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Safety Valve or Flash Point?

The Worsening Conflict between U.S. Trade Laws and WTO Rules

by Lewis E. Leibowitz

Executive Summary

The U.S. trade remedy laws—in particular, the antidumping and countervailing duty laws and the section 201 "safeguard" provision—are often defended as necessary for ensuring domestic political support for trade liberalization. Consequently, the argument goes, they actually strengthen the U.S. commitment to the World Trade Organization.

This argument ignores the controversy that the U.S. trade laws have sparked with trading partners abroad. More than any other country, the United States is being challenged for failure to abide by the multilateral rules that govern antidumping, countervailing duties, and safeguards. In response to a succession of wide-ranging challenges to U.S. trade remedy law and practice, the WTO Dispute Settlement Body has handed down a number of key decisions finding the U.S. government in violation of its international obligations.

A review of those disputes and the relevant WTO rulings makes clear that the U.S. trade remedy laws have become a flash point of tension in the international trading system. It is increasingly obvious that the U.S. laws in their current form and U.S. support for negotiated trade liberalization are not complementary but rather antagonistic and even incompatible. American policymakers are now faced with a stark choice between the trade law status quo and the integrity of the U.S. commitment to the WTO.

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Introduction

The U.S. trade remedy laws—in particular, the antidumping and countervailing duty laws and the section 201 "safeguard" provision—are widely defended as a political "safety valve" that alleviates protectionist pressure. Even free traders who understand that these laws are themselves protectionist have nonetheless supported them on the ground that they prevent even greater backsliding away from open markets. As Richard Boltuck and Robert Litan explain:

> At bottom, the imperfect success with which domestic interests have pursued unfair trade remedies suggests perhaps the only principled reason for the statutes: as a legal "safety valve" for channeling the strongest claimants for protection away from overtly supporting more transparent forms of protection. Thus, the overall effort to enforce the unfair trade practice program can be rationalized to the extent it successfully prevents more unjustified protection than it hands out.[1]

According to this line of reasoning, the trade remedy laws complement the overall U.S. trade policy of gradual negotiated trade liberalization. Anti-trade commercial interests that might otherwise seek to block new trade-opening agreements are mollified by the opportunity the laws provide to obtain relief from foreign competition. By sacrificing free trade at the margins, the argument goes, the laws serve the greater good by putting trade liberalization on a firmer political foundation.

What this strategy ignores, however, is the controversy that the U.S. trade laws have sparked with trading partners abroad. This controversy has been intensifying in recent years along two fronts. First, many foreign countries have made the reform of the U.S. antidumping law a major priority for future trade negotiations. Second, the trade laws themselves have been successfully challenged in the World Trade Organization as being inconsistent with U.S. market-opening commitments.

On the first point, the U.S. government has thus far resisted calls for negotiations that could result in the "weakening" of the U.S. trade laws. U.S. intransigence on this subject has become a major sticking point at both the multilateral and regional levels. The U.S. refusal to allow new WTO talks on antidumping was a major reason for the collapse of talks that were intended to start a new WTO round during the ill-fated 1999 ministerial conference in Seattle. Continued opposition could cause a similar failure at the upcoming WTO ministerial meeting.

Meanwhile, plans for a free-trade area of the Americas (FTAA) are also threatened by disagreements over antidumping. In particular, Brazilian president Fernando Henrique Cardoso has said that no FTAA is possible unless it includes antidumping reform.

The second point—the increasing friction between the trade remedy laws and existing U.S. market-opening commitments—is the subject of this paper. More than any other country, the United States is being challenged for failure to abide by the multilateral rules that govern antidumping, countervailing duties, and safeguards. In response to a succession of wide-ranging challenges to U.S. trade remedy law and practice, the WTO Dispute Settlement Body has handed down a number of key decisions finding the U.S. government[2] in violation of its commitments under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade of 1994 (Antidumping Agreement), the Agreement on Subsidies and Countervailing Measures, and the Agreement on Safeguards.

These decisions, together with other WTO decisions concerning the trade remedy regimes of other WTO members that have implications for U.S. laws, will require the United States to amend its trade remedy laws and practices or face potential retaliation against U.S. exports. In the coming months, Congress and the Bush administration will need to evaluate the necessary changes and implement them or risk undermining the WTO system that benefits the United States at least as much as any other country in the world. The conse-

quences of defying the WTO would adversely affect a broad range of interests within the American economy and around the world.

In this paper I examine the recent WTO decisions affecting U.S. trade remedy laws in the areas of antidumping, countervailing duties, and safeguards. In particular, I discuss the effect those decisions may have on existing U.S. law and practice and the changes that may be required as a result. Finally, I examine several key WTO rulings against other WTO members that have implications for the WTO consistency of U.S. law.

What emerges from this review is the clear conclusion that the U.S. trade remedy laws have become a flash point of tension in the international trading system. It is increasingly obvious that the U.S. trade laws in their current form and U.S. support for negotiated trade liberalization are not complementary but rather antagonistic and even incompatible. In particular, American policymakers are now faced with a stark choice between the trade law status quo and the ongoing integrity of the U.S. commitment to the WTO. At stake in this choice is nothing less than the enormous U.S. national interest in the relatively free and open world trading system that WTO rules help to support.[3]

U.S. Antidumping Determinations

The antidumping law is by far the most frequently used of the anti-import remedies afforded by U.S. trade law. Under its provisions, imports are subject to special duties whenever they are found to (1) be sold at "less than fair value" (as determined by the Commerce Department) and (2) cause or threaten "material injury" to a competing U.S. industry (as determined by the International Trade Commission). Although the antidumping law is defended as a necessary shield against "unfair trade," the fact is that its rules are so heavily biased against foreign competition that normal business practices are routinely penalized.[4]

Imposing some restraint on the U.S. law— and similar laws in dozens of other countries[5]—is the 1994 WTO Antidumping Agreement. This agreement, negotiated during the Uruguay Round of multilateral trade talks, sets standards for what national governments can and cannot do in the name of antidumping. Unfortunately, the standards set by the agreement are quite lax, especially with respect to how "dumping" is defined. As a result, the agreement offers wide scope for outright protectionism in the name of fighting "unfair trade." Furthermore, Article 17.6 of the agreement establishes a special—and especially deferential—standard for reviewing antidumping determinations under the WTO dispute settlement standard. Specifically, it provides that a dispute settlement panel should bow to national authorities' factual determinations whenever the "establishment of the facts was proper" and the "evaluation of those facts was unbiased and objective"—even if the panel itself might have reached a different factual conclusion. In the same vein, it provides that a panel should accept a national authority's legal interpretation whenever it is one of perhaps multiple "permissible" interpretations —even if it is not the one favored by the panel.

Despite the weakness of current WTO rules, antidumping has been a frequent subject of WTO dispute settlement decisions. U.S. antidumping practice, in particular, has been under scrutiny by four different dispute settlement panels. Although many foreign claims were rejected in those cases, on all four occasions the panel found at least some violations of WTO norms.

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Calculation of Net Prices

Dumping determinations often entail highly complicated comparisons of "net" prices. Sales in the export market (the country where the investigation is occurring) by a foreign producer accused of dumping are typically compared to sales by that producer in its home market. But before actual comparisons are made, a multitude of adjustments is performed to strip out movement and packing costs and reflect differences in credit terms, warranties, advertising, physical characteristics, and so on. The idea is to arrive at net "ex factory" prices so that proper "apples to apples" comparisons can be made. In practice, however, determinations regarding which adjustments to make and how they

should be quantified offer wide scope for manipulation and abuse. By making steep downward adjustments to export prices, while disallowing appropriate adjustments to home-market prices, antidumping authorities can generate dumping margins out of thin air.

Just such a problem came before a WTO dispute settlement panel in the *Korean Stainless Steel* case. The panel found WTO inconsistencies in the Commerce Department's treatment of certain unpaid U.S. sales of Korean steel. In the underlying investigations of stainless steel plate and sheet, Commerce found that a U.S. customer of POSCO, a Korean steel producer, had failed to make payment and ultimately declared bankruptcy; Commerce responded by adjusting U.S. sales prices down accordingly and treating this bit of bad luck as evidence of dumping. Before the WTO panel, the U.S. government defended Commerce's action as a valid interpretation of the Antidumping Agreement.

Specifically, Article 2.4 allows adjustments to export price for "differences in conditions and terms of sale" and allowances to constructed export price (resales by a related importer to unrelated customers) for costs "incurred between importation and resale." The U.S. government defended Commerce's decision to treat a totally unforeseen default by a customer as coming within this language.

The panel rejected the U.S. government's argument. With respect to Article 2.4, the panel held:

> We do not consider that the phrase "differences in conditions and terms of sale," interpreted in accordance with customary rules of interpretation of public international law, can be understood to encompass differences arising from the unforeseen bankruptcy of a customer and consequent failure to pay for certain sales.[6]

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With respect to U.S. treatment of unpaid sales as a cost incurred between importation and resale, the panel stated,

> We do not believe . . . that this interpretation of costs "incurred between importation and resale" can be stretched to include costs that not only were not incurred in an accounting sense until the date of resale but which were entirely unforeseen at that time.[7]

Once net prices in the comparison and export markets are calculated, it is frequently necessary to perform currency conversions before comparisons can be made. The question of which exchange rate to use opens up opportunities to manufacture price differences—and thus "unfair trade"—from of the fact of fluctuating currencies. In the *Korean Stainless Steel* case, the Commerce Department's decision to make an unnecessary currency conversion provoked the WTO panel's censure. In the original investigation, local sales in Korea were ordered and invoiced in dollars; nevertheless, Commerce opted to convert the prices into won at one exchange rate and then convert them back into dollars at a different exchange rate—inflating dumping margins in the process.

The panel found that some of Commerce's double currency conversions violated Article 2.4.1 of the Antidumping Agreement. In so ruling, the panel recognized that a special standard of review applied to its examination of the facts underlying the currency conversions at issue. For questions of fact in antidumping cases, Article 17.6(i) of the Antidumping Agreement limits the panel to determining

> whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the Panel might have reached a different conclusion, the evaluation shall not be overturned.

This deferential standard prevented the panel in *Korean Stainless Steel* from substituting its judgment for that of the investigating authority regarding factual issues so long as establishment of the facts was "proper" and the evaluation was "unbiased and objective." Although it was clear to the

panel—and uncontested by the U.S. government—that the dollar price controlled the eventual amount of payment by the customer (payment was made in won at the prevailing exchange rate on the date of payment), the factual record in the underlying plate investigation did not unambiguously establish this point. With respect to that investigation, accordingly, the panel gave the U.S. government the benefit of the doubt. With respect to the sheet investigation, however, the facts of record clearly established that the dollar prices were controlling. The panel therefore concluded:

> As we have seen, it was clear from the record in the *Sheet* investigation that the won price which the [Department of Commerce] considered to be the price in which local sales were denominated was in no sense controlling. Rather, the won amount ultimately paid would be determined by converting the dollar amount appearing on the invoice into won at the rate of exchange prevailing on the date of payment. . . .
>
> For the foregoing reasons, we conclude that an unbiased and objective investigating authority evaluating the evidence before the DOC in the *Sheet* investigation could not properly have determined that the local sales in question were made in won.[8]

Related Parties

Before prices are compared to assess the existence of dumping, it must be decided which sales are to be included in the analysis. In particular, the existence of sales to affiliated companies, whether in the export market or the comparison market, raises methodological issues. Sales prices to affiliates may reflect arm's-length bargaining, or they may reflect larger corporate strategy (for example, to shift income to particular affiliates for tax purposes). In the latter case, prices do not reflect market conditions and therefore are not reliable evidence of possible market distortions.

In light of those concerns, the U.S. antidumping law establishes special procedures for handling sales to related parties. In the U.S. market, the Commerce Department disregards all sales to related importers and instead uses resales to unrelated purchasers as the basis for constructed export price. That methodology, for better or for worse, is enshrined in the WTO Antidumping Agreement. For sales in the comparison market, Commerce has an established practice of subjecting related-party sales to an arm's-length test. Under that test, if related-party sales are found to be less than 99.5 percent of the weighted average price of sales to unrelated customers, they are excluded as "outside the ordinary course of trade." Commerce then requires the foreign producer to report sales by the affiliated customer to its unrelated purchasers.[9]

The Commerce Department's practice with regard to related-party sales in the comparison market was reviewed in the *Japanese Hot-Rolled Steel* case. The panel found that Commerce policy failed to pass WTO muster because such sales were not within the meaning of sales "outside the ordinary course of trade." The Appellate Body affirmed the panel's conclusion on other grounds. The Appellate Body found that the 99.5 percent arm's-length test is not "even-handed" in its consideration of affiliated-party sales at high prices as well as those at low prices.[10] Such "even-handed" treatment is required in the determination of whether sales to affiliates in the comparison market are in the "ordinary course of trade."[11] Under the Commerce policy, prices are rejected only when they are lower than average, not when they are higher. By not taking "equal account" of the prospect that affiliate-party sales could distort comparisons whether they are at prices above or below the average prices to nonaffiliated buyers, the Appellate Body concluded, the arm's-length test violated the Antidumping Agreement.[12]

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Averaging

Article 2.4.2 of the Antidumping Agreement provides that dumping shall normally be determined on the basis of a comparison of weighted average normal value and weighted average export prices, or on the basis of a comparison of normal value and export prices on a transaction-by-transaction basis. This provision was a response to the abusive practice of comparing weighted average normal value to individual export transactions and then ignoring "negative" dumping margins (that is, comparisons in which export prices are higher than normal value). Under that skewed method-

Given the mind-boggling complexity of antidumping investigations, authorities so inclined can almost always manufacture some pretext for throwing out respondents' data.

ology, identical prices in two markets would still generate findings of dumping. Article 2.4.2 does allow comparison of weighted average normal value to individual export prices to reveal so-called targeted dumping—instances in which dumped export prices are concentrated in sales to a particular customer or region or during a particular time period and whose existence would therefore be masked by averaging.

In the *Korean Stainless Steel* case, the panel struck down a deviation by the Commerce Department from the requirements of Article 2.4.2. Commerce in the underlying investigtions had engaged in "multiple averaging"; namely, it split the period of investigation— which coincided with the Asian financial crisis—into two segments in order to prevent the low normal values (in dollar terms) during the second half of the period from dragging down dumping margins during the first half. The U.S. government argued that because Article 2.4.2 requires that transactions underlying the normal value be "comparable" to export transactions in establishing the dumping margin, multiple averaging may be used where there are significant differences in normal value over the course of the investigation. The panel rejected this interpretation of Article 2.4.2:

> [T]he United States asserts that the existence of differences in the timing of sales in the home market and the export market renders transactions non-comparable, at least in cases where there are significant differences in the normal value, export price or constructed export price over the course of the investigation. . . .
>
> Yet to interpret the word "comparable," when combined with the requirement that sales be compared "at as nearly as possible the same time," to obligate Members to perform numerous average to average comparisons based on the shortest possible time periods would in effect read the Article 2.4.2 authorization to perform average to average comparisons out of the [Antidumping] Agreement. . . .[13]

The panel's finding was limited to the dumping calculations in those individual stainless steel investigations. However, the panel's conclusions may have broader implications. Under U.S. law, Commerce enjoys wide latitude in determining how to calculate average prices to determine whether sales have taken place at less than fair value.[14] Clearly, however, if Commerce continues to use the interpretation of Article 2.4.2 it advanced in the *Korean Stainless Steel* case to justify multiple averaging in future cases, it will be vulnerable to additional WTO challenges. Moreover, the WTO ruling calls into question the validity of the U.S. antidumping regulations themselves, which explicitly authorize multiple averaging in the very situation the panel found impermissible under Article 2.4.2.[15]

Facts Available

Many dumping determinations in the United States and elsewhere are based, not on information provided by the foreign producer under investigation, but rather on "facts available"—which usually means information cooked up by the complaining domestic industry. Facts available are used when a foreign producer fails to participate, or when the information it does provide is deemed insufficiently accurate or complete by the antidumping authorities. In the latter case the authorities have wide discretion that is highly prone to abuse: given the mind-boggling complexity of antidumping investigations, authorities so inclined can almost always manufacture some pretext for throwing out respondents' data. Meanwhile, the standards governing what constitutes facts available are notoriously inexact. As a result, dumping margins based on facts available are often punishingly high. For example, a recent review of 141 U.S. dumping calculations over a three-year period found that 36 of those determinations were based on facts available—and that the average margin in those cases was 95.58 percent.[16]

Several aspects of U.S. antidumping practice involving the use of facts available were found WTO-deficient in the *Japanese Hot-Rolled Steel* case. The most egregious abuse by Commerce was its decision to apply "adverse facts available" against one of the respondents, Kawasaki Steel Corporation. Some of Kawasaki's U.S. sales were to California Steel Industries, an affiliate that was also one of the petitioners in the

antidumping investigation. Commerce, as usual, asked Kawasaki to report resales by its related importers in the United States; in this case, unsurprisingly, California Steel refused to provide the necessary information. Commerce found that Kawasaki was refusing to cooperate with the investigation—because it was unable to convince an opposing party to come to its assistance!—and decided to apply adverse facts available against Kawasaki. Using punitively negative information, Commerce slammed Kawasaki with a 68 percent dumping margin.

The WTO panel and Appellate Body found that Commerce's action violated the Antidumping Agreement. Both ruled that no unbiased and objective fact-finder could have reasonably concluded that Kawasaki, caught in an impossible situation, was refusing to cooperate. They therefore concluded that Commerce's use of punitive data violated the Antidumping Agreement's rules for use of facts available[17]

In addition, the panel and Appellate Body in *Japanese Hot-Rolled Steel* found that the U.S. antidumping statute's rules regarding use of facts available in the calculation of "all-others" rates violate the Antidumping Agreement. In antidumping investigations, Commerce typically investigates and assigns company-specific dumping rates only to the largest foreign producers; the rest receive an all-others rate that is a weighted average of the investigated companies' rates. Article 9.4 of the Antidumping Agreement, however, provides that rates based on facts available cannot be included in the calculation of the all-others rate. The U.S. statute purports to acknowledge this requirement by excluding rates based *entirely* on facts available from the all-others calculation; under U.S. law, however, rates based only partially on facts available (for example, Kawasaki's rate in the original hot-rolled steel investigation) are included in the calculation. The Appellate Body upheld the panel's ruling that the distinction between partial and full use of facts available could not be squared with the language of Article 9.4, and therefore that the statutory provision, and its application in the Japanese hot-rolled steel investigation, violates the Antidumping Agreement.[18]

Revocation of Antidumping Orders

The first successful WTO challenge to the U.S. antidumping law occurred in the *Korean DRAMs* case. Although the Korean government lost several arguments before the panel,[19] it prevailed on a crucial claim in the case—that Commerce was using the wrong legal standard for determining whether to revoke antidumping orders.

The panel in the *Korean DRAMs* case rejected the U.S. regulatory standard for revocation of an antidumping order, which required the continuation of antidumping duties in all cases unless it could be shown, to the satisfaction of the Commerce Department, that dumping was not likely to recur.[20] The panel determined that this "not likely" test failed to meet the requirement in Article 11.2 of the Antidumping Agreement that continued imposition of an antidumping duty be "necessary to offset dumping." The panel found that the U.S. test reversed the burden of proof by requiring that antidumping orders be maintained unless and until there is evidence that dumping is not likely to recur.[21] Accordingly, it held that Commerce had adopted an impermissible interpretation that did not comport with the customary rules of interpretation of public international law.[22]

The Commerce Department has changed its regulations to implement the WTO's ruling, replacing the old "not likely" standard with the appropriate "necessary to offset dumping" requirement. Commerce's application of the new standard, though, remains a contentious issue.[23]

Captive Production

The "captive production" provision of the U.S. law addresses those situations in which vertically integrated producers consume their own products for downstream production as well as sell them on the "merchant" market. In those situations, so-called captive production is effectively shielded from foreign competition—and thus incapable of being injured by imports. In order to encourage the International Trade Commission to find that imports are injuring domestic producers regardless of such insulation from competition, the captive production provision instructs the ITC, under defined circumstances, to "focus primarily" on the merchant market when conducting its injury analysis.[24]

Commerce found that Kawasaki was refusing to cooperate with the investigation—because it was unable to convince an opposing party to come to its assistance!

The obscure and infrequently invoked Antidumping Act of 1916 creates a private right of action in federal courts and provides for treble damages, criminal fines, and even imprisonment.

In the *Japanese Hot-Rolled Steel* case, the panel sided with the U.S. government in finding that the captive production provision, both on its face and as applied in the underlying antidumping investigation, was consistent with WTO rules. The Appellate Body, however, disagreed. Although it did not find that the provision violates the Antidumping Agreement on its face, it ruled that if "authorities examine one part of a domestic industry, they must examine, in like manner, all the other parts of the industry, or, in the alternative, provide a satisfactory explanation as to why it is not necessary to examine directly or specifically the other parts."[25] In the hot-rolled steel investigation, the ITC examined conditions in the merchant market, and in the hot-rolled industry as a whole, but not in the captive segment. The Appellate Body found that this "selective examination of one part of a domestic industry" conflicted with the requirement under Article 3.1 of the Antidumping Agreement that injury determinations be based on an "objective examination" of the relevant evidence.[26] This ruling deals a major blow to the captive production provision's utility in slanting the ITC's analysis in favor of affirmative injury determinations.

1916 Antidumping Act

The United States has not one but two antidumping laws. In addition to the well-known and often-used statute that provides for imposition of duties (Title VII, Tariff Act of 1930, as amended), the obscure and infrequently invoked Antidumping Act of 1916 creates a private right of action in federal courts and provides for treble damages, criminal fines, and even imprisonment. In the long history of this relic of World War I, the Justice Department has never brought a criminal case under its authority, and no court has ever awarded treble damages. Two 1916 act claims by steel producers and one by a producer of newspaper printing presses have been brought in recent years, and in one steel case defendants opted to settle rather than fight.

The European Union and Japan separately challenged the 1916 act as a violation of the Antidumping Agreement as well as the underlying Article VI of the GATT (which provides for antidumping measures). Both panels ruled that Article VI and the Antidumping Agreement make clear that antidumping duties are the only permissible remedy for dumping under multilateral rules.[27] Since the 1916 act allows for treble damages, criminal fines, and imprisonment, it violates both the GATT and the WTO Antidumping Agreement. The U.S. government appealed the panels' rulings, but the WTO Appellate Body upheld their conclusions. As the Appellate Body concluded:

> Article VI, and, in particular, Article VI:2, read in conjunction with the Anti-Dumping Agreement, limit the permissible responses to dumping to definitive anti-dumping duties, provisional measures and price undertakings. Therefore, the 1916 Act is inconsistent with Article VI:2 and the Anti-Dumping Agreement to the extent that it provides for "specific action against dumping" in the form of civil and criminal proceedings and penalties.[28]

In a binding arbitrator's decision issued in February 2001, the U.S. government was given 10 months, or until July 26, 2001, to implement the WTO ruling.[29] The arbitrator did not specify what form implementation should take, but it is difficult to see how implementation could mean anything other than congressional repeal of the 1916 act. In July 2001 the Bush administration committed itself to securing repeal of the act by the end of 2001.

Pending Challenges to Byrd Amendment

An important change in the U.S. antidumping law occurred last year through an act of legislative sleight of hand. Bypassing the normal congressional committees that oversee U.S. trade laws, Sen. Robert Byrd (D-W.Va.) inserted the Continued Dumping and Subsidy Offset Act into the agriculture appropriations bill. This piece of legislation, popularly known as the Byrd amendment, was signed into law despite Clinton administration protests in October 2000.

The Byrd amendment provides that antidumping duties collected by the Customs Service are to be distributed among those companies that originally petitioned for antidumping relief. In other words, those companies will

now receive, not only the benefit of squelched competition and increased prices, but direct financial support as well. The Byrd amendment prompted widespread denunciation by U.S. trading partners. No fewer than nine WTO members—Australia, Brazil, Chile, the European Union, India, Indonesia, Japan, Korea, and Thailand—requested a dispute settlement panel in July 2001 to hear their claim that the Byrd amendment is WTO-inconsistent. Canada and Mexico are expected to submit their own panel requests as well.

It is risky to predict the outcome of a WTO challenge, but it can be said that there are strong arguments in support of a legal challenge to the Byrd amendment. The Appellate Body stated clearly in the *1916 Act* case that antidumping duties are the only permissible remedy under the Antidumping Agreement. In light of that precedent, it can be argued with considerable force that the Byrd amendment's provision of monetary awards for petitioning companies exceeds the limited scope of remedies provided under the Antidumping Agreement and thus violates WTO rules. If a WTO panel should make this finding, and if that ruling were to be upheld by the Appellate Body, Congress would be faced with the choice of repealing the Byrd amendment or defying U.S. WTO obligations.

Other WTO Antidumping Rulings

The conflict between the U.S. antidumping law and U.S. WTO obligations goes beyond specific WTO rulings in which the U.S. government was a defendant. A number of rulings regarding the antidumping laws of other WTO members have direct implications for the WTO-consistency of U.S. law and practice.

Perhaps most important, an Indian complaint against the European Union's antidumping regulation has resulted in an Appellate Body ruling against the controversial practice of "zeroing" in calculating a weighted average dumping margin. As discussed above, Article 2.4.2 of the Antidumping Agreement states that weighted average normal values will normally be compared to weighted average export prices. This provision took aim at an abusive practice in which weighted average normal value was compared to individual export prices and any negative dumping margins were treated as if they were zero dumping margins. The upshot of this methodology was that identical prices in two markets could still yield dumping margins. After the signing of the Antidumping Agreement, the United States changed its regulations to provide for average-to-average comparisons—but only in original investigations (not administrative reviews that recalculate dumping rates and assign final antidumping liability) and only on a model-specific basis. As to the second qualification, Commerce now compares weighted average normal values and export prices of each particular model of the product under investigation, but still negative dumping margins for particular models are treated as zero dumping margins for purposes of the final calculation of an overall weighted average dumping margin. Under this revised methodology, identical prices for identical models in two markets could no longer generate dumping margins, but it remained the case that higher overall prices in the export market could still yield findings of dumping.

The European Union's zeroing methodology, substantially identical to the current U.S. approach, was under review in the *EC—Bed Linens* case. Upholding a panel's ruling in favor of India's challenge to the practice, the Appellate Body agreed with the panel's finding that zeroing manipulates individual export prices by treating the weighted average export price as equal to, instead of greater than, the weighted average normal value in those cases. Zeroing violates the rules for establishing dumping margins under Article 2.4.2, the Appellate Body concluded, because it fails to account fully for the export prices of all comparable transactions involving a like product. The Appellate Body noted that once a member defines the scope of the "like product" in an antidumping investigation, it cannot turn around and argue that transactions involving different subcategories of the like product are not comparable.[30]

The *EC—Bed Linens* case has no direct legal impact on the similar U.S. practice. However, there is no substantial legal distinction between U.S. and EU practices, and it is only a matter of time before the U.S. averaging methodology is subjected to a WTO challenge.[31] In light of the

It can be argued with considerable force that the Byrd amendment's provision of monetary awards for petitioning companies exceeds the limited scope of remedies provided under the Antidumping Agreement.

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Appellate Body's ruling, it appears very likely that the U.S. methodology will be found to violate Article 2.4.2 as well. The U.S. government, recognizing the threat that India's dispute with the European Union poses, made arguments before the *EC—Bed Linens* panel in favor of the European approach. All of those arguments were rejected.

Dispute settlement panels in four recent WTO cases[32] have established a significant rule for injury determinations in antidumping cases. In examining the impact of dumping on the domestic industry, investigating authorities are required under Article 3.4 of the Antidumping Agreement to

> include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

In each case, there was much disagreement among the parties (including the U.S. government as both a party in interest and a third-party participant) as to the precise scope of the Article 3.4 factors. Specifically, the panels were asked to decide whether investigating authorities must consider all of the factors enumerated under Article 3.4 or whether Article 3.4 gives authorities a certain amount of discretion in deciding which factors to examine. Despite WTO members' widely diverging views on the issue, the panels in all four cases concluded that Article 3.4 admits of only one permissible interpretation—that authorities must consider all the enumerated factors. As the panel in the *Thailand—Steel* case found:

> We are of the view that the language in Article 3.4 makes it clear that all of the listed factors in Article 3.4 must be considered in all cases. The provision is specific and mandatory in this regard. . . .
>
> On the basis of this textual analysis of Article 3.4, we are therefore of the view that each of the fifteen individual factors listed in the mandatory list of factors in Article 3.4 must be evaluated by the investigating authorities.[33]

Thailand appealed the panel's ruling, but the Appellate Body upheld the panel's interpretation of Article 3.4.[34]

It is noteworthy that the U.S. government's position on this issue has been somewhat inconsistent. Most recently, as a third party in *Thailand—Steel*, the U.S. government supported the position of Poland that each of the Article 3.4 factors must be considered in every antidumping investigation.[35] However, as the complaining party in the *Mexico—High Fructose Corn Syrup* case, the U.S. government advanced a different interpretation of Article 3.4 that did not require consideration of all factors.[36]

Moreover, in a much earlier WTO case involving an analogous provision in Article 6.3 of the WTO Agreement on Textiles and Clothing, the U.S. government as responding party had argued, unsuccessfully, that the list of factors in that provision was merely illustrative and that the U.S. government had satisfied its WTO obligations by considering "some of the relevant factors listed in Article 6.3 of the ATC" and examining "factors 'such as' the listed factors."[37] The panel in that case rejected the U.S. government's interpretation, finding that the list of factors under the ATC was mandatory.[38]

The succession of consistent WTO rulings on Article 3.4 of the Antidumping Agreement establishes a clear rule for injury determinations and means that in each antidumping case the ITC must, in order to uphold WTO commitments, consider each of the 15 factors listed in Article 3.4.

The sufficiency of the evidence to justify initiation of an antidumping investigation was a key element of the WTO ruling in *Guatemala—Cement*. This is also an issue that has relevance for U.S. antidumping investigations. The panel found that Guatemala had failed to satisfy the

requirement of Article 5.3 of the Antidumping Agreement that there be "sufficient evidence" in order to initiate an investigation. Central to this finding was the panel's linkage of the Article 5.3 requirement with the substantive provisions on dumping and threat of injury contained in Articles 2 and 3.7. The panel held that the legal elements of dumping, as defined in Article 2, "provide guidance" for determining whether an investigation is warranted. "[T]hey are certainly relevant," the panel found, "to an investigating authority's consideration as to whether sufficient evidence of dumping exists to justify the initiation of an investigation."[39] Similarly, consideration of the Article 3.7 factors governing threat of injury determinations "is certainly pertinent to an evaluation of whether there was sufficient evidence of threat of material injury to justify the initiation of an investigation."[40]

The U.S. government argued as a third party in favor of finding Guatemala in violation of Article 5.3, but with an important qualifier. The U.S. government believed the sufficiency of evidence for initiation of an investigation could be determined without reference to the specific elements of dumping under Article 2. In fact, the U.S. government called on the panel to not establish any linkage between the two provisions: "[T]he Panel need not define the precise relationship between Articles 5.2 and 5.3 and Articles 2 and 3. . . . [T]he legal sufficiency of Guatemala's decision to initiate the anti-dumping investigation can be assessed by the Panel without a finding regarding the extent to which Articles 2 and 3 inform Articles 5.2 and 5.3."[41]

The panel's determination—rejecting the U.S. government's argument—that Article 2 (and Article 3.7 in threat of injury cases) necessarily informs a WTO member's evaluation of the sufficiency of evidence under Article 5.3 may play an important role in future WTO cases involving U.S. antidumping investigations. On the basis of *Guatemala—Cement*, each WTO member now bears the responsibility of ensuring that its investigating authorities assess the quantity and quality of evidence before them, paying careful heed to the WTO-mandated elements of an antidumping case before determining whether an investigation is warranted.

U.S. Countervailing Duty Determinations

The U.S. countervailing duty (CVD) law targets subsidized imports that injure or threaten domestic U.S. industries. As is that of the antidumping law, administration of the CVD law is bifurcated: Commerce conducts the subsidy analysis, and the ITC examines the injury question. If both agencies make affirmative determinations, special duties are imposed to "countervail" the effect of foreign government subsidies.

Prior to 1995, when the Uruguay Round Agreements Act went into effect, only countries that were signatories of the old Tokyo Round Subsidies Code (now superseded by the WTO Agreement on Subsidies and Countervailing Measures) were entitled to an injury test under U.S. law. When nonsignatory countries—including many less-developed nations—were investigated, it was necessary only for Commerce to find subsidies, and then duties were imposed regardless of their effect on U.S. industries. The absence of an injury test made the CVD law a popular protectionist weapon against the exports of developing countries. Now, however, that the injury test has been extended to all WTO members, the popularity of the CVD law has waned considerably. Thus, from 1980 to 1994, on average, 19 new cases were initiated every year; by contrast, during 1995–99 the average number of new cases per year fell to 6.[42]

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The U.S. CVD law is subject to the WTO Agreement on Subsidies and Countervailing Measures. That agreement establishes disciplines regarding both how member countries can subsidize their industries and how members can respond (with countervailing measures) to subsidized import competition. Two WTO dispute settlement cases thus far have scrutinized the operation of the U.S. law. In both cases, critical elements of U.S. law or practice were found to violate WTO rules.

Privatization

At issue in the *UK Lead Bar* case was how subsidized capital injections granted to state-owned firms should be treated after those firms have been privatized. Does the subsidy contin-

ue to exist, or is it extinguished by the sale? Presumably, the value of those prior equity infusions is incorporated into the price of the company when it is sold; private investors therefore must pay full market value for those equity infusions and thus receive no subsidized benefit because of them. Assuming that the privatization is conducted on an arm's-length basis, privatization should eliminate the subsidy. Nevertheless, despite this logic, the U.S. CVD law treated subsidies as continuing regardless of intervening privatization.

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In the *UK Lead Bar* case, the WTO panel ruled that the U.S. approach violated the ASCM. In May 2000 the Appellate Body confirmed the panel's findings. The Appellate Body ruled that in presuming that the benefit of subsidies to the state-owned British Steel Corporation "passed through" to the postprivatization company, the Commerce Department had failed to abide by the requirement in Article 1.1(b) of the ASCM that there be a "benefit to the *recipient*" in order for a subsidy to be countervailable.[43] The Appellate Body squarely rejected the U.S. government's argument that there was no need to establish the existence of a separate "benefit" to the privatized company:

> In this case, given the changes in ownership leading to the creation of [postprivatization companies] UES and BSplc/BSES, the U.S. [Department of Commerce] was *required* under Article 21.2 to examine, on the basis of the information before it relating to these changes, whether a "benefit" accrued to UES and BSplc/BSES.[44]

As to the specific CVD order in dispute, Commerce actually terminated countervailing duties on lead bar from the United Kingdom prior to the Appellate Body's ruling (it did so because petitioners failed to request a "sunset" review under other provisions of the U.S. law). In spite of the WTO ruling, however, Commerce has refused to back down from its position that privatization does not extinguish prior subsidies.

Since the Appellate Body ruling, the Commerce Department has instituted a new change-in-ownership methodology in response to a federal appeals court decision that the old test failed to satisfy U.S. statutory requirements.[45] Under the new methodology, Commerce determines as a threshold matter whether the current producer-exporter is the "same legal person" as the original subsidy recipient, and if so, Commerce "will determine that all of the elements of a subsidy are established, i.e., we will determine that a 'financial contribution' and a 'benefit' have been received by the 'person' that is the firm under investigation."[46] The new methodology, which assumes that 100 percent of the original subsidy "passes through" after the change in ownership, actually leads to even higher countervailing duties in some cases than did apportioning part of the subsidy to the presale company under the old methodology.

After a series of discussions with U.S. authorities, the European Union announced its intention to bring 12 new privatization cases to the WTO in July 2001. It is quite likely that the new Commerce methodology will also run counter to the requirements of the Subsidies Agreement.[47]

Export Restraints

A recent WTO panel decision has cast a dark cloud over the U.S. practice of treating export restraints as countervailable subsidies.[48] In previous CVD investigations, the Commerce Department has found that export restraints on certain upstream products constitute subsidies for producers of downstream products, since they act to divert upstream products away from export markets and toward the domestic market and thus depress the price paid by domestic downstream producers for their inputs. In particular, in its 1992 CVD investigation of softwood lumber from Canada, Commerce found that Canadian restrictions on exports of unprocessed logs amounted to a subsidy for downstream softwood lumber producers.

Canada, fearing a new CVD investigation of softwood lumber (a fear that was realized in April 2001), preemptively challenged U.S. CVD practice on export restraints as a violation of the ASCM. Since there was no specific CVD case under way at the time of the challenge, Canada argued that U.S. law and practice mandate the treatment of

export restraints as subsidies and that this requirement violates WTO rules on its face.

In the *United States—Export Restraints* case, the panel proceeded with a two-step analysis. First, it examined whether export restraints can be treated as subsidies under the provisions of the ASCM; second, it examined whether U.S. law requires that export restraints be so treated. On the first point, it ruled in Canada's favor; on the second point, it sided with the U.S. government.

There is a strong case in economic theory that restrictions on exports act to subsidize downstream producers. Indeed, that subsidizing effect is precisely why many governments restrict the exports of primary products: they are hoping to nurture the development of value-added processing industries. Nevertheless, not all market-distorting government interventions are classified as subsidies under WTO rules—and thus not all are countervailable under CVD laws. The ASCM sets forth specific criteria for what constitutes a countervailable subsidy, none of which includes export restraints. The U.S. government attempted to argue that export restraints constitute a "financial contribution" by a government in accordance with ASCM provisions, but the panel concluded otherwise. It reasoned that if export restraints make a financial contribution to downstream producers, import tariffs likewise make a financial contribution to import-competing producers; such an elastic definition of "subsidy," however, could not be squared with the language or negotiating history of the ASCM. Accordingly, the panel ruled:

> [W]e reject the US approach that, because, or to the extent that, an export restraint causes an increased domestic supply of the restrained good, it is the same as if a government had expressly entrusted or directed a private body to provide the good domestically. The remaining textual elements . . . support this conclusion. This conclusion is also confirmed by the negotiating history of the term "financial contribution." Accordingly, we find that the treatment of export restraints as financial contributions is inconsistent with Article 1.1(a) of the SCM Agreement.[49]

The panel went on to find, however, that the U.S. CVD statute does not require that export restraints be treated as countervailable subsidies, and thus is not facially inconsistent with the ASCM. Although technically the U.S. government won the case, in substance it was a total defeat. An important element of U.S. CVD practice has been declared WTO-illegal, and the Commerce Department is therefore on notice that any continuation of that practice will constitute a violation of U.S. WTO obligations.[50]

Safeguard Measures under Section 201

Section 201 of the Trade Act of 1974 is the "safeguard" provision of U.S. trade law.[51] Under Article XIX of the GATT, and the WTO Agreement on Safeguards that interprets and expands upon Article XIX, countries can impose temporary trade barriers, or "safeguards," when increased imports cause or threaten "serious injury" to a domestic industry. There is no fig leaf here of allegations of unfair trade or an unlevel playing field: safeguard remedies are an explicit deviation from open markets intended to help ailing domestic producers.

The U.S. safeguard provision, section 201, requires that increased imports (increased either in absolute terms or relative to domestic consumption) must be a "substantial cause" (that is, at least as important as any other single cause) of serious injury, or threat thereof, to the domestic industry under consideration. Before a safeguard measure is imposed, U.S. law provides a two-stage process: First, the ITC conducts an investigation to determine whether the serious injury standard is satisfied. If the ITC reaches an affirmative injury determination, it conducts proceedings to determine the appropriate form of remedy. The case then goes to the president, who determines whether awarding relief is in the "national economic interest" by conducting a cost/benefit analysis of the potential economic effects of protection.[52] Relief can take the form of tariffs or quotas.

Not all market-distorting government interventions are classified as subsidies under WTO rules.

Two major dispute settlement cases—the *Wheat Gluten* and *Lamb* cases—have identified significant discrepancies between U.S. safeguard measures and WTO rules.

With the explosion of antidumping cases during the 1980s and 1990s, safeguard remedies fell into relative disuse in the United States. In the last three years of the Clinton administration, though, section 201 was invoked successfully by several American industries. U.S. producers of wheat gluten, steel wire rod, welded line pipe, and lamb meat all have received relief since 1998. (In addition, the United States imposed safeguard measures on imports of broom-corn brooms from Mexico from 1996 to 1998.) And on June 5, 2001, the Bush administration announced that it was initiating on its own authority section 201 investigations of a wide range of steel products. Consequently, safeguards have gained renewed prominence in the U.S. protectionist arsenal.

Two major dispute settlement cases—the *Wheat Gluten* and *Lamb* cases—have identified significant discrepancies between U.S. safeguard measures and WTO rules. The rulings will require the United States to overhaul its safeguard law and methodology or face retaliatory action by aggrieved WTO members.

Causation of Injury

Central to both cases was the question of the appropriate standard for determining that increased imports are causing or threatening injury. Under U.S. law, the ITC must find that imports are a "substantial cause" of injury, defined as a cause not less important than any other cause that is contributing to the domestic industry's plight.[53] In neither the *Wheat Gluten* nor the *Lamb* case was it alleged that this statutory standard on its face violates WTO rules. Rather, the ITC's application of this standard was challenged, and in both cases was found wanting.

In particular, the Appellate Body in both cases found that the ITC had run afoul of Article 4.2(b) of the Safeguards Agreement, which requires that administering authorities' analysis of causation distinguish imports from other causes of injury and ensure that the effects of those other causes not be attributed to imports. In *Wheat Gluten*, the Appellate Body found that the ITC had not properly examined other causal factors and thus had failed to establish causation of injury by reason of increased imports as required by WTO rules:

> Under Article 4.2(b) of the Agreement on Safeguards, it is essential for the competent authorities to examine whether factors other than increased imports are simultaneously causing injury. If the competent authorities do not conduct this examination, they cannot ensure that injury caused by other factors is not "attributed" to increased imports. It follows, in this case, that the USITC has *not* demonstrated adequately, as required by Article 4.2(b), that any injury caused to the domestic industry by increases in average capacity has not been "attributed" to increased imports and, in consequence, the USITC could not establish the existence of "the causal link" Article 4.2(b) requires between increased imports and serious injury.[54]

In *Lamb*, the Appellate Body noted that the ITC had identified six other factors besides imports that could have contributed to the industry's injured state but concluded—in accordance with the U.S. statute—that each of those six factors was not a more important cause of injury than imports. "But to be certain that the injury caused by these other factors, whatever its magnitude, was not attributed to increased imports," the Appellate Body reasoned, "the USITC should also have assessed, to some extent, the injurious effect of these other factors. It did not do so."[55] Consequently, the Appellate Body concluded, the ITC's analysis was not sufficient to satisfy WTO requirements.

While striking down the ITC's decisions in these cases, the Appellate Body retreated from the standard set forth by the underlying dispute settlement panels. The panels in these cases had concluded that the Safeguards Agreement requires that increased imports, by themselves, be a sufficient cause of serious injury before relief can be granted. The Appellate Body rejected that bright-line standard in favor of a much murkier formulation. It ruled that, once an administering authority isolates the injurious effects of imports from those of other causal factors, the authority need not find that increased imports alone are causing or threatening serious injury. Rather, it need find only a "genuine and substantial rela-

tionship of cause and effect" between increased imports and serious injury that may be the combined result of many causes.[56] How exactly this standard should be applied in practice—and whether or how it jibes or conflicts with U.S. statutory requirements—is far from clear. This uncertainty makes future WTO disputes over U.S. section 201 actions almost inevitable.

"Unforeseen Developments"

The *Lamb* case included a claim by Australia and New Zealand regarding a requirement of GATT Article XIX long ignored under U.S. law and practice—namely, that a safeguard measure can be applied only if it is found that increased imports are causing or threatening serious injury "as a result of unforeseen developments." The Appellate Body in *Lamb* upheld the panel's ruling that the ITC, by failing to examine whether injury by reason of increased imports was due to unforeseen developments, had violated WTO rules. The panel held that under GATT Article XIX, read in conjunction with Article 3.1 of the Safeguards Agreement,

> it must be clear from the published report that the investigating authorities examined the existence of unforeseen developments and came to a reasoned conclusion in this regard. . . . [T]here needs to be a conclusion that makes clear that changes that had not been anticipated had taken place in the market, and that these changes had resulted in a situation in which increased imports were causing or threatening to cause serious injury[57]

In finding that the ITC had failed to make explicit findings on the existence of unforeseen developments, the *Lamb* panel rejected the U.S. government's attempt to characterize certain references in the ITC's report of its determination as findings of unforeseen developments. It made clear that the U.S. government cannot ignore Article XIX when imposing safeguards and then later, in the context of a WTO challenge, try to construct a post hoc demonstration of unforeseen circumstances. After scrutinizing the ITC report, the panel concluded that while such facts suggest that the ITC may indeed have viewed certain developments as unforeseen, those facts "do not constitute a *conclusion* that the shift in the product mix or the increase in the cut size constituted an unanticipated change."[58]

The panel's unwillingness to defer to the U.S. government's subjective interpretation of ITC decisions paves the way for similar WTO challenges to safeguard determinations on GATT Article XIX grounds. Indeed, several U.S. measures presently in force are vulnerable on precisely this point and are the subject of pending WTO dispute settlement cases filed by the European Union and South Korea.[59]

Definition of "Domestic Industry"

Another important ruling in the *Lamb* case concerns the long-established U.S. practice of expanding the definition of "domestic industry" to include upstream producers of raw materials or inputs. Specifically, the ITC includes upstream industries in its analysis when it finds that there is a "continuous line of production from the raw to the processed product" and a "substantial coincidence of economic interests" between upstream and downstream producers.[60] When the scope of the domestic industry is expanded in this way, imports of one product can be subject to safeguard protection because of poor performance in an upstream industry.

The dispute settlement panel in *Lamb*, however, ruled that this U.S. practice violates WTO rules. The Appellate Body, in turn, upheld the panel's decision. Citing as precedent two GATT cases involving the definition of "domestic industry" under the Tokyo Round Subsidies Code,[61] the *Lamb* panel found that there is no basis in the WTO Safeguards Agreement for the ITC's practice of including producers of raw materials in the same industry as the producers of the end product, since Article 4.1(c) of the Safeguards Agreement makes it clear that an enterprise is a "producer" of only those goods that it actually makes. In its disapproval of the ITC's "continuous line of production" and "substantial coincidence of interests" test, the panel found that this test impermissibly gives unbridled discretion to the ITC to decide how far upstream or downstream to define the relevant industry. Such a practice, the panel warned, "could easily defeat the Safeguard Agreement's purpose of

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reinforcing disciplines in the field of safeguards and enhancing rather than limiting competition."[62]

Unlike the more vague Appellate Body rulings on causation, the decision on defining the scope of the domestic industry makes it absolutely clear that there are no circumstances in which the "continuous line of production" and "substantial coincidence of economic interests" test would be acceptable in defining the domestic industry.[63] Thus, to comply with the *Lamb* ruling, the ITC must remove any aspect of the test from its definition of the producers of a like product.

Exclusion of NAFTA Countries

Under section 201 as modified by implementing legislation for the North American Free Trade Agreement, imports from Canada and Mexico can be excluded from safeguard measures if certain criteria are met.[64] In the *Wheat Gluten* case, though, the Appellate Body ruled that the U.S. decision to exclude Canadian and Mexican imports from the application of the safeguard, after including imports from *all* sources in the determination of serious injury and causation, violated the Safeguards Agreement. Citing well-established precedent in an earlier WTO ruling involving the same issue,[65] the Appellate Body agreed with the panel that Articles 2.1 and 4.2 require "symmetry" and "parallelism" between the scope of the imports in the investigation and the scope of the imports on which the safeguard measure is imposed. After examining how the NAFTA exclusion had been applied to the wheat gluten safeguard, the Appellate Body found a lack of symmetry because the ITC did not determine whether serious injury and causation existed *without* imports from Canada and Mexico.[66]

The old pose that indulging in trade remedy protectionism and claiming leadership of the multilateral trading system are mutually supportive will no longer wash.

The Appellate Body ruling against the NAFTA exclusion was limited to its particular application in that case, because the ITC in that case had failed to establish serious injury and causation independent of NAFTA-origin imports. However, the ruling raises serious questions about the validity of the NAFTA exclusion provision as a whole. The U.S. NAFTA-implementing legislation *mandates* exclusion under certain circumstances, without first requiring that a separate serious injury and causation determination be made by the ITC. In fact, one of the statutory criteria for determining whether the NAFTA exclusion applies—whether the NAFTA goods "contribute importantly" to serious injury[67]—is based on the presumption that such goods have been included in the scope of the serious injury and causation determination. The European Union's pending challenge to U.S. steel wire rod and line pipe safeguards includes a claim, on this ground, that the NAFTA exclusion is on its face inconsistent with the Safeguards Agreement.[68] Moreover, the pending EU challenge raises another fundamental question about the NAFTA exclusion: whether it violates the most-favored nation (MFN) principles of GATT Article I and Article 2.2 of the Safeguards Agreement.[69] This question has never been addressed by the WTO and will require the dispute settlement panel to address the interplay among the Safeguards Agreement, U.S. MFN obligations, and GATT Article XXIV, which provides a limited exception to the MFN principle for preferences accorded under free-trade agreements. A WTO ruling against the statutory NAFTA exclusion on its face could create a messy conflict between the U.S. WTO and NAFTA obligations.

Conclusion

The "administrative protectionism" of the U.S. trade remedy laws has long been defended as a "safety valve" for protectionist pressure that actually serves to strengthen the U.S. commitment to the multilateral trading system. With an increasing number of rulings against current U.S. laws and practices, however, the "safety valve" defense of trade remedy laws cannot be sustained.

The old pose that indulging in trade remedy protectionism and claiming leadership of the multilateral trading system are mutually supportive will no longer wash. U.S. policymakers now face a choice between defending U.S. trade laws in their current form and defending the U.S. commitment to the WTO. While this choice is politically difficult, it must be faced and faced soon. If the United States is going to continue its postwar role of leadership within the world trading system, it will be necessary to rethink laws that are bringing the country into incessant and worsening conflict with its WTO obligations. The United States cannot

maintain its leadership role if it is widely perceived to be flouting WTO rules, and it cannot urge other countries to live up to commitments that it does not honor itself. In light of the enormous national interest in a strong and vibrant international trading order, it is vitally important that policymakers make the right choice—and make it before the damage done is irreparable.

Notes

The author would like to acknowledge the valuable research assistance provided by Irene Chang.

1. Richard Boltuck and Robert E. Litan, eds., *Down in the Dumps: Administration of the Unfair Trade Laws* (Washington: Brookings Institution Press, 1991), p. 13.

2. It is often written that the "United States" (as opposed to the U.S. government) won or lost this or that dispute—a shorthand that carries the assumption that the whole nation is united behind the position taken by the government, and that that position reflects the overall national interest. That assumption is certainly not warranted with respect to the U.S. government positions in WTO disputes regarding the U.S. trade remedy laws.

3. For an analysis of the U.S. interest in a healthy WTO, see Daniel T. Griswold, "WTO Report Card: America's Economic Stake in Open Trade," Cato Institute Trade Briefing Paper no. 8, April 3, 2000. For a response to charges that WTO rules undermine U.S. sovereignty, see William H. Lash III and Daniel T. Griswold, "WTO Report Card II: An Exercise or Surrender of U.S. Sovereignty?" Cato Institute Trade Briefing Paper no. 9, May 4, 2000.

4. For a full discussion of this point, see Brink Lindsey, "The U.S. Antidumping Law: Rhetoric versus Reality," Cato Institute Trade Policy Analysis no. 7, August 16, 1999.

5. For an analysis of the worldwide spread of antidumping laws, see Brink Lindsey and Dan Ikenson, "Coming Home to Roost: Proliferating Antidumping Laws and the Growing Threat to U.S. Exports," Cato Institute Trade Policy Analysis no. 14, July 30, 2001.

6. Report of the Panel on *United States—Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, December 22, 2000, ¶ 6.75. All WTO panel and Appellate Body reports are available at http://www.wto.org.

7. Ibid. ¶ 6.100

8. Ibid., ¶¶ 6.37, 6.39.

9. Although the arm's-length test is not set forth in any U.S. statutory or regulatory provision, it has been established as a uniform practice through Commerce Department and case law precedent. See, for example., U.S. Department of Commerce, Notice of Final Results of Antidumping Duty Administrative Review, *Industrial Phosphoric Acid from Belgium*, October 2, 1996 (finding that Commerce "must exclude" from the calculation of normal value those sales to affiliated parties that "have not been shown to be at arm's-length prices (i.e., the weighted-average sales price . . . was less than 99.5 percent of the weighted-average sales price to unaffiliated parties)" (citing *Usinor Sacilor v. United States*, 872 F. Supp. 1000, 1004 (CIT 1994)).

10. Report by the Appellate Body on *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, July 24, 2001, ¶ 154 n. 113.

11. Ibid., ¶ 148.

12. Ibid., ¶ 157.

13. Panel Report, *Stainless Steel from Korea*, ¶¶ 6.119, 6.122.

14. See § 777A(b) of the Tariff Act of 1930 ("The authority to select averages and statistically valid samples shall rest exclusively with the administering authority"). Furthermore, the U.S. antidumping regulations provide: "When applying the average-to-average method, the Secretary normally will calculate weighted averages for the entire period of investigation or review, as the case may be. However, when normal values, export prices, or constructed export prices differ significantly over the course of the period of investigation or review, the Secretary may calculate weighted averages for such shorter period as the Secretary deems appropriate."

15. See 19 C.F.R. §351.414(d)(3).

16. Lindsey, p. 8.

17. Panel Report, *Hot-Rolled Steel from Japan*, ¶ 7.73.

18. Ibid., ¶ 7.90; and Appellate Body Report, *Hot-Rolled Steel from Japan*, ¶ 130.

19. Report of the Panel on *United States—Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/R, January 29, 1999. The panel ruled in favor of the U.S. government on Korea's claims that (1) Article 11.2 of the Antidumping Agreement requires revocation as soon as a foreign exporter is found to have ceased dumping; (2) Article 11.2

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requires the United States to initiate an administrative review, based solely on the absence of dumping for three and one-half years; (3) the U.S. 0.5 percent de minimis standard for the postinvestigation phase of an antidumping proceeding was precluded by the Antidumping Agreement's de minimis rule for the investigation phase; (4) Korea could use rules governing post-WTO administrative reviews to challenge pre-WTO antidumping determinations.

20. The test was set forth in the former 19 C.F.R. 353.25(a)(2)(ii).

21. See Panel Report, *DRAMs from Korea*, ¶ 6.51.

22. See ibid., ¶ 6.54 n. 499.

23. 19 C.F.R. § 351.222(b)(1)(B). When the U.S. government applied this new legal standard to a reconsideration of Korea's revocation request, it again decided to continue the *DRAMs* order by concluding that it was "necessary" to offset dumping. Korea challenged this second determination, accusing the U.S. government of circumventing the panel's recommendations. The parties settled the dispute late last year, heading off a WTO panel's ruling on the compliance issue.

24. 19 U.S.C § 1677(7)(C)(iv).

25. Appellate Body Report, *Hot-Rolled Steel from Japan*, ¶ 211.

26. Ibid., ¶ 214.

27. Report of the Panel on *United States—Anti-Dumping Act of 1916* (complaint by the European Communities), March 31, 2000, WT/DS136/R; and Report of the Panel on *United States—Anti-Dumping Act of 1916* (complaint by Japan), WT/DS136/R, May 29, 2000.

28. Report by the Appellate Body on *United States—Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, August 28, 2000, ¶ 137.

29. Award of the Arbitrator, *United States—Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, February 28, 2001.

30. Report by the Appellate Body on *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141 /AB/R, March 1, 2001, ¶ 58. See also Report by the Panel on *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, October 30, 2000, ¶ 6.117.

31. Indeed, respondents in U.S. antidumping cases have begun to cite the *EC—Bed Linens* decision in protest of Commerce's own zeroing practice. Commerce thus far has refused to acknowledge that the WTO ruling has any relevance to its administration of U.S. law.

32. Report by the Panel on *Thailand—Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, September 28, 2000, ¶¶ 7.229, 7.231; Panel Report, *EC—Bed Linen from India*, ¶ 6.162; Report by the Panel on *Guatemala—Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, October 24, 2000, ¶ 8.283; and Report by the Panel on *Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup from the United States*, WT/DS132/R, January 28, 2000, ¶ 7.128.

33. Panel Report, *Thailand—Angles, Shapes and Sections*, ¶¶ 7.229, 7.231.

34. Report by the Appellate Body on *Thailand—Antidumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, March 12, 2001, ¶ 128.

35. Third Party Submission by the United States on *Thailand—Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122, February 21, 2000, ¶¶ 6–7.

36. Panel Report, *Mexico—High Fructose Corn Syrup*, ¶ 7.121.

37. Report by the Panel on *United States—Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/R, January 6, 1997, ¶¶ 5.35, 5.42.

38. Ibid.

39. Panel Report, *Guatemala—Cement*, ¶ 8.36.

40. Ibid., ¶ 8.52.

41. Ibid., ¶¶ 5.138, 5.140.

42. Information on initiations of CVD investigations was obtained from the Commerce Department's Web site, http://ia.ita.doc.gov/stats/cv8099.htm.

43. Report by the Appellate Body on *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, May 10, 2000, ¶ 58 (emphasis added).

44. Ibid., ¶ 62 (emphasis in original).

45. *Delverde, SrL v. United States*, 202 F.3d 1360 (Fed. Cir.), February 2, 2000, rehearing denied, June 20, 2000.

46. *Certain Pasta from Italy*, Final Results of Commerce Department Redetermination Pursuant to Court Remand in *Delverde, SrL v. United States* (December 4, 2000); and *Stainless Steel Plate in Coils from Italy*, Final Results of Commerce Department Redetermination Pursuant to Court Remand in *Acciai Speciali Terni S.p.A v. United States* (December 19, 2000).

47. The new methodology is also being challenged in several cases pending before the U.S. Court of International Trade. The author is involved in some of this litigation.

48. Report of the Panel on *United States—Measures Treating Export Restraints as Subsidies*, WT/DS194 /R, June 29, 2001.

49. Ibid., ¶ 8.75.

50. In its preliminary determination in the latest CVD investigation of softwood lumber from Canada, Commerce did not address whether Canadian restrictions on log exports constitute a countervailable subsidy. That omission is likely a response to the WTO ruling. It remains to be seen, however, if the issue will surface later in the investigation.

51. 19 U.S.C. §§ 2251–53.

52. 19 U.S.C. § 2253(a)(2) (setting forth list of factors that must be considered).

53. 19 U.S.C. § 2252(b)(1)(B).

54. Report by the Appellate Body on *United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166 /AB/R, December 22, 2000, ¶ 91 (emphasis in original).

55. Report by the Appellate Body on *United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, May 1, 2001, ¶ 185.

56. Ibid., ¶ 168, quoting Appellate Body Report, *Wheat Gluten*, ¶ 69.

57. Report by the Panel on *United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS178/R, December 21, 2000, ¶¶ 7.29, 7.31.

58. Ibid., ¶ 7.42.

59. See Request for Establishment of a Panel by Korea, *United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/4, September 15, 2000; and Request for Consultations by the European Communities, *United States—Definitive Safeguard Measures on Imports of Steel Wire Rod and Circular Welded Quality Line Pipe*, WT/DS214/1, December 7, 2000.

60. *Lamb Meat*, Inv. no. TA-201-68, USITC Pub. 3176, April 1999. The same test had been applied by the ITC in a number of previous safeguards investigations. See *Fresh Tomatoes and Bell Peppers*, Inv. no. TA-201-66, USITC Pub. 2985, August 1996; *Apple Juice*, Inv. no. TA-201-59, USITC Pub. 1861, June 1986; *Certain Canned Tuna Fish*, Inv. no. TA-201-53, Pub. 1558, August 1984; *Mushrooms*, Inv. no. TA-201-3, USITC Pub. 1089, August 1980; and *Honey*, Inv. no. TA-201-14, USITC Pub. 781, June 1976. While the WTO complaint against the lamb safeguards measure, including the "continuous line of production" and "substantial coincidence of interests" test, was still pending, the ITC used the test in another case, *Crabmeat from Swimming Crabs*, Inv. no. TA-201-71, USITC Pub. 3349, August 2000.

61. Report by the Panel on *United States—Definition of Industry Concerning Wine and Grape Products*, adopted by the Committee on Subsidies and Countervailing Measures, April 28, 1992, SCM/71, BISD 39S/436; and Report by the Panel on *Canada—Imposition of Countervailing Duties on Imports of Manufacturing Beef from the EEC*, October 13, 1987, not adopted, SCM/85.

62. Panel Report, *Lamb Meat*, ¶ 7.77.

63. Ibid., ¶ 7.109 (reviewing past GATT cases rejecting the same test and concluding that "separability of operations and data between different stages of production, rather than vertical integration, common ownership, continuous lines of production, economic interdependence or substantial coincidence in economic interests are relevant for determining the scope of the industry in consistency with SG Article 4.1(c)").

64. Article 802 of NAFTA provides in relevant part:

> Any Party taking an emergency action under Article XIX or any such agreement shall exclude imports of a good from each other Party from the action unless:
> (a) imports from a Party, considered individually, account for a substantial share of total imports
> (b); and imports from a Party, considered individually, or in exceptional circumstances imports from Parties considered collectively, contribute importantly to the serious injury, or threat thereof, caused by imports.

See also NAFTA Implementation Act, Public. Law no. 103-182, sec. 312(b), 19 U.S.C. § 3372(b) (prohibiting U.S. president from imposing safeguards against NAFTA-origin products unless conditions specified in Article 802 of NAFTA are satisfied).

65. Report by the Appellate Body on *Argentina—Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, January 12, 2000.

66. Appellate Body Report, *Wheat Gluten*, ¶ 98.

67. NAFTA Implementation Act, § 312(a)(2) at 19 U.S.C. § 3372(a)(2).

68. See Request for Consultations, *EC Steel Wire Rod.* In a separate WTO complaint, Korea is challenging the NAFTA exclusion as applied. Request for Establishment of a Panel, *Korean Circular Welded Line Pipe.*

69. The most-favored nation principle is embodied in GATT Article I:1, which provides that "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties." Moreover, Article 2.2 of the Safeguards Agreement provides that safeguard measures shall be applied to "a product being imported irrespective of its source."

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