS98/R, para. 7.59.

<sup>50</sup> *Argentina—Footwear*, WT/DS121/AB/R, paras 138, 139.

<sup>51</sup> *US—Wheat Gluten*, WT/DS166/R, para. 8.81.

<sup>52</sup> *US—Wheat Gluten*, WT/DS166/AB/R, para. 55. The Panel in *US—Wheat Gluten* found that competent authorities are required to consider the listed injury factors under Article 4.2(a) and other factors that are clearly raised before them as relevant by the interested parties in the domestic investigation. WT/DS166/R, para. 8.69. The Appellate Body subsequently disagreed on this decision and ruled that national authorities must examine other factors that they consider relevant irrespective of whether they had been clearly raised by the interested parties.

<sup>53</sup> *US—Wheat Gluten*, WT/DS166/AB/R, para. 53.

<sup>54</sup> *Korea—Dairy Products*, WT/DS98/R, para. 7.58.

<sup>55</sup> *US—Line Pipe*, WT/DS202/R, para. 7.228.

The Panel also stated that it would only consider condemning the methodology adopted by the USITC if Korea had proposed an alternative method.<sup>56</sup> The decision indicates that the methodology adopted by the national authorities for injury assessment would be accepted unless effectively refuted by the complainant with a proposal on an alternative methodology. This position does not seem consistent with the standard of review established in the previous cases and used by this Panel<sup>57</sup> since the appropriateness of the national authorities' investigation should not be determined by the availability of the alternative proposal made by the complainant.

The Panel also approved of the USITC's attribution of certain cost to the line pipe production where the cost was allegedly associated with the production of other products and with the temporary closure with a filing of bankruptcy.<sup>58</sup> The Panel upheld the investigating authorities' decision on the ground that the complainant's challenge failed to demonstrate that such attribution was improper. The standard of review requires the Panel to examine the national authorities' decision critically,<sup>59</sup> and the Panel did not inquire into the legitimacy of such allocation. In addition, the decision does not seem consistent with the previous Panel decision in *Korea—Dairy Products* which rejected the profit/loss analysis conducted by the national investigating authorities on the ground that the data included businesses other than those for production and sale of domestic products.<sup>60</sup> It remains to be seen whether this more deferential treatment on the relevance of data would be followed by future panels and approved by the Appellate Body.

The currency of injury was also called into a question in *US—Line Pipe*. The complainant argued that the deterioration of the US domestic industry was only temporary since the relevant factors such as the investment, capital expenditure, price, and demand all increased toward the end of the investigation period.<sup>61</sup> The Panel rejected the complainant's claim, accepting the explanations offered by the United States for the reason that the increases in those factors do not negate the claim of injury. The United States argued that the increase in capital investment reflects pre-import surge decisions and that the price increases are not driven by the improving condition of the domestic industry but by increasing input costs.<sup>62</sup> The Panel emphasized the onus on the complainant to prove its case.<sup>63</sup>

The adequacy of reasoning for the injury determination was also put to a test in *US—Line Pipe*. Article 3.1 of the SA provides that national authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law. Article 4.2(c) of the SA also provides, "The competent authorities

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<sup>56</sup> *US—Line Pipe*, WT/DS202/R, para 7.228.

<sup>57</sup> Refer to the discussion in II.A.1 above.

<sup>58</sup> *US—Line Pipe*, WT/DS202/R, para. 7.237.

<sup>59</sup> *US—Lamb Meat*, WT/DS177/AB/R, WT/DS178/AB/R, para. 106.

<sup>60</sup> *Korea—Dairy Products*, WT/DS98/R, para. 7.72 and footnote 441.

<sup>61</sup> *US—Line Pipe*, WT/DS202/R, paras 7.246–7.248.

<sup>62</sup> *US—Line Pipe*, WT/DS202/R, paras 7.249–7.251.

<sup>63</sup> *US—Line Pipe*, WT/DS202/R, para. 7.258.

shall publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined.” The United States made a finding of “serious injury or the threat of serious injury”, without any distinction between the two. In the opinion of the United States, the distinction is not important as serious injury and its threat are not mutually exclusive of each other—they are only different “labels” addressing the timing of the injury and neither of them indicates the precise state of the domestic industry.<sup>64</sup>

The Panel disagreed on this position and subsequently found that both “serious injury” and “threat of serious injury” refer to distinctively different states of domestic industry—the former being “a significant overall impairment in the position of a domestic industry” (Article 4.1(a)) and the latter, “serious injury that is clearly imminent” (Article 4.2(b)) and no present serious injury. Those terms therefore cannot be used interchangeably.<sup>65</sup> The Panel found that the failure to make a discreet decision between “serious injury” and “threat of serious injury” violates the requirement to provide adequate explanations about the condition of the domestic industry under the aforementioned provisions of Articles 3.1 and 4.2(c).

On appeal, the Appellate Body reversed the Panel decision. It recognized the distinction between “serious injury” and “threat of serious injury”, but it did not find that this distinction necessarily requires national authorities to make a discreet decision between the two.<sup>66</sup> It considered that serious injury is often the realization of a threat of serious injury and that the precise point where a “threat of serious injury” becomes “serious injury” may sometimes be difficult to discern.<sup>67</sup> Therefore, in its opinion, national authorities should not be precluded from finding both serious injury and its threat since a Member obtains a right to apply a safeguard measure where at least there is a threat of serious injury as it only indicates a lower threshold for the application of a safeguard measure.<sup>68</sup>

It is questionable that national authorities should be allowed to apply a safeguard measure without a definite determination of the state of its own domestic industry. Although a Member may apply a safeguard measure based on either serious injury or its threat, it has an obligation under the provisions of the SA to examine the condition of its domestic industry and provide reasoned conclusions.<sup>69</sup> As the Appellate Body found, there may be a continuum between a threat of serious injury and its realization as serious injury. Nevertheless, those two refer to apparently different conditions of domestic industry that could not have occurred at the same time. Therefore, making an indiscreet decision about the condition of domestic industry between serious injury and its threat indicates, arguably, an absence of reasoned conclusions, which is inconsistent with the requirements of Articles 3.1 and 4.2(c) of the SA.

<sup>64</sup> *US—Line Pipe*, WT/DS202/R, para. 7.261.

<sup>65</sup> *US—Line Pipe*, WT/DS202/R, paras 7.264–7.266.

<sup>66</sup> *US—Line Pipe*, WT/DS202/AB/R, para. 167.

<sup>67</sup> *US—Line Pipe*, WT/DS202/AB/R, para. 168.

<sup>68</sup> *US—Line Pipe*, WT/DS202/AB/R, paras 169–170.

<sup>69</sup> Articles 3.1 and 4.2(c) of the Agreement on Safeguards.

#### 4. Causation

Article 4.2(b) of the SA requires that there must be a causal link between the increase in imports and serious injury to domestic industry. It provides, “The determination referred to in sub-paragraph (a) should 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.”

The *Argentina—Footwear* Panel set out a three-pronged test to determine the existence of the requisite causal link.<sup>70</sup> The first prong of the test is whether an upward trend in imports coincides with downward trends in the injury factors, and if not, whether a reasoned explanation is provided as to why the data nevertheless show causation. The second prong is whether the conditions of competition in the domestic market between imported and domestic products demonstrate, on the basis of objective evidence, a causal link between the imports and any injury. The third prong is whether other relevant factors have been analysed and whether it is established that any injury caused by factors other than the imports has not been attributed to the imports.

The requirement for the causation is necessary since restrictions on imports cannot be justified where the injury to domestic industry is not caused by the increase in imports.<sup>71</sup> As to the first prong of the test, the issue is the possible gap between the increase in imports and the downward trends of the injury factors. How closely should they coincide with each other? In *US—Wheat Gluten*, the Panel found that a general coincidence over the period of investigation would be sufficient to meet the first test, and that it need not be precise.<sup>72</sup>

The second prong requires the existence of market competition between the imports and domestic product since a mere coincidence of an upward trend in imports and a negative trend in injury factors may be only the temporal overlapping of two unrelated events. It must be established that the domestic product is being replaced by imports through market competition. The relevant economic tests such as the “cross-elasticity of demand”<sup>73</sup> can be employed to determine the degree of competition between imports and domestic product.

<sup>70</sup> *Argentina—Footwear*, WT/DS121/R, para. 8.229. The Appellate Body affirmed this test, and it was also followed by the Panel in *US—Wheat Gluten*, WT/DS166/R, para. 8.91. See also Y.S. Lee, *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 J.W.T. 2 (April 2000), pp. 140–142.

<sup>71</sup> The econometric tests such as the “Granger causality test” are often used to determine the economic impact (injury) of the increase in imports on the domestic industry. Y.S. Lee and J.S. Mah, *Reflections on the Agreement on Safeguards in the WTO*, 21 W. Comp. 6 (December 1998), pp. 25–31, at p. 29.

<sup>72</sup> *US—Lamb Meat*, WT/DS177/R, WT/DS178/R, paras 8.97–8.102.

<sup>73</sup> The cross-elasticity of demand is the rate of the change of quantity in one good measured over a unit change of the price in the other good. If it is positive, there exists substitutability between those two products.

The third prong involves the examination of possible causes other than the increase in imports. It would not be justifiable to attribute injury to the increase in imports where the import increase is only an insignificant factor in causing the injury. The question was raised with respect to the significance of the increase in imports as a causal factor. The Panel in *US—Wheat Gluten* found that the increase in imports need not be the sole cause for the injury, but it should be sufficient to cause the injury “in and of itself”.<sup>74</sup> The Appellate Body disagreed and found that the increase in imports need not be capable of causing the injury by itself.<sup>75</sup> The Appellate Body ruled that a causal link is established if the increase in imports contributed to the injury and the contribution is sufficiently clear.<sup>76</sup>

In order to determine the increase in imports as a causal factor, how should its impact on the injury be assessed in the presence of other contributory factors? The Appellate Body in *US—Wheat Gluten* considered that the non-attribution requirement of Article 4.2(b) presupposes the separation and the examination of the injurious effects of the increase in imports from those of the other factors.<sup>77</sup> The Appellate Body in *US—Lamb Meat* found that an examination of the relative weight of different factors would not be sufficient to meet the non-attribution requirement under Article 4.2(b). It confirmed its previous decision in *US—Wheat Gluten* that the causal link is not established in cases where the injurious effects of the increase in imports cannot be assessed separately from those of the other factors.<sup>78</sup>

The non-attribution requirement in the last sentence of Article 4.2(b) became a major issue in *US—Line Pipe*. In its investigation, the USITC identified several factors which could have contributed to the injury other than increased imports and asserted that no other factor was a more important cause than increased imports.<sup>79</sup> The Panel and the Appellate Body both considered that a mere assertion was not sufficient. Affirming its previous decisions, the Appellate Body found that “competent authorities are required to identify the nature and extent of the injurious effects of the known factors other than increased imports, as well as explain satisfactorily the nature and extent of the injurious effects of those other factors as distinguished from the injurious effects of the increased imports”.<sup>80</sup> The Appellate Body further required that the

<sup>74</sup> *US—Wheat Gluten*, WT/DS166/R, para. 8.138. This position was also followed by the Panel in *US—Lamb Meat*, WT/DS177/R, WT/DS178/R, para. 7.239.

<sup>75</sup> The Panel in *US—Lamb Meat* also found that the increase in imports alone should be sufficient to cause serious injury. WT/DS177/R, WT/DS178/R, para. 7.241. The Appellate Body, citing its own decision in *US—Wheat Gluten*, held once again that the increase in imports need not be a sufficient cause for the injury. *US—Lamb Meat*, WT/DS17/AB/R, WT/DS178/AB/R, para. 171.

<sup>76</sup> *US—Wheat Gluten*, WT/DS166/AB/R, para. 67. According to the Appellate Body, the last sentence of Article 4.2(b) (non-attribution requirement) requires national authorities to examine the existence of “a genuine and substantial relationship of cause and effect” between the increase in imports and the injury where the injurious effects caused by other factors are distinguished from those caused by the increase in imports. WT/DS166/AB/R, para. 69.

<sup>77</sup> *US—Wheat Gluten*, WT/DS166/AB/R, para. 69.

<sup>78</sup> *US—Lamb Meat*, WT/DS17/AB/R, WT/DS178/AB/R, para. 180.

<sup>79</sup> USITC Report, *Circular Welded Carbon Quality Line Pipe*, USITC Publication No. 3261, December 1999, p. I-30.

<sup>80</sup> *US—Line Pipe*, WT/DS202/AB/R, para. 215.

competent authorities must provide a reasoned and adequate explanation in clear, express terms to establish that the injury caused by factors other than increased imports is not attributable to increased imports.<sup>81</sup>

Under this decision, national authorities would have to separate the injurious effects of increased imports from those of the other factors and also assess those effects separately. Discerning the injurious effects of increased imports may well involve complicated economic analysis. As found in the cited case, a mere identification of other contributory factors and a conclusive assertion of the requisite causal link will not be sufficient. The national authorities would have to establish the causal link by offering reasoned explanations that the increase in imports contributes clearly to the injury.

### C. APPLICATION OF A SAFEGUARD MEASURE

The application of a safeguard measure should be proportionate to the injury in its extent and should not be excessive as to restrict imports more than necessary. Ideally, safeguard measures should be applied to the minimal level only necessary to remedy or prevent serious injury and facilitate economic adjustment. Such minimal approach will minimize the welfare loss<sup>82</sup> resulting from the application of safeguard measures. Article 5.1 of the SA governs the application of a safeguard measure. It provides in the relevant part, “A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.”

A question was raised whether the provisions in Article 5.1 require Members to prove that the extent of their measure is necessary to prevent or remedy injury and to facilitate adjustment. In *Korea—Dairy Products*, the Panel found that the first sentence of Article 5.1 requires a Member to justify the extent of its safeguard measure.<sup>83</sup> The Appellate Body acknowledged that Article 5.1 creates a general obligation on Members to apply a measure that is not excessive. However, it also reached the conclusion that Members need not prove the adequacy of their measure unless it is a quantitative restriction beyond the minimal quota (the average of imports in the last three representative years) prescribed in Article 5.1.<sup>84</sup> The Appellate Body decision gave a significant relief to national authorities since complicated and costly economic analyses may be necessary to prove the adequacy of the measure.

The justification for the measure and its permissible extent also became an issue in *US—Line Pipe*. The Appellate Body affirmed its previous decision that national authorities are not required to justify the adequacy of their measures unless they are quantitative restrictions.<sup>85</sup> Nevertheless, Members are still required to apply a safeguard

<sup>81</sup> *US—Line Pipe*, WT/DS202/AB/R, para. 217.

<sup>82</sup> The application of import restrictions would reduce the economic welfare that could have been drawn from free trade.

<sup>83</sup> *Korea—Dairy Products*, WT/DS98/R, para. 7.101.

<sup>84</sup> *Korea—Dairy Products*, WT/DS98/AB/R, para. 99.

<sup>85</sup> *US—Line Pipe*, WT/DS202/AB/R, para. 235.

measure with an adequate extent, and the Appellate Body considered that complying with the requirements under the SA “have the effect of clearly explaining and justifying the extent of the application of the measure”.<sup>86</sup>

The Appellate Body considered that the phrase, “only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment” in Article 5.1 obligates Members to apply safeguard measures only to the extent that they address serious injury attributed to increased imports.<sup>87</sup> The Appellate Body, reversing the previous Panel decision, also found that a complainant establishes a *prima facie* case that the measure is applied beyond the necessary extent where it demonstrates that the importing Member did not comply with their obligations under the SA.<sup>88</sup> Thus, the Appellate Body found subsequently that the United States violated Article 5.1 by failing to rebut a *prima facie* case made by Korea that the United States did not apply the measure to the appropriate extent since it did not establish the causal link between the increased imports and the injury.<sup>89</sup>

There was also a controversy whether Article 5.1 requires a consideration of adjustment plans.<sup>90</sup> Safeguard measures are only a temporary measure, and their important objective is to enable Members to make economic adjustment.<sup>91</sup> It would therefore be advisable to devise a proper adjustment plan to ensure that the safeguard measure would facilitate such adjustment. The Panel in *Korea—Dairy Products* considered this issue and concluded that Article 5.1 does not require adjustment plans. However, it noted that the examination of an adjustment plan would be “strong evidence that the authorities considered whether the measure was commensurate with the objectives of preventing or remedy serious injury and facilitating adjustment”.<sup>92</sup>

#### D. PROCEDURAL ISSUES

##### 1. *Use of Confidential Information*

Article 3.2 of the SA provides, “Any information which is by nature confidential or which is provided on a confidential basis shall, upon cause being shown, be treated as such by the competent authorities. Such information shall not be disclosed without permission of the party submitting it. Parties providing confidential information may be requested to furnish non-confidential summaries thereof or, if such parties indicate that such information cannot be summarized, the reasons why a summary cannot be provided. However, if the competent authorities find that a request for confidentiality is not warranted and if the party concerned is either unwilling to make the information

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<sup>86</sup> *US—Line Pipe*, WT/DS202/AB/R, para. 236.

<sup>87</sup> *US—Line Pipe*, WT/DS202/AB/R, para. 260.

<sup>88</sup> *US—Line Pipe*, WT/DS202/AB/R, para. 261.

<sup>89</sup> *US—Line Pipe*, WT/DS202/AB/R, para. 262.

<sup>90</sup> *Korea—Dairy Products*, WT/DS98/R, para. 4.611.

<sup>91</sup> The Preamble of the Agreement also provides in the relevant part, “Recognizing the importance of structural adjustment and the need to enhance rather than limit competition in international markets...” (emphasis added).

<sup>92</sup> *Korea—Dairy Products*, WT/DS98/R, para. 7.108.

public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.”

The information submitted to national investigating authorities pertaining to the condition of the domestic industry may include sensitive information of which disclosure will be adverse to the interest of domestic producers. Article 3.2 protects confidentiality of such information, and the question has been raised concerning application of this provision. In *US—Wheat Gluten*, the public version of the USITC Report redacted some information as confidential. The EC complained that the unavailability of the information based on confidentiality made the USITC’s findings unreviewable and unverifiable.<sup>93</sup> The Panel considered that the provisions of Article 3.2 allowed national authorities a wide discretion on determining the disclosure of information that is deemed confidential and subsequently found in favour of the USITC’s determination.<sup>94</sup> On the one hand, there is a legitimate interest in protecting confidential information, but on the other hand, non-disclosure of crucial information for the injury determination may compromise the transparency in the investigation, causing complaints and disputes.<sup>95</sup>

Another issue with the confidentiality of information involved the Panel’s request of confidential information and the subsequent failure of a party to provide the requested information. The Panel in *US—Wheat Gluten* noted that the failure by the United States to comply with the Panel’s request for confidential information presented a serious systematic problem

“as to the relationship between, on the one hand, the confidentiality obligations under Article 3.2 SA of a Member’s investigating authorities with respect to confidential information obtained in the course of a domestic safeguards investigation and, on the other hand, the duties of Members when faced with a Panel request for such confidential information under Article 13 DSU.”

The United States did not submit the requested information since the Panel and the US could not agree on the protocol on the treatment of confidential information. The Panel finally proceeded without the requested information, finding that it already had sufficient information for its review.

The issue of confidential information was revisited in *US—Line Pipe*. The Panel acknowledged the need to review confidential information in order to “make an objective assessment” of the dispute but also considered that it has to show proper restraint in requesting confidential information for the protection of confidentiality.<sup>96</sup> Therefore, the Panel, in response to the complainant’s requests for certain confidential information, granted the complainant its requests only for such information that the Panel considered relevant to the objective assessment of the case and to the claim

<sup>93</sup> *US—Wheat Gluten*, WT/DS166/R, para. 8.13.

<sup>94</sup> *US—Wheat Gluten*, WT/DS166/R, para. 8.20.

<sup>95</sup> *US—Wheat Gluten*, WT/DS166/R, para. 8.11.

<sup>96</sup> *US—Line Pipe*, WT/DS202/R, para. 7.4.

advanced by the complainant.<sup>97</sup> During the Panel proceedings, the United States also proposed to provide the Panel with the computerized models, one to evaluate the impact of imports on the domestic industry and the other to assess the impact of the proposed measure. The United States subsequently failed to provide those models, and no further action was taken.

The current provisions of Article 3.2 allow Members wide latitude in determining confidential information. In addition, there is no clear working procedure as to the request for and treatment of confidential information.<sup>98</sup> The call for confidentiality and, perhaps, the strategic need not to disclose certain information may discourage national authorities from producing sensitive information. However, national authorities should be aware that their failure to provide crucial information only weakens their justification for the application of a safeguard measure and therefore, non-disclosure should be limited to the minimal extent necessary to protect the narrowly and clearly defined confidentiality.

## 2. *Notifications and Consultations*

Under Article 12 of the SA, the Members proposing to apply a safeguard measure are required to provide the Committee on Safeguards with proper notifications of their investigations and decisions. They also must provide exporting Members with an adequate opportunity for consultations prior to the application of a safeguard measure. The purpose of the notifications is to ensure that the affected Members stay informed of the progress of the investigations. The prior consultations provide affected Members with an opportunity to exchange views with the importing Member and to achieve a mutually agreeable settlement.

The contents of the notifications were at issue. Article 12.2 provides in the relevant part, “the Member proposing to apply or extend a safeguard measure shall provide the Committee on Safeguards with *all pertinent information ...*” (emphasis added). In *Korea—Dairy Products*, the scope of “all pertinent information” was controversial. The complainant argued that the notifications should include all the details of the recommendations and reasoning to be found in the report of national authorities.<sup>99</sup> The Panel and subsequently the Appellate Body both rejected the argument, finding such information would be excessively broad. The Appellate Body considered that all the items specified in Article 12.2, as well as the address of the injury factors listed in Article 4.2(a), need to be included in the notifications.<sup>100</sup>

<sup>97</sup> The Panel granted Korea’s requests for addendum to the dissenting views of an ITC commissioner and data concerning import data but not for the full confidential record of the investigation. *US—Line Pipe*, WT/DS202/R, para. 7.4.

<sup>98</sup> See the relevant discussion in III, below, for the proposal to modify the current provisions.

<sup>99</sup> *Korea—Dairy Products*, WT/DS98/R, paras 4.693–4.697.

<sup>100</sup> Specifically, the following should be included in the notifications pursuant to the provisions of Article 12.1(b) and (c): evidence of serious injury or threat thereof caused by increased imports, precise description of the product involved and the proposed measure, proposed date of introduction, expected duration and timetable for progressive liberalization. *Korea—Dairy Products*, WT/DS98/AB/R, para. 108.

The address of the injury factors could be extensive, and it is not clear how much of it needs to be included in the notifications. It would seem necessary to include the assessment of each injury factor as well as the conclusion about the existence of serious injury or its threat, so that the affected Members are informed of the basis for the injury determination.

On the issue of the timing of notifications, Article 12.1 of the SA provides, “A Member shall immediately notify the Committee on Safeguards upon:

- (a) initiating an investigatory process relating to serious injury or threat thereof and the reasons for it;
- (b) making a finding of serious injury or threat thereof caused by increased imports; and
- (c) taking a decision to apply or extend a safeguard measure”.

In *Korea—Dairy Products*, the complainant argued that Korea’s notifications were not made “immediately”. The difficulty is that those notifications could not be made overnight for practical administrative and logistical needs such as translation. Korea argued that those notifications were made as soon as practically possible. The Panel did not find that “as soon as practically possible” is equated to “immediately”, and found certain delays in Korea’s notifications unacceptable. It, however, did not provide any standard for the determination of the required immediacy of notifications.

The subsequent Panel in *US—Wheat Gluten* also faced this issue.<sup>101</sup> It considered that the 15 days of delay between the US’s initiation of the investigation and its notification, and the 26 days between its finding of serious injury and its subsequent notification were not acceptable. However, it noted that the five-day gap between its decision to take a safeguard measure and the final notification under Article 12.1(c) satisfied the immediacy requirement of the notification. Nevertheless, the Panel found the timing of the final notice still inconsistent with Article 12 since the notification was made after the application of the safeguard measure. The Panel found that the notification pertaining to the proposed measure must be made before the implementation of the measure so that the affected Members may have an opportunity to discuss the measure prior to its application in the subsequent consultations that may result in a settlement such as compensation and/or modification of the measure.

Article 12.3 of the SA requires Members proposing to apply a safeguard measure to provide adequate consultations prior to the implementation of its measure. Consultations are essentially important since they provide concerned parties with an opportunity to exchange views on the proposed measure and to reach a mutually satisfactory settlement. Therefore, Members proposing to apply a safeguard measure are advised to hold those consultations well before the implementation of a safeguard measure so that the consultation results can be incorporated in its implementation.

In *Korea—Dairy Products*, the adequacy of consultations was at issue. Korea modified its original quota level in response to the complainant’s concern expressed

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<sup>101</sup> *US—Wheat Gluten*, WT/DS166/R, paras 8.189–8.207.

during the consultations. The Panel considered that Korea's subsequent modification of its original measure indicated the adequacy of the consultations since they allowed for a meaningful exchange of views, which led to the modification of Korea's measure.<sup>102</sup> The adequacy of consultations was also examined in *US—Wheat Gluten*.<sup>103</sup> The Panel emphasized that consultations are an important means to achieving the aim of Article 8.1 of the SA, the settlement of compensation to maintain the balance of concessions. The Appellate Body also considered that a Member proposing to apply a safeguard measure is required under Article 12.3 to “provide exporting Members with sufficient information and time to allow for the possibility, through consultations, for a meaningful exchange on the issues identified”.<sup>104</sup>

Consultations were also at issue in *US—Line Pipe*. The prior consultations were held based on the measure proposed by the USITC. Subsequent to the consultations, substantially different measures were announced in the press release and then applied. The Appellate Body found that the United States did not provide an adequate opportunity for consultations by failing to provide information in advance on the measure that will be actually applied.<sup>105</sup> The 18 days between the announcement of the actual US measure and the implementation of the measure as well as the 11 days between the announcement of the actual implementation date and the implementation were not considered sufficient for exporting Members to analyse the effect of the measure and to enter into consultations.<sup>106</sup>

The Appellate Body considered that the fair amount of time necessary to prepare for consultations should be decided on a case by case basis.<sup>107</sup> It also believed that the measure considered under consultations need not be precisely identical to the one actually applied, as the measure may be modified as the result of consultations.<sup>108</sup> In any case, exporting Members should be allowed necessary time to analyse the proposed measure and determine its consequences before consultations so that they can have a meaningful exchange of views on the proposed measure. As the Appellate Body emphasized, proper consultations are for the best interests of both importing and exporting Members since the understanding and settlement during the consultations may well enable them to avoid disputes and subsequent retaliatory actions.<sup>109</sup>

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<sup>102</sup> *Korea—Dairy Products*, WT/DS98/R, para. 7.152.

<sup>103</sup> *US—Wheat Gluten*, WT/DS166/R, paras 8.215–8.219.

<sup>104</sup> *US—Wheat Gluten*, WT/DS166/AB/R, para. 136. The Appellate Body also added that the information for consultations should include a precise description of the proposed measure and its proposed date of introduction.

<sup>105</sup> *US—Line Pipe*, WT/DS202/AB/R, paras 102–113.

<sup>106</sup> *US—Line Pipe*, WT/DS202/AB/R, paras 107–108. The Panel previously held that the press release is not an adequate means to provide necessary information (*US—Line Pipe*, WT/DS202/R, para. 7.314). The Appellate Body, however, believed that it can be, and the issue in the case was whether the complainant received necessary information sufficiently in advance.

<sup>107</sup> *US—Line Pipe*, WT/DS202/AB/R, para. 107.

<sup>108</sup> *US—Line Pipe*, WT/DS202/AB/R, para. 104.

<sup>109</sup> See also *US—Line Pipe*, WT/DS202/AB/R, para. 109.

### III. PROPOSAL FOR THE MODIFICATION OF THE RULES ON SAFEGUARDS

The Agreement on Safeguards is considered a success of the Uruguay Round as it provides the detailed substantive and procedural rules for the application of a safeguard measure. Nevertheless, inherent ambiguities in certain provisions of the SA have caused disputes and problems in the application of a safeguard measure. The WTO Panel and the Appellate Body decisions have cleared some of those ambiguities, but many still remain unsolved. It is therefore advised to consider the modification of the relevant provisions to remove those ambiguities and enhance the clarity and consistency of the discipline on safeguards.

First of all, the legal relationship between the GATT Article XIX and the SA should be clarified. There is a strong indication that the negotiators in the Uruguay Round intended the Safeguard Agreement to be the sole authority in the discipline of safeguards. The conditions and requirements in the provisions of Article XIX were repeated almost verbatim in the text of SA with necessary modifications and additions. The controversial “unforeseen developments” clause in Article XIX was originally included in the text of the SA but subsequently dropped out of it after debate, which demonstrates that the clause in question was not intended to be a legal condition for the application of a safeguard measure.<sup>110</sup>

Despite the recent Appellate Body decisions, the reading of the relevant provisions of the SA does not support the position that Article XIX provides additional rules that are not included in the SA. For instance, the Preamble of the SA emphasizes the need for a comprehensive agreement on safeguards. The provision of Article 8.3 also presupposes that the SA constitutes a comprehensive discipline of safeguards.<sup>111</sup> The continuing application of Article XIX will also create confusion to the discipline of safeguards concerning the application of Article XIX:1(b).<sup>112</sup> In addition, the provision of the old Article XIX omitted from the SA, such as the “unforeseen developments” clause, is too ambiguous to be considered a legal requirement and serves no useful purpose.<sup>113</sup> Therefore, it is necessary to clarify the intent of the participants of the Uruguay Round by modifying Article 1 of the SA. It should provide in the relevant part, “This Agreement establishes *comprehensive* rules for the application of safeguard measures...” (emphasis added).

The standard of review is another area that calls for express clarification in the text. As discussed above, the difficulty arises where two different conclusions can be drawn from the same set of facts through different yet adequate alternative reasoning. The Appellate Body ruled that a Panel must find that an explanation is not reasoned, or

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<sup>110</sup> See Lee, as note 26 above, pp. 1240–1241.

<sup>111</sup> See Lee, as note 26 above, pp. 1239–1240.

<sup>112</sup> See Lee, as note 26 above, pp. 1242–1245. Paragraph 1(b) of Article XIX authorizes the importing countries to apply a safeguard measure on behalf of a third party. The SA does not include such provision, and consequently, there is no procedural guidelines for the application of this paragraph should this paragraph be given a legal effect. This is another indication that the provisions not contained in the SA were never intended to be a legal condition.

<sup>113</sup> Refer to the relevant discussion in II.A.2. See also Lee, as note 26 above, pp. 1241–1242.

is not adequate, if some alternative explanation of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation.<sup>114</sup> According to this decision, the reasoning and conclusion of national authorities will not be approved unless they are defensible against all possible alternative explanations. It is onerous to the authorities to consider all those possible alternative explanations beforehand and make their explanations defensible to them. They should be given an opportunity to defend their position, with additional reasoning if necessary, should their position be challenged during the Panel proceedings.

Therefore, the SA should include the provision on the standard of review to resolve this difficulty. For instance, it may provide:

“The panel shall review whether competent national authorities have examined all facts in its possession or which they should have obtained in accordance with Article 4.2 of the Agreement on Safeguards, whether adequate explanations had been provided of how the facts as a whole supported the determination made and, consequently, whether the determination made was consistent with the international obligation of the Member applying a safeguard measure. *The said authorities shall be given an opportunity to justify its determination, where necessary, with explanations supplementary to those included in the final investigation report required under Article 3*” (emphasis added).

It is also necessary to address the wide discretion allowed to national authorities under Article 3.2 concerning confidential information. Although protection of confidential information is necessary, unavailability of essential information based on confidentiality would make it impossible for interested parties to assess the measure. The wide discretion allowed under Article 3.2 should be therefore curtailed. At the minimum, the provision of Article 3.2 should require that statistics pertaining to the mandatory injury factors under Article 4.2(a) be made available to the public in order to ensure the transparency and reviewability of the proposed measure.<sup>115</sup> In addition, a standard protocol concerning the request and treatment of confidential information during the Panel proceedings should be prepared so that Members may comply with the Panel's future request for confidential information.

The determination of serious injury or its threat was also controversial in the recent case *US—Line Pipe*. The Appellate Body, reversing the previous Panel decision, found that Members may apply a safeguard measure based on its indiscreet determination that their domestic industry has either sustained serious injury or faced threat thereof, without a clear distinction between the two. As discussed above, “serious injury” and “threat of serious injury” indicate two distinctively different conditions of the domestic industry, one with a significant overall impairment in its position (Article 4.1(a)) and the other without it.

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<sup>114</sup> *US—Lamb Meat*, WT/DS17/AB/R, WT/DS178/AB/R, para. 106.

<sup>115</sup> The statistics of individual companies need not be available to the public. The aggregate statistics for the industry should be sufficient for review.

The national authorities fail to establish the basis for the application of a safeguard measure if they cannot even determine whether their domestic industry has sustained serious injury or is facing its threat. An application of emergency import restrictions such as safeguards is hardly justifiable without a clear identification of the condition of the domestic industry. The Appellate Body relied its decision, *inter alia*, on the current wording of Article 4.2(a), in particular, the use of “or” in the phrase.<sup>116</sup> Therefore, it seems necessary to modify the wording of the Article to ensure the national authorities’ responsibility to make a discreet determination on the condition of their domestic industry. The following clause could be added in the relevant provision of Article 4: “The competent national authorities shall make a clear and discreet determination on the condition of the domestic industry whether it has sustained serious injury or is facing threat thereof.”

The non-attribution requirement in Article 4.2(b) in the presence of multiple causal factors should also be further clarified in the text. As shown in the previous discussion, the panels and the Appellate Body differed repeatedly in their decisions with respect to the requisite sufficiency of the increase in imports as a causal factor.<sup>117</sup> This repeated disagreement indicates the ambiguous nature of the clause. It should be modified to:

“When factors other than increased imports are causing injury to the domestic industry at the same time, *the said determination shall not be made unless investigation demonstrates that the increased imports have clearly contributed to the injury after having made an adequate assessment of the injurious effects of the imports separate from those of the other factors*” (emphasis added).

Finally, the timing of notifications and consultations should be specified in the SA. The issue of timing has been repeatedly brought up. Neither the Panel nor the Appellate Body prescribed the time limit. Concerning the notifications, the SA requires that the notifications be made immediately upon the relevant actions of competent national authorities (Article 12.1). As mentioned, notifications cannot be made overnight for practical administrative reasons. The previous Panel considered the five days’ gap between the relevant decision and the notification was acceptable where substantially longer delays were not. It would be practically helpful to stipulate the maximum permissible delay in the text to avoid repeated disputes on this issue. The relevant provision of Article 12.1 can be modified to “A Member shall immediately notify the Committee on Safeguards upon, and under any circumstances no later than seven days from: ...”.

<sup>116</sup> The relevant provision states, “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 ...” (emphasis added).

<sup>117</sup> Both Panels in *US—Wheat Gluten* and *US—Lamb Meat* held that the increase in imports need not be a sole cause for the injury, but it needs to be significant enough to cause the injury by and of itself. The Appellate Body in both cases disagreed with those panels and ruled that the causation requirement is met as long as its contribution to the injury is clear although not sufficient enough to cause the injury by itself. See the relevant discussion in II.B.4 above.

The timing of consultations has been also a recurring problem. Although the timing for consultations should be decided on a case by case taking into account the relevant circumstances, the time limit has to be drawn to ensure the right of exporting Members to adequate consultations. Therefore, the following clause may be added to the provision of Article 12.3:

“A Member proposing to apply or extend a safeguard measure shall provide information on the proposed measure including its proposed implementation date no later than sixty days before the implementation of the measure and shall furnish an opportunity for consultations to be held no later than thirty days before its implementation.”

#### IV. THE US STEEL SAFEGUARD CASE—THE TEST FOR THE MULTILATERALISM IN INTERNATIONAL TRADE

##### A. INTRODUCTION: THE US STEEL SAFEGUARD CASE—THE BEGINNING OF A TRADE WAR?

On 20 March 2001, despite widespread international opposition, the United States finally applied a controversial safeguard measure, comprising increased tariffs up to 30 percent and a tariff quota, to its imports of a range of steel products.<sup>118</sup> The measure will be remembered as one of the most controversial and significant trade measures in its implications on world trade.

Since the beginning of the WTO in 1995 no other trade measure has ever provoked more swift and fierce resistance worldwide. Dozens of governments from Brasilia to London and from Seoul to Sydney expressed a strong opposition to the US measure. The subsequent consultations between the United States and the complainants did not produce any settlement on this dispute, and the case is likely to be referred to the Dispute Settlement Panel of the WTO for adjudication.

This controversial US safeguard measure has also triggered protectionism in other countries. Fearing increased imports of steel products, diverted from the US market, the EU announced its intention to apply a provisional safeguard measure. Canada also initiated an investigation for the application of a safeguard measure. It is possible that other countries will also apply safeguard measures to prevent the “diversion” of steel products to their own market due to the higher tariffs in the United States and European Union. This spread of protectionism creates a significant concern for preserving free trade and the multilateralism in the world trading system.

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<sup>118</sup> The products subject to the US safeguard measure include 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. For the specifics of the measure, refer to “Proclamation 7529 of March 5, 2002—To Facilitate Positive Adjustment to Competition from Imports of Certain Steel Products” 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 US”, 67 Federal Register 45 (7 March 2002).

## B. BACKGROUND OF THE US STEEL INDUSTRY—THE GIANT IN TROUBLE

What has caused the US government to apply this controversial safeguard measure, despite significant criticism and resistance from both within<sup>119</sup> and from the rest of the world? In addition, there seems no economic rationale that the measure will improve the condition of the US steel industry.<sup>120</sup> Does the current condition of the US steel industry in any way warrant the application of emergency import restriction such as a safeguard measure?

The US steel industry, once a glorious workhorse of the United States and the world economy, has been described as “an industry in crisis”. Several factors including excessive labour costs, inefficient facilities and outdated production techniques, particularly at old and smaller mills, have been pointed out as a reason for the declining condition of the industry. According to the recent report, prices are at their lowest for 20 years.<sup>121</sup> Leading US producers have sustained significant loss and no fewer than 18 US steel companies have filed for bankruptcy between January 1998 and June 2001. Significant job losses have also been reported, as many as 5,000 in average a year since 1990 and increasing.<sup>122</sup>

Job losses and the downward pressure on prices are not unique in the US steel industry. The steel industries throughout the world have experienced inevitable job losses due mainly to the substantial increase in productivity and resulting over-capacity. Smaller mills became unprofitable and merged into more sizable ones for the scale of economy. In the past 30 years, capacity has been known to exceed production by as much as 20 percent.<sup>123</sup> The existence of over-capacity has caused a long-term downward trend on prices and made the condition of the steel industry particularly vulnerable to the decreases in demand during general economic recessions.

The US government has been responsive to the call for assistance from the steel industry for decades. Trade protection and financial subsidies have been generously provided to the industry.<sup>124</sup> In fact, repeated protections and subsidies were pointed out as the reason for the delay in the necessary structural change in the steel industry. Given the situation, is there any economic justification to apply import restrictions at this time?

The observation has been made that the political demands rather than the economic needs to provide necessary remedy and induce structural adjustment to this troubled industry may have prompted the US safeguard measure. For decades, the US

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<sup>119</sup> The US Treasury Secretary Paul H. O'Neill stated in the off-the-record comments after a dinner speech at the Council on Foreign Relations that he disagreed with the Bush administration's decision to impose tariffs on imported steel and that it would cost more jobs in the US than it would save. *New York Times*, 16 March 2002, p. A1.

<sup>120</sup> A prominent economist considered that the recent US measure would not improve the condition of the US steel industry. See Robert J. Barro, *Big Steel Doesn't Need Any More Propping Up*, *Business Week*, 1 April 2001, p. 24.

<sup>121</sup> *A tricky business*, *Economist*, 28 June 2001.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> For instance, around one half of the existing anti-dumping actions are on imports of steel products although steel accounts only for 2 percent of total imports.

steel industry has been known as a powerful lobbyist in Washington, DC. The steel industry has substantial influence on the constituencies of the US administration, pressuring it to make an immediate response to their demands.<sup>125</sup> Facing upcoming congressional and senatorial elections, the Bush administration seems to have decided to comply with the demand of the influential steel industry by imposing a safeguard measure.

### C. THE US AND EU SAFEGUARD MEASURES AND THE WTO RULES ON SAFEGUARDS

Although the decision to apply a safeguard measure may have been prompted by the political needs, the integrity of the world trading system will be preserved as long as Members comply with the relevant rules. In fact, in the real world where economic rationale does not always control, politics will not cease to be an important factor in the decision to apply a trade measure. Safeguard measures provide a political cushion to governments which face acute economic problems resulting from rapid increases in imports, by allowing them to restrict imports temporarily. The objective of safeguard measures is to allow Members an opportunity to implement economic adjustment in political peace by enabling them to maintain the *status quo*.

The question is whether the US safeguard measure, regardless of its underlying political motive, is consistent with the WTO rules on safeguards. In its complaint, the European Union alleged that the United States violated Articles 2, 3, 4, 5 and 9 of the Agreement on Safeguards as well as Article I:1, XIII and XIX:1 of the GATT 1994.<sup>126</sup> As shown in the previous safeguard disputes, the failures in recent consultations would likely lead to an establishment of a Panel under Article 6 of the DSU, for the legal review of the US measure.

As discussed above, both Panels and the Appellate Body have made important findings concerning the interpretation and the application of the rules on safeguards. Thus, their decisions in the previous safeguard disputes provide essential guidelines to determine the consistency of the current US safeguards measure with the WTO rules on safeguards. In light of those Panel and Appellate Body decisions, it is questionable that the US measure has been applied consistently with the rules on safeguards.

Some of evident inconsistencies are as follows. First, under the rulings of the Appellate Body, national investigating authorities are obliged to demonstrate the existence of “unforeseen developments” that led to increases in imports causing or threatening to cause injury to domestic industry in their investigation report.<sup>127</sup> No such demonstration can be found in the investigation report made by the United States International Trade Commission (“USITC Report”).<sup>128</sup>

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<sup>125</sup> An immediate, comprehensive import relief has been demanded by the steel industry. “Recommended Action to Solve the Steel Import Crisis”, Steel Manufacturers’ Association, 9 May 2001.

<sup>126</sup> WTO document WT/DS248/1, G/L/527, G/SG/D20/1 (dated 13 March 2002).

<sup>127</sup> Refer to the relevant discussion in II.A.2 above.

<sup>128</sup> *Steel*, USITC Pub. 3479 (December 2001).

Second, the United States has exempted imports from certain countries from its application of a safeguard measure.<sup>129</sup> Article 2.2 of the Agreement on Safeguards prohibits a selective application of a safeguard measure according to the product's origin. The previous panels found and the Appellate Body subsequently affirmed that Members are not allowed to apply safeguard measures selectively where they considered imports from all sources in their injury determination.

In the USITC Report, the injury assessment is based on the analysis of imports from all sources. The Report provides separate analyses on the injurious effects of the imports from NAFTA with respect to each steel product. In *US—Wheat Gluten*, the United States conducted a separate analysis of the imports from Canada and subsequently determined that the imports from Canada did not reach the “substantial share” and did not “contribute importantly” to the injury. The Panel found that once the injury determination is made based on the imports from all sources, a safeguard measure must be applied to the imports from all sources regardless of the result from such an analysis because imports from different sources may have collectively caused the injury and therefore the exclusion of the imports from a particular source from the application of a safeguard measure is not allowed.<sup>130</sup> Under this finding, the US exemption of imports from certain countries in its application of the safeguard measure is not consistent with the requirement under Article 2.2.

Another flaw in the injury assessment by the United States is also observed. As discussed above, Article 4.2 of the Agreement on Safeguards requires Members to consider specific injury factors. The previous panels and the Appellate Body also found that consideration of those injury factors is mandatory. The USITC Report does not provide an analysis of every injury factor listed under Article 4.2(a). For instance, productivity, which is one of those enlisted injury factors, is not analysed. The analysis of productivity is important particularly where a claim for injury is based on an increase in unemployment as in the steel case. The unemployment is often the important motivator for the application of a safeguard measure as it often causes serious social and political problems. However, a decrease in employment may not be necessarily indicative of serious injury in the domestic industry where the decrease is the result of an increase in productivity. The use of labour-saving production and/or management technology may result in the corresponding decrease in employment.

The inconsistency of the US safeguard measure with the procedural requirements of the SA is also significant. Article 12.3 of the Agreement on Safeguards 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

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<sup>129</sup> Imports of certain steel that are the product of Canada, Israel, Jordan, or Mexico have been excluded from the US safeguard measure. See “Proclamation 7529 of March 5, 2002—To Facilitate Positive Adjustment to Competition from Imports of Certain Steel Products”, 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 US”, 67 Federal Register 45 (7 March 2002).

<sup>130</sup> *US—Wheat Gluten*, WT/DS166/R, para. 8.176. The Appellate Body also upheld the Panel findings. WT/DS166/AB/R, paras 98–100.

of the product concerned, with a view to, inter alia, reviewing the information provided 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.”

As discussed above, consultations are an essential procedural requirement in the application of a safeguard measure since they provide all involved parties with an opportunity to discuss the measure and to reach a mutually satisfactory result. Indeed, the requirement of consultations is a manifestation of the multilateralism in international trade, obliging Members to consider interests of others and accommodate them if possible before applying a trade measure. Successful consultations would allow Members to avoid further disputes and retaliations.

Thus, exporting Members should be allowed necessary time to analyse the proposed measure and determine its consequences before consultations so that they can have a meaningful exchange of views on the proposed measure. The lack of adequate consultation opportunities is evident in the US steel safeguard case. The United States announced its decision to apply a safeguard measure on 5 March and implemented the measure only after 15 days from its decision. Several countries rushed to consultations with the United States, resulting in no settlement. As found in the previous *US—Line Pipe* case,<sup>131</sup> the period of 15 days is hardly sufficient for the preparation for consultations on the part of exporting countries. Had any settlement or understanding been reached during the consultations, this short time period would not have allowed the United States to incorporate them in its implementation of the measure.

This significant disregard of adequate consultations raises a serious concern about maintaining the multilateralism in the world trading system. Although a safeguard measure may be applied unilaterally, the absence of adequate consultative effort only invites subsequent disputes and retaliations. Such has been the development following the US implementation of its steel safeguard measure. The formal complaints were filed with the WTO shortly after the US decision to apply a safeguard measure. The European Union has also submitted to the WTO its list of US products subject to its retaliation. The European Union has applied a safeguard measure in response to the US action. This unfortunate chain of retaliatory and protectionist responses is precisely the result of the inadequate consultative effort, undermining the multilateralism in international trade.

The spread of protectionism, demonstrated in the application of another safeguard measure by the European Union, is a cause for a particular concern. The European Union has applied a provisional safeguard measure under Article 6 of the Agreement on Safeguards.<sup>132</sup> The European Union justified that its measure is necessary to prevent a large volume of steel exports from being diverted to its own market due to the higher

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<sup>131</sup> In *US—Line Pipe*, the Appellate Body did not consider that the periods of the 18 days between the announcement of the actual US measure and the implementation of the measure and the 11 days between the announcement of the actual implementation date and the implementation were not considered sufficient for exporting Members to analyse the effect of the measure and enter into consultations. *US—Line Pipe*, WT/DS202/AB/R, para. 107. See also the relevant discussion in III above.

<sup>132</sup> See the EC notification to the Committee on Safeguards, G/SG/N/6/EEC/1-G/SG/N/7/EEC/-G/SG/N/11/EEC/1, dated 2 April 2002.

tariffs in the United States. Nevertheless, this sort of “preventive” safeguard measure, albeit its negative impact on world economy, is not consistent with the rules on safeguards.

Article 6 of the Agreement on Safeguards provides:

“In critical circumstances where delay would cause damage which it would be difficult to repair, a Member may take a provisional safeguard measure pursuant to a preliminary determination that there is clear evidence that increased imports have caused or are threatening to cause serious injury. The duration of the provisional measure shall not exceed 200 days, during which period the measures should take the form of tariff increases to be promptly refunded if the subsequent investigation referred to in paragraph 2 of Article 4 does not determine the increased imports have caused or threatened to cause serious injury to a domestic industry. The duration of any such provisional measure shall be counted as a part of the initial period and any extension referred to in paragraphs 1, 2 and 3, of Article 7.”

It is doubtful that the circumstances prescribed in the above provision of Article 6 apply to this case. As the basis for the EU’s proposed measure is the possible diversion of steel exports to its own market rather than the existence of current serious injury, the question is whether there is any clear evidence that increased imports are threatening to cause serious injury under the requirement of Article 6. Article 4.1(b) of the Agreement on Safeguards also requires in the relevant part that a determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility.

The provisional safeguard measures are applicable where there is a true emergency where Members cannot afford to take time to investigate. The present circumstances do not warrant the European Union taking a provisional safeguard measure since the European Union is acting merely on a precaution of the possible diversion of the steel exports and not on clear facts or evidence of serious injury or its threat, as required under the Agreement on Safeguards. Thus, the safeguard measure applied by the European Union is a protective response to the US measure, which is not consistent with the rules on safeguards. Other Members should restrain themselves from applying a safeguard measure on a similar ground without clear evidence that serious injury is either present or imminent.

## V. CONCLUSION

The success of the WTO system and the promotion of free trade depend on maintaining the multilateralism consistently in the international trading system. Without a strong sense of multilateralism, the trading system will be vulnerable to protectionist demands that would only result in disputes and retaliations down the road, reducing international trade and its benefits. Observing binding concessions once agreed in the multilateral trade negotiations is essential in preserving the free trading system, and the safeguard actions should be taken as an exceptional device that should be applied as the last resort only to remedy or prevent serious injury caused by increased imports.

A streak of successful challenges against safeguard measures before the WTO Dispute Settlement Body has created a perception that it is difficult to apply a safeguard measure consistently with the rules. A proper application of a safeguard measure should begin with the understanding that safeguard measures are designed as emergency import restrictions to relieve domestic economy of acute, short-term economic problems such as massive unemployment that often results from rapid increases in imports. Those economic problems can cause social and political turmoil, and as discussed above, the purpose of the measure is to enable Members to avoid such problems by maintaining the *status quo* through temporary import restrictions and to initiate economic adjustment.

The application of a safeguard measure should be consistent with all provisions of the rules on safeguards. The previous panels and the Appellate Body have also emphasized the importance of reasoning provided by competent national authorities to justify their determination. As the current decision stands, all the reasoning and explanations made by the national authorities should be found in their final investigation report required under Article 3.1 of the SA. In short, national authorities would have to provide in their final investigation report adequate reasoning and explanations to support their determination of the existence of serious injury or its threat to the domestic industry caused by increased imports.

Particular attention must also be given to the procedural requirements under the SA. The required notifications under Article 12.1 should be expeditiously made to the Committee on Safeguards. Despite the political pressure for the immediate application of a safeguard measure, sufficient time and information about the measure should be provided to the affected Members before entering into consultations under Article 12.3. Consultations themselves should be held well in advance to allow the implementation of agreements and settlements that may be reached during the consultations.

Can a safeguard be applied consistently with the rules despite the history of disputes that has demonstrated continued failures to comply with them? The answer is yes provided that a need for emergency import restrictions is well examined and that a careful review of the proposed safeguard measure is made with respect to all provisions of the rules as well as the relevant Panel and the Appellate Body decisions. Again, attention has to be given to the investigation report that needs to be complete with all necessary explanations for the determination of national authorities.

In addition, certain ambiguities in the current rules have caused difficulties and confusion in the application of a safeguard measure. The controversy over the continuing application of Article XIX, in particular, the application of the “unforeseen developments” clause, is an apparent example. Those ambiguities need to be resolved to improve the clarity of the rules. The suggested modification of the rules should be considered to enhance the consistency and the effectiveness of the discipline on safeguards.

A final caution: if a safeguard measure is used as a convenient political means to appease protectionist demands and applied without legitimate economic and legal justifications, it would only encourage other Members to do the same, dismantling the multilateral framework of the trading system that is essential for maintaining free trade. Members should also be reminded that a safeguard measure, whether or not provoked by a safeguard measure taken by another, affects adversely not only the interests of foreign exporters but also those of their own consumers for the benefit of a selected group of producers. The application of a safeguard measure will not resolve inherent structural problems of the domestic industry, and it may well only prolong the resolution of those long-term problems. All this indicates that safeguard measures should be applied sparingly as a measure of the last resort. In the long run, rampant applications of import restrictions will set the stage for protectionism worldwide, which will harm exports of everyone in the end. Then ironically, the difficulties in exports and the resulting economic losses may well return to the country that initiated import restrictions and undermine its internal political interests that it set out to protect by applying the trade measure in the first place.