CHAPTER IV

RELIEF FROM FAIRLY PRICED FOREIGN COMPETITION

This chapter examines regulatory responses that can be used to limit fairly priced foreign imports. We begin to ask in this chapter a question that reappears constantly throughout the text: what is "unfair" foreign competition? Why should the U.S. Government respond more favorably to limitations on "unfair" import competition than to an industry that seeks protection when it is badly hurt by imports, regardless of their cause?

The relief discussed in this chapter hinges primarily upon harm to the domestic industry, rather than any specific foreign "unfair" practice. The concept of and plausible standard for injury to an industry are difficult to grasp. Moreover, since the import-limiting approach could be so easily misused, there are now equally complicated multilateral rules to define standards for such relief–and the choice of specific relief itself becomes a serious political problem.

This chapter considers six different U.S. statutory responses to fairly priced foreign competition:

1. the escape clause, originally contained in § 201 of the Trade Act of 1974,[1] once known as the "peril point" provision, and treated by the GATT under article XIX (the "safeguard" provision) and the Agreement on Safeguards;
2. adjustment assistance to help firms, workers, and communities harmed by foreign imports, pursuant to 19 U.S.C. §§ 2271 *et seq.*;
3. Section 22 of the Agricultural Adjustment Act, 7 U.S.C. § 624, which is designed to deal with problems caused by agricultural imports;
4. Section 406 of the Trade Act of 1974, 19 U.S.C. § 2436, which specifically addresses "market disruption" created by imports from nonmarket economies;
5. Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862, which is designed to limit imports that may impair U.S. national security; and,
6. import restraints on textiles, which used to be governed by the Multifiber Arrangement (MFA)– since replaced by the Uruguay Round Agreement on Textiles and Clothing (ATC)–and the bilateral agreements negotiated by the United States pursuant to MFA/ATC , which phased out and finally terminated the global quota system on 1 January 2005.

1. While escape clause actions are still referred to as "§ 201 actions," the pertinent statutory provisions were subject to significant amendment and rearrangement in 1988. Pub. L. No. 100-418, Title I, § 1401(a), 102 Stat. 1225 (1988) (amending and recodifying §§ 201-202, 19 U.S.C.§§ 2251-2252 (1982), as 19 U.S.C. §§ 2252-2253, and enacting new §§ 2251, 2254). Subsequent legislation in 1993, 1994, 1996 and 2001 further amended the provisions in various ways without disturbing the 1988 recodification. *See* Pub. L. No. 103-182, Title III, §§ 315, 317(b), 107 Stat. 2107, 2108 (1993); Pub. L. No. 103- 465, Title III, §§ 301(a)-(c), (d)(1), (2), (4), (e), (f), 302(b)(4)(B), 303(1)-(6), 108 Stat. 4932-4934, 4936, 4937 (1994); Pub. L. No. 104-295, § 20(c)(5), 110 Stat. 3528 (1996); Pub. L. No. 107-43, Title II, §§ 222, 404(a), 115 Stat. 250, 251 (2001).

A. THE FRAMEWORK FOR RELIEF FROM FAIRLY PRICED IMPORTS

1. The Escape Clause: § 201 of the Trade Act of 1974

The foreign trade laws of the United States should be approached in terms of the elements that must be established before a petitioner can prevail under a particular trade action. In case of the escape clause, §§ 201-204, 19 U.S.C. §§ 2251-2254–now known as an action to facilitate positive adjustment to import competition–four conditions must be satisfied before the International Trade Commission (ITC) can recommend relief on the grounds that imports are causing injury to a U.S. industry:

1. *Imports:* an article must be imported in increased quantities, either in actual terms or relative to domestic production (in making this calculation the ITC may exclude "captive imports" of overseas affiliates of U.S. companies).
2. *Industry:* the petition must denominate an industry that produces an article domestically that is like or directly competitive with the imported article;
3. *Injury:* the industry that is the subject of the investigation must be experiencing serious injury or the threat thereof; and
4. *Causation:* the increased imports must be a substantial cause of serious injury to the U.S. industry; for this purpose, "substantial cause" means a cause that is important and not less than any other cause.

If the International Trade Commission decides that relief should be provided to an industry, the following import restraints are available to the president: (1) an increase in, or the imposition of, duties; (2) tariff-rate quotas; (3) quantitative restrictions; (4) trade adjustment assistance under 19 U.S.C. §§ 2271 *et seq.*; or (5) any combination of such actions.[2] The term of import relief, including any combination of the foregoing, may not exceed four years, but may be extended up to a total of eight years.[3]

Under the Trade Act, the president has the discretion to refuse to accept the recommendation of the International Trade Commission to provide import relief if he determines that it would not be in the national economic interest. Under the revisions to § 201 in 1984–after the Supreme Court's 1983 *Chadha* decision[4]–both houses of Congress, by an affirmative vote of a majority of those present and voting, are now permitted to pass a joint resolution within 90 days of the president's refusal to require the president to implement the relief recommended by the Commission. This joint resolution is subject to a presidential veto, but Congress can override such a veto if both houses can muster a two-thirds majority vote.

Relief may be granted by tariff increases to a rate up to 50 percent *ad valorem* above the rate existing at the time of presidential action. Quantitative restrictions must be limited to the quantity or value of the article imported during the "most recent period which the President determines is representative of imports of such article."

The impact of the 1974 Trade Act on the "escape clause" cannot fully be appreciated without a look back at the Trade Expansion Act of 1962. That act provided that to meet

---

2. Additional forms of relief are authorized by 19 U.S.C. § 2252(e)(4).

3. *Id*. §§ 2252(e)(3), 2253(e).

4. *INS v. Chadha*, 462 U.S. 919 (1983) (declaring legislative veto unconstitutional as not in compliance with Presentment Clause of Article II).

the causation requirement, it had to be determined that increased imports were due "in major part" to trade agreement concessions, and were the "major factor" in causing or threatening serious injury. Three basic changes in the escape clause were effected by the 1974 Trade Act. First the linkage of prior tariff concessions to the increased imports was cut. Second, the increased imports formerly had to be the "major factor," which was often interpreted as the cause greater than all the others combined. As noted above, "substantial" cause is now the Trade Act's criterion–which means a cause that is important and not less than any other cause. And, finally, the choice of remedies was broadened under the Trade Act. Formerly, the president had only tariff remedies under the escape clause. The Trade Act gives flexibility to the president by permitting him to use tariffs, tariff quotas, or orderly marketing agreements as remedies for the distress of a domestic industry. (The impact of the WTO implementing legislation on this statutory scheme will be examined in §C, *infra*.)

a. Objectives of § 201 Enforcement

The enforcement of § 201 has distinct juridical, political, and economic objectives. From a juridical point of view, it is important that U.S. citizens perceive that § 201 protects their legal "rights." The "right" at stake is the expectation of protection from foreign competition when serious injury is being sustained by a U.S. industry. If the prior sentence sounds like it is describing an anticompetitive statute, the student has obtained the correct impression. Section 201 is the most protectionist of the U.S. trade laws, because it is not predicated upon the existence of a specific unfair foreign trade practice. It has no domestic analogue, as U.S. enterprises folding under the pressure of *domestic* U.S. competition simply go out of business, and cannot petition the government for any relief outside of the protection offered by the bankruptcy laws.[5]

Section 201, like the other U.S. foreign trade laws, has an independent political significance. Its enforcement can vitiate protectionist sentiments that may not serve the interests of the overall polity. Section 201 can serve as a safety valve in the formulation of trade policy in a democratic society by relieving pressures that might result in even more extreme solutions from Congress. If § 201 were not present Congress would be much more active in formulating U.S. tariffs and quotas on a product-by-product basis in response to specific pressures. Section 201 permits the executive branch to set trade policy when a U.S. industry is seriously injured; Congress has made this delegation of authority in recognition of the greater resources and expertise available in the executive branch for this type of decision-making.

Perhaps more importantly, § 201 can be of major economic significance. With the United States continuing to run serious trade deficits, less competitive U.S. industries may look to § 201 for protection from foreign competition. In this context, it may be appropriate that the president be the final authority in § 201 cases, since the decisions made have to take into account the national interest as well as the particular interest of each petitioning industry. Indeed, in a 1984 speech before the National Press Club, ITC Chair Alfred E. Eckes revealed a certain defensiveness about enforcement of § 201, contending that § 201 is merely a temporary relief and adjustment mechanism, and *not*

---

5. One obvious exception to this situation, of course, is the many forms of financial assistance offered to distress U.S. depository institutions under federal banking law. *See, e.g.* 12 U.S.C. § 1823 (c) (providing for "open bank" assistance by Federal Deposit Insurance Corporation). For discussion of "open bank" assistance, see 3 Michael P. Malloy, Banking Law and Regulation §113.4.1 (1994 & Cum. Supp.).

a form of permanent industrial policy designed to save U.S. industrial "dinosaurs."

The reality is that each time the president decides to impose import limitations pursuant to § 201, a political decision is being made to reverse the economic effects of comparative advantage discussed in Chapter 1.[6] In fact, the executive branch has been reluctant to provide escape clause relief, in order to avoid provoking U.S. trading partners from responding in kind. Furthermore, legal constraints on the availability of such relief under the Escape Clause Code that emerged from the Uruguay Round negotiations make such relief even less likely.[7] It should also be noted that NAFTA significantly limits the availability of escape clause relief in cases between NAFTA members.[8]

QUESTIONS

1. Which is economically preferable–adjustment assistance to an injured industry, or import restraints? Which is preferable from the point of view of domestic politics?

2. How might your perception of the relative value of adjustment assistance and import quotas differ if you represented a craft union? An industrial union? Management? A business trade association?

3. Why does the escape clause procedure leave the president so much flexibility in the choice of remedy?

4. Why do you think an inordinate number of escape clause petitions have traditionally been filed around February of presidential election years?

b. The Escape Clause in Action: The Automobile Example

The framework of international trade determines many important economic issues in our lives, such as the food we eat, the clothes we wear, and the automobiles we drive (and the prices we pay for them). This subsection discusses a classic ITC escape clause case, the 1980 automobile decision,[1] an interesting precursor to the steel safeguard action that is the focus of the next subsection.

The automobile case highlights the importance of understanding the economics of the product under investigation. Since the early 1970s many questions have been raised concerning the long-term prospects of the automobile industry.[2] Three pressing structural problems were compounded by economic difficulties. From 1950 to 1980 world gasoline consumption increased from 1.29 to 5.32 billion barrels per annum–against a backdrop of a finite and declining world supply of petroleum. As a result gasoline prices were being ratcheted upwards in a seemingly endless spiral. Simultaneously, the absorptive capacity of the earth's atmosphere was stable or, perhaps, declining. Also troubling were the implications of automobiles and ever-growing traffic for the world's urban environments, with worldwide automobile fatalities running at more than 250,000 per year in the late 1970s. Overall, the economics of the domestic automobile industry have continued to worsen over the past twenty years.

---

6. This presumes that, if dumping or subsidies were involved, the affected U.S. industries would seek a "level playing field" under the antidumping or countervailing duty laws, to be discussed *infra* in Chapters V and VI, respectively.

7. The Escape Clause Code is discussed in § C, *infra*, at ▬.

8. For discussion of NAFTA in this regard, see § D, *infra*, at ▬.

1. *Report to the President on Certain Motor Vehicles and Certain Chassis and Bodies Therefor*, United States International Trade Commission Investigation No. TA-201-44 (Dec. 3, 1980).

2. The information in this paragraph is drawn from D. Roos & A. Altshuler, The Future of the Automobile (1984).

A complicating factor was the severe energy shock of the 1970s, swiftly followed by the fall of the Shah of Iran in the spring of 1979. The fall of the Shah, and the Islamic revolution in Iran, triggered a sharp increase in the price of oil and long lines at U.S. gasoline stations. The "scarcity" mentality affecting consumers seeking fuel-efficient vehicles led to a consumer rush for small automobiles in 1979, a demand that Japan was happy to satisfy.

Compounding Detroit's difficulties in 1980 was the onset of a prolonged worldwide recession that sharply reduced the ability of U.S. consumers to buy *any* cars, not just the traditional U.S. large car models. "Engine" Charlie Wilson, the President of General Motors, had said in 1952 that what was good for General Motors was good for the U.S.A. One might doubt the axiomatic status of this utterance, but it is true that a depression in Detroit sends major shock waves through the United States, the country with the highest degree of motorization. In 1979 9.1 percent of the U.S. work force was employed in motor-vehicle-related occupations: 1.2 percent of in manufacturing vehicles, 2.8 percent in selling and servicing them, 1.0 percent in building and maintaining the highway network, and 4.1 percent in hauling freight or passengers by means of motor vehicles.

In 1972 Henry Ford had said: "Minicars, mini-profits." In the eyes of many, Detroit was paying the price in 1979 for its neglect of the small car market. The mistakes of the managers of the manufacturers, however, were being paid for by their workers as well, as by the spring of 1979 more than 200,000 unemployed automobile workers created a social, economic and political problem that could not be ignored. The Ford Motor company suggested in its import relief petition that over 40 percent of all U.S. automobile workers were laid off or furloughed.

Against the background the Ford Motor Company and the United Automobile Workers (UAW) filed petitions with the ITC under § 201 of the Trade Act of 1974 for import relief. Interestingly, the petitions sought different forms of relief. The UAW sought five years of import protection through a 20 percent *ad valorem* tariff; Ford requested a quota of 1.7 million automobiles for the same length of time. The importers and foreign manufacturers contended that the requested remedies would amount to an onerous tax on consumers and severely limit freedom of choice in selecting automobiles.

The ITC had before it two unassailable facts: the U.S. automobile industry was in a shambles, and Japanese automobile industry had dramatically increased. The issue it had to consider was whether Detroit's distress was due to imports or to other factors. The ITC decision followed 46 hours of public testimony from 27 different groups over a one-week period. Its conclusions surprised many industry observers and posed thorny issues for the newly installed Reagan administration in 1981. The ITC determined that automobile trucks, on-the-highway passenger automobiles, and bodies (including cabs) and chassis for automobile trucks were *not* being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industries producing articles "like or directly competitive with" the imported articles.

NOTES AND QUESTIONS

1. How might the UAW's interest in filing the § 201 petition differ from that of Ford? Why didn't General Motors or Chrysler file a petition for relief?

2. What are the factors relevant to defining the market in this case? Consumer perceptions? Cross-elasticity of demand? What is the relevance of the market definition

to the issue of causation? The Senate Finance Committee Report on the Trade Act provided guidance as to what the phrase "like or directly competitive with" means:

> The words "like" and "directly competitive," as used previously and in this bill, are not to be regarded as synonymous or explanatory of each other, but rather to distinguish between "like" articles and articles which, although not "like" are nevertheless "directly competitive." In such context, "like" articles are those which are substantially identical in inherent or intrinsic characteristics (i.e., materials from which made, appearance, quality, texture, etc.) and "directly competitive" articles are those which, although not substantially identical in their inherent or intrinsic characteristics, are substantially equivalent for commercial purposes, that is, are adapted to the same uses and are essentially interchangeable therefor."

S. Rep. No. 98-1298, 93d Cong. 2d Sess. 122 (1974).

3. Why do you suppose the petitioners were seeking to have all the vehicles "viewed as a single industry"? Why would respondents seek to have such vehicles treated as separate markets? Why would respondents seek to have the investigation limited to injury to the large-car segment of the domestic automobile industry? (Note that in most cases the party seeking relief from imports will seek to define the market as narrowly as possible, in order to emphasize the harm.)

4. The UAW and Ford wanted Canadian auto imports to be excluded from the case. Why would they take that position? Does the ITC have the power to discriminate in favor of Canadian imports? Does the president? Former § 203(k)(1) of the Trade Act of 1974, which dealt with direct and indirect importation and geographic concentration of domestic production, was omitted by the 1988 amendments to the act. Pub. L. No. 100-418, § 1401(a), 102 Stat. 1234 (Aug. 23, 1988).

5. How might the *threat* of serious injury be measured (as distinguished from serious injury itself)? In considering the situation regarding imported automobiles, how relevant should be:

> (a) substantial overcapacity in Japan;
> (b) the new "world cars" to be produced by U.S. manufacturers;
> (c) Japanese investment in U.S. automobile facilities?

6. What types of expertise and evidence would you want in order to prove or disprove injury? How confident are you of such evidence?

7. The ITC waited until *after* the 1980 presidential election to issue its opinion. Do you think that that was wise? Did the ITC decision appear likely to defuse the issue politically? Would such a delay be likely to help a free-trade president deflect political pressure?

8. The political fallout from the automobile decision was substantial. Presidential candidate Ronald Reagan described himself as a "free trader," but during the course of the 1980 presidential campaign he had promised to take steps to assist the U.S. automobile industry.[3] The failure of the ITC to provide import relief for the industry thus placed the new president in the difficult position of having to live up to his campaign rhetoric despite the negative ITC decision. What resulted was a "voluntary restraint

---

3. *See* Cannon & Lescaze, *Auto-Import Compromise Bore Meese's Subtle Mark*, Wash. Post, May 26, 1980, at A2 (reporting on candidate's remarks).

agreement" (VRA) negotiated with the Japanese Government in 1981, under which *Japan* agreed to limit its automobile imports to the United States. Had the president not induced Japan to accept the VRA, it is possible that Congress might have passed legislation imposing stricter import quotas or requiring specific levels of "domestic content" in automobiles sold into the U.S. market.[4]

9. Is a "voluntary" import quota like the VRA legal under the GATT? Consider articles I, XI, and XIX. Consider also article 11 of the Agreement on Safeguards, a product of the Uruguay Round.[5] What effect does this provision have on devices like the VRA?

10. Would a domestic content bill designed to force foreign automobile producers to invest in the United States be legal under the GATT? Consider articles I, III, XI, XIII, and XXVIII.

11. As president, or as an ITC member, what would you have done in the automobile context if it had appeared that a steel import restraint like that of *Consumers Union of U.S. v. Kissinger*, *supra* at ▬, were a major cause of the automobile industry's problems?

12. Obviously, devices like the VRA represent an end-run around the strictures of § 201. How likely is it that a challenge to such a device in the courts would be successful? Consider the fate of the challenge to the "voluntary import restraints" negotiated between the U.S. Government and foreign steel producers in *Consumers Union*. Could a VRA be successfully challenged as an unratified "treaty," in light of *Made in the USA Foundation v. United States*, *supra* at ▬?

13. What about an attack under the antitrust laws? Although the formal logic of *Consumers Union* is certainly applicable to both this question and the preceding one, are you convinced? Consider also *United States v. Watchmakers of Switzerland Information Center*, 1963 Tr. Cas. ¶ 77,600 at 77,456 ("If, of course, defendants' activities had been required by Swiss law, this court could indeed do nothing"); *Continental Ore v. Union Carbide and Carbon*, 370 U.S. 690 (1962); *United States v. Aluminum Corp. of America*, 148 F.2d 416 (2d Cir. 1945); *Timken Roller Bearing v. United States*, 341 U.S. 593 (1951). Does "administrative guidance" under Japanese law amount to an act of state or sovereign compulsion, beyond judicial redress?[6]

14. Assume that the ITC undertakes a § 201 investigation in response to an industry petition, examining whether widgets are being imported into the United States in such increased quantities that they are threatening to cause the closing of the three smallest of the ten U.S. producers of widgets, and possibly all seven of the U.S. producers of gadgets, which are usually marketed as an upscale (and more expensive) alternative to widgets. After an investigation, the ITC recommends to the president an increase in the duty on imported widgets from 5 percent to 35 percent. The president has decided to increase the duty to 50 percent. The Widget Importers Association (WIA) believes that the ITC's reasoning is flawed, and that the president was unreasonable in deciding to increase the duty to 50 percent. How likely is it that the WIA would be able to challenge the decision in the courts? In considering this problem, review the following case.

---

4. *See, e.g.*, H.R. 5133 (Sept. 21, 1982) (proposing to require foreign producers selling over 900,000 units in the U.S. market to have a minimum domestic content of 90 percent).

5. The Agreement on Safeguards will be discussed in § C, *infra* at ▬.

6. This question will be easier to handle after a review of the antitrust chapter. *See* Chapter XII, *infra* at ▬.

MAPLE LEAF FISH CO. v. UNITED STATES

762 F.2d 86 (Fed. Cir. 1985)

DAVIS, CIRCUIT JUDGE

This "escape clause" case brings to us the narrow question whether frozen mushrooms were properly included in determinations by the International Trade Commission (ITC) and the President in imposing additional duties on "mushrooms, prepared and preserved" provided for in item 144.20 of the Tariff Schedules of the United States (TSUS). The Court of International Trade (Carman, *J.*) ruled that they were so included. . . . We agree and affirm.

I.

Sections 2251-53 of Title 19 of the U.S.Code (Sections 201-03 of Title II of the Trade Act of 1974) provide for import relief to a domestic industry injured or threatened by import competition due to increased quantities of competing imports. This is frequently referred to as the "escape clause." . . . The statute provides that in such a case a petition may be filed with the ITC (19 U.S.C. § 2251(a)(1)); that agency must then investigate, with public hearings, whether increased imports injure or threaten to injure a domestic injury producing an article like or directly competitive with the imported article. 19 U.S.C. § 2251(b)(1), (c). The Act lists a number of specific factors to be considered (19 U.S.C. § 2251(b)(2)) but "[t]hose factors are not intended to be exclusive. . . . [T]he Commission is directed to take into account all economic factors it considers relevant." S.Rep. 1298, 93d Cong. 2d Sess. 121, [1974] U.S.Code Cong. & Ad.News 7265.

After it has finished its investigation the ITC makes a report to the President. 19 U.S.C. § 2251(d). If the Commission finds serious injury or threat thereof it must recommend appropriate import relief and whether adjustment assistance is appropriate.

On receipt of an affirmative report from the ITC the President shall provide import relief "unless he determines that provision of such relief is not in the national economic interest of the United States." 19 U.S.C. § 2252. The President is empowered to grant a number of types of relief, including increased duties, trade restrictions, etc., "or take any combination of such actions." 19 U.S.C. § 2253. Nine factors are specified for the President to consider "in addition to such other considerations as he may deem relevant." 19 U.S.C. § 2252(c).[1]

II.

In March 1980, the American Mushroom Institute (a trade association representing domestic canners and growers of mushrooms) filed a petition with the ITC under the "escape clause" legislation. . . . The ITC commenced and pursued an investigation to determine whether mushrooms classifiable under item 144.20 of TSUS as "[m]ushrooms . . . [o]therwise prepared or preserved" were being imported in such increased quantities as substantially to cause serious injury or the threat thereof to a like or competing domestic industry.

The ITC's report to the President began with the statement: "On the basis of the information developed in the course of the investigation, the Commission has determined ... that mushrooms, prepared or preserved, provided for in item 144.20 of the Tariff Schedules of the United States (TSUS), are being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat

---

1. There are a number of other statutory limitations, authorizations, and requirements, but for this case the sketch we have given is sufficient.

thereof to the domestic industry producing an article like or directly competitive with the imported article." The report then recommended import relief taking the form of quantitative restrictions, or import quotas, for a 3-year period. The President accepted the Commission's determinations but decided to give import relief in the form of increased duties, and so proclaimed in October 1980. As a result, supplemental or cumulative duties were imposed on all mushrooms covered by item 144.20 of the TSUS.

Appellant Maple Leaf Fish Co. (Maple Leaf), a Canadian importer of frozen battered and breaded mushrooms, imported the mushrooms involved in this action and protested Customs' assessment of the increased duties. The protest was denied. Maple Leaf then filed this suit in the CIT in October 1981, challenging the assessment of the supplemental duties so far as such frozen and battered mushrooms are concerned. Appellant's position is, first, that such mushrooms were not included in the ITC's determinations and report and accordingly were beyond the scope of the President's power to award import relief as to them, and, second, that if those products were intended by the ITC to be covered by its report the investigation, evidence, and findings did not permit their inclusion. . . .[2]

III.

The initial inquiry is whether the ITC report covered frozen mushrooms (like appellant's) or whether it confined itself to canned mushrooms. Judge Carman read the report as including frozen mushrooms, and so do we. . . .

IV.

Maple Leaf then says that, if this is so, the Commission–and therefore the President–violated statutory requirements because there is no adequate finding of injury to the frozen mushroom industry (as distinct from the canned mushroom industry). Appellant makes the argument as if the ITC had gone wildly beyond its own investigation to include frozen mushrooms, without the slightest basis in the record before it. The fact is, however, that a part of the report entitled "Information Obtained in the Investigation" contains a section headed "Dried, frozen and fresh mushrooms," giving in detail the statistics on imports of those particular varieties, including imports from Canada. We therefore have before us an ITC report which followed an investigation that actually included frozen mushrooms, and a report which . . . covered frozen mushrooms in its final determinations.

The question then is to what extent the courts can review the challenged actions of the Commission and the President in such a case. The critical element is that the area of the "escape clause" legislation undoubtedly involves the President and his close relationship to foreign affairs, our nation's connections with other countries, and the external ramifications of international trade. More than that, Congress has vested the President with very broad discretion and choice as to what he decides to do affirmatively, or even whether he should do anything. . . . Similarly, the ITC has great leeway to consider various factors–including all economic factors it deems relevant–bearing on its final determination "whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article." 19 U.S.C. § 2251(b)(1)-(6). . . .

---

2. The "escape clause" statute does not specifically provide for judicial proceedings or for review of the ITC proceedings but the CIT earlier held, rejecting a jurisdictional challenge by the Government, that Maple Leaf could sue under 28 U.S.C. § 1581(a). *Maple Leaf Fish Co. v. United States*, 566 F.Supp. 899 (CIT 1983). In this court there is no challenge to the CIT's jurisdiction.

In international trade controversies of this highly discretionary kind–involving the President and foreign affairs–this court and its predecessors have often reiterated the very limited role of reviewing courts. *See, e.g., American Association of Exporters and Importers v. United States,* 751 F.2d 1239, 1248-49 (Fed.Cir.1985); *Florsheim Shoe Co. v. United States,* 744 F.2d 787, 793, 795-97 (Fed.Cir.1984). For a court to interpose, there has to be a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority. On the other hand, "[t]he President's findings of fact and the motivations for his action are not subject to review." *Florsheim, supra,* 744 F.2d at 795. The same is true, we think, of ITC "escape clause" action which is preparatory to, and designed to aid, presidential action. The same factors which have led, in this kind of discretionary case, to strict confinement of the court's intervention vis-a-vis the President are equally applicable to the ITC in its "escape clause" functioning. *See Sneaker Circus, Inc. v. Carter,* 566 F.2d 396, 401-02 (2d Cir.1977).

Appellant's submission to us runs counter to those principles. There is at this point no substantial showing of a misreading of the "escape clause" statute, a trenching beyond delegated power, or a significant violation of appellant's procedural rights. Instead, we are told–despite our holding that the ITC and the President did include frozen mushrooms in their final determinations . . . and despite the fact that this ITC investigation specifically included that kind of mushroom–that nevertheless the Commission could not properly find that the domestic frozen mushroom industry was injured or threatened by the importation of foreign frozen mushrooms. This is said to be so because the commissioners, in other parts of their discussion, considered canning of mushrooms as the domestic industry producing a "like" article, and did not specifically discuss injury to frozen mushrooms. It is plain that this contention asks us, contrary to our precedents, to review the ITC's ultimate factual determination that there *was* injury to domestic frozen mushroom producers. We cannot, however, turn this case into the ordinary administrative review in other areas in which the court looks to see if substantial evidence supports the agency's findings. Nor should we decide whether the Commission had to be more specific as to a class of mushroom importers (bringing in frozen mushrooms) who were responsible for less than 3 percent of all mushroom imports into this country. It is enough for this case that, as we have held, the ITC did in fact make the ultimate finding and determination that there was such injury (or threat). *Cf. Florsheim, supra,* 744 F.2d at 796-797 (sufficient that Executive Order cited a certain statute despite contention that the President was actually acting under another provision with a different underlying theory).

COWEN, SENIOR CIRCUIT JUDGE, specially concurring.

While I concur in the court's opinion, I write here to emphasize my agreement with one aspect of the trial judge's opinion which the majority may have implicitly adopted. The Government has argued that in determining whether the International Trade Commission (ITC) misconstrued section 201 or acted outside the scope of its delegated authority, courts need only consider whether the ITC made a *determination* that increased imports of particular items injure or threaten to injure a domestic industry that produces like or directly competitive products. The logical consequence of this argument is that a procedurally faultless affirmative injury determination is totally immune from judicial review, regardless of whether, or to what extent, any reasoning supports this finding.

In my opinion, the Court of International Trade properly rejected this argument. Although the ITC's findings of fact are not subject to the same substantial evidence

standard that prevails in judicial review of most administrative action, the agency is required by section 201(d) to report its determination to the President, accompanied by "the basis therefor." Before the ITC can be deemed to have complied with this statute, it is therefore necessary, as Judge Carman held, that its Report "fairly apprise the President, interested parties, and the public of the reasoning underlying its recommendation." 596 F.Supp. at 1081.

In an analogous case, the Supreme Court recognized that the findings of the ITC's predecessor, the Tariff Commission, were not subject to the same standard of review as might ordinarily apply in administrative law cases. *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 321 (1933). Because Congress required by statute that the Commission hold hearings, however, the Court held the agency to an implied standard of fairness in the conduct of its hearings. *Id.* The same principle should apply here to require the ITC to at least state the reasons for its findings, in addition to the findings themselves.

In the instant case, the Report of the ITC shows that this requirement has been met. . . .

c. The Escape Clause in Action: The Steel Case

In 2001 the ITC undertook a global safeguard investigation concerning steel imports, involving a wide variety of steel products. Steel products of one sort or another had been the subject of many ITC investigations in the past, but this one was relatively more ambitious in scope. The political context in which the investigation proceeded was reminiscent of the automobile investigation twenty years before. The outcome was a crucial political issue in such states as West Virginia–which the President had won narrowly in the 2000 election, in part on his promise to do more on behalf of the steel industry and its workers than his Democratic predecessor had done. On the other hand, the new Republican administration was also publicly committed to free markets, and going too far with safeguard relief might compromise this commitment–and also run the risk of alienating U.S. trading partners who were expected to be allies in the ongoing war against terrorism.

Unlike the automobile case, however, in the global safeguard steel investigation the ITC did rule that domestic industries had been seriously injured by increased imports in a wide range of steel product categories, although not in all of the product categories under investigation. The ITC report and recommendations run on for almost 700 pages and close to 2,000 footnotes, with multiple or competing views expressed by the six commissioners on virtually every issue. (The report includes a chart just to keep track of how the voting went with respect to each product category.) The *brief* excerpt that follows is intended to convey a sense of the ITC's overall findings and recommendations, to highlight certain important issues raised by the investigation, and to lay the groundwork for the questions posed on pages ▬-▬, *infra*.

STEEL; IMPORT INVESTIGATIONS
[Injury Determination]

International Trade Commission Investigation No. TA-201-73 (Dec. 20, 2001)

DETERMINATION

On the basis of information developed in the subject investigation, the United States

International Trade Commission–

(1) Determines pursuant to section 202(b) of the Tariff Act of 1974 [19 U.S.C. § 2252(b)], that certain steel products[1] are being imported into the United States in such increased quantities as to be a substantial cause of serious injury or the threat of serious injury to the domestic industry producing articles like or directly competitive with the imported articles; and

(2) Finds pursuant to section 311(a) of the North American Free-Trade Agreement (NAFTA) Implementation Act, that imports of carbon and alloy steel hot bar, cold bar, welded tubular products,[2] and fittings, and stainless steel bar and fittings from Canada account for a substantial share of the total imports and contribute importantly to the serious injury or threat thereof caused by imports.[3] With regard to imports from Mexico, the Commission finds that imports of certain carbon and alloy flat-rolled steel (slabs, plate, hot-rolled steel, cold-rolled steel, and coated steel), carbon and alloy steel fittings, and stainless steel fittings from Mexico account for serious injury or threat thereof caused by imports.[4]

RECOMMENDATIONS WITH RESPECT TO REMEDY

The Commission[5] *Recommends a Four-Year Program of Tariffs and Tariff-Rate Quotas*

Plate, hot-rolled sheet, cold-rolled sheet, coated sheet, hot-rolled bar, cold-finished bar and stainless steel rod: An additional 20 percent ad valorem duty in the first year of relief, to be reduced to a 17 percent ad valorem duty in the second year of relief, 14 percent ad valorem duty in the third year of relief, and 11 percent ad valorem duty in the fourth year of relief;

Stainless steel bar: An additional 15 percent ad valorem duty in the first year of relief, to be reduced to a 12 percent ad valorem duty in the second year of relief, 9 percent ad valorem duty in the third year of relief, and 6 percent ad valorem duty in the fourth year of relief;

Carbon and alloy steel fittings and flanges:[6] An additional 13 percent ad valorem duty in the first year of relief, to be reduced to a 10 percent ad valorem duty in the second

---

1. The Commission made affirmative determinations with regard to certain carbon and alloy steel, including (1) slabs, (2) plate, (3) hot-rolled steel, (4) cold-rolled steel, (5) coated steel, (6) hot bar, (7) cold bar, (8) rebar, (9) welded tubular products other than OCTG, and (10) fittings; and stainless steel (11) bar and (12) rod.

The Commission was equally divided in its determination with regard to (1) carbon and alloy steel tin mill products, (2) tool steel, (3) stainless steel wire, and (4) stainless steel fittings. Pursuant to section 330(d)(1) of the Tariff Act of 1930, where the Commission is equally divided, the determination of either group of Commissioners may be considered by the President to be the determination of the Commission.

The Commission made negative determinations with regard to carbon and alloy steel (1) GOES [Grain-Oriented Electrical Steel], (2) ingots, (3) rails, (4) wire, (5) rope, (6) nails, (7) shapes, (8) fabricated structural units, (9) seamless tubular products other than OCTG, (10) seamless OCTG, and (11) welded OCTG; and stainless steel (12) slabs/ingots, (13) plate, (14) cloth, (15) rope, (16) seamless tubular products, and (17) welded tubular products. . . .

A tabulation showing the individual votes of each Commissioner is presented in appendix B [reporduced at pages ▬-▬, *infra*].

2. The Commission was equally divided, 3-3, in its finding with regard to carbon and alloy steel welded tubular products other than OCTG from Canada.

3. The Commission made a negative finding with regard to imports from Canada of certain carbon and alloy steel, including (1) slabs, (2) plate, (3) hot- rolled steel, (4) cold-rolled steel, (5) coated steel, (6) tin mill products, and (7) rebar; (8) tool steel; and stainless steel (9) rod and (10) wire.

4. The Commission voted in the negative regarding imports from Mexico of carbon and alloy steel (1) tin-mill products, (2) hot bar, (3) cold bar, (4) rebar, and (5) welded tubular products other than OCTG; (6) tool steel; and stainless steel (7) bar, (8) rod, and (9) wire.

5. Pursuant to section 330(d)(2) of the Tariff Act of 1930 (19 U.S.C. § 1330(d)(2)), the remedy recommendation of Chairman Koplan and Commissioners Miller and Hillman in this investigation is to be treated as the remedy finding of the Commission for purposes of section 203 of the Trade Act.

6. Vice Chairman Okun joins in this recommended remedy for the first three years of relief only.

year of relief, 7 percent ad valorem duty in the third of relief, and 4 percent ad valorem duty in the fourth year of relief;

Rebar: An additional 10 percent ad valorem duty in the first year of relief, to be reduced to an 8 percent ad valorem duty in the second year of relief, 6 percent ad valorem duty in the third year of relief, and 4 percent ad valorem duty in the fourth year of relief;

Slabs:[6] A tariff-rate quota with an additional 20 percent ad valorem duty on imports in excess of 7.0 million short tons in the first year of relief, 17 percent ad valorem duty on imports in excess of 7.5 million short tons in the second year of relief; 14 percent ad valorem duty on imports in excess of 8.0 million short tons in the third year of relief; and 11 percent ad valorem duty on imports in excess of 8.5 million short tons in the fourth year of relief;

Welded tubular products other than OCTG:[6] A tariff-rate quota with an additional 20 percent ad valorem duty on imports in excess of year 2000 U.S. imports,[7] 17 percent ad valorem duty on imports in excess of the quantities noted in the second year, 14 percent ad valorem duty on imports in excess of the quantities noted for the third year, and 11 percent ad valorem duty in imports in excess of the quantities noted below.

Vice Chairman Okun and Commissioner Hillman made negative determinations under section 311 of the NAFTA with respect to imports of welded tubular products from Canada and Mexico and therefore recommend that the additional tariffs not apply to those countries and that the tariffs apply to imports in excess of 1,400,443 short tons in the first year, 1,442,456 short tons in the second year, 1,485,730 short tons in the third year, and (Commissioner Hillman only) 1,530,302 short tons in the fourth year.

The Commission further recommends that the additional tariffs or tariff-rate quotas on slabs, plate, hot-rolled, cold-rolled and coated products be applied to imports from Mexico but not imports from Canada; that the additional tariffs on cold-finished bar and stainless steel bar be applied to imports from Canadabut not imports from Mexico; that the additional tariffs on rebar and stainless steel rod not apply to imports from either Canada or Mexico; that the additional tariffs on carbon and alloy fittings and flanges apply to imports from both Mexico[8] and Canada;[9] and that the additional tariffs on hot-rolled bar apply to imports from Canada but not imports from Mexico.[10] With respect to welded tubular products other than OCTG, the Commission recommends that the additional tariff-rate quota not be applied to imports from Mexico, and was evenly split regarding Canada.[11] The Commission further recommends that none of the additional tariffs or tariff-rate quotas apply to imports from Israel, or to any imports entered duty-free from beneficiary countries under the Caribbean Basin Economic Recover Act or the Andean Trade Preference Act.[12]

---

7. Chairman Koplan and Commissioner Miller made affirmative determinations under Section 311 of the NAFTA with respect to imports of welded tubular products from both Canada and Mexico and therefore recommend that the additional tariffs apply to imports in excess of 2,600,000 short tons in the first year, 2,680,000 short tons in the second year, 2,760,000 short tons in the third year and 2,840,000 short tons in the fourth year.

8. Chairman Koplan, Vice Chairman Okun and Commissioner Miller determined that the additional duties on fittings and flanges should apply to imports from Mexico.

9. Vice Chairman Okun and Commissioners Miller and Hillman determined that the additional duties on fittings and flanges should apply to imports from Canada.

10. Chairman Koplan and Commissioner Miller recommend that the additional duties apply to imports of hot-rolled bar from Mexico.

11. Chairman Koplan and Commissioner Miller recommend that the additional tariff-rate quota apply to imports from Mexico.

12. To the extent that the U.S.-Jordan Free Trade Area Implementation Act applies to this investigation, the Commission further recommends that none of the additional tariffs be applied to imports from Jordan.

The Commission also recommends that the remedy on welded tubular products other than OCTG not apply to certain large diameter welded line pipe products.

The Commission also recommends that the President continue to pursue international negotiations with the governments of all the countries that supply these steel products aimed at reducing inefficient global overcapacity to produce these steel products.

The Commission further encourages the President to consider other appropriate action to facilitate the efforts of the domestic industry to rationalize and consolidate and thus make a positive adjustment to import competition.

The Commission's remedy recommendation and the individual remedy recommendations of the Commissioners are summarized in the tabulation at Appendix C [reproduced at pages ▬▬-▬▬, *infra*]. . . .

BACKGROUND

Following receipt of a request from the United States Trade Representative on June 22, 2001, the Commission instituted investigation No. TA-201-73, Steel, under section 202 of the Trade Act of 1974 (19 U.S.C. 2252) to determine whether certain steel products are being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article.[17]

. . .

As provided for in section 202 of the Trade Act of 1974 [19 U.S.C. § 2252], as amended, this investigation was conducted in two parts, an injury phase and a remedy phase. . . .

This investigation was structured by four broad product groups: certain carbon and alloy flat products, certain carbon and alloy long products, certain carbon and alloy pipe and tube products, and certain stainless steel and alloy tool steel products. As a result, the injury and remedy views are similarly structured along these broad product categories, although some Commissioners have grouped products differently in reaching their injury determinations and remedy recommendations.

VIEWS ON INJURY OF THE COMMISSION

I. Introduction

Pursuant to section 202(b) . . . , the Commission determines that certain carbon flat-rolled products, including slab, hot-rolled sheet and strip (including plate in coils), plate (including cut-to-length plate and clad plate), cold-rolled sheet and strip (other than grain-oriented electrical steel), and corrosion-resistant and other coated sheet and strip, are being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the domestic industry.[1] The Commission also determines that grain-oriented electrical steel ("GOES") is not being imported into the United States in such increased quantities as to be a substantial cause of serious injury or threat thereof to the domestic industry.[2] Chairman Koplan, Vice Chairman Okun, and Commissioner Hillman determine that carbon and alloy tin mill products are not being

---

17. On July 26, 2001, the Commission received a resolution from the Committee on Finance of the United States Senate for an investigation of the same scope. Pursuant to section 603 of the Trade Act, the Commission consolidated the investigation requested by the Committee with the ongoing investigation.

1. Pursuant to section 311(a) of the North American Free Trade Agreement ("NAFTA") Implementation Act (19 U.S.C. § 3371(a)), the Commission unanimously makes negative findings with respect to Canada and makes affirmative findings (5-1 vote) with respect to Mexico regarding these imports (Commissioner Devaney dissenting with respect to Mexico).

2. Commissioner Bragg and Commissioner Devaney make affirmative determinations regarding imports of grain-oriented electrical steel. See Separate Views of Commissioner Lynn M. Bragg, and Separate and Dissenting Views of Commissioner Dennis M. Devaney.

imported into the United States in such increased quantities as to be a substantial cause of serious injury to the domestic industry; Commissioners Bragg, Miller, and Devaney make an affirmative determination regarding imports of carbon and alloy tin mill products.[3]

The Commission further determines that the following products are being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the pertinent domestic industry: (1) carbon and alloy hot-rolled bar and light shapes; (2) carbon and alloy cold- finished bar; and (3) carbon and alloy rebar.[4] [5] The Commission unanimously determines that fabricated structural units are not being imported into the United States in such increased quantities as to be a substantial cause of serious injury or threat of serious injury to the domestic industry. The Commission additionally determines that the following products are not being imported into the United States in such increased quantities as to be a substantial cause of serious injury or threat of serious injury to the pertinent domestic industry: (1) carbon and alloy billets, ingots, and blooms; (2) carbon and alloy rails and railway products; (3) carbon and alloy heavy structural shapes and sheet piling; (4) carbon and alloy wire; (5) carbon, alloy, and stainless rope, strand, cable, and cordage; (6) carbon and alloy nails, staples, and cloth.[6]

The Commission further determines that: (1) welded pipe other than OCTG is being imported into the United States in such increased quantities as to be a substantial cause of the threat of serious injury to the domestic industry;[8] and (2) fittings, flanges, and tool joints are being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the domestic industry.[9] The Commission[10] additionally determines that: (1) seamless pipe other than OCTG and (2) welded and seamless OCTG are not being imported into the United States in such increased

---

3. Pursuant to 19 U.S.C. § 3371(a), Commissioners Bragg and Devaney make negative findings with respect to Canada regarding these imports; Commissioner Miller makes an affirmative finding with respect to Canada. Commissioners Miller and Devaney make negative findings with respect to Mexico regarding these imports; Commissioner Bragg makes an affirmative finding with respect to Mexico. . . .

4. Commissioner Bragg determines that certain carbon and alloy long mill products, including billets, ingots, and blooms; hot-rolled bar and light shapes; cold-finished bar; rebar; rails and railway products; and heavy structural shapes and sheet piling are being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the domestic industry. She also determines that carbon and alloy wire products, including wire; strand, rope, cable, and cordage; and nails, staples, and woven cloth are being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the domestic industry.

Commissioner Devaney determines that certain carbon and alloy long products, including hot-rolled bar and light shapes; cold-finished bar; rebar; rails and railway products; heavy structural shapes and sheet piling; wire; strand, rope, cable, and cordage; and nails, staples, and woven cloth are being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the domestic industry.

5. Pursuant to 19 U.S.C. § 3371(a), the Commission has made affirmative findings for Canada for hot-rolled bar (Commissioners Bragg and Devaney dissenting) and cold-finished bar (Commissioners Bragg and Devaney dissenting) and a negative finding for Canada for rebar. The Commission has made negative findings for Mexico for all three products (Chairman Koplan and Commissioner Miller dissenting with respect to hot-rolled bar).

6. Commissioners Bragg and Devaney dissenting concerning these products per their determinations referenced above.

8. Pursuant to 19 U.S.C. § 3371(a), the Commission was equally divided 3-3 in its findings for Canada, (Chairman Koplan and Commissioners Bragg and Miller made affirmative findings, and Vice Chairman Okun and Commissioners Hillman and Devaney made negative findings); and made a negative finding (4-2) for Mexico (Chairman Koplan and Commissioner Miller dissenting).

9. Pursuant to 19 U.S.C. § 3371(a), the Commission made an affirmative finding for Canada (Chairman Koplan and Commissioner Devaney dissenting), and made an affirmative finding for Mexico (Commissioners Hillman and Devaney dissenting).

10. Commissioners Bragg and Devaney determine that (1) seamless pipe, including seamless OCTG, is being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the pertinent domestic industry, and (2) welded pipe, including welded OCTG, is being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the pertinent domestic industry. . . .

quantities as to be a substantial cause of serious injury or the threat of serious injury to the pertinent domestic industry.

The Commission further determines that stainless steel bar and light shapes and stainless steel rod are being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the domestic industry.[11] The Commission also determines that semifinished stainless steel products, stainless cut-to-length plate, stainless woven cloth, seamless stainless tubular products, and welded stainless tubular products are not being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industries.[12] Chairman Koplan and Commissioners Bragg and Devaney determine that tool steel,[13] stainless steel wire,[14] and stainless steel fittings and flanges are being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry.[15] Vice Chairman Okun and Commissioners Miller and Hillman determine that tool steel, stainless steel wire, and stainless steel fittings and flanges are not being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry.

In making determinations in safeguard actions, the Commission has traditionally divided the statutory standard into three criteria. Specifically, to make an affirmative determination, the Commission must find that:

(1) imports of the subject article are in increased quantities (either actual or relative to production);

(2) the domestic industry producing an article that is like or directly competitive with the imported article is seriously injured or threatened with serious injury; and

(3) the article is being imported in such increased quantities as to be a substantial cause of serious injury or threat of serious injury to the domestic industry.[16]

The Commission must find that all three criteria are satisfied to make an affirmative determination. In a recent section 201 determination, and in this action, the Commission has considered the second and third criteria together with respect to its threat of serious

---

11. Pursuant to 19 U.S.C. §3371(a), Chairman Koplan, Vice Chairman Okun, and Commissioners Miller and Hillman make an affirmative finding with respect to imports of stainless steel bar and light shapes from Canada. They make negative findings with respect to imports of stainless bar and light shapes from Mexico and imports of stainless wire rod from Canada and Mexico. Commissioners Bragg and Devaney found that semifinished stainless steel products, stainless cut-to-length plate, stainless bar and light shapes, stainless rod, and tool steel were one like product and make an affirmative finding for that like product. Pursuant to 19 U.S.C. §3371(a), they made a negative finding with respect to imports of this like product for imports from Canada and Mexico.

12. Commissioners Bragg and Devaney dissenting with respect to semifinished stainless steel products and stainless cut-to-length plate. As discussed above, pursuant to 19 U.S.C. §3371(a), Commissioners Bragg and Devaney make negative findings with respect to imports of semifinished stainless steel products and stainless cut-to-length plate from Canada and Mexico.

13. Commissioners Bragg and Devaney found that semifinished stainless steel products, stainless cut-to-length plate, stainless bar and light shapes, stainless rod, and tool steel were one like product and make an affirmative finding for that like product. Pursuant to 19 U.S.C. §3371(a), they made a negative finding with respect to imports of this like product for imports from Canada and Mexico.

14. Commissioners Bragg and Devaney found that stainless steel wire and stainless steel rope were one like product and made an affirmative finding for this like product. Pursuant to 19 U.S.C. §3371(a), they made a negative finding for imports of this like product from Canada and Mexico.

15. Pursuant to 19 U.S.C. §3371(a), Chairman Koplan makes negative findings with respect to imports of tool steel and stainless steel wire from Canada. Commissioners Bragg and Devaney make an affirmative finding with respect to imports of stainless steel fittings from Canada and Mexico and Chairman Koplan makes a negative finding with respect to imports of stainless steel fittings from Canada and Mexico.

16. *See, e.g., Extruded Rubber Thread*, Inv. No. TA-201-72, USITC Pub. 3375 at I-3 (Dec. 2000); Wheat Gluten, Inv. No. TA-201-67, USITC Pub. 3088 at I-5 (Mar. 1998).

injury analysis.[17] . . .

III. Legal Standards

The legal standards discussed below apply to all our determinations in this proceeding. . . .[22]

A. Domestic Industry Producing Like or Directly Competitive Article . . .

The legislative history to the Trade Act defines the term "like" to mean those articles which are "substantially identical in inherent or intrinsic characteristics (i.e., materials from which made, appearance, quality, texture, etc.)" and the term "directly competitive" to mean those articles which are "substantially equivalent for commercial purposes, that is, are adapted to the same uses and are essentially interchangeable therefor."[26] The decision regarding the like or directly competitive article is a factual determination.[27]

In determining what constitutes the like product, the Commission traditionally has taken into account such factors as the physical properties of the product, its customs treatment, its manufacturing process (i.e., where and how it is made), its uses, and the marketing channels through which the product is sold. These are not statutory criteria and do not limit what factors the Commission may consider in making its determination. No single factor is dispositive and the weight given to each individual factor will depend upon the facts in the particular case. The Commission traditionally has looked for clear dividing lines among possible products and has disregarded minor variations.[28]

The Commission has broad discretion to determine what constitutes the domestic industry producing a like or directly competitive article in a section 201 investigation and generally has adhered to the principal that "[t]he industry should be defined in a manner which allows for a meaningful analysis of the statutory criteria in light of the legislative history of section 201."[29] In particular, the Commission has recognized that the concept of industry employed in section 201 may be more broadly defined and is not the same as that used in countervailing and antidumping duty provisions of title VII. As the Commission has stated

---

17. *See Extruded Rubber Thread*, Inv. No. TA-201-72, USITC Pub. 3375 (Dec. 2000).

22. Vice Chairman Okun, Commissioner Miller, and Commissioner Hillman note that a number of parties, both in testimony and in their briefs, argued that the Commission should consider national security concerns in this analysis. See, e.g., 9/17/01 Injury Hearing Transcript at 52, 58, 87-88; 9/24/01 Injury Hearing Transcript at 1273. They also note that although section 203 of the statute mandates that the President consider the national security interests of the United States in determining whether to take action, the Commission's mandate is far narrower under section 202. Indeed, the statute is silent as to whether the Commission should consider national security issues when it is very explicit on the areas the Commission should take into account. Moreover, there are separate statutes addressing national security concerns and trade, namely section 232 of the Trade Expansion Act of 1962[, 19 U.S.C. § 1862. *See* § A.5, *infra* (discussing national security and trade)]. Finally, although the Commission received anecdotal information regarding the importance of steel products in general to national security, there was no attempt to quantify such information, nor to identify which steel products are most critical to our national security. Moreover, parties were not specifically asked to address this issue in response to questionnaires. Therefore, Vice Chairman Okun, Commissioner Miller, and Commissioner Hillman have not considered national security concerns in making their injury determination.

26. H.R. Rep. No. 93-571, at 45 (1973); S. Rep. No. 93-1298, at 121-122 (1974). The Commission also may consider whether there are directly competitive products pursuant to 19 U.S.C. § 2482(5) ("section 601(5)"). Under that provision, the Commission may consider whether there are directly competitive products by analyzing what products may be commercial equivalents for the subject imports and/or if earlier or later processed domestic products are suffering the "comparable" economic effects of imports.

27. *See, e.g., Extruded Rubber Thread*, Inv. No. TA-201-72, USITC Pub. 3375 at I-6 (Dec. 2000); *Crabmeat from Swimming Crabs*, Inv. No. TA-201-71, USITC Pub. 3349 at I-6 (Aug. 2000); *Circular Welded Carbon Quality Line Pipe*, Inv. No. TA- 201-70, USITC Pub. 3261 at I-10 (Dec. 1999); *Certain Steel Wire Rod*, Inv. No. TA-201-69, USITC Pub. 3207 at I-9 (July 1999).

28. *Extruded Rubber Thread*, Inv. No. TA-201-72, USITC Pub. 3375 at I-6 (Dec. 2000); *Circular Welded Carbon Quality Line Pipe*, Inv. No. TA-201-70, USITC Pub. 3261 at I-10 (Dec. 1999).

29. *Stainless Steel and Alloy Tool Steel*, Inv. No. TA-201-48, USITC Pub. 1377 at 12 (May 1983).

> Title VII is narrowly aimed at remedying the specific advantages imports may be receiving from unfair trade practices. The purpose of section 201 either is to prevent or remedy serious injury to domestic productive resources from all imports. In light of the purpose of section 201 and in contrast to title VII, the sharing of productive processes and facilities is a fundamental concern in defining the scope of the domestic industry under section 201.[30]

The legislative history to the 1974 Trade Act indicates that the concern for the Commission in a safeguard investigation is "the question of serious injury to the productive resources (e.g., employees, physical facilities, and capital) employed in the divisions or plants in which the article in question is produced."[31] [32] The Commission highlighted this fundamental concern in defining its like products and domestic industries in the 1984 Steel safeguard case, where the imports involved a diversity of products and in which the Commission found nine products that were like or directly competitive with the imported articles.[33] The Commission stated:

> The breadth of this investigation, covering such a diversity of products, requires the Commission to define like or directly competitive in a manner that reflects the realities of the market and at the same time accomplishes the fundamental purpose of section 201, protection of the productive resources of domestic producers. Thus, the Commission considers both the productive facilities and processes and the markets for these products in determining those articles that may be considered like or directly competitive within the meaning of section 201.[34]

The starting point for the Commission's analysis of the domestic industry producing a like or directly competitive article is with the imported product or products included within the investigation that is set forth in the request or petition.[35] While the Commission begins with the universe of imports identified in the request, the Commission only is required to define or identify the domestic article or articles like or directly competitive with the imported product or products in the petition or request and is not required to consider, in the first instance, whether and how to subdivide the imported article or articles.[36] The Commission has recognized that the like or directly competitive article, and thus the domestic industry, are not necessarily coterminous with the description of the imported articles subject to investigation.[37] As noted above, the decision regarding

---

30. *Stainless Steel and Alloy Tool Steel*, Inv. No. TA-201-48, USITC Pub. 1377 at 16, n.21 (May 1983).

31. H.R. Rep. 93-571, at 46 (1973).

32. The 1988 amendments to the Trade Act reinforced the objective of protecting the productive resources of domestic producers. H.R. Rept. 100-576, at 661-662 (1988); S. Rept. 100-71, at 46-47 (1987); H.R. Rept. 100-40, at 86- 96 (1987).

33. For example, one of the nine like products defined in 1984 Steel encompassed hot-rolled, cold-rolled, and coated products, each of which has been defined as a separate domestic like product in Title VII investigations. *See, e.g., Carbon and Certain Alloy Steel Products*, Inv. No. TA-201-51, USITC Pub. 1553 at Appendix C (July 1984) ("1984 Steel"). *See also Bolts, Nuts, and Large Screws of Iron or Steel*, Inv. No. TA-201-37, USITC Pub. 924 at 4 (Nov. 1978); *Certain Headwear*, Inv. No. TA-201-23, USITC Pub. 829 at 5 (Aug. 1977).

34. *Carbon and Certain Alloy Steel Products*, Inv. No. TA-201-51, USITC Pub. 1553 at 12-13 (July 1984).

35. This is evident in the statute, 19 U.S.C. § 2252(b)(1)(A), which indicates that the Commission shall conduct an investigation to consider "the domestic industry producing an article like or directly competitive with the imported article."

36. Compare 19 U.S.C. § 1673(1) ("the administering authority determines that a class or kind of foreign merchandise ...."). The statute, however, directs the Commission in a safeguard investigation to define the domestic industry in order to conduct its analysis and make its determination regarding that industry. 19 U.S.C. §§ 2252(b)(1)(A) and (c)(4).

37. *See, e.g., Fresh Winter Tomatoes*, Inv. No. TA-201-64 (Provisional Relief Phase), USITC Pub. 2881 at I-7 (April 1995)("The domestic industry or industries are not necessarily coterminous in scope with the imported articles- there may be more than one industry, and/or the industry or industries may encompass a broader or narrower array of products than that identified in the notice of investigation."). *See generally, Certain Cameras*, Inv. No. TA-201-62, USITC Pub. 2315 at 7 (Sept. 1990); *Certain Metal Castings*, Inv. No. TA-201-58, USITC Pub. 1849 at 7-8 (June 1986); *Carbon and Certain Alloy Steel*

the like or directly competitive product is a factual determination. . . .

B. Increased Imports

Statutory Framework and Commission Practice. The first of the three statutory criteria for an affirmative determination in a safeguard investigation is that imports must be in "increased quantities." Under 19 U.S.C. § 2252(c)(1)(C), imports are considered to have increased when the increase is "either actual or relative to domestic production."[41] In determining whether imports have increased, the Commission considers imports from all sources. The Commission traditionally has considered import trends over the most recent five-year period as a framework for its analysis, but can consider longer or shorter periods and may focus on the most recent period, as it deems appropriate.[42]

C. Serious Injury Or Threat Thereof

Statutory Framework and Commission Practice. The second of the three statutory criteria concerns whether the domestic industry is seriously injured or threatened with serious injury. The statute defines "serious injury" as being "a significant overall impairment in the position of a domestic industry."[43] The term "threat of serious injury" is defined as "serious injury that is clearly imminent."[44]

In determining whether serious injury or threat exists, the Commission considers "all economic factors which it considers relevant, including (but not limited to)" the following–

> (A) with respect to serious injury–
>
> (i) the significant idling of productive facilities in the domestic industry,[45]
>
> (ii) the inability of a significant number of firms to carry out domestic production operations at a reasonable level of profit, and
>
> (iii) significant unemployment or underemployment within the domestic industry;
>
> (B) with respect to threat of serious injury–
>
> (i) a decline in sales or market share, a higher and growing inventory (whether maintained by domestic producers, importers, wholesalers, or retailers), and a downward trend in production, profits, wages, productivity, or employment (or increasing underemployment) in the domestic industry,
>
> (ii) the extent to which firms in the domestic industry are unable to generate adequate capital to finance the modernization of their domestic plants and equipment, or are unable to maintain existing levels of expenditures for research and development, and
>
> (iii) the extent to which the United States market is the focal point for the diversion of exports of the article concerned by reason of restraints on exports of such article to, or on imports of such article into, third country markets.[46]

The presence or absence of any of these factors is not "necessarily dispositive" of whether increased imports are a substantial cause of serious injury, or the threat of serious injury, to the industry."[47] In addition, the Commission must "consider the

---

Products, Inv. No. TA-201-51, USITC Pub. 1553 at 12-13 (July 1984); *Stainless Steel and Alloy Tool Steel*, Inv. No. TA-201-48, USITC Pub. 1377 at 15-16 (May 1983).

41. 19 U.S.C. § 2252(c)(1)(C).

42. *Extruded Rubber Thread*, Inv. No. TA-201-72, USITC Pub. 3375 at I-8 (Dec. 2000).

43. 19 U.S.C. § 2252(c)(6)(C).

44. 19 U.S.C. § 2252(c)(6)(D).

45. In this regard, the statute provides that the term "significant idling of productive facilities" includes the "closing of plants or the underutilization of production capacity." 19 U.S.C. § 2252(c)(6)(B).

46. 19 U.S.C. § 2252(c)(1)(A) and (B).

47. 19 U.S.C. § 2252(c)(3).

condition of the domestic industry over the course of the relevant business cycle."[48]

D. Substantial Cause

Statutory Framework and Commission Practice. The third statutory criterion concerns whether the subject article is being imported in such increased quantities as to be a "substantial cause" of serious injury or threat.[49] The statute defines "substantial cause" as meaning "a cause which is important and not less than any other cause."[50] Thus, increased imports must be both an important cause of the serious injury or threat and a cause that is equal to or greater than any other cause.

In determining whether increased imports are a substantial cause of serious injury or threat of serious injury, the statute directs that the Commission take into account all economic factors that it considers relevant, including but not limited to "... an increase in imports (either actual or relative to domestic production) and a decline in the proportion of the domestic market supplied by domestic producers."[51] The statute further directs that the Commission consider "the condition of the domestic industry over the course of the relevant business cycle," but provides that the Commission "may not aggregate the causes of declining demand associated with a recession or economic downturn in the United States economy into a single cause of serious injury or threat of injury."[52]

Moreover, the statute directs that the Commission "examine factors other than imports" that may be a cause of serious injury or threat of serious injury to the domestic industry and include the results of its examination in its report.[53] Neither the statue nor the legislative history rules out consideration of any other possible causes of injury.[54] Thus, the statute directs the Commission to (1) examine possible causes of serious injury other than increased imports, and (2) to make findings with respect to these other causes. According to the legislative history, the purpose of this provision "is to assure that all factors injuring the domestic industry are identified."[55]

E. Findings Regarding NAFTA Imports

Statutory Framework and Commission Practice. Section 311(a) of the NAFTA Implementation Act (19 U.S.C. § 3371(a)) provides that if the Commission makes an affirmative injury determination in a safeguard investigation (or is equally divided with respect to injury), the Commission must find whether:

> (1) imports of the article from a NAFTA country, considered individually, account for a substantial share of total imports; and
>
> (2) imports of the article from a NAFTA country, considered individually or, in exceptional circumstances, imports from NAFTA countries considered collectively,

---

48. 19 U.S.C. § 2252(c)(2)(A).
49. 19 U.S.C. § 2252(b)(1)(A).
50. 19 U.S.C. § 2252(b)(1)(B).
51. 19 U.S.C. § 2252(c)(1)(C).
52. 19 U.S.C. § 2252(c)(2)(A).
53. 19 U.S.C. § 2252(c)(2)(B).
54. The legislative history of the Trade Act includes examples of these types of other causes "such as changes in technology or in consumer tastes, domestic competition from substitute products, plant obsolescence, or poor management," which if found to be more important causes of injury than increased imports, would require a negative determination. S. Rept. No. 93-1298, at 121 (1974).
55. S. Rept. No. 100-71, at 50 (1987).

contribute importantly to the serious injury, or threat thereof, caused by imports.[56] [57]

Under 19 U.S.C. § 3371(b)(1), imports from a NAFTA country "normally shall not be considered to account for a substantial share of total imports if that country is not among the top 5 suppliers of the article subject to the investigation, measured in terms of import share during the most recent 3-year period."[58] The statute also indicates that imports from a NAFTA country are considered to "contribute importantly to the serious injury or threat thereof" when they are "an important cause, but not necessarily the most important cause."[59] In determining whether such imports have contributed importantly to the serious injury or threat thereof, the Commission is directed to consider "such factors as the change in the import share of the NAFTA country or countries, and the level and change in the level of imports of such country or countries."[60] Imports from a NAFTA country or countries "normally shall not be considered to contribute importantly to serious injury, or the threat thereof, if the growth rate of imports from such country or countries during the period in which an injurious increase in imports occurred is appreciably lower than the growth rate of total imports from all sources over the same period."[61] . . .

IV. Certain Carbon And Alloy Flat Products

A. Domestic Industry Producing a Like or Directively [*sic*] Competitive Article

[T]he starting point for the Commission's analysis of the domestic industry producing a like or directly competitive article is with the imported product or products subject to investigation as set forth in the request. . . . [O]ur analysis in this section covers the range of products broadly categorized as certain carbon and alloy flat products.

[W]e find: (1) one domestic industry producing slab, hot-rolled steel, plate, cold-rolled steel, and coated steel, which is the article, "certain carbon flat-rolled steel," that is like the imported certain carbon flat-rolled steel; (2) one domestic industry producing the article, grain-oriented electrical steel ("GOES"), that is like the imported GOES; and (3) one domestic industry producing the article, tin mill products, that is like the imported tin mill products.[65] . . .

B. Certain Carbon Flat-Rolled Steel

1. Increased Imports

---

56. 19 U.S.C. § 3371(a).

57. The Commission considered and rejected Russian Respondents' request to create an exception for imports from Russia equivalent to the exception for NAFTA countries. While various steel products from Russia are subject to quantitative restraints and/or suspension agreements entered pursuant to 19 U.S.C. § 1673c(1), there is nothing within any of these agreements that indicates an intention that the Commission treat imports from Russia in a safeguard proceeding as per se non-injurious or in the same manner that it treats NAFTA imports. A specific statutory provision instructs the Commission to accord special treatment to NAFTA countries in injury determinations in safeguards investigations. Moreover, the legislative history of the NAFTA provision indicates that one of the reasons legislation was necessary was because Commission safeguards investigations encompass imports from all sources. H.R. Rep. 103-361(I) at 57, 59 (1993). There is no comparable provision concerning imports from Russia, imports subject to quantitative restrictions, or imports subject to suspension agreements. Furthermore, as discussed below, the existence of orders or suspension agreements under the antidumping and countervailing duty laws, of which 19 U.S.C. § 1673c(1) is a part, does not preclude the Commission from determining in a safeguards investigation that increased imports are a substantial cause of serious injury or threat of serious injury. Consequently, we see no basis to accord special treatment to imports from Russia by administrative fiat. Nevertheless, if the facts warrant, we may consider such agreements or restrictions as a condition of competition in our analysis.

58. 19 U.S.C. § 3371(b)(1).

59. 19 U.S.C. § 3371(c).

60. 19 U.S.C. § 3371(b)(2).

61. 19 U.S.C. § 3371(b)(2).

65. Commissioner Devaney has applied the same basic analysis as the majority. However he finds a single like product consisting of all flat products. . . .

Finding. We find that the statutory criterion of increased imports is met.[180] We find that total imports of certain carbon flat-rolledsteel, including slabs, plate, hot-rolled, cold-rolled, and coated steel increased in both actual terms and relative to domestic production. In actual terms, total imports increased from 18.4 million short tons in 1996 to 20.9 million short tons in 2000, an increase of 13.7 percent. Total imports declined from 11.5 million short tons in interim 2000 to 6.9 million short tons in interim 2001. The ratio of imports to domestic production (including production for captive consumption) also increased during the POI, from 10.0 percent in 1996 to 10.5 percent in 2000. Imports also increased relative to domestic commercial shipments. Total imports were equivalent to 32.6 percent of domestic commercial shipments in 2000, up from 31.5 percent in 1996. In interim 2001 total imports were equivalent to 22.7 percent of domestic commercial shipments.

We note that in 1998, the midpoint of the full five-year period examined, there was a rapid and dramatic increase in imports, as import volumes both in absolute terms and as a percentage of U.S. production peaked. Imports of certain carbon flat-rolled steel were 25.3 million short tons, an increase of 37.5 percent over 1996 levels. While the volume of imports declined in 1999 and 2000 from this peak, the absolute volume and ratio of imports to U.S. production were still significantly higher in 1999 and 2000 than at the beginning of the period. . . .

2. Serious Injury

Finding. We find that the domestic industry producing certain carbon flat-rolled steel is seriously injured; that is, we find that there has been a "significant overall impairment in the position" of the domestic industry.[186] . . .

3. Substantial Cause

Finding. We find that the increased imports of certain carbon flat-rolled steel are an important cause, and a cause not less than any other cause, of serious injury to the domestic industry.[224] In making this finding, we have considered carefully evidence in the record relating to the enumerated statutory factors, as well as evidence relating to domestic production, capacity, capacity utilization, shipments, market share, profit and loss data, plant closings, wages and other employment-related data, productivity, capital expenditures, and research and development expenditures. Accordingly, we find that increased imports are a substantial cause of serious injury to the domestic industry producing certain carbon flat-rolled steel.

[The report went on to find that, while there was an increase in imports of GOES, the domestic industry was not seriously injured. Nor were the increased imports a substantial cause of any threat of serious injury to the domestic industry producing GOES.

[Total imports of tin mill products had increased, both in actual terms and relative to domestic production, during the POI, and the domestic was seriously injured; "that is, we find that there has been a 'significant overall impairment in the position' of the

---

180. Commissioner Devaney joins in the analysis of the majority, related to increased imports, as presented here. He further finds that if the analysis is performed over the entire industry as he has defined it, the result is the same, *i.e.*, the statutory criterion of increased imports is met.

186. Commissioner Devaney joins in the analysis of the majority, related to injury, as presented here. He further finds that if the analysis is performed over the entire industry as he has defined it, the result is the same, *i.e.* the industry is seriously injured.

224. Commissioner Devaney joins in the analysis of the majority, related to causation, as presented here. He further notes that when the analysis is performed over the entire industry as he has defined it, the result is the same, *i.e.* imports are a substantial cause of serious injury.

domestic industry." However, the report concluded that increased imports were not a substantial cause of serious injury to the domestic tin mill industry. The competitiveness of both domestic and imported tin mill products in the U.S. market was affected by "the declining trends in demand for tin mill products, in large part because of the increasing use of alternative packaging materials, the consistent low levels of capacity utilization, and the consolidated purchaser base."]

V. Certain Carbon and Alloy Long Products

[As to these products, the report found that there were ten domestic industries producing articles like the investigated imports in this product category, despite various arguments to aggregate or separate products in certain categories. Nine of the industries produced articles corresponding to individual product categories on which the Commission had collected data: (*i*) carbon and alloy billets, ingots, and blooms, (*ii*) carbon and alloy hot-rolled bar and light shapes; (*iii*) carbon and alloy cold-finished bar; (*iv*) carbon and alloy rebar; (*v*) carbon and alloy rails and railway products; (*vi*) carbon and alloy heavy structural shapes and sheet piling; (*vii*) carbon and alloy fabricated structural units; (*viii*) carbon and alloy wire; and, (*ix*) carbon and alloy nails, staples, and woven cloth. The tenth industry was producers of carbon and alloy and stainless strand, rope, cable, and cordage.

[The report found that hot-rolled bar, cold-finished bar, and rebar were being imported into the United States in such increased quantities as to be each a substantial cause of serious injury to the respective U.S. industry. On the other hand, the report found that–for varying reasons–billets, rails, heavy structural shapes, fabricated units, carbon and alloy steel wire, carbon/alloy and stainless steel wire rope, carbon and alloy nails, staples, and woven cloth were not being imported into the United States in such increased quantities as to be a substantial cause of (or the threat of) serious injury to the corresponding U.S. industries. The following brief excerpts from the report illustrate the kinds of reasons given for denial of escape clause relief for these products.]

Imports [of billets] were lower in both absolute terms and relative to U.S. production in 2000 than they were in 1996. They were also lower in both absolute terms and relative to U.S. production in interim 2001 than they were in interim 2000. Consequently, the threshold statutory requirement of increased imports has not been satisfied and we need not proceed further with the questions of serious injury, substantial cause, or threat. We consequently have made a negative determination with respect to billets. . . .

We find that the domestic rail industry is not seriously injured; that is, we find that there has not been a "significant overall impairment in the position" of the domestic industry. . . .

There has been no significant idling of productive facilities in the domestic rail industry. Production trends tended to track demand throughout the period examined. Domestic production of rails was higher in 2000 than it was in 1996. Production increased from 717,082 tons in 1996 to 895,985 tons in 1997 and then to 955,292 tons in 1998. Production then declined to 667,823 tons in 1999 but increased to 845,350 tons in 2000, a figure 17.9 percent above the 1996 figure. The 334,962 tons of production in interim 2001 were lower than the 446,743 tons of production in interim 2000. . . .

We find that the domestic heavy structural shapes industry is not seriously injured. . . .

Domestic production of heavy structural shapes increased during each full year of the period examined. Production rose from 5.8 million tons in 1996 to 7.3 million tons in 2000, an increase of 27.0 percent. The 3.1 million tons of production in interim 2001 was lower than the 3.8 million tons of production in interim 2000. . . .

We observe that one domestic heavy structural shapes producer, Northwestern Steel, declared bankruptcy and terminated operations in May 2001. Notwithstanding Northwestern's shutdown, however, productive capacity increased substantially during the period examination–and did not decline even in the interim period comparison. Moreover, even with the increases in capacity, capacity utilization remained relatively stable over the period examined, with the exception of interim 2001. Consequently, there has been no significant idling of productive facilities in the U.S. heavy structural shapes industry.

We find that the domestic fabricated unit industry is not seriously injured. . . .

The Commission received questionnaire responses from 37 domestic producers of fabricated units. The principal parties agree that questionnaire coverage is quite low. . . .

For purposes of our analysis, we do not believe it is necessary to resolve the parties' dispute concerning the proper way to calculate U.S. apparent consumption. It is sufficient to observe that, under either party's version, the Commission's questionnaire data cover far less than a majority of the industry and that any import penetration ratio based on the questionnaire data will be vastly overstated. . . .

The data, no matter how they are analyzed, indicate that the overwhelming majority of fabricated units producers operate in a consistently profitable manner, and that overall industry operating performance has been extremely strong. We consequently conclude that the record does not indicate that a significant number of firms are unable to carry out production operations at a reasonable level of profit. . . .

We find that the domestic carbon and alloy steel wire industry is not seriously injured. . . .

We find that the domestic carbon/alloy and stainless steel wire rope industry is not seriously injured. . . .

We find there has been no deterioration in the condition of the domestic industry during the period examined. Production, capacity, market share, capacity utilization, shipments, sales, employment all increased over the period examined, and the industry exhibited consistently profitable operating performance. Consequently, the evidence demonstrates no significant overall impairment in the position of the domestic industry. As a result, we conclude that the domestic rope industry is not seriously injured. We therefore do not reach the issue of substantial cause. . . .

We find that the domestic nails industry is not seriously injured. . . .

Domestic production of nails increased from 601,961 short tons in 1996 to 618,245 short tons in 1997, and to 627,720 short tons in 1998. Production then declined to 617,711 short tons in 1999, and to 600,481 short tons in 2000. Domestic production was 253,691 short tons in interim 2001, as compared to 310,563 short tons in interim 2000. In sum, domestic production declined only 0.2 percent from 1996 to 2000, and was 18.3 percent lower in interim 2001 than in interim 2000.

Total domestic capacity was 792,267 short tons in 1996, increased to 825,192 short tons in 1997, 840,492 short tons in 1998, 852,364 short tons in 1999, and 894,142 short tons in 2000. Capacity was 423,655 short tons in interim 2001, as compared to 452,337 short tons in interim 2000. Overall, U.S. capacity increased by 12.9 percent between 1996 and 2000, and was 6.3 percent lower in interim 2001 than in interim 2000. . . .

[T]he data indicate annual fluctuations in many of the factors examined. Several of the output-related factors, such as the quantity of production and shipments, showed little change from 1996 to 2000, while employment showed some declines over the latter portion of the period examined. Nevertheless, one facet of domestic industry perfor-

mance remained consistent throughout the period examined: profitability. The domestic industry maintained strong operating margins throughout the period. Consequently, the record does not indicate the type of significant overall impairment in the position of the domestic industry sufficient to constitute serious injury. Accordingly, we conclude that the domestic nail industry is not seriously injured. We therefore do not reach the issue of substantial cause. . . .

VI: Certain Carbon and Alloy Tubular Products[891]

A. Domestic Industry Producing a Like or Directly Competitive Product

. . . [W]e find that there are four domestic industries producing articles like the corresponding imported articles subject to investigation within the tubular products category: (1) welded pipe, other than oil country tubular goods (OCTG); (2) seamless pipe (other than OCTG); (3) OCTG, welded and seamless; and (4) fittings, flanges, and tool joints.[892] [893] . . .

B.Welded (Non-OCTG) Pipe Industry

We find that increased imports of welded pipe are a substantial cause of the threat of serious injury: that is, we find that serious injury–a "significant overall impairment in the position" of the domestic industry–due to imports is "clearly imminent," and that increased imports of welded pipe are an important cause, and a cause not less than any other cause, of the threat of serious injury to the domestic industry. . . .

The domestic and imported welded pipe products are regarded as interchangeable in most applications.[977] For the most part they are commodity products and must meet common standards regarding materials, dimensions, and testing. . . . Manufacturing processes and technology are similar throughout the world. U.S. purchasers reported that domestic and imported products were generally competitive and used in the same applications.

Apparent U.S. consumption increased rapidly between 1996 and 1998, rising from 6.01 million short tons to 7.14 million short tons. After rising by 8.1 percent in 1997 and by 10.0 percent in 1998, however, apparent U.S. consumption has stabilized, fluctuating by less than 1 percent per year in 1999 and 2000.[979] As noted above, demand for welded pipe is driven by industrial production, construction, and overall economic activity.

Domestic production of welded pipe rose during the early part of the investigation, reaching its highest level in 1998 at 5.40 million short tons. It declined by 3.9 percent to 5.19 million short tons in 1999 and by 7.9 percent to 4.78 million short tons in 2000. Production was 0.2 percent lower in interim 2001 than in interim 2000.

---

891. Unless otherwise stated, this section of the opinion is joined by Chairman Koplan, Vice Chairman Okun, Commissioner Miller, and Commissioner Hillman.

892. Unless stated otherwise, in these views the terms "pipes," "tubes," and "tubular products" are used interchangeably. These terms are also used interchangeably in common usage and generally in the Harmonized Tariff Schedule, and this is the practice the Commission has followed previously.

893. We find, and there is no dispute, that in each case the domestic article is "like" the corresponding imported product. Since we have found that there are domestic articles "like" the imported articles, we did not need to reach the question of whether there are "directly competitive" domestic articles.

977. A majority of respondents to the Commission's purchasers' questionnaire indicated that they purchase both domestic and imported welded pipe. . . . While purchasers indicated that either they or their buyers were usually aware of the country of origin of the welded pipe products purchased, purchasers indicated that quality and adherence to industry recognized standards, followed by price and cost competitiveness, were the most important factors in purchasing decisions. . . . *See also Certain Pipe and Tube from Argentina, Brazil, Canada, India, Korea, Mexico, Singapore, Taiwan, Thailand, Turkey, and Venezuela*, Invs. Nos. 701-TA-253 (Review) and 731-TA-132, 252, 271, 273, 276, 277, 296, 409, 410, 532-534, 536, and 537 (Review), USITC Pub. 3316 at CIRC-I-19, II-3 (July 2000), comparing domestic and imported circular welded pipe under 16 inches in outside diameter, including production methods.

979. . . . Apparent U.S. consumption was at its highest level in 2000 (7.2 million short tons), and was the same in interim 2000 and interim 2001 (3.8 million short tons).

Domestic capacity rose 22 percent during the period examined, from 6.86 million short tons in 1996 to 8.37 million short tons in 2000, with the largest one-year increase occurring in the middle of the period, between 1997 and 1998 (7.1 percent). Domestic capacity has increased by smaller amounts recently (by 4.4 percent between 1999 and 2000, and by 0.5 percent between interim 2000 and interim 2001).

Foreign producers' capacity and production rose between 1996 and 1998, and declined in 1999 and 2000; both were both higher in interim 2001 than in interim 2000.[982] . . .

C. Fittings, Flanges, and Tool Joints Industry

1. Increased Imports

. . . Imports of fittings and flanges steadily increased in both absolute terms and relative to domestic production during the period examined, with the largest increase occurring at the end of the period. Imports increased by 30.8 percent from 1996 to 2000, including 15.3 percent between 1999 and 2000. Imports were 32.1 percent higher in interim 2001 than in the same period of 2000.[1053] . . .

2. The Domestic Industry Is Seriously Injured

. . . [V]irtually all of the indicators of industry condition declined in 1999 and 2000 and were substantially below levels earlier in the period examined. Industry production, shipments, capacity utilization, profitability, capital expenditures, employment, wages, and market share all declined, and most of the declines were greatest in 1999 and 2000. The industry operated at a loss in 2000. Nearly half the reporting domestic producers operated at a loss in 1999, 2000, and interim 2001. While several of the indicators increased slightly in 2000 from 1999 levels, or in interim 2001 as compared to the same period of 2000, they remained at depressed levels in 2000 and interim 2001. Thus, we find the domestic industry to be seriously injured. . . .

[3]. Causation

. . . [T]he increased imports of fittings, flanges, and tool joints are an important cause, and a cause not less than any other cause, of serious injury to the domestic industry. Accordingly, we find that increased imports of fittings, flanges, and tool joints are a substantial cause of serious injury to the domestic industry.

D. Seamless and welded OCTG industry

. . . [W]e find that the domestic industry is not seriously injured . . .

. . . [T]he strong rebound in industry production and sales, capacity utilization, employment, and profitability in 2000 and interim 2001, which showed the industry to be operating at among the best levels of the period examined, does not indicate that the industry is seriously injured. Other factors examined, including increased inventories and the decline in domestic producers' market share, which in other cases might suggest injury, are more reflective in this instance of the increase in domestic production (in the case of inventories) and the very large increase in OCTG consumption (in the case of

---

982. Foreign producers' capacity and production reached their highest level of the period examined in 1998, at 21.25 million tons and 16.55 million tons, respectively. Capacity was 21.03 million tons in 1999 and 20.80 million tons in 2000, and 10.89 million tons in interim 2001 as compared to 10.74 million short tons in interim 2000. Production was 15.62 million tons in 1999 and 15.09 million tons in 2000, and 7.98 million tons in interim 2001 as compared to 7.86 million tons in interim 2000. . . .

1053. Imports were at their highest level of the period examined in 2000 (135,399 short tons), and were significantly above the level of the second highest year, 1999 (117,461 short tons). Imports in interim 2001 were 81,380 short tons, well above the level of the same period in 2000 (61,588 short tons). The value of total imports also increased substantially during the period examined (45.9 percent), and between 1999 and 2000 (19.3 percent), and was at its highest full-year level in 2000 ($307.9 million). The value of imports was significantly higher in interim 2001 ($182.3 million) than in the same period of 2000 ($144.7 million). . . .

market share) that benefitted domestic producers, and do not indicate serious injury in this investigation.

. . . We find that increased imports are not a substantial cause of the threat of serious injury; that is, we find that "a significant overall impairment in the position" of the domestic industry due to imports is not "clearly imminent." . . . While there is some recent anecdotal information that suggests that the trends in certain data may be turning downward, the data that the Commission collected for the period through June 30, 2001, show that the trends in most indicators are up and suggest that the condition of the industry was improving through June 2001, not worsening. . . . [I]n 2000 and in interim 2001 (as compared to the same period in 2000), domestic production and shipments were up, domestic capacity and capacity utilization were up, employment was up, and industry profitability was up significantly. Industry capital expenditures remained strong. . . .

E. Seamless Pipe Industry

. . . [W]e find that seamless pipe is being imported into the United States in increased quantities in both absolute terms and relative to domestic production. . . .

. . . [W]e find that the domestic industry is not seriously injured. . . .

. . . [T]he data present a mixed picture as to whether the domestic industry is seriously injured. There were annual fluctuations in many of the factors examined, highlighted by a steep decline in industry performance in 1999, a year in which apparent U.S. consumption collapsed. Several of the output-related factors, such as the quantity of production and shipments, showed moderate changes between 1996 and 1998, followed by sharp declines in 1999 and solid recoveries in 2000, while employment showed declines over the latter portion of the period of investigation. Nevertheless, one facet of domestic industry performance remained consistent throughout the period examined: profitability. The domestic industry maintained strong operating margins throughout the period, other than in 1999. On balance, we find that the record does not indicate the type of "significant overall impairment" in the position of the domestic industry sufficient to constitute serious injury. Accordingly, we conclude that the domestic seamless pipe industry is not seriously injured. . . .

We find that increased imports are not a substantial cause of the threat of serious injury. . . . [M]ost of the factors relevant to the condition of the industry were higher in 2000 than in 1999. Domestic production and shipments were up in 2000, and U.S. producers' operating income was up 100 percent. While capacity was down in 2000, capacity utilization was up. Employment was down slightly, but wages paid were up. The ratio of inventories to domestic shipments was stable. Although several of the factors were lower in interim 2001 as compared to the same period of 2000, there was no marked decline in any of them; in fact, several factors showed improvement, including profitability and the ratio of inventories to shipments. The more general declines in several factors, such as market share and capital expenditures, when viewed against other factors that were stable or improving, do not provide a sufficient basis for concluding that serious injury is imminent.

VII. Certain Stainless Steel And Alloy Tool Steel Products[1166]

[As to these steel products, the report found that there were ten domestic industries producing articles like the investigated imports in this product category. These are the

---

1166. Unless otherwise stated, this section of the opinion is joined by Chairman Koplan, Vice Chairman Okun, and Commissioners Miller and Hillman. Commissioner Devaney joins sections [on stainless woven cloth, seamless stainless tubular products, welded stainless tubular products, and stainless steel fittings and flanges].

industries producing (*i*) semifinished stainless steel products; (*ii*) stainless steel cut-to-length plate; (*iii*) stainless steel bar and light shapes; (*iv*) stainless steel rod; (*v*) stainless steel wire; (*vi*) stainless steel woven cloth; (*vii*) seamless stainless tubular products; (*viii*) welded stainless tubular products; (*ix*) stainless steel fittings and flanges; and, (*x*) tool steel.

[The report found that stainless steel bar and light shapes, and stainless steel wire rod were being imported into the United States in such increased quantities as to be each a substantial cause of serious injury to the respective U.S. industry. On the other hand, the report found that–for varying reasons–semifinished stainless steel, stainless cut-to-length plate, tool steel, stainless steel wire, stainless woven cloth, seamless stainless tubular products, welded stainless tubular products, and stainless steel fittings were not being imported into the United States in such increased quantities as to be a substantial cause of (or the threat of) serious injury to the corresponding U.S. industries. The following brief excerpts from the report illustrate the kinds of reasons given for denial of escape clause relief for these products.]

In finding that the domestic [semifinished stainless steel products] industry is not seriously injured, we have considered carefully evidence in the record relating to the enumerated statutory factors, including evidence relating to domestic production, capacity, capacity utilization, shipments, market share, profit and loss data, plant closings, wages and other employment-related data, productivity, inventories, capital expenditures, and research and development expenditures. Considered in their entirety, these factors reflect that there is not a significant overall impairment in the condition of the industry which would constitute "serious injury" within the meaning of section 202 of the Trade Act. . . .

We find that the domestic stainless plate industry is not seriously injured. . . .

. . . [N]otwithstanding some declines in its financial condition, the record does not show that the stainless plate industry is suffering such an impairment of its overall condition that it should be considered seriously injured. Despite its losses in market share and declines in net commercial sales value between 1996 and 2000 as well as declines in employment levels, the industry was consistently profitable throughout the period, displayed reasonably good and improving operating margins during the latter portion of the period and exhibited strong and stable production and capacity utilization levels. The declines in certain of the industry's operating indicia (such as employment levels and capital expenditures) do not, in our view, offset the other factors we have discussed above. Moreover, although most of the industry's economic indicators declined during interim 2001, these declines occurred during a significant downturn in demand and were not significant enough to change our conclusion that the industry has not experienced serious injury during the period. Consequently, we find that the record does not show the type of overall impairment of the industry that is substantial enough in duration or magnitude to constitute serious injury. We therefore do not reach the question of substantial cause in this proceeding for this product. . . .

We find that the domestic tool steel industry is not seriously injured. . . .

. . . [A]n examination of the industry's trade and financial indicia during the period of investigation indicates that the industry's condition remained reasonably sound. The industry remained reasonably profitable, increased its production, shipments and capacity levels, and saw its employment levels grow during the five full years of the period of investigation. Although a number of indicators, including operating performance, declined in the interim period, the declines occurred during a significant downturn in demand and were not so sustained that they lead us to conclude that the

industry has begun suffering serious injury. On the whole, the record does not show the type of overall impairment of the industry that is substantial enough in duration or magnitude to constitute serious injury within the meaning of section 202 of the Trade Act. Accordingly, we do not reach the question of substantial cause. . . .

We find that the domestic stainless steel wire industry is not seriously injured. . . .

. . . [A]n examination of the stainless wire industry's trade and financial indicia during the period of investigation indicates that the industry's condition generally remained stable or improved during the period. The industry remained profitable throughout the five full years of the period of investigation, with its operating income levels remaining stable throughout the period. The industry increased its production, capacity utilization levels and its market share during the five full years of the period of investigation. Although most indicators declined between interim periods, including operating performance, these declines occurred during a significant downturn in demand and were not significant enough to change our conclusion that the industry has not experienced serious injury during the period. Consequently, we find that the record does not show the type of overall impairment of the stainless wire industry that is substantial enough in duration or magnitude to constitute serious injury. We therefore do not reach the question of substantial cause. . . .

We find that the domestic stainless woven cloth industry is not seriously injured. . . .

. . . [A]n examination of the stainless woven cloth industry's trade and financial indicia during the period of investigation indicates that the industry's condition either remained stable or improved during that period. The industry remained very profitable throughout the five full years of the period of investigation. The industry's employment and production levels remained essentially stable during the period of investigation and the industry appears to remain a small but significant player in the woven cloth market. Finally, the industry has not entered an appearance in this proceeding to seek relief from imports. Consequently, we find that the record does not show the type of overall impairment of the industry that is substantial enough in duration or magnitude to constitute serious injury. We therefore do not reach the question of substantial cause in this proceeding for this product. . . .

We find that the domestic industry is not seriously injured. . . .

. . . [W]e note that the domestic seamless stainless tubular product industry has not actively sought import relief in this proceeding. In fact, the seamless stainless tubular products producers who appeared at the Commission's hearing stated that they oppose relief against imports of seamless stainless tubular products.[1570] The industry's opposition to a remedy in this proceeding indicates that the domestic seamless stainless tubular products industry is not suffering serious injury within the meaning of section 201 of the Trade Act.[1571] . . .

We find that the domestic welded stainless tubular products industry is not seriously injured. . . .

. . . [M]ost of the sales, output and employment-related factors we examined for the stainless welded tubular product industry either remained somewhat stable or improved between 1996 and 2000, notwithstanding the losses in market share that occurred

---

1570. . . . In addition, counsel for these domestic producers testified that, after this investigation was instituted, his clients attempted unsuccessfully to amend the scope of the investigation to remove seamless stainless tubular products. . . .

1571. The domestic industry does not contend that it has not suffered any injury by reason of all imports; rather, it takes the position that it is suffering material injury by reason of dumped imports from Japan. [On dumping, see *infra*, Chapter V.]

between 1996 and 2000. The industry displayed reasonably good operating margins during this period as well as strong employment and production levels. Although most indicators declined during the interim period comparison, including operating performance, these declines occurred during a significant downturn in demand and were not significant enough for us to conclude that the industry has experienced serious injury during the period. Consequently, we find that the record does not show the type of overall impairment of the industry that is substantial enough in duration or magnitude to constitute serious injury.[1615] We therefore do not reach the question of substantial cause in this proceeding for this product. . . .

We find that the domestic stainless steel fittings industry is not seriously injured. . . .

. . . [A] number of the industry's trade and financial indicia declined during the period of investigation. However, the industry remained profitable throughout the five full years of the period of investigation, and saw its operating income levels improve considerably during the last year and a half of the period of investigation. Although most of the industry's other indicators declined during the period, these declines were not so significant that they would lead us to conclude that the industry was experiencing serious injury. Consequently, we find that the record does not show the type of overall impairment of the industry that is substantial enough in duration or magnitude to constitute serious injury. We therefore do not reach the question of substantial cause in this proceeding for this product. . . .

1615. We therefore do not reach the question of substantial cause in this proceeding for this product.

[INSERT Appendix B, Part 1, HERE]

[INSERT Appendix B, Part 2, HERE]

[INSERT Appendix C, Part 1, HERE]

[INSERT Appendix C, Part 2, HERE]

[INSERT Appendix C, Part 3, HERE]

[INSERT Appendix C, Part 4, HERE]

NOTES AND QUESTIONS

1. An agency established with an *even* number of voting members seems almost designed for plurality decision making, separate and concurring and dissenting opinions, and perhaps confusion. Does the structure of the ITC seem to make decisions more difficult to reach–or to comprehend, for that matter? In that regard, consider the following excerpt from a case involving an antidumping investigation.[1616]

TAIWAN SEMICONDUCTOR IND. ASS'N v. UNITED STATES
118 F.Supp.2d 1250 (CIT 2000)

POGUE, Judge.

[The court reviewed a final determination by the ITC–following a *second* remand from the court–finding that imports of static random access memory semiconductors ("SRAMs") from Taiwan had not materially injured the U.S. SRAM industry. Even though the imports of SRAMs from Taiwan were sold at less than fair value ("LTFV"), a negative finding on the issue of material injury would mean that antidumping duties could not be imposed on the imports. In its first attempt, the ITC had reached an *affirmative* injury determination, but it had not adequately explained how it handled the possible harmful effects from other (non-import) sources of injury. On the first remand, the ITC again determined that the domestic industry was materially injured by reason of the imported SRAMs, but it did not adequately explain its reasoning.]

In its second remand determination, the Commission now determines that, pursuant to section 735(b) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1673d(b) (1994), "an industry in the United States is not materially injured or threatened with material injury by reason of imports of [SRAMs] from Taiwan that have been found by the Department of Commerce to be sold in the United States at [LTFV]." . . .

The statute directs the Commission to "make a final determination of whether ... an industry in the United States ... is materially injured, or ... threatened with material injury ... by reason of [LTFV] imports...." 19 U.S.C. § 1673d(b). The six commissioners comprising the Commission vote to make this determination. . . . [T]he details surrounding the Commission's voting record in its investigation of SRAMs from Taiwan are rather unique. . . . Due to vacancies and a recusal, only two commissioners actually voted in the original determination. Commissioner Bragg found that the U.S. industry was materially injured by reason of LTFV imports of SRAMs from Taiwan, with Commissioner Miller dissenting. . . . Accordingly, Commissioner Bragg's decision constituted an affirmative determination of the Commission pursuant to 19 U.S.C. § 1677(11).

"By the time of the remand, three new members had been appointed to the Commission: Commissioner Askey, Commissioner Koplan, and Commissioner Hillman." . . . Nevertheless, only Commissioner Bragg prepared written views on remand. . . . "The Commission ... submit[ted] [Commissioner] Bragg's remand views to the Court ... as its 'Views on Remand[.]' "

. . . Plaintiffs argued that the Commission's first remand determination was unlawful because it only constituted the views of Commissioner Bragg. . . . Plaintiffs maintained that all eligible commissioners should have participated in the remand determination, because the applicable statute, case law, and this Court's remand order . . . all compelled an institutional response. . . .

Upon reviewing 19 U.S.C. § 1516a(c)(3), the relevant case law, and our own remand

---

1616. Antidumping duties are examined in Chapter V, *infra*. The substantive aspects of the *Taiwan Semiconductor Ind. Ass'n* decision are excerpted at ▬-▬, *infra*.

order . . . , we agreed that all eligible commissioners should have participated meaningfully in the remand. . . . That is, the commissioners should have adequately considered the record evidence and the decision's merits before submitting the remand views of Commissioner Bragg as an institutional response of the Commission. . . . Because there was no clear evidence demonstrating that the full Commission had not meaningfully participated in the remand, however, the Court presumed that the commissioners properly discharged their official duties.[5] . . .

It is now clear, however, that the new commissioners did not meaningfully participate in the first remand determination. In a motion for extension of time, Defendant stated that, in the first remand proceeding, the new "commissioners did not undertake to themselves reach independent determinations based on a review of the substantive record." . . .

In the second remand determination, "all participating [c]ommissioners engaged in a substantive review of the record." . . . Commissioners Hillman, Koplan, and Okun adopted, with some elaboration, the negative material injury and threat determinations made by Commissioner Miller in her dissent issued with the original final determination.[7] Commissioner Miller reaffirmed her original views offered in her dissent. . . . Commissioner Bragg maintained her finding that the domestic industry was materially injured by reason of the Taiwanese subject imports and dissented. . . . Therefore, in its second remand determination, the Commission determined, by a four to one margin, that the domestic industry was not materially injured or threatened with material injury by the Taiwanese imports. . . .

2. What do you think of the rule in 19 U.S.C. § 1330(d), which governs divided ITC votes in specified cases? Is § 1330(d)(1) consistent with § 1330(d)(2)?

3. Review the ITC report Appendices B and C (*supra* at ▬, ▬). How does 19 U.S.C. § 1330(d) affect the decisions reached in the investigation? Are decisions reached by an even-numbered commission, typically involving multiple separate opinions that are often incongruent in their reasoning, consistent with U.S. obligations under GATT article XIX and the Safeguards Agreement? In answering this question, consider the following excerpt from the Appellate Body's report on the steel tariffs.

UNITED STATES – DEFINITIVE SAFEGUARD MEASURES ON IMPORTS OF CERTAIN STEEL PRODUCTS
Report of the Appellate Body, AB-2003-3 (Nov. 10, 2003)

1. Tin Mill Products

401. The Panel also found that the USITC failed to provide a reasoned and adequate explanation for its determination that imports of tin mill products had increased. The Panel

5. "The presumption of regularity supporting the acts of agency officials mandates that, 'in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.' " . . . (quoting *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926)); *see also United States v. Morgan*, 313 U.S. 409, 422 (1941). "[F]ederal courts have consistently recognized that challengers must satisfy a high burden in order to rebut the presumption that agency officials have adequately considered the issues in making a final decision, including their reading and understanding of the record evidence." . . . (citations omitted).

7. By the date of the second remand, new Commissioner Okun had begun serving her term; Commissioner Crawford's term had expired; and Commissioner Askey had recused herself. . . .

noted that the President of the United States "based his determination [with respect to tin mill products] on the findings of [] Commissioners [Bragg, Devaney, and Miller], although those three commissioners did not perform their analysis on the basis of the same like product definition". The Panel went on to find that these findings "cannot be reconciled as a matter of their substance", because they were not based on an identically-defined like product; the Panel concluded that a WTO Member is not permitted, under Articles 2.1 and 3.1 of the *Agreement on Safeguards*, to "base a safeguard measure on a determination supported by a set of explanations each of which is different and impossible to reconcile with the other. Such findings cannot simultaneously form the basis of a determination."

402. The Panel also said that:

> [T]he Panel sees no inconsistency with WTO law in the fact itself that only one commissioner reached affirmative findings with regard to tin mill products as a separate product. However, if a Member *relies* on the findings made by *three* Commissioners and the findings of those *three* Commissioners constitute the *determination* of the competent authorities in the sense of Article 2.1 of the Agreement on Safeguards, there is a requirement for those findings to provide a reasoned and adequate explanation. A reasoned and adequate explanation is not contained in a set of findings which *cannot* be reconciled one with another. (original emphasis; underlining added)

. . .

412. We note that the Panel did not examine the substance of the findings of the three Commissioners; rather, the Panel noted only that these findings were not based on an identically-defined like product, and concluded that this rendered the findings of the three Commissioners "irreconcilable". From this conclusion, the Panel deduced that these findings could not provide a reasoned and adequate explanation for the USITC's single determination.

413. We have reservations about the Panel's approach. First, as a preliminary matter, we are not persuaded that the findings of the three Commissioners "*cannot* be reconciled". We do not believe that an affirmative finding with respect to a broad product grouping, on the one hand, and an affirmative finding with respect to one of the products contained in that broad product grouping, on the other hand, are, necessarily, mutually exclusive. It may be that they are irreconcilable, but that will depend on the facts of the case. Here, the Panel did not inquire into the details of the findings as they related to increased imports and, hence, was not adequately informed as to whether the three findings were reconcilable or not.

414. Secondly, in any event, we note that Article 3.1 of the *Agreement on Safeguards* requires the competent authority, *inter alia*, to "publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law". We do not read Article 3.1 as necessarily precluding the possibility of providing multiple findings instead of a single finding in order to support a determination under Articles 2.1 and 4 of the *Agreement on Safeguards*. Nor does any other provision of the *Agreement on Safeguards* expressly preclude such a possibility. The *Agreement on Safeguards*, therefore, in our view, does not interfere with the discretion of a WTO Member to choose whether to support the determination of its competent authority by a single explanation or, alternatively, by multiple explanations by members of the competent authority. This discretion reflects the fact that, as we stated in *US – Line Pipe*, "the *Agreement on Safeguards* does not prescribe the internal decision-making process for making [] a determination [in a domestic safeguard investigation]".[382]

415. In the appeal before us, the USITC set out, in its report, three distinct and separate sets of findings. The results were combined into a "single institutional determination". These findings were made on the basis of different product definitions developed by three

---

382. Appellate Body Report, *US – Line Pipe*, para. 158.

Commissioners. Although we agree with the Panel that "it makes a difference whether the product at issue is tin mill or a much broader category called CCFRS and containing tin mill products", because "the import numbers for different product definitions will not be the same", this very difference, as well as the fact that the findings underlying the USITC's determination were set out as distinct and separate in the USITC's report, implies that these findings should *not* be read together, nor should a panel seek to "reconcile" them. Rather, a panel must ascertain whether a reasoned and adequate explanation for the USITC's determination is contained in the report, even if only in one of the Commissioner's individual findings.

416. In our view, in the case before us, the Panel should, therefore, not have ended its enquiry after noting that the conclusions of Commissioners Bragg and Devaney were based on a product definition that differed from that on which Commissioner Miller based her conclusion. After making this correct observation, the Panel should have continued its enquiry by examining the views of the three Commissioners *separately*, in order to ascertain whether one of these sets of findings contained a reasoned and adequate explanation for the USITC's "single institutional determination" on tin mill products.

417. In fact, we note that the approach which, in our view, the Panel should have taken in the context of increased imports, is precisely the approach the Panel adopted in the context of parallelism.[384] In that context, the Panel first reviewed the findings of Commissioner Bragg and subsequently proceeded to review the findings reached by Commissioner Miller. We do not understand why the Panel reviewed the multiple findings separately in the context of parallelism, but declined to do so in the context of increased imports.

418. It bears emphasizing that, in reviewing each of such findings separately, a panel is of course obliged to assess whether that particular finding provides a reasoned and adequate explanation of how the facts support the competent authority's determination. As we held in *US – Lamb*, "panels must [not] simply *accept* the conclusions of the competent authorities"; they must examine these conclusions "critically" and "in depth".[387] Hence, in examining whether one of the multiple sets of explanations set forth by the competent authority, taken individually, provides a reasoned and adequate explanation for the competent authority's determination, a panel may have to address, *inter alia*, the question whether, *as a matter of WTO obligations*, findings by individual Commissioners made on the basis of a *broad* product grouping can provide a reasoned and adequate explanation for a "single institutional determination" of the USITC concerning a *narrow* product grouping.[388] Accordingly, we do *not* suggest that the product scope of an affirmative finding by an individual Commissioner is *not* relevant for the enquiry whether this finding does or does not provide a reasoned and adequate explanation for the competent authority's determination.[389] Rather, our finding implies that a panel may not conclude that there is no reasoned and adequate explanation for a competent authority's determination by relying merely on the fact that distinct multiple explanations given by the competent authority are not based on an identically-defined like product.[390]

419. In the light of the above, we *reverse* the Panel's finding . . . that the USITC report

---

384. We note, however, that the Panel also relied on the divergence in product definitions in the context of its causation analysis. . . .

387. Appellate Body Report, *US – Lamb*, para. 106. (original emphasis).

388. In this regard, we note that the fact that, pursuant to the domestic law of a WTO Member, a finding made on the basis of a *broad* product grouping is deemed to support a competent authority's determination which relates to a *narrower* product, does not, in and of itself, imply that this conclusion holds true also for the purposes of the *Agreement on Safeguards*.

389. Indeed, we note that in the context of parallelism, the Panel addressed separately the finding of Commissioner Bragg and found that "findings on a product category other than tin mill products are [not] able to support a measure relating to tin mill products as a separate product category, unless there is a reasoned and adequate explanation relating the two product categories". . . .

390. We also emphasize that our finding does not address the question whether the USITC and/or individual Commissioners correctly defined the "like product", the "imported product", or the "domestic industry".

does not contain a reasoned and adequate explanation of how the facts support the determination of increased imports for tin mill products because "the explanation consists of alternative explanations partly departing from each other which, given the different product bases, cannot be reconciled as a matter of their substance." . . .

2. Stainless Steel Wire

423. The six Commissioners of the USITC made divergent findings on the product category stainless steel wire. Four Commissioners (Chairman Koplan, Vice Chairman Okun, as well as Commissioners Hillman and Miller) defined stainless steel wire as a distinct product category and presented their respective views on the basis of this product category. The remaining two Commissioners (Bragg and Devaney) did not consider stainless steel wire as a separate product category; rather, these two Commissioners identified a product category "stainless steel wire products" (Bragg) or "stainless steel wire and wire rope" (Devaney), both composed of stainless steel wire and stainless steel rope, and presented their respective views on the basis of this broader product category.

424. Among the four Commissioners who defined stainless steel wire as a distinct and separate product category, three reached a negative finding (Vice Chairman Okun and Commissioners Hillman and Miller), and one reached an affirmative finding (Chairman Koplan). Commissioners Bragg and Devaney reached an affirmative finding with respect to the larger product category stainless steel wire products/stainless steel wire and wire rope. . . .

426. The Panel found that the USITC failed to provide a reasoned and adequate explanation of how the facts support its determination that imports of stainless steel wire have increased. The Panel first noted that the situation before it "is equivalent to that encountered in the context of tin mill products". The Panel then stated:

> [T]he Agreement on Safeguards does not permit the combination of findings as supporting a determination, if these findings were reached on the basis of differently defined products. If such findings cannot be reconciled one with another (as a matter of substance), they cannot simultaneously form the basis of a determination.

The Panel, moreover, cross-referenced its reasoning set out in the context of its findings on tin mill products. . . .

429. The facts on stainless steel wire, as well as the findings of the Panel, are, for all relevant purposes, identical to those before us in the context of tin mill products. Therefore, our reasoning with respect to tin mill products is applicable, *mutatis mutandis*, also to stainless steel wire. We therefore *reverse* the Panel's finding . . . that the USITC report does not contain a reasoned and adequate explanation of how the facts support the determination of increased imports for stainless steel wire because the "explanation consists of alternative explanations departing from each other and which, given the different product bases, cannot be reconciled as a matter of substance." . . .

4. In its steel decision, how does the ITC treat imports from the NAFTA countries Canada and Mexico? Review §§ 311 and 312 of the NAFTA Implementation Act. Do these provisions give NAFTA countries an unfair advantage over other WTO members in injury determinations? In answering this question, consider the following excerpt from the Appellate Body's report on the steel tariffs.

UNITED STATES – DEFINITIVE SAFEGUARD MEASURES ON IMPORTS OF CERTAIN STEEL PRODUCTS
Report of the Appellate Body, AB-2003-3 (Nov. 10, 2003)

433. . . . [T]he United States excluded imports from Canada and Mexico, as well as from Israel and Jordan, from the scope of application of these safeguard measures. The Panel found that these safeguard measures were inconsistent with Articles 2.1 and 4.2 of the *Agreement on Safeguards* because the United States did not, with respect to any of the product categories at issue, establish explicitly that imports from the sources included in the application of these measures, *alone*, satisfied the conditions for the application of a safeguard measure. The United States challenges these findings of the Panel.

434. In its findings, the Panel began by making some general comments about the requirement of "parallelism"[417], and then reviewed the USITC's findings on a product-specific basis. In these general comments, the Panel noted that:

> [i]ncreased imports from sources ultimately excluded from the application of the measure must … be excluded from the analysis. The increase of these imports and their effect on the domestic industry cannot be used to support a conclusion that the product in question "is being imported in such increased quantities so as to cause serious injury". *This makes it necessary … to account for the fact that excluded imports may have some injurious impact on the domestic industry*. (emphasis added)

435. In its product-specific analysis, the Panel, using similar language, relied on this reasoning in examining the USITC's determination with respect to non-NAFTA imports for nine product categories, namely, CCFRS, tin mill products, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, stainless steel bar, and stainless steel wire. For each of these nine product categories, the Panel found that the USITC had not complied with the requirement to demonstrate a causal link between increased imports and serious injury, because it did not account for the effects—existing or possible—of excluded imports on the domestic industry.[419] The Panel did not make this finding with respect to the tenth product category, stainless steel rod.

436. For all ten product categories, the Panel found a second flaw in the USITC's analysis after examining its determination concerning non-NAFTA imports. Using virtually identical language for most product categories[421], the Panel stated:

> [T]he Panel notes that the sources excluded from the measure are not only Canada and Mexico, but also those from Israel and Jordan. Accordingly, imports from sources covered by the measure are not "non-NAFTA imports", but imports other than those from Canada, Mexico, Israel and Jordan. With regard to such imports, the USITC did not establish explicitly that they satisfied the requirements of Article 2.1 (as elaborated in Article 4) of the Agreement on Safeguards, neither in the USITC Report, nor in the Second Supplementary Report.
> It may well be that imports from Israel and Jordan[422] were so small that they could not possibly affect the findings reached, whether about all imports or about non-NAFTA imports.

---

417. Appellate Body Report, *US – Line Pipe*, paras. 178–181.

419. The Panel used the language "to account for the fact that excluded … imports contributed to the serious injury" or "the injury caused by excluded imports must be accounted for" with respect to the product categories CCFRS . . . , hot-rolled bar . . . , cold-finished bar . . . , rebar . . . , FFTJ . . . , and stainless steel bar . . . . With respect to Commissioner Miller's analysis of the causal link between non-Canadian imports of tin mill products and serious injury, the Panel stated that "[the] findings do not account for the fact that imports other than those from an excluded source are less than those from all sources and that the effects on the domestic producers are, therefore, not the same." . . . With respect to welded pipe, the Panel stated that the USITC's finding "does not account for the fact that the threat of serious injury caused by non-NAFTA imports is but a part of the threat of serious injury caused by all imports and does not establish that there is a genuine and substantial relationship of cause and effect." . . . With respect to stainless steel wire, the Panel stated that "the findings [ ] do not take account of the portion of the threat of serious injury caused by NAFTA imports." . . .

421. The Panel did not include the first paragraph with respect to its findings on tin mill products and stainless steel rod.

422. For tin mill products, the Panel referred to imports from Mexico, Israel and Jordan.

> However, in the view of the Panel, it would then still be necessary for the competent authorities to actually express the findings required under parallelism with regard to increased imports other than those from Canada, Mexico, Israel and Jordan. The standard is that the Member must establish explicitly that imports from sources covered by the measure satisfy all conditions for the right to apply a safeguard measure. For this finding to be made, it is not sufficient to merely find that the exclusion of imports from Israel and Jordan would not change the conclusions regarding the prerequisites for a safeguard measure. The Panel recognizes that if, as established elsewhere in the report of the competent authorities, imports from an excluded source were [very small or (virtually) non-existent], it is very possible that the facts *allow* a finding that imports from sources covered by the measure do satisfy the conditions for the application of a safeguard measure. This, however, still needs to be established explicitly and supported with a reasoned and adequate explanation. (original emphasis, footnotes omitted)

. . .

439. . . . The word "parallelism" is not in the text of the *Agreement on Safeguards*; rather, the requirement that is described as "parallelism" is found in the "parallel" language used in the first and second paragraphs of Article 2 of the *Agreement on Safeguards*. Article 2 of the *Agreement on Safeguards* stipulates:

> *Conditions*
>
> 1. A Member[1] may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, 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.
> 2. Safeguard measures shall be applied to a product being imported irrespective of its source. (underlining added)
>
> [1] A customs union may apply a safeguard measure as a single unit or on behalf of a member State. When a customs union applies a safeguard measure as a single unit, all the requirements for the determination of serious injury or threat thereof under this Agreement shall be based on the conditions existing in the customs union as a whole. When a safeguard measure is applied on behalf of a member State, all the requirements for the determination of serious injury or threat thereof shall be based on the conditions existing in that member State and the measure shall be limited to that member State. Nothing in this Agreement prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994.

440. In *US – Wheat Gluten*, we said that:

> The same phrase – "product … being imported" – appears in *both* … paragraphs of Article 2. In view of the identity of the language in the two provisions, and in the absence of any contrary indication in the context, we believe that it is appropriate to ascribe the *same* meaning to this phrase in both Articles 2.1 and 2.2. To include imports from all sources in the determination that increased imports are causing serious injury, and then to exclude imports from one source from the application of the measure, would be to give the phrase "product being imported" a *different* meaning in Articles 2.1 and 2.2 of the *Agreement on Safeguards*. In Article 2.1, the phrase would embrace imports from *all* sources whereas, in Article 2.2, it would exclude imports from certain sources. This would be incongruous and unwarranted. In the usual course, therefore, the imports included in the determinations made under Articles 2.1 and 4.2 should correspond to the imports included in the application of the measure, under Article 2.2.[430] (original emphasis; underlining added)

441. Thus, where, for purposes of applying a safeguard measure, a Member has

---

430. Appellate Body Report, *US – Wheat Gluten*, para. 96.

conducted an investigation considering imports from *all* sources (that is, *including* any members of a free-trade area), that Member may not, subsequently, without any further analysis, exclude imports from free-trade area partners from the application of the resulting safeguard measure. As we stated in *US – Line Pipe*, if a Member were to do so, there would be a "gap" between, on the one hand, imports covered by the investigation and, on the other hand, imports falling within the scope of the safeguard measure.[431] In clarifying the obligations of WTO Members under the "parallel" requirements of the first and second paragraphs of Article 2 of the *Agreement on Safeguards*, we explained in *US – Line Pipe* that such a "gap" can be justified under the *Agreement on Safeguards* only if the Member establishes:

> … "explicitly" that imports from sources covered by the measure "satisf[y] the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the *Agreement on Safeguards*."

442. We further explained, in that same appeal, that, in order to fulfill this obligation in Article 2, "establish[ing] explicitly" signifies that a competent authority must provide a "reasoned and adequate explanation of how the facts support their determination"[432], adding that "[t]o be explicit, a statement must express distinctly all that is meant; it must leave nothing merely implied or suggested; it must be clear and unambiguous."[433]

443. . . . It is undisputed by the United States that, in its investigation, the USITC considered imports from *all sources—including* imports from Canada, Israel, Jordan, and Mexico. Nevertheless, imports from Canada, Israel, Jordan, and Mexico were *excluded* from the application of the safeguard measures at issue. Therefore, there is, in these measures, a gap between the imports that were taken into account in the investigation performed by the USITC and the imports falling within the scope of the measures as applied.

444. It was thus incumbent on the USITC, in fulfilling the obligations of the United States under Article 2 of the *Agreement on Safeguards*, to justify this gap by establishing explicitly, in its report, that imports from sources covered by the measures—that is, imports from sources *other than* the excluded countries of Canada, Israel, Jordan, and Mexico—satisfy, *alone*, and in and of themselves, the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the *Agreement on Safeguards*. Further, and as we have already explained, to provide such a justification, the USITC was obliged by the *Agreement on Safeguards* to provide a reasoned and adequate explanation of how the facts supported its determination that imports from sources *other than* Canada, Israel, Jordan, and Mexico satisfy, *alone*, and in and of themselves, the conditions for the application of a safeguard measure. . . .

450. . . . [I]mports *excluded* from the application of the safeguard measure must be considered a factor "other than increased imports" within the meaning of Article 4.2(b). The possible injurious effects that these excluded imports may have on the domestic industry must not be attributed to imports included in the safeguard measure pursuant to Article 4.2(b). The requirement articulated by the Panel "to account for the fact that excluded imports may have some injurious impact on the domestic industry" is, therefore, not, as the United States argues, an "extra analytical step" that the Panel added to the analysis of imports from all sources. To the contrary, this requirement necessarily follows from the obligation in Article 4.2(b) for the competent authority to ensure that the effects of factors other than increased imports—a set of factors that subsumes *imports excluded from the safeguard measure*—are not attributed to imports included in the measure, in

---

431. Appellate Body Report, *US – Line Pipe*, para. 181.
432. Appellate Body Report, *US – Line Pipe*, para. 181, quoting *US – Lamb*, para. 103.
433. Appellate Body Report, *US – Line Pipe*, para. 194.

establishing a causal link between imports included in the measure and serious injury or threat thereof. . . .

465. . . . At no point did the USITC make a determination on whether imports . . . from those sources *other than* Canada, Israel, Jordan, and Mexico . . . satisfied, *alone*, in and of themselves, the conditions for the application of a safeguard measure. Instead, the USITC made *two separate determinations*—one determination that the exclusion of imports from *Canada and Mexico* would not change the "injury analysis" of the USITC, and another *separate* determination that the exclusion of imports from *Israel and Jordan* would not change the conclusions of the USITC.[470]

466. The requirement of the *Agreement on Safeguards* to establish explicitly that imports from sources covered by a measure, *alone*, satisfy the conditions for the application of a safeguard measure cannot be fulfilled by conducting a *series of separate and partial* determinations. For example, where a WTO Member seeks to establish explicitly that imports from *sources other than A and B* satisfy the conditions for the application of a safeguard measure, if that Member conducts a separate investigation, and makes a separate determination, on whether imports from sources *other than A* satisfy the relevant conditions, and then, subsequently, conducts *another* separate and distinct investigation, and makes a separate determination, on whether imports from sources *other than B* satisfy the relevant conditions, then these *two separate* determinations, in our view, do not demonstrate that imports from sources other than *A and B together* satisfy the requirements for the imposition of a safeguard measure. By making these two separate determinations, that Member will, logically, for each of them, be basing its determination, in part, either on imports from A or on imports from B.[471] If this were permitted, a determination on the application of a safeguard measure could be easily subjected to mathematical manipulation. This could not have been the intent of the Members of the WTO in drafting and agreeing on the *Agreement on Safeguards*.

467. We are, therefore, of the view that the Panel raised a valid methodological concern when it stated that "it would … be required for the competent authorities to actually express the findings required under parallelism with regard to increased imports other than those from Canada, Mexico, Israel and Jordan."

468. It may not have made a practical difference in the application of the safeguard measures at issue in this appeal, in as much as, on the facts, the quantity of imports from the excluded countries was negligible or virtually non-existent.[473] However, we are of the view that, rather than making *two separate determinations*—excluding either Canada and Mexico, or, alternatively, Israel and Jordan—from the underlying data on which it based its overall determination, the USITC should have, as the Panel found, provided *one single joint* determination, supported explicitly by a reasoned and adequate explanation, on whether imports from sources *other than Canada, Israel, Jordan, and Mexico*, by themselves, satisfied the conditions for the application of a safeguard measure. . . .

5. Note that the steel investigation was prompted by requests from the USTR *and* the

---

470. We note that the USITC provided these two separate findings with respect to almost all product categories at issue. For one product category—tin mill products—*three* separate findings were provided—one finding for imports from sources other than Canada, one finding for imports from sources other than Mexico, and one finding that the "exclusion of imports from Israel and Jordan would not change the conclusions of the USITC or individual Commissioners". . . .

471. Clearly, where a Member examines imports from sources *other than A*,it will be *including*, in its analysis, imports from B; conversely, when examining imports from sources *other than B*, the Member will be *including* in its analysis imports from A. Thus, at each step of the investigation, the Member will be including the effects of some of the excluded imports in its analysis.

473. We note that we are *not* addressing the question of the appropriate interpretation, in this respect, of the parallelism requirement in circumstances where imports from Israel and Jordan were *zero* in every year of the period of investigation. We note that, for the product category at issue, stainless steel rod, contrary to the United States' assertion . . . , according to the data tables contained in the USITC report . . . , imports from Israel during the period of investigation were *not zero* in every year. ...

Senate Finance Committee. Is initiation of an investigation as a result of such requests appropriate under 19 U.S.C. § 2252? Does the involvement of the Senate Committee constitute a politicizing of the investigation? *Cf. Nippon Steel Corporation v. United States*, 182 F.Supp.2d 1330 (Ct. Intl. Trade. 2001) (rejecting, on factual grounds, due process claim of political interference in antidumping case).

6. Even in our electronic age, production and availability of steel and steel products are still, presumably, of concern in terms of national security. Should the ITC take such concerns into account in deciding whether to recommend safeguard action to the President? Whether or not the ITC does so, should the President take such concerns into account in deciding whether or not to act on the ITC's recommendations? In this regard, review 19 U.S.C. §§ 2252-2253. Does it make a difference that there is specific–and separate–statutory authority (*id*. § 1862) dealing with national security policy and trade regulation? For discussion of this authority, see *infra* § A.5.

7. Are you satisfied with the way the ITC report delineates the domestic industries affected by the product categories under investigation? Do the 33 product categories seem sufficiently distinct to be investigated separately? Why isn't there just one category–*i.e.*, "steel"?

8. Focusing on one group of products, carbon flat-rolled steel, review the report's injury determination, *supra* at ▬▬-▬▬. Consider also the report's treatment of fittings and flanges, *supra* at ▬▬-▬▬. Are you satisfied with the ITC's treatment of the three statutory factors–increased imports, serious injury, substantial cause? Do these factors, as interpreted and applied by the ITC, unduly favor petitioners?

9. Focusing on another group, carbon and alloy long products, *supra* at ▬▬-▬▬, on what grounds does the report decide that certain product categories do *not* qualify for safeguard protection? (Consider also the report's treatment of stainless steel and alloy tool steel, *supra* at ▬▬-▬▬.) To what extent is profitability of the affected domestic industry a key factor?

10. Note that, even if increased imports have not yet caused serious injury, under certain circumstances the *threat* of serious injury to a domestic industry may be the basis for safeguard protection. Review the report's treatment of welded (non-OCTG) pipe. On what basis does the ITC conclude that such a threat of serious injury warrants safeguard action?

STEEL; IMPORT INVESTIGATIONS
[Remedy Recommendations]

International Trade Commission Investigation No. TA-201-73 (Dec. 20, 2001)

VIEWS ON REMEDY OF THE COMMISSION[474]

I. Introduction

Having found that increased imports are a substantial cause of serious injury or the threat of serious injury to certain domestic industries, we must now recommend to the

474. Unless otherwise stated, this opinion is joined by Chairman Koplan, Commissioner Miller, and Commissioner Hillman. Pursuant to section 330(d)(2) of the Tariff Act of 1930, 19 U.S.C. § 1330(d)(2), the findings and recommendations articulated in these views, to the extent they are endorsed by all three Commissioners who have joined this opinion, will be treated as the remedy findings and recommendations of the Commission for purposes of section 203 of the Trade Act, 19 U.S.C. § 2253.

President the action that will address the serious injury or threat of serious injury and be most effective in facilitating the efforts of each domestic industry to make a positive adjustment to import competition. In deciding what relief to recommend, we have taken into account the considerations set forth in section 202(e)(5)(B) of the Trade Act of 1974,[475] including the form and amount of action that will, in our view, remedy the serious injury we have found to exist; commitments submitted by firms in the domestic industries during the course of the investigation; information available to the Commission concerning the conditions of competition in domestic and world markets and likely developments affecting such conditions during the period for which action is being requested; whether international negotiations may be constructive to address the serious injury or to facilitate adjustment; and the arguments of the parties.

The action we recommend must conform to certain statutory limitations with respect to the amount and duration of the relief. In addition, we must state whether our recommendations include imports from Canada and Mexico and whether and to what extent our recommendations include imports from Israel, with which the United States has a free trade agreement, and from beneficiary Caribbean Basin and Andean countries.[476] We must also describe the likely short- and long-term effects of taking and not taking the recommended action on each pertinent domestic industry and its workers, other domestic industries, and consumers.

A. Form of Recommended Remedies

The statute authorizes the Commission to recommend several forms of import relief, including additional duties, quantitative restrictions, tariff- rate quotas, and adjustment measures, as well as a combination of these remedies. In determining which of these forms would be most effective in remedying the serious injury being suffered by the industries in question, we have examined closely the costs and benefits of each remedy. As we discuss below, we believe that tariff-based remedies will provide each industry with the most appropriate and easily-administered form of relief for the products for which we made affirmative injury or threat of injury findings, while minimizing market disruption to that necessary to remedy injury and facilitating positive adjustment. These remedies are generally additional duties. For two products we have recommended tariff-rate quotas that include additional duties.

In general, the tariff-based remedies we are recommending are intended to increase domestic prices, shipment volumes, and industry profitability and therefore allow the domestic industries to make additional investments in the modernization and rationalization of their productive facilities. The recommended additional duty levels are also intended to help restore the market share of seriously injured domestic industries to the levels that existed prior to the import surges and maintain the market shares of industries threatened with serious injury. We note that the additional duties do not prohibit the importation of any products.

A number of parties have argued that we should recommend that the President impose quantitative restrictions on the imports subject to affirmative findings in this proceeding either in addition to or in lieu of tariffs. For these industries, we believe that additional

---

475. 19 U.S.C. § 2252(e)(5)(B).

476. Pursuant to the President's proclamation of December 7, 2001, the U.S.- Jordan Free Trade Area Implementation Act, Pub. L. 107-43 ("Jordan FTA Act"), became effective on December 17, 2001, which was almost two months after we made our injury determination but was prior to the time the report on our findings and recommendations in this investigation were to be submitted to the President. To the extent that section 221(a) of the Jordan FTA Act applies to this investigation, we must also recommend whether imports from Jordan should be subject to any recommended remedy.

duties are generally more appropriate than quotas to address the serious injury or threat of serious injury. First, simple tariff increases in general are less discriminating between foreign sources of supply, have greater flexibility in the event of shifts in demand, and are easier to administer than quantitative restrictions.[477] Second, tariffs are more likely than quotas to provide some price and revenue relief to the industries in question in the short term, a factor that is particularly important in this investigation, given the price declines experienced by all of these industries. Tariffs are thus more consistent with our mandate under the statute that requires us to recommend action that will "address the serious injury." Finally, the difficulty in predicting likely future demand for the various subject steel products makes a tariff remedy a more attractive option in this case. The recent significant change in demand conditions for many of the products, as a result of factors such as the overall downturn in the U.S. economy, has made setting an appropriate quota level particularly difficult. Should future demand increase, or decrease, there is a danger that a given quota level will provide either too much or not enough relief. By contrast, the impact of additional tariffs is less affected by changes in demand conditions. Given the foregoing, we believe that for these industries, tariffs are the most appropriate tool to provide the amount of relief necessary to remedy the serious injury or threat of serious injury.

Duration and Degressivity. For all products, we recommend that the tariffs, or tariff-rate quotas, be imposed for a four-year period. We believe that a four-year period of relief is necessary to give the domestic industries time both to generate the profits needed to complete the investments called for in their adjustment plans and the time to implement the plans themselves. We recognize that a relief action of more than three years will require the Commission to conduct a mid-course review under section 204(a)(2) of the Trade Act. Such an investigation would provide the Commission with an opportunity to review the progress of the various industries in implementing their adjustment plans. It would also provide the President, after receiving the Commission's report, with the opportunity to reduce or terminate relief if relief is no longer necessary to prevent or remedy serious injury or if the industry has not made adequate efforts to make a positive adjustment to import relief.

For most products, we also recommend that the additional tariffs (including that recommended in our tariff rate quotas) be phased down by three percentage points per year during the period of relief.[478] We believe that this phase down, together with the level of tariffs we have recommended, will strike a balance between yielding positive and immediate revenue effects for the industries in the short-term while minimizing the impact on consumers and the market in the long run.

B. Requests for Product-Specific Exclusions

During the investigation, the Commission was presented with many requests to exclude from any remedy particular products for which the Commission made affirmative determinations in the injury phase of the proceeding. The parties making these requests generally contended that the products for which they were requesting exclusions were niche or specialty products either not produced by the pertinent domestic industry or produced in insufficient quantities by that industry to satisfy U.S. demand.

In recent investigations, the Commission has recommended the exclusion of

---

477. *See Wheat Gluten*, Inv. No. TA-201-67, USITC Pub. 3088 at I-26 (March 1998).

478. . . . [W]e have recommended the phase down for rebar be two percentage points per year.

particular products from its remedy, but only when the record indicated that such products are not available from the domestic industry or were unavailable in commercially significant volumes.[479] In this investigation the domestic producers have maintained, with limited exceptions, that they currently produce or are able to produce the products covered by the exclusion requests. Consequently, the record does not support the conclusion that the great majority of products for which exclusions are sought are not available from the pertinent domestic industry. We therefore decline to recommend exclusion of these products from our remedies, with the exception of a limited number of products identified in the product-specific analyses below that the domestic industry has acknowledged it does not and cannot produce in commercial quantities or has no objection to exclusion. We observe that under the tariff-based remedies we are proposing, U.S. end users of specialty products that believe they cannot obtain such products from domestic sources, or do not desire to source domestically, will still be able to import these products at the pertinent tariff rate.[8]

C. Additional Recommendations

International Negotiations. We recommend that the President continue recently-initiated international negotiations to address the underlying cause of the increase in imports of the articles for which we made affirmative determinations in the injury phase of this investigation or otherwise to alleviate the injury or threat. We observe that a part of the President's multilateral steel initiative is initiation of negotiations with U.S. trading partners seeking the near-term elimination of inefficient excess capacity in the steel industry worldwide, in a manner consistent with applicable U.S. laws.[9] We agree that there is significant excess global steelmaking capacity. Moreover, all parties to this investigation agreed that consolidation and rationalization is a necessary step in addressing the global overcapacity problem. Quantifying the magnitude of this capacity is a more difficult step.

Information collected in this investigation suggests that actual global production of steel has increased over the past decade, by about 15 percent, with the most significant increase, 7 percent, occurring from 1999 to 2000. World production capacity is more difficult to quantify, although it is commonly considered to exceed both actual production and market demand. Estimates of global annual production capacity for 2000 ranged from 1.1 to 1.2 billion tons.

We note that despite these difficulties it is clear that there is a need for all steel producing countries to address the global inefficient capacity problem. The existence of excess capacity has clearly contributed to the serious injury experienced by the domestic industry. If global capacity continues to exceed global production and demand, steel prices will continue to drop and will prevent the recovery of the domestic steel industry. It is therefore essential that international negotiations result in a significant reduction in global capacity, and we recommend that the President strive to achieve this goal, which is vital to the long-term viability of the domestic industry.

---

479. *Compare Certain Steel Wire Rod*, Inv. No. TA-201-69, USITC Pub. 3207 at I- 56 & n.12 (July 1999) (views of Commissioners Miller and Koplan) (granting exclusions when domestic industry acknowledged it did not produce products) *with Certain Welded Cardon Quality Line Pipe*, Inv. No. TA-201-70, USITC Pub. 3261 at I-84 (Dec. 1999) (denying exclusion when record did not indicate domestic industry could not make product in question).

8. Additionally, USTR separately has requested and will evaluate submissions from entities that seek to exclude particular products from any remedy. We acknowledge that the President may conclude that the record developed before USTR justifies exclusions for some products. The President may also want to consider establishing an ongoing mechanism for considering product-specific exclusion requests should he impose import relief.

9. Statement by the President Regarding a Multilateral Initiative on Steel (June 5, 2001). Such negotiations are ongoing. "Washington steels itself for push to cut output," Financial Times (Nov. 25, 2001).

Trade Adjustment Assistance.[a] We have also considered whether to recommend adjustment measures, such as the trade adjustment assistance programs administered by the U.S. Department of Commerce and the U.S. Department of Labor. The assistance and funding that these programs offer is limited in amount and scope. In the context of the record of this investigation, trade adjustment assistance alone would not provide the amount or type of assistance that would remedy the serious injury or threat of serious injury and facilitate adjustment. In particular, trade adjustment assistance would not limit the influx of imports that we have found is a substantial cause of serious injury or threat of serious injury to the pertinent domestic industries. However, such adjustment assistance may prove useful in conjunction with import relief, particularly insofar as it may offer retraining to workers displaced by any consolidation or rationalization the domestic industry may undertake to increase its competitiveness. Thus, pursuant to section 202(a) of the Trade Act,[13] we have notified the Secretary of Commerce and the Secretary of Labor of our affirmative determinations. Under section 202(a) of the Trade Act, applications for adjustment assistance by firms or workers in the pertinent domestic industries are to be given expedited treatment once the Commission makes an affirmative determination.

D. Other Steps to Facilitate Positive Adjustment to Import Competition

The statute directs the Commission to recommend the action that would be most effective in facilitating the efforts of the domestic industry to make a positive adjustment to import competition. The domestic steel industry faces a number of competitive conditions that are not directly related to imports, but that must be addressed on a track parallel to import relief and international negotiations in order to ensure the industries' future viability and health.[15] These problems relate to impediments to industry restructuring and consolidation. Many domestic producers and the USWA agree that there exists a need in the United States for further consolidation and restructuring. While we discuss these problems below, we do not find that it is within the authority of the Commission to recommend what specific steps should be taken to address these obstacles to adjustment. We also recognize that not all of the sectors of the domestic steel industry examined in this investigation face any or all of these problems.

Many producers, especially integrated producers, face substantial costs for retiree benefits, in particular pension and health care costs, widely referred to as legacy costs. Data collected in this investigation show the enormity of these costs, with many of the companies funding only current expenses and leaving substantial unfunded liabilities. Post-employment benefits not guaranteed by the Pension Benefit Guaranty Corporation ("PBGC") totaled over $8.6 billion in 2000 for 23 reporting steel firms. Health, medical, and life insurance benefits are important post-employment costs for steel producers. Like pension costs, the combined plans for these post-employment benefits are also widely underfunded, and importantly, are not insured by a federal trustee such as the PBGC. We note that in most foreign steel- producing countries, the government, not the individual steel producer, bears the burden of such costs.

Domestic steel producers also face substantial environmental liabilities under the Resource Conservation and Recovery Act ("RCRA") and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA," also

---

a. For discussion of trade adjustment assistance, see *infra* § A.2.

13. 19 U.S.C. § 2252(a).

15. As we have discussed in our injury opinions, none of these factors is currently as important a cause of serious injury or threat of serious injury to any of the domestic industries as increased imports.

known as "Superfund"). While environmental clean-up costs are substantial for facilities in operation, the costs associated with shutting down and selling a facility can be enormous, and could impede the closure of outdated facilities.

These problems threaten the future viability of these industries and their ability to compete effectively with imports upon the termination of any import relief provided pursuant to this investigation. Moreover, we note that it is currently extremely difficult for firms in these industries to raise capital in the debt or equity markets. Action to facilitate rationalization would increase investor confidence and help the industry obtain needed financing.

The Commission has gathered considerable information throughout this proceeding regarding these impediments and various proposals to address them have been made by a number of parties, both before the Commission and in other fora. We take no position on any specific recommendations proposed by the various parties, as they are primarily within the purview of the Administration and Congress.[22] However, we stress that, absent effective and equitable solutions to these problems, import relief is unlikely to result in a healthy, viable U.S. steel industry.

NOTES AND QUESTIONS

1. Under 19 U.S.C. § 2252, what remedies may the ITC recommend to the President? Does the statute prefer any particular type of remedy? Does the ITC?

2. How does the ITC treat remedies with respect to imports from the NAFTA countries Canada and Mexico? Review §§ 311 and 312 of the NAFTA Implementation Act. Do these provisions affect the remedies phase of a safeguard action with respect to NAFTA countries?

3. What is the status of the ITC's recommendation that the President pursue international negotiations to alleviate the problems caused by increased imports? Is this a remedy? What is the ITC's authority to make such a recommendation?

4. Note that the ITC is also recommended trade adjustment assistance, though it did not believe that such assistance would on its own be a sufficient response to the increased imports that were the subject of the investigation. Why not? If not, then what role is such assistance to play? We will consider trade adjustment assistance in detail in the next section.

5. The ITC report briefly discusses other "competitive conditions that are not directly related to imports," but that nevertheless have a significant impact on the operations of domestic industries–retirement benefit costs, regulatory costs (such as environmental regulation), and impediments to capital formation. All of these conditions adversely affect the ability of domestic industries to restructure efficiently and to respond to new competitive situations. Are these conditions the actual root causes of the serious injury identified by the ITC? How might these problems be effectively addressed?

6. The issuance of the ITC report immediately raised the stakes for the new Administration. Affirmative ITC recommendations required decisions to be taken by the President under 19 U.S.C. § 2253, difficult political decisions. The President's chief

---

22. We note that some of the domestic industries' proposals do not clearly anticipate the reduction in capacity and closures that, as discussed above, are necessary for the industry's improvement.

political and economic advisers were divided on the extent to which the Administration should embrace the recommendations, require the U.S. steel industry to absorb the costs of restructuring (particularly as to retirement benefit costs), or some combination of both approaches.[1] In the meantime, thousands of steel workers crowded a park across from the White House, demanding tariffs of not less than 40 percent on steel from major trading partners like China, Germany, and Russia. While the 2002 mid-term elections loomed in the near future, and with the certainty that the European Union (EU) in particular was likely to challenge any U.S. decision on steel before the World Trade Organization, it appeared likely that the tariff relief on balance would be in the 20 to 40 percent range.[2] Political pressure increased both for and against stiff tariff relief as the President and his advisers seemed to be inclined towards a varied set of tariffs or "softer" tariff measures.[3] Some combination of tariffs and quotas, depending on the type of steel product involved, was expected.[4] Then on March 5, 2002, the President issued the following proclamation.

PROCLAMATION TO FACILITATE POSITIVE ADJUSTMENT TO COMPETITION FROM IMPORTS OF CERTAIN STEEL PRODUCTS
Pres. Proc. No. 7529, 67 Fed. Reg. 10,553 (2002)

1. On December 19, 2001, the United States International Trade Commission (ITC) transmitted to the President a report on its investigation under section 202 of the Trade Act of 1974, as amended (the "Trade Act") (19 U.S.C. 2252), with respect to imports of certain steel products.

2. The ITC reached affirmative determinations under section 202(b) of the Trade Act that the following products are being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or threat of serious injury, to the domestic industries producing like or directly competitive articles: (a) certain carbon flat-rolled steel, including carbon and alloy steel slabs ("slabs"); plate (including cut-to-length plate and clad plate) ("plate"); hot-rolled steel (including plate in coils) ("hot-rolled steel"); cold-rolled steel (other than grain-oriented electrical steel) ("cold-rolled steel"); and corrosion-resistant and other coated steel ("coated steel") (collectively, "certain flat steel"); (b) carbon and alloy hot-rolled bar and light shapes ("hot-rolled bar"); (c) carbon and alloy cold-finished bar ("cold-finished bar"); (d) carbon and alloy rebar ("rebar"); (e) carbon and alloy welded tubular products (other than oil country tubular goods) ("certain tubular products"); (f) carbon and alloy flanges, fittings, and tool joints ("carbon and alloy fittings"); (g) stainless steel bar and light shapes ("stainless steel bar"); and (h) stainless steel rod. The ITC commissioners were equally divided with respect to the determination required under section 202(b) regarding whether (i) carbon and alloy tin mill products ("tin mill products") and (j) stainless steel wire.

3. The ITC provided detailed definitions of the products included in categories (a) through (j) of paragraph 2, and their corresponding subheadings, under the Harmonized Tariff Schedule of the United States (HTS) in Appendix A to its determination, set out at 66 Fed. Reg. 67304, 67308-67311 (December 28, 2001). By February 4, 2002, the ITC provided additional information in response to a request by the United States Trade

---

1. *See* Joseph Kahn & David E. Sanger, *Bush Officials Meet to Seek A Compromise On Steel Tariffs*, N.Y. Times, Mar. 1, 2002, at C1, col. 2 (discussing administration reactions to ITC report).

2. *Id*. at C13, col. 1.

3. David E. Sanger & Joseph Kahn, *Bush Weighs Raising Steel Tariffs But Exempting Most Poor Nations*, N.Y. Times, Mar. 4, 2002, at A1, col. 1.

4. Richard W. Stevenson, *Bush Edging Toward Decision on Steel Imports*, N.Y. Times, Mar. 5, 2002, at C6, col. 2.

Representative (USTR) under section 203(a)(5) of the Trade Act (19 U.S. 2253(a)(5)) (the "supplemental report").

4. Section 330(d)(1) of the Tariff Act of 1930, as amended (19 U.S.C. 1330(d)(1)), provides that, when the ITC is required to determine under section 202(b) of the Trade Act whether increased imports of an article are a substantial cause of serious injury, or the threat thereof, and the commissioners voting are equally divided with respect to such determination, then the determination agreed upon by either group of commissioners may be considered by the President as the determination of the ITC. Having considered the determinations of the commissioners with regard to tin mill products and stainless steel wire, I have decided to consider the determinations of the groups of commissioners voting in the affirmative with regard to each of these products to be the determination of the ITC.

5. Pursuant to section 311(a) of the North American Free Trade Agreement Implementation Act (the "NAFTA Implementation Act") (19 U.S.C. 3371(a)), the ITC made findings as to whether imports from Canada and Mexico, considered individually, account for a substantial share of total imports and contribute importantly to the serious injury, or threat thereof, caused by imports. The ITC made negative findings with respect to imports from Canada of certain flat steel, tin mill products, rebar, stainless steel rod, and stainless steel wire; and the ITC also made negative findings with respect to imports from Mexico of tin mill products, hot-rolled bar, cold-finished bar, rebar, certain tubular products, stainless steel bar, stainless steel rod, and stainless steel wire. The ITC made affirmative findings with respect to imports from Canada of hot-rolled bar, cold-finished bar, carbon and alloy fittings, and stainless steel bar; and the ITC also made affirmative findings with respect to imports from Mexico of certain flat steel, and carbon and alloy steel fittings. The ITC commissioners were equally divided with respect to imports from Canada of certain tubular products.

6. The ITC commissioners voting in the affirmative under section 202(b) of the Trade Act also transmitted to the President their recommendations made pursuant to section 202(e) of the Trade Act (19 U.S.C. 2252(e)) with respect to the actions that, in their view, would address the serious injury, or threat thereof, to the domestic industries and be most effective in facilitating the efforts of those industries to make a positive adjustment to import competition.

7. Pursuant to section 203 of the Trade Act (19 U.S.C. 2253), and after taking into account the considerations specified in section 203(a)(2) of the Trade Act and the ITC supplemental report, I have determined to implement action of a type described in section 203(a)(3) (a "safeguard measure") with regard to the following steel products:

(a) certain flat steel, consisting of: slabs . . . ; plate . . . ; hot-rolled steel . . . ; cold-rolled steel . . . ; and coated steel . . . ;

(b) hot-rolled bar . . . ;

(c) cold-finished bar . . . ;

(d) rebar . . . ;

(e) certain tubular products . . . ;

(f) carbon and alloy fittings . . . ;

(g) stainless steel bar . . . ;

(h) stainless steel rod . . . ;

(i) tin mill products . . . ; and

(j) stainless steel wire. . . . The steel products listed in clauses (i) through (ix) of subdivision (b) of U.S. Note 11 to subchapter III of chapter 99 of the HTS ("Note 11") in the Annex to this proclamation were excluded from the determinations of the ITC described in paragraph 2, and are excluded from these safeguard measures. I have also determined to exclude from these safeguard measures the steel products listed in the subsequent clauses of subdivision (b) of Note 11 in the Annex to this proclamation. [The Annex is not reproduced.]

8. Pursuant to section 312(a) of the NAFTA Implementation Act (19 U.S.C. 3372(a)),

I have determined after considering the report and supplemental report of the ITC that imports from each of Canada and Mexico of certain flat steel, tin mill products, hot-rolled bar, cold-finished bar, rebar, certain tubular products, carbon and alloy fittings, stainless steel bar, stainless steel rod, and stainless steel wire, considered individually, do not account for a substantial share of total imports or do not contribute importantly to the serious injury or threat of serious injury found by the ITC. Accordingly, pursuant to section 312(b) of the NAFTA Implementation Act (19 U.S.C. 3372(b)), I have excluded certain flat steel, tin mill products, hot-rolled bar, cold-finished bar, rebar, certain tubular products, carbon and alloy fittings, stainless steel bar, stainless steel rod, and stainless steel wire the product of Mexico or Canada from the actions I am taking under section 203 of the Trade Act.

9. Pursuant to section 203 of the Trade Act (19 U.S.C. 2253), the actions I have determined to take shall be safeguard measures in the form of:

(a) a tariff rate quota on imports of slabs described in paragraph 7, imposed for a period of 3 years plus 1 day, with annual increases in the within-quota quantities and annual reductions in the rates of duty applicable to goods entered in excess of those quantities in the second and third years; and

(b) an increase in duties on imports of certain flat steel, other than slabs (including plate, hot-rolled steel, cold-rolled steel and coated 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, as described in paragraph 7, imposed for a period of 3 years plus 1 day, with annual reductions in the rates of duty in the second and third years, as provided in the Annex to this proclamation. . . .

11. These safeguard measures shall apply to imports from all countries, except for products of Canada, Israel, Jordan, and Mexico.

12. These safeguard measures shall not apply to imports of any product described in paragraph 7 of a developing country that is a member of the World Trade Organization (WTO), as long as that country's share of total imports of the product, based on imports during a recent representative period, does not exceed 3 percent, provided that imports that are the product of all such countries with less than 3 percent import share collectively account for not more than 9 percent of total imports of the product. If I determine that a surge in imports of a product described in paragraph 7 of a developing country WTO member undermines the effectiveness of the pertinent safeguard measure, the safeguard measure shall be modified to apply to such product from such country.

13. The in-quota quantity in each year under the tariff rate quota described in paragraph 9 shall be allocated among all countries except those countries the products of which are excluded from such tariff rate quota pursuant to paragraphs 11 and 12.

14. Pursuant to section 203(a)(1)(A) of the Trade Act (19 U.S.C. 2253(a)(1)(A)), I have further determined that these safeguard measures will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs. If I determine that further action is appropriate and feasible to facilitate efforts by the pertinent domestic industry to make a positive adjustment to import competition and to provide greater economic and social benefits than costs, or if I determine that the conditions under section 204(b)(1) of the Trade Act are met, I shall reduce, modify, or terminate the action established in this proclamation accordingly. In addition, if I determine within 30 days of the date of this proclamation, as a result of consultations between the United States and other WTO members pursuant to Article 12.3 of the WTO Agreement on Safeguards that it is necessary to reduce, modify, or terminate a safeguard measure, I shall proclaim the corresponding reduction, modification, or termination of the safeguard measure within 40 days. . . .

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, acting under the authority vested in me by the Constitution and the laws of the United States, including but not limited to sections 203 and 604 of the Trade Act, and

section 301 of title 3, United States Code, do proclaim that:

(1) In order to establish increases in duty and a tariff rate quota on imports of the certain steel products described in paragraph 7 (other than excluded products), subchapter III of chapter 99 of the HTS is modified as provided in the Annex to this proclamation. Any merchandise subject to a safeguard measure that is admitted into U.S. foreign trade zones on or after March 20, 2002, must be admitted as "privileged foreign status" as defined in 19 CFR 146.41, and will be subject upon entry to any quantitative restrictions or tariffs related to the classification under the applicable HTS subheading.

(2) Such imports of certain steel that are the product of Canada, Israel, Jordan, or Mexico shall be excluded from the safeguard measures established by this proclamation, and such imports shall not be counted toward the tariff rate quota limits that trigger the over-quota rates of duty.

(3) Except as provided in clause (4) below, imports of certain steel that are the product of WTO member developing countries, as provided in subdivision (d)(i) of Note 11 in the Annex to this proclamation, shall be excluded from the safeguard measures established by this proclamation, and such imports shall not be counted toward the tariff rate quota limits that trigger the over-quota rates of duties.

(4) Clause (3) above shall not apply to imports of a product that is the product of a country listed in subdivision (d)(i) of Note 11 in the Annex to this proclamation if subdivision (d)(ii) of such Note indicates that such country's share of total imports of the product exceeds 3 percent, or that imports of the product from all listed countries with less than 3 percent import share collectively account for more than 9 percent of total imports of the product. The USTR is authorized to determine whether a surge in imports of a product that is the product of a country listed in subdivision (d)(i) undermines the effectiveness of the pertinent safeguard measure and, if so, upon publication of a notice in the Federal Register, to revise subdivision (d) of Note 11 in the Annex to this proclamation to indicate that such product from such country is not excluded from such safeguard measure. . . .

(6) In March of each year in which any safeguard measure established by this proclamation remains in effect, the USTR is authorized, upon publication in the Federal Register of a notice of his finding that a particular product should be excluded, to modify the HTS provisions created by the Annex to this proclamation to exclude such particular product from the pertinent safeguard measure established by this proclamation. . . .

(8) The modifications to the HTS made by this proclamation, including the Annex hereto, shall be effective with respect to goods entered, or withdrawn from warehouse for consumption, on or after 12:01 a.m., EST, on March 20, 2002, and shall continue in effect as provided in the Annex to this proclamation, unless such actions are earlier expressly reduced, modified, or terminated. Effective at the close of March 21, 2006, or such other date that is 1 year from the close of the safeguard measures established in this proclamation, the U.S. note and tariff provisions established in the Annex to this proclamation shall be deleted from the HTS.

7. On March 5, 2002, in conjunction with the Proclamation, the President sent a memorandum to the Secretary of the Treasury, the Secretary of Commerce, and the USTR requiring action under section 203 of the Trade Act of 1974 (19 U.S.C. 2253). 67 Fed. Reg. 10,593 (2002). The President instructed the Secretary of the Treasury, pursuant to section 505(a) of the Tariff Act of 1930 (19 U.S.C. 1505(a)), to prescribe by regulation a date, no later than 45 days after the date of the memorandum, at which estimated duties for affected steel products that are entered or withdrawn from warehouse for consumption on or after 12:01 a.m., EST, March 20, 2002, and up to the 30th day after the signing of the memorandum, were to be deposited. The purpose of this deferral of duty was to facilitate consultations between the United States and its

trading partners concerning the President's determination in accordance with Article 12.3 of the WTO Agreement on Safeguards.

8. Reviewing the Proclamation, how would you assess the alternatives chosen by the President? Are the measures that he adopted likely to result in a positive adjustment in the condition of the injured U.S. industries? Which of the President's advisers, and which interests or constituencies, prevailed in the outcome?

9. On June 3, 2002, a WTO dispute settlement panel was established at the request of the EU to examine the U.S. safeguard measures on steel products. Panels were also established at the request of Brazil, China, Japan, Korea, New Zealand, Norway, and Switzerland to examine the safeguard measures. (Pursuant to an agreement with these complaining parties, one panel examined all of the disputes.) The complaining parties alleged that the safeguard measures were inconsistent with U.S. obligations under the GATT and the Safeguards Agreement. Canada, the Republic of China (Taiwan), Cuba, Malaysia, Mexico, Thailand, Turkey, and Venezuela notified the WTO of their intention to participate as third parties. The Panel issued eight Panel Reports in one document circulated to the Members of the WTO on July 11, 2003. The Panel concluded, in all of the Panel Reports, that all ten challenged safeguard measures were inconsistent with the Safeguards Agreement and the GATT. On August 11, 2003, the United States notified the DSB of its intention to appeal, pursuant to Article 16.4 of the DSU. On November 10, 2003, the Appellate Body issued the following report.

UNITED STATES – DEFINITIVE SAFEGUARD MEASURES ON IMPORTS OF CERTAIN STEEL PRODUCTS

Report of the Appellate Body, AB-2003-3 (Nov. 10, 2003)

I. Introduction

1. The United States appeals certain issues of law and legal interpretations developed in the Panel Reports, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products* (the "Panel Reports"). . . .

4. . . . The Panel concluded [as to each of the challenges] that all ten safeguard measures imposed by the United States were inconsistent with the *Agreement on Safeguards* and the GATT 1994.

5. In particular, the Panel found that:

> (a) the application of safeguard measures by the United States on imports of CCFRS [certain carbon flat-rolled steel], hot-rolled bar, and stainless steel rod was inconsistent with Articles 2.1 and 3.1 of the *Agreement on Safeguards*, because "the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to 'increased imports'";
>
> (b) the application of safeguard measures by the United States on imports of CCFRS, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ [carbon and alloy fittings, flanges and tool joints], and stainless steel bar was inconsistent with Articles 2.1, 3.1, and 4.2(b) of the *Agreement on Safeguards*, because "the United States failed to provide a reasoned and adequate explanation that a 'causal link' existed between any increased imports and serious injury to the relevant domestic producers";
>
> (c) the application of safeguard measures by the United States on imports of tin mill products and stainless steel wire was inconsistent with Articles 2.1, 3.1, and 4.2(b) of the *Agreement on Safeguards*, because "the United States failed to provide a reasoned and

adequate explanation of how the facts supported its determinations with respect to 'increased imports'" and the existence of a "causal link" between any increased imports and serious injury, "since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance"; and

(d) the application of safeguard measures by the United States on imports of CCFRS, tin mill products, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, stainless steel bar, stainless steel rod, and stainless steel wire was inconsistent with Articles 2.1 and 4.2 of the *Agreement on Safeguards*, because "the United States failed to comply with the requirement of 'parallelism' between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure".

6. In addition, the Panel concluded, in the Panel Reports concerning the complaints of China, the European Communities, New Zealand, Norway, and Switzerland, that:

the application of safeguard measures by the United States on imports of CCFRS, tin mill products, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, stainless steel bar, stainless steel rod, and stainless steel wire was inconsistent with Article XIX:1(a) of the GATT 1994 and Article 3.1 of the *Agreement on Safeguards*, because "the United States failed to provide a reasoned and adequate explanation demonstrating that 'unforeseen developments' had resulted in increased imports causing serious injury to the relevant domestic producers".

7. The Panel concluded that, to the extent that the United States had acted inconsistently with the provisions of the *Agreement on Safeguards* and the GATT 1994 set out above, it had nullified or impaired the benefits accruing to the Complaining Parties under the *Agreement on Safeguards* and the GATT 1994. The Panel recommended that the DSB request the United States to bring all the safeguard measures into conformity with its obligations under the *Agreement on Safeguards* and the GATT 1994. . . .

IV. Issues Raised In This Appeal

. . .

264. . . . Together, Article XIX and the *Agreement on Safeguards* confirm the right of WTO Members to apply safeguard measures when, as a result of unforeseen developments and of the effect of obligations incurred, including tariff concessions, a product is being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products. However, as Article 2.1 of the *Agreement on Safeguards* makes clear, the right to apply such measures arises "*only*" if these prerequisites are shown to exist. . . .

267. In response to our questioning at the oral hearing, all parties agreed that this dispute concerns only the *specific* safeguard measures as applied by the United States. Consequently, there is no United States law, regulation, or methodology that is challenged, *as such*, in this dispute. . . .

V. Unforeseen Developments and Article 3.1 of the *Agreement on Safeguards*

269. The United States appeals the Panel's finding that the United States acted inconsistently with Article XIX:1(a) of the GATT 1994 and Article 3.1 of the *Agreement on Safeguards* because the USITC failed to demonstrate, through a reasoned and

adequate explanation, that "unforeseen developments"[167] had *resulted* in increased imports of *each of the products* on which the United States imposed safeguard measures on 20 March 2002. In examining this issue on appeal, we are mindful of the precise scope of the issue before us. We observe that the United States' appeal does not raise the issue whether the "unforeseen developments" identified as such by the United States—that is, "the Russian crisis, the Asian crisis and the continued strength of the United States' market together with the persistent appreciation of the US dollar" as well as the "confluence" of those events—actually amounted to "unforeseen developments" within the meaning of Article XIX:1(a). In response to our questions at the oral hearing, none of the participants disagreed with this formulation of the issue before us.[170]

. . .

A. *Appropriate Standard of Review for Claims Under Article XIX:1(a) of the GATT 1994*

[In paragraphs 273-280 of the Report, the Appellate Body found that the Panel had applied the proper standard of review in determining how it should assess the dispute before it under Article XIX of the GATT 1994. For excerpts from this portion of the Report, see Chapter IX, *infra*, at ▬-▬.]

B. *Article 3.1 of the Agreement on Safeguards*

. . .

283. . . . [T]he Panel, in addition to finding that the United States acted inconsistently with Article 3.1 with respect to the determination by the competent authority of "unforeseen developments", also found that certain of the USITC's findings on increased imports and causation were inconsistent with Article 3.1.

284. We begin our analysis with an examination of the interpretation by the United States of Article 3.1, last sentence, which underlies its submissions regarding the Panel's alleged errors under Article 3.1. The United States argues that "the key consideration [under Article 3.1 of the *Agreement on Safeguards*] is whether the authorities present a logical basis for their conclusion." According to the United States, "the Safeguards Agreement does not explicitly require an 'explanation'." The United States rather argues that Article 3.1 of the *Agreement on Safeguards* "implies an explanation only in requiring 'reasoned conclusions on all pertinent issues of fact and law'." To support its interpretation, the United States submits that the "ordinary meaning of the verb 'reason' is to '[t]hink in a connected or logical manner; use one's reason in forming conclusions ... [a]rrange the thought of in a logical manner, embody reason in; express in a logical form.'"[192]

285. As we understand it, this is the basis for the United States argument that Article 3.1 requires a competent authority to present a "logical basis" for its determination in its published report. The United States did not explain what it meant by a "logical basis"

---

167. We use the term "unforeseen developments" as shorthand to describe the prerequisites set forth in the first clause of Article XIX:1(a) of the GATT 1994, that is, "[i]f, as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions".

170. At the oral hearing, the European Communities requested, however, that, should we reverse the Panel's finding that the USITC failed to demonstrate, through a reasoned and adequate explanation, that "unforeseen developments" resulted in increased imports of each of the relevant products on which the United States imposed safeguard measures, we address other arguments that were raised by the Complaining Parties before the Panel concerning "unforeseen developments". The European Communities refers, for instance, to its argument that "unforeseen developments" that occurred several years ago and may have caused increased imports then but the effects of which have now ceased, cannot be considered as "unforeseen developments" justifying the imposition of safeguard measures. . . .

192. . . . The United States refers to the definition of "reason" in the *New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol.II, pp. 2495-2496.

in its written submissions. However, in response to our questioning at the oral hearing, the United States clarified that a "logical basis describes the underpinning to the conclusion." The United States affirmed, further, in the oral hearing, that the United States sees it as possible to have "a 'reasoned conclusion' without a 'reasoned and adequate explanation'."

286. We have misgivings about the approach of the United States to ascertaining the meaning of the last sentence of Article 3.1. The requirement of Article 3.1 is that "competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law." The meaning of Article 3.1 must be established through an examination of the ordinary meaning of the terms of Article 3.1, read in their context and in the light of the object and purpose of the *Agreement on Safeguards*.[195] Thus, instead of basing an interpretation of Article 3.1—as the United States does—entirely on the meaning of *one* word—"reasoned"—in that provision, it is, in our view, appropriate to interpret Article 3.1 by examining the ordinary meaning of *all* of the words that together prescribe the relevant obligation in that Article.

287. In doing so, we note that the definition of "conclusion" is "the result of a discussion or an examination of an issue" or a "judgement or statement arrived at by reasoning: an inference; a deduction".[196] Thus, the "conclusion" required by Article 3.1 is a "judgement or statement arrived at by reasoning". We further note that the word "reasoned", which the United States defines in terms of the verb "to reason", is, in fact, used in Article 3.1, last sentence, as an adjective to qualify the term "conclusion". The relevant definition of the intransitive verb "to reason" is "to think in a connected or logical manner; use one's reason in forming conclusions".[197] The definition of the transitive verb "to reason" is "to arrange the thought of in a logical manner, embody reason in; express in a logical form".[198] Thus, to be a "reasoned" conclusion, the "judgement or statement" must be one which is reached in a connected or logical manner or expressed in a logical form. Article 3.1 further requires that competent authorities must "set forth" the "reasoned conclusion" in their report. The definition of the phrase "set forth" is "give an account of, esp. in order, distinctly, or in detail; expound, relate, narrate, state, describe".[199] Thus, the competent authorities are required by Article 3.1, last sentence, to "give an account of" a "judgement or statement which is reached in a connected or logical manner or expressed in a logical form", "distinctly, or in detail."

288. Panels have a responsibility in WTO dispute settlement to assess whether a competent authority has complied with its obligation under Article 3.1 of the *Agreement on Safeguards* to "set forth" "findings and reasoned conclusions" for their determinations. The European Communities and Norway argue that panels could not fulfill this responsibility if they were left to "deduce for themselves" from the report of that competent authority the "rationale for the determinations from the facts and data contained in the report of the competent authority." We agree. . . .

293. The Panel stated that "[t]he nature of the facts, including their complexity, will

---

195. Article 3.2 of the DSU; Article 31 of the *Vienna Convention on the Law of Treaties*, done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.

196. *Shorter Oxford English Dictionary*, 5th ed. W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. I, p. 477.

197. *Shorter Oxford English Dictionary*, 5th ed. W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. II, p. 2482.

198. *Ibid.*

199. *Ibid.*, p. 2773.

dictate the extent to which the relationship between the unforeseen developments and increased imports causing injury needs to be explained. The timing of the explanation [relating to unforeseen developments], its extent and its quality are all factors that can affect whether [that] explanation is reasoned and adequate." According to the United States, there is no basis in the *Agreement on Safeguards* "for finding that 'timing' or 'extent' are relevant to whether the competent authorities' explanations are reasoned and adequate."

294. As we see it, the United States appears to equate the word "extent" to the word "length" with a view to implying that the Panel would have required that the competent authority's explanation be of a certain length. Based on our understanding of the relevant section of the Panel Reports, the Panel required no such thing. Rather than requiring that the USITC provide a "longer" explanation, the Panel was, in our view, simply stating that the USITC had not provided a reasoned and adequate explanation of how the "unforeseen developments" resulted in increased imports of the products on which the United States imposed the safeguard measures. In other words, the Panel was merely requiring that the competent authorities—to use our clarification of the requirement in Article 3.1—"give an account of" a "judgement or statement which is reached in a connected or logical manner or expressed in a logical form" on *unforeseen developments* "distinctly, or in detail".

295. The United States further argues that the *Agreement on Safeguards* "do[es] not obligate the competent authorities to present their report in any particular form." As we see it, the United States understands the Panel to have imposed such a requirement by finding that "the USITC failed to provide a reasoned and adequate explanation because the USITC Report did not cite specifically to data or reasoning in another section of the report that supported a particular conclusion." Although we agree with the United States that competent authorities "may choose any structure, any order of analysis, and any format for [the] explanation that they see fit, as long as the report complies with Article 3.1, we do not agree that the Panel was requiring that a report be in a certain form. Again, the Panel was assessing whether the USITC had provided a reasoned and adequate explanation of how the facts supported the USITC's determination, and was not requiring that the explanation of facts be provided in any particular form in the report.

296. We see no error in the Panel's approach. In our view, it is consistent with our understanding of Article 3.1, last sentence. Further, the Panel's approach is in line with the standard of review for panels that we discussed earlier. As we said in *US – Line Pipe* and in *US – Lamb*, competent authorities must provide a "reasoned and adequate explanation" of how the facts support their determination.[209] In *US – Line Pipe*, we found, further, in clarifying the obligations of WTO Members under the *Agreement on Safeguards*, that:

> … the competent authorities must establish explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports. This explanation must be clear and unambiguous. It must not merely imply or suggest an explanation. It must be a straightforward explanation in express terms.[210]

---

209. Appellate Body Report, *US – Line Pipe*, para. 217, in the context of a claim under Article 4.2(b) of the *Agreement on Safeguards*; Appellate Body Report, *US – Lamb*, para. 103, in the context of a claim under Article 4.2(a) of the *Agreement on Safeguards*.

210. Appellate Body Report, *US – Line Pipe*, para. 217.

297. This was a clarification of the obligation under Article 4.2(b), last sentence, of the *Agreement on Safeguards*. However, . . . our articulation of this standard of review should not be read as limited to claims under Article 4 of the *Agreement on Safeguards*. Thus, to the extent that the Panel looked for a "reasoned and adequate explanation" that was "explicit" in the sense that it was "clear and unambiguous" and "did not merely imply or suggest an explanation", the Panel was, in our view, correctly articulating the appropriate standard of review to be applied in assessing compliance with Article XIX of the GATT 1994 and the *Agreement on Safeguards*. . . .

299. . . . [A] panel may not conduct a *de novo* review of the evidence or substitute its judgement for that of the competent authorities.[211] Therefore, the "reasoned conclusions" and "detailed analysis" as well as "a demonstration of the relevance of the factors examined" that are contained in the report of a competent authority, are the only bases on which a panel may assess whether a competent authority has complied with its obligations under the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994. This is all the more reason why they must be made explicit by a competent authority. . . .

301. We turn now to the United States' argument that, since "the Panel based many of its findings against the United States on its conclusions that the USITC Report failed to provide a 'reasoned and adequate explanation' of certain findings", it follows that there can only be a violation of Article 3.1, and not also of Articles 2 and 4 of the *Agreement on Safeguards*. The United States adds that a failure to explain a finding does not automatically prove that the USITC had not performed the analysis necessary to make the finding.

302. . . . When the Panel found that the USITC report failed to provide a "reasoned and adequate explanation" of certain findings, the Panel was assessing compliance with the obligations contained in Articles 2 and 4 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994. As we said in *US – Lamb*, "[i]f a panel concludes that competent authorities, in a particular case, have not provided a reasoned or adequate explanation for their determination … [that] panel has … reached a conclusion that the determination is inconsistent with the specific requirements of [the relevant provision] of the *Agreement on Safeguards*."[215] Thus, we do not agree with the United States that the lack of a reasoned and adequate explanation does not imply a violation of Articles 2 and 4 of the *Agreement on Safeguards*.

303. Moreover, we cannot accept the United States' interpretation that a failure to explain a finding does not support the conclusion that the USITC "did not actually *perform* the analysis correctly, thereby breaching Article 2.1, 4.2, or 4.2(b) [of the *Agreement on Safeguards*]". As we stated above, because a panel may not conduct a *de novo* review of the evidence before the competent authority, it is the *explanation* given by the competent authority for its determination that alone enables panels to determine whether there has been compliance with the requirements of Article XIX of the GATT 1994 and of Articles 2 and 4 of the *Agreement on Safeguards*. It may well be that, as the United States argues, the competent authorities have performed the appropriate analysis correctly. However, where a competent authority has not provided a reasoned and adequate explanation to support its determination, the panel is not in a position to conclude that the relevant requirement for applying a safeguard measure has been

---

211. Appellate Body Report, *Argentina – Footwear (EC)*, para. 121.

215. Appellate Body Report, *US – Lamb*, para. 107.

fulfilled by that competent authority. Thus, in such a situation, the panel has no option but to find that the competent authority has not performed the analysis correctly.

304. In sum, Members may suspend trade concessions temporarily by applying safeguard measures "*only*" in accordance with Article XIX of the GATT 1994 and with the *Agreement on Safeguards*, including Article 3.1 of that Agreement. The last sentence of the latter provision, as elaborated by Article 4.2(c) of that Agreement, requires that:

> (a) the "competent authorities … publish a report";
> (b) the report contain "a detailed analysis of the case";
> (c) the report "demonstrat[e] … the relevance of the factors examined";
> (d) the report "set[] forth findings and reasoned conclusions"; and
> (e) the "findings and reasoned conclusions" cover "all pertinent issues of fact and law"
>
> prescribed in Article XIX of the GATT 1994 and the relevant provisions of the *Agreement on Safeguards*. . . .

C. *Is it Necessary to Demonstrate for Each Safeguard Measure at Issue that Unforeseen Developments Resulted in Increased Imports?*

306. The Panel found that, because Article XIX of the GATT 1994 requires a demonstration that "unforeseen developments" have *resulted* in "increased imports", the report of the investigating authorities must "contain *specific* factual demonstrations of unforeseen developments identified to have resulted in increased imports causing or threatening to cause serious injury to the relevant domestic producers for each safeguard measure at issue."[a]

307. It is useful to set out the relevant reasoning and findings of the Panel on this issue before analyzing the argument made by the United States. The Panel found first that:

> … at no point in the initial USITC Report is the issue of "unforeseen developments" *per se* mentioned, except, as the complainants have pointed out, in a footnote in the separate view of one commissioner explaining that although such a demonstration is required in WTO law, it is not required by US law. There is otherwise no discussion of the effects of unforeseen developments for the specific safeguard measures at issue. (footnote omitted)

308. Turning to the Second Supplementary Report provided by the USITC, the Panel observed that "the USITC insists on the *overall effects* of the Asian and Russian financial crisis together with the strong US dollar and economy to displace steel to other markets." The Panel found that "although it describes a plausible set of unforeseen developments that may have resulted in increased imports to the United States from various sources, it falls short of demonstrating that such developments actually resulted in increased imports into the United States causing serious injury to the relevant domestic producers."

309. The Panel went on to find that, even if, as the USITC had found, "large volumes of foreign steel production were displaced from foreign consumption," this did not, in itself, imply that imports *to the United States* increased as a result of "unforeseen developments". The Panel further found that "the USITC did not provide any data to support its general assertion that the confluence of unforeseen developments resulted[a] in the *specific* increased imports at issue in this dispute," and agreed with the

---

a. Underlining in original. –Eds.

Complaining Parties that "the USITC's explanation relates to steel production in general and does not describe how the unforeseen developments resulted in increased imports in respect of the *specific* steel products at issue."

310. The Panel noted also that the United States referred, in its first written submission to the Panel, "to parts of the USITC Report, which contain footnote references to tables that show imports by country and by product for the entire period of investigation." The Panel found that, although "these tables contained data that *could* have been used to explain how unforeseen developments resulted in increased imports that caused injury … the competent authority did no such thing." The Panel added that "[i]n fact, the text to which the footnotes correspond is either totally unrelated to an explanation of unforeseen developments, or it deals generally with imports without specifying from where those imports came." On that basis, the Panel concluded that:

> … the explanation provided by the USITC [on] how unforeseen developments resulted in increased imports causing serious injury is not reasoned and adequate. Moreover, it is not supported by relevant data and it does not demonstrate, as a matter of fact, that such unforeseen developments resulted in increased imports into the United States of the *specific* steel products that are the subject of the safeguard measures at issue. (emphasis added)

311. The Panel found, therefore, that the United States acted inconsistently with Article XIX:1(a) of the GATT 1994 and Article 3.1 of the *Agreement on Safeguards* by failing to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had *resulted* in increased imports of the *specific* steel products subject to the safeguard measure at issue.

312. The United States objects to this finding by arguing that Article XIX does not specify a particular type of analysis, nor does it require any differentiation by the competent authority of the impact of various "unforeseen developments" on *each* product that is subject to the relevant safeguard measures. The United States submits that "[t]o perform such an analysis, the competent authorities would have to identify the effects of each unforeseen development on subsequent increases in imports of a product" and thus "obligate the competent authorities to evaluate unforeseen developments in the same way as imports themselves". According to the United States, this is "manifestly incorrect" because "[w]hile Article XIX:1(a) requires that increased imports be a 'result of' unforeseen developments, in contrast, it requires that those imports 'cause' serious injury." . . .

314. The term "such product" in Article XIX:1(a) refers to the product that may be subject to a safeguard measure. That product is, necessarily, *the product* that "is being imported in such increased quantities". Read in its entirety, Article XIX:1(a) clearly requires that safeguard measures be applied to the product that "is being imported in such increased quantities", and that those "increased quantities" are being imported "as a result" of "unforeseen developments".

315. Turning to the term "as a result of" that is also found in Article XIX:1(a), we note that the ordinary meaning of "result" is, as defined in the dictionary, "an effect, issue, or outcome *from* some action, process or design".[232] The increased imports to which this provision refers must therefore be an "effect, or outcome" of the "unforeseen developments". Put differently, the "unforeseen developments" must "result" in

---

232. *Shorter Oxford English Dictionary*, 5th ed. W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. II, p. 2555.

increased imports of the product ("such product") that is subject to a safeguard measure.

316. It is evident, therefore, that not just any development that is "unforeseen" will do. To trigger the right to apply a safeguard measure, the development must be such as to *result* in increased imports of *the product* ("such product") that is subject to the safeguard measure. Moreover, *any* product, as Article XIX:1(a) provides, may, potentially, be subject to that safeguard measure, provided that the alleged "unforeseen developments" *result* in increased imports of that *specific product* ("such product"). We, therefore, agree with the Panel that, with respect to the specific products subject to the respective determinations, the competent authorities are required by Article XIX:1(a) of the GATT 1994 to demonstrate that the "unforeseen developments identified … have resulted in increased imports [of the specific products subject to] … each safeguard measure at issue."[233]

317. We find further support for this conclusion in our rulings in *Argentina – Footwear (EC)* and in *Korea – Dairy*. In those appeals, we characterized the term "as a result of" as implying that there should be a "logical connection" between "unforeseen developments" and the conditions set forth in the second clause of Article XIX:1(a). We found that there must be:

> … a logical connection between the circumstances described in the first clause – "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions … " – and the conditions [regarding increased imports] set forth in the second clause of Article XIX:1(a) for the imposition of a safeguard measure.[234]

318. There must, therefore, be a "logical connection" linking the "unforeseen developments" and an increase in imports of the product that is causing, or threatening to cause, serious injury. Without such a "logical connection" between the "unforeseen developments" and *the product* on which safeguard measures may be applied, it could not be determined, as Article XIX:1(a) requires, that the increased imports of "such product" were "a result of" the relevant "unforeseen development". Consequently, the right to apply a safeguard measure to *that product* would not arise.

319. For this reason, when an importing Member wishes to apply safeguard measures on imports of several products, it is not sufficient merely to demonstrate that "unforeseen developments" resulted in increased imports of a broad category of products that included the specific products subject to the respective determinations by the competent authority. If that could be done, a Member could make a determination and apply a safeguard measure to a broad category of products even if imports of one or more of those products did not increase and did not result from the "unforeseen developments" at issue. Accordingly, we agree with the Panel that such an approach does not meet the requirements of Article XIX:1(a), and that the demonstration of "unforeseen develop-

---

233. Panel Reports, para. 10.44. (underlining added) In the same vein, we further note that, as China argues in paragraph 49 of its appellee's submission, the USTR had, in fact, asked the USITC in its letter dated 3 January 2002, to identify "for each affirmative determination … any unforeseen developments that led to the relevant steel products being imported into the United States in such increased quantities as to be a substantial cause of serious injury." (Letter of the USTR to the USITC dated 3 January 2002, question 1). (underlining added)

234. Appellate Body Report, *Argentina – Footwear (EC)*, para. 92; Appellate Body Report, *Korea – Dairy*, para. 85.

ments" must be performed for *each* product subject to a safeguard measure.[235] . . .

D. *Alleged Failure by the Panel to "Link" Certain Data to the USITC's Demonstration of how "Unforeseen Developments" Resulted in Increased Imports*

324. Before the Panel, the United States argued that there were data to support the USITC's finding that "unforeseen developments" had resulted in increased imports of the relevant products which "extended beyond consumption data for the most severely affected countries in south east Asia and production and consumption data for the former USSR republics". The United States referred, *inter alia*, to the section of the USITC report dealing with increased imports, which contains footnote references to tables that show imports by country and by product for the entire period of investigation.

325. . . . [T]he Panel found that those "tables contained data that *could* have been used to explain how unforeseen developments resulted in increased imports … However, the competent authority did no such thing." The Panel explained that "the text to which the footnotes correspond is either totally unrelated to an explanation of unforeseen developments, or it deals generally with imports without specifying from where those imports came." The United States acknowledges that the USITC itself did not cite these data in connection with its demonstration of "unforeseen developments", but, nevertheless, it argues that the Panel "was *required* to consider [those data] in evaluating whether the unforeseen developments finding was consistent with Article 3.1 [of the *Agreement on Safeguards*]".

326. Article 3.1 of the *Agreement on Safeguards* requires that the competent authority set out "reasoned conclusions" on all "pertinent issues of fact and law". One of those "issues of law" is the requirement to demonstrate the existence of "unforeseen developments" that have resulted in increased imports causing serious injury. In our view, therefore, it was for the USITC to provide a "reasoned conclusion" on "unforeseen developments". A "reasoned conclusion" is not one where the conclusion does not even refer to the facts that may support that conclusion. As the United States itself acknowledges, "Article 3.1 thus assigns the competent authorities—not the panel—the obligation to 'publish a report setting forth *their* findings and reasoned conclusions reached on all pertinent issues of fact and law.'" A competent authority has an obligation under Article 3.1 to provide reasoned conclusions; it is not for panels to find support for such conclusions by cobbling together disjointed references scattered throughout a competent authority's report.

327. The United States argues that our findings in *EC – Tube or Pipe Fittings* support its view that the Panel was "required" to consider the relevant data to which the USITC refers in other sections of the USITC report to support the USITC's finding that "unforeseen developments" had resulted in increased imports. The United States explains that "[i]n that dispute, the report of the investigating authority failed to mention one of the factors specifically listed in the Antidumping Agreement at all in its discussion." In that dispute, according to the United States, despite that omission, "the

---

235. We note that the United States also alleges that the Panel "mistakenly indicated that a competent authority had to 'differentiate the impact' of various unforeseen developments on the individual industries and even economies of other countries." (United States' appellant's submission, para. 85, referring to Panel Reports, paras. 10.127–10.128). Based on our review of the Panel Reports, we do not understand the Panel to have imposed such a requirement. Instead, as we see it, the Panel merely observed, in paragraph 10.127, that the Asian and Russian crises affected some countries more than others, to support its view that the USITC was required to "explain how the increased imports of the specific steel products subject to the investigation *were linked to and resulted from* the confluence of unforeseen developments." (emphasis added) Previously, in paragraph 10.123 of the Panel Reports, the Panel had stated that "even if 'large volumes of foreign steel production were displaced from foreign consumption', this [did] not, in itself, imply that *imports to the United States* increased as a result of unforeseen developments." (emphasis added)

Appellate Body determined, by virtue of a close reading of the remainder of the report, that the investigating authority had in fact 'considered' the enumerated factor." The United States concludes from this that "[i]f this is a permissible analysis of whether the necessary evaluation was performed by national authorities, then the ITC's reliance on data tables actually referenced in the Report (although not in the unforeseen development section) is surely also permissible."

328. The issue in *EC – Tube or Pipe Fittings* was not the obligation contained in Article 3.1 of the *Agreement on Safeguards*. The issue there was, as the United States explains, whether a particular injury factor listed in Article 3.4 of the *Anti-Dumping Agreement* "ha[d] been evaluated, even though a separate record of the evaluation of that factor ha[d] not been made." We found in that appeal that "under the particular facts of [that] case, it was reasonable for the Panel to have concluded that the [competent authorities had] addressed and evaluated" the relevant factor.

329. Unlike the United States, we do not see the two cases as the same. The issue in this case is not whether certain data referred to in the USITC report had, in fact, been "considered" by the USITC. The USITC may indeed have "considered" all the relevant data contained in its report or referred to in the footnotes thereto. However, it did not use those data to *explain* how "unforeseen developments" resulted in increased imports. Rather, as the Panel found, "the text to which the footnotes correspond is either totally unrelated to an explanation of unforeseen developments, or it deals generally with imports without specifying from where those imports came." Hence, what is wanting here is not the data, but the reasoning that uses those data to support the conclusion. The USITC did not, in our view, provide a conclusion that is supported by facts and reasoning, in short, a "reasoned conclusion", as required by Article 3.1. Moreover, as we have stated previously, it was for the USITC, and not the Panel, to provide "reasoned conclusions". It is not for the Panel to do the reasoning for, or instead of, the competent authority, but rather to assess the adequacy of that reasoning to satisfy the relevant requirement. In consequence, we cannot agree with the United States that the Panel was "required" to consider the relevant data to which the USITC referred in other sections of its report to support the USITC's finding that "unforeseen developments" had resulted in increased imports; and, for the reasons mentioned, we do not see how our findings in *EC – Tube or Pipe Fittings* support the United States' view to that effect.

330. We, therefore, uphold the Panel's findings . . . that the ten safeguard measures at issue are inconsistent with Article XIX:1(a) of the GATT 1994 and Article 3.1 of the *Agreement on Safeguards* because the USITC's report failed to demonstrate, through a reasoned and adequate explanation, that "unforeseen developments" had resulted in increased imports of CCFRS, tin mill products, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, stainless steel bar, stainless steel rod, and stainless steel wire, causing serious injury to the relevant domestic producers.

VI. Increased Imports

[The report upheld the Panel's conclusion that the application of safeguard measures on imports of CCFRS, stainless steel rod and hot-rolled bar was inconsistent with the requirements of GATT article XIX, paragraph 1(a) and article 3.1 of the Safeguards Agreement. The United States had failed to provide a "reasoned and adequate explanation" as to its determination that these products were being imported in "such increased quantities."

[However, the report reversed the Panel's "increased imports" conclusions as to tin mill products and stainless steel wire. The Appellate Body's discussion is excerpted at ▬, *supra*. The Appellate Body found it unnecessary to decide independently if the ITC

determination as to "increased imports" was inconsistent with articles 2.1 and 3.1 of the Safeguards Agreement.

[The report also reversed the panel's conclusions that the safeguard measures with respect to tin mill products and stainless steel wire were inconsistent with articles 2.1, 3.1 and 4.2(b) of the Safeguards Agreement on the issue of the "causal link" between "increased imports" and "serious injury." The Appellate Body again found it unnecessary to decide independently if the ITC determination as to "increased imports" was inconsistent in this regard.]

VII. Parallelism

[As to the U.S. exclusion from the safeguard measures of imports from free trade areas like NAFTA, the report upheld the panel's conclusions that the safeguard measures were inconsistent with articles 2.1 and 4.2 of the Safeguards Agreement. It agreed that "the United States failed to comply with the requirement of 'parallelism' between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure." The Appellate Body's discussion is excerpted at ▬, *supra*.]

VIII. Causation

[The report found it unnecessary to rule on whether the United States had failed to demonstrate a "causal link" between increased imports from all sources of CCFRS, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, and stainless steel bar and serious injury to the domestic injury. It neither reversed nor upheld the panel's findings on causation.

[For tin mill products and stainless steel wire, the Panel had found that the USITC did not offer "a reasoned and adequate explanation of how the facts support" the "causal link" determination, as required by Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, because the determination was based on alternative explanations given by different Commissioners that could not be reconciled. The Appellate Body reversed, since it did not accept the Panel's reasoning based simply on the different findings by the USITC Commissioners. The Appellate Body emphasized, however, that it was not saying "that a causal link *has been* established with respect to tin mill products and stainless steel wire. We are simply saying that the reasoning used by the Panel . . . is flawed, and does not support the Panel's conclusion that no such link was established." In the light of the Appellate Body's other findings that all ten safeguard measures were inconsistent with GATT article XIX, paragraph 1(a) and articles 2.1, 3.1 and 4.2 of the Safeguards Agreement, it did not consider it necessary "to make further rulings on causation related to tin mill products and stainless steel wire."]

514. The Appellate Body *recommends* that the DSB request the United States to bring its safeguard measures, which have been found . . . to be inconsistent with the *Agreement on Safeguards* and the GATT 1994, into conformity with its obligations under those Agreements.

NOTES AND QUESTIONS

1. In paragraph 267 of the report, the Appellate Body emphasizes that the dispute before it concerned only "the *specific* safeguard measures as applied by the United States." What, then, are the implications–if any–for the validity and future application of U.S. trade law and regulation--and the methodology used by the ITC in safeguard actions?

2. Review part V of the report, concerning "unforeseen developments" under article

3.1 of the Safeguards Agreement. What was wrong with the ITC's determination that such developments existed? If the ITC offered an appropriately full explanation, could the Russian crisis, the Asian crisis, the continued strength of the U.S. market, and the persistent appreciation of the dollar, taken together, constitute "unforeseen developments" within the meaning of GATT article XIX, paragraph 1(a)? *Cf.* paragraphs 308-309.

3. In paragraphs 301-304 of the report, the Appellate Body considered the U.S. argument that a violation of the "reasoned explanation" requirement of article 3.1 of the Safeguards Agreement should not be read as violations of articles 2 and 4 as well–in effect, that the panel was double-counting the underlying violation. How does the Appellate Body respond? Is it convincing?

4. Would it be enough for the ITC to demonstrate that identified "unforeseen developments" resulted in increased steel imports, in the aggregate, to the United States? How specific must the link be between the developments to the imports of each specific category of products from each specific exporting country? In this regard, review paragraphs 306-319 of the report. Are the statistical data on the imports enough to demonstrate that the imports were in fact increasing during the relevant period? In this regard, review paragraphs 324-329 of the Appellate Body report.

5. The Appellate Body recommended that the DSB request the United States to bring its safeguard measures into conformity with the GATT and the Safeguards Agreement. What options were available to the President in responding to that request? With a presidential election looming in November 2004, could the president legally decide to repudiate the request and keep the safeguard measures in place? Replace the measures with other, equally aggressive trade sanctions?[1] Simply withdraw the safeguard measures? The president's eventual response, excerpted below, came on December 4, 2003. What did the president do, and what are the implications for the future?

Proclamation 7741
To Provide for the Termination of Action Taken
With Regard to Imports of Certain Steel Products
68 Fed. Reg. 68,483 (2003)

1. Proclamation 7529 of March 5, 2002, implemented actions (safeguard measures) of a type described in section 203(a)(3)(A) and (B) of the Trade Act of 1974, as amended (19 U.S.C. 2253(a)(3)(A) and (B)) (the "Trade Act"), with respect to imports of [certain steel products].

2. In Proclamation 7529 and Proclamation 7576 of July 3, 2002, I authorized the United States Trade Representative (USTR) to further consider any request for exclusion of a particular product and upon finding that a particular product should be excluded, to modify the provisions of the Harmonized Tariff Schedule of the United States (HTS) created by the Annex to Proclamation 7529 to exclude such particular product from the pertinent safeguard measure established in Proclamation 7529. Pursuant to that authorization, the USTR published four notices of exclusions of products from the safeguard measures. . . . The USTR also published notice in the Federal Register of technical corrections to that

1. Such sanctions might include restraining steel imports, pursuant to 19 U.S.C. § 1862, to ensure that the imports would not threaten to impair the national security (*see* § 5, *infra*); initiating anti-dumping investigations under GATT article VI (*see* Chapter V, *infra*); or perhaps declaring a national emergency with respect to steel imports and imposing prohibitions or restrictions on such imports. (*See* Chapter XIII, *infra* at ▬-▬ (discussing economic sanctions authority in trade context). *Cf. Yoshida International, supra* at ▬ (involving national emergency authority invoked to impose additional tariffs).

Annex.

3. In a Memorandum of March 5, 2002 (67 Fed. Reg. 10593), pursuant to section 203(a)(3)(I) of the Trade Act (19 U.S.C. 2253(a)(3)(I)), I instructed the Secretary of the Treasury and the Secretary of Commerce to establish a system of import licensing to facilitate the monitoring of imports of certain steel products. . . .

4. Section 204(a) of the Trade Act (19 U.S.C. 2254(a)) requires the United States International Trade Commission (ITC) to monitor developments with respect to the domestic industry while action taken under section 203 remains in effect. If the initial period of a safeguard action exceeds 3 years, then the ITC must submit to the President a report on the results of such monitoring not later than the date that is the mid-point of the initial period of the safeguard action. The ITC report in Investigation Number TA-204-9 was submitted on September 19, 2003.

5. Section 204(b)(1)(A) of the Trade Act (19 U.S.C. 2254(b)(1)(A)) authorizes the President to reduce, modify, or terminate a safeguard action if, after taking into account any report or advice submitted by the ITC and after seeking the advice of the Secretary of Commerce and the Secretary of Labor, he determines that changed circumstances warrant such reduction, modification, or termination. The President's determination may be made, inter alia , on the basis that the effectiveness of the action taken under section 203 has been impaired by changed economic circumstances.

6. In view of the information provided in the ITC report, and having sought advice from the Secretary of Commerce and the Secretary of Labor, I determine that the effectiveness of the actions taken under section 203(a)(3)(A) and (B) of the Trade Act with respect to imports of certain steel products and the exclusions from and technical corrections to the coverage of Proclamation 7529 has been impaired by changed economic circumstances. Accordingly, I have determined, pursuant to section 204(b)(1) (A)(ii), that termination of the actions taken under section 203(a)(3)(A) and (B) set forth in Proclamation 7529 taken with respect to certain steel imports is warranted. The action taken under section 203(a)(3)(I) set forth in the Memorandum of March 5, 2002, requiring the licensing and monitoring of imports of certain steel products remains in effect and shall not terminate until the earlier of March 21, 2005, or such time as the Secretary of Commerce establishes a replacement program.

7. Section 604 of the Trade Act (19 U.S.C. 2483) authorizes the President to embody in the HTS the substance of the relevant provisions of that Act, and of other acts affecting import treatment, and actions thereunder, including the removal, modification, continuance, or imposition of any rate of duty or other import restriction.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, acting under the authority vested in me by the Constitution and the laws of the United States of America, including, but not limited to sections 204 and 604 of the Trade Act and section 301 of title 3, United States Code, do proclaim that:

(1) The HTS is modified as provided in the Annex to this proclamation.

(2) The United States Trade Representative is authorized, upon his determination that the Secretary of Commerce has established a replacement program pursuant to paragraph 6 of this proclamation, to terminate the action under section 203(a)(3)(I) of the Trade Act set forth in the Memorandum of March 5, 2002, and the Licensing System and to publish notice of this determination and action in the Federal Register.

(3) Any provisions of previous proclamations and Executive Orders that are inconsistent with the actions taken in this proclamation are superseded to the extent of such inconsistency.

(4) The modifications to the HTS made by this proclamation shall be effective with respect to goods entered, or withdrawn from warehouse for consumption, on or after 12:01 a.m., eastern standard time, December 5, 2003.

2. The Adjustment Assistance Alternative

As an alternative to § 201, the executive branch can bring into play the adjustment assistance program, which, unlike to § 201, has purely domestic ramifications. The problem with adjustment assistance is not only budgetary (*i.e.*, pressure on fiscal resources) but political–large U.S. industries would in practically all cases prefer to continue doing what they are already doing, rather than adjust to a new type of endeavor. Adjustment assistance may be sought by a domestic firm or workers before a § 201 escape clause action or in tandem with a § 201 action.

a. The Theory of Adjustment Assistance[1]

The theory of adjustment assistance, as its title suggests, is premised on the concept of adjustment to a dynamic world economy. Moves toward a freer trade regime–especially for the developed countries[2]–will tend to increase each country's overall national income under the law of comparative advantage.[3] Those individuals in disfavored factor sectors of the economy will, however, be rendered worse off, since a reduction in import barriers will lead to an increase in competing imports and a decrease in the domestic output of the liberalized industry.[4]

Familiar general principles of loss allocation lie behind the notion that the government should recompense "victims" of trade liberalization by redistributing part of the gains from expanded trade. The first is the principle of enterprise liability, under which enterprises giving rise to a loss bear the burden of that loss.[5] It could be argued that the government is frequently "causing" the "injury" to the industry or its workers by removing protection it has given them. It thus seems equitable to recompense the reliance interests that have grown up over time. Second, adjustment assistance spreads the loss from removal of trade restrictions, causing fewer severe economic dislocations.[6] Third, a justification for adjustment assistance can be found in the "deep pocket" theory of loss allocation.[7] Of course, this rationale would apply to *all* imports, not just those resulting from trade liberalization; it would treat all imports as "accidents," the costs of which should be equitably distributed. The industries that are candidates for adjustment assistance are typically the sick and the dying, the marginal industries relying on relatively static technologies and homogeneous product lines. It seems reasonable to finance their adjustments through our progressive tax system, as other expenditures considered necessary by the government are financed.

b. The Statutory Framework of Adjustment Assistance

---

1. This section is derived from Fisher, *The Multinationals and the Crisis in United States Trade and Investment Policy*, 53 B.U. L. Rev. 308 (1973).

2. Different approaches to development theory differ on the effects of freer trade for developing economies. The U.N. Secretary-General has suggested that liberalized trade can be an instrument for economic development. *See* Report of the United Nations Secretary-General on the Work of the Organization, *supra* at ▬ (recommending freer trade policies). Many critics have argued that free trade does not tend to benefit developing countries. *See* P. Pincus, Trade, Aid and Development: The Rich and Poor Nations 126-134 (1967) (discussing views of Prebisch, Myrdal, and Singer).

3. For discussion of the law of comparative advantage, see Chapter I, *supra* at ▬.

4. W. Salant & B. Vaccara, Import Liberalization and Employment 15 (1961).

5. *See, e.g.*, G. Calabresi, The Cost of Accidents: A Legal and Economic Analysis 21 (1970); Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 Yale L.J. 499 (1961).

6. Calabresi, The Cost of Accidents, *supra* at 21.

7. Calabresi, *Some Thoughts*, 70 Yale L.J. at 518.

Sections 221-273 of Title II of the Trade Act of 1974 (reproduced in the Selected Documents Supplement) provide the statutory framework for direct financial aid in the form of adjustment assistance for workers, firms and communities. An affirmative determination of eligibility for firms or workers may be made if it is found that increased imports have contributed importantly to (rather than being a major factor in) decline in sales or production and to a total or partial separation of a significant number or proportion of workers in question. Eligibility determinations for workers and firms are made, respectively, by the Secretaries of Labor and Commerce, not the ITC.

The assistance program for eligible firms includes technical assistance and financial assistance. Technical assistance may be furnished for the purpose of developing a program for economic adjustment, assistance in implementing a program, or both.

NOTES AND QUESTIONS

1. How effective would you expect adjustment assistance to be? It has generally been criticized. *See, e.g.*, Comptroller General, Report to Congress: Adjustment Assistance to Firms Under the Trade Act of 1974–Income Maintenance or Successful Adjustment? (Report ID-78-53, Dec. 21, 1978).

2. Despite skepticism about such programs, the United States and other countries continue to maintain adjustment assistance programs. Does this reflect political choices between imposing import restrictions–with the attendant international controversy–and paying out of the public pocket to assuage domestic controversy? For discussion of the adjustment assistance programs of other countries, see Comptroller General, Report to Congress: Considerations for Adjustment Assistance Under the Trade Act of 1974: A Summary of Techniques Used in Other Countries (Report ID-78-43, Jan. 18, 1979).

3. According to a February 2005 report[1] the Institute for International Economics has estimated the "dislocation costs" incurred by the U.S. economy as a result of globalization–including the effects of lost jobs and adverse economic effects on U.S. businesses–at approximately $50 billion per year, while the U.S. Government annually spends only between $1 billion to $2 billion to ameliorate such dislocation. The report recommends the following measures:

- expanding Trade Adjustment Assistance to include service workers
- qualifying trade-impacted industries rather than individual groups of workers for such assistance; and,
- creating a "human capital investment tax credit"–similar to a research and development tax credit–to encourage U.S. companies to adopt worker training programs.

Are these measures likely to be sufficient to offset the effects of globalized competition on the U.S. economy? Is Mr. Walter, in the excerpted case that follows, a "service worker"? Would he have benefitted from the Institute's recommendations?

Former Employees of Murray Engineering, Inc. v. Chao

— F.Supp.2d —, 2004 WL 955607 (CIT 2004)

---

1. INSTITUTE FOR INTERNATIONAL ECONOMICS, THE UNITED STATES AND THE WORLD ECONOMY: FOREIGN ECONOMIC POLICY FOR THE NEXT DECADE (2005). For more information on the report, see the Institute's Web site at http://www.iie.com.

POGUE, J.

In this action, Ken Walter ("Plaintiff"), as a former employee of Murray Engineering, Inc. ("Murray"), challenges the determination of the Department of Labor ("Labor" or "Defendant") that he is not eligible for trade adjustment assistance ("TAA") under the Trade Act of 1974 ("the Act"). Labor found that Plaintiff was not eligible for TAA based on its determinations that Murray neither produced an "article,"[1] nor a "component part" for a TAA-certified business within the meaning of the Act.[2] Because Labor's first determination relies on its flawed interpretation of the terms of the Harmonized Tariff Schedule of the United States ("HTSUS"), 19 U.S.C. § 1202 (2003), the Court remands this action to Labor for further investigation.[3] The Court reserves review of the second issue until Labor has made a second determination on remand.

BACKGROUND

Plaintiff is a former employee of Murray Engineering, Inc. Plaintiff worked at Murray producing custom designs[4] for industrial machinery. In response to Plaintiff's petition for TAA certification,[5] Labor initiated an investigation into Plaintiff's eligibility in January 2003. . . . Labor denied Plaintiff's petition in February 2003. . . . Plaintiff requested an administrative reconsideration, which was subsequently denied. . . . Plaintiff then appealed his case to the Court. . . . The case, however, was voluntarily remanded to Labor. . . .

Neither in its original determination, nor on remand did Labor make any factual findings regarding the nature of the items produced by Plaintiff's employer or regarding Plaintiff's eligibility for TAA. Rather, Labor made a legal determination that the terms of the HTSUS precluded Murray's designs from being considered to be "articles" under the Act, and that Murray's employees similarly failed to qualify as adversely affected

---

1. Section 222 of the Trade Act of 1974, as amended, is codified at 19 U.S.C.A. § 2272 (West Supp.2003). It reads, in pertinent part:

> *(a) In general*
>
> A group of workers ... shall be certified by the Secretary as eligible to apply for adjustment assistance under this part ... if the Secretary determines that--
>
> *(1)* a significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated ...; and ...
>
> *(2)(A)(ii)* imports of articles like or directly competitive with articles produced by such firm or subdivision have increased.

19 U.S.C.A § 2272(a) (West Supp.2003).

2. Congress re-authorized trade adjustment assistance, as provided by the Act, in 2002. Trade Adjustment Assistance Reform Act of 2002, Pub.L. No. 107-210, § 111, 2002 U.S.C.A.A.N. (116 Stat.) 935, 936. Congress also amended the Act to cover "adversely affected secondary workers." *Id.* at § 113. This new coverage is codified at 19 U.S.C.A. § 2272(b). 19 U.S.C.A. § 2272(b) (West Supp.2003). This provision grants eligibility for trade adjustment assistance to workers whose firm is a supplier of "component parts" to a producer already certified for adjustment assistance. *Id.*

3. The Court notes that there are two administrative records in this case: the record as it was developed up to the point of voluntary remand, and a supplemental administrative record developed after the voluntary remand. For each of these records, there is a public and a confidential version. . . . Because the supplemental administrative record largely duplicates the documents available in the record up until voluntary remand, the majority of the Court's [references] are to the supplemental record.

4. Although Labor refers to the items Murray produces variously as "designs," "drawings," and "schematics", the Court throughout its opinion refers to the items created by Murray as "designs." Such terminology is not indicative of whether or not the items are "articles" for purposes of 19 U.S.C.A. § 2272(a) (West Supp.2003), but is used only because "designs" is not a term already used by the statutes at issue in this litigation.

5. . . . Although Plaintiff filed for NAFTA transitional adjustment assistance, which is authorized by the North American Free Trade Implementation Act of 1993, Labor treated the petition as one for trade adjustment assistance under the Act. *See* 19 U.S.C. §§ 3352-3356 (2000). . . .

secondary workers because Murray did not supply a "component part" to a TAA-certified business. . . .

After remand, the case now returns before the Court on Plaintiff's challenge to Labor's determinations regarding assistance both as a former employee of a company that manufactures an "article" and as an adversely affected secondary worker. . . .

STANDARD OF REVIEW

The Act contains a provision for judicial review of Labor's eligibility determinations. *See* 19 U.S.C. § 2395(a) (West Supp.2003).[6] Subsection (b) of this provision requires that, in reviewing a denial of certification of eligibility, "[t]he findings of fact by the Secretary of Labor ..., if supported by substantial evidence, shall be conclusive." 19 U.S.C. § 2395(b) (West Supp.2003). The statute, however, does not mention how this Court is to treat Labor's legal determinations. That Congress would provide for a deferential level of review for Labor's factual findings, but not mention questions of law, could suggest that Congress meant for this Court to conduct a *de novo* review of Labor's legal determinations under the Act. *See United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (arguing that one can infer from "statutory circumstances" whether deference is due to an agency's legal interpretations).

In the case at issue here, however, Labor seeks to interpret the terms of the Act through its interpretation of the terms of another federal statute, the HTSUS. Regardless of whether Congress intended to give Labor the scope to interpret the Act, *see id.*,[7] the HTSUS contains no indication that Congress intended for Labor to have authority to interpret its terms. Rather, the agency charged by Congress with applying and interpreting the HTSUS is the United States Bureau of Customs and Border Protection. *See* 19 U.S.C. § 1500. Nor is there any reason to believe that Labor possesses any particular expertise in regard to the HTSUS. *Cf. NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-57 (1995). Therefore, there appears to be no Congressional intent for this Court to grant deference to Labor's interpretation of the HTSUS under the doctrine articulated in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (*"Chevron"*).[10]

---

6. 19 U.S.C. § 2395(a) reads, in part:

> *(a) Petition for review; time and place of filing*
>
> A worker, group or workers, ... or group aggrieved by a final determination of the Secretary of Labor under section 2273 of this title ... may, within sixty days after notice of such determination, commence a civil action in the United States Court of International Trade for review of such determination.

19 U.S.C. § 2395(a) (West Supp.2003).

7. The Court notes that the presence of formal rulemaking or adjudicative procedures in making an interpretation may be indicative of agency authority to interpret ambiguous statutes. *See Mead Corp.*, 533 U.S. at 229-30. In this case, to the extent that Labor has issued regulations on eligibility determinations, these regulations, in the main, simply restate the statutory requirements. *Cf.* 29 C.F.R. § 90.16 (2003), *with* 19 U.S.C.A. §§ 2272-2273 (West Supp.2003). Moreover, there is no regulation on the definition of "articles," although Labor has defined other terms by regulation. *See* 29 C.F.R. § 90.2. Neither does a formal adjudicative process appear to have been followed in this case. Although Labor claims that "traditionally," it regards the production of designs on a computer as a service, rather than the production of an "article" within the meaning of 19 U.S.C.A. § 2272 (West Supp.2003), it points to no particular previous adjudication for which this holds true. . . .

10. The "*Chevron* doctrine" holds that where an agency interprets ambiguous statutory language, a court should defer to the agency's interpretation, even if it is not the one the court would have reached, as long as it is "reasonable." *See Chevron*, 467 U.S. at 842-44.

However, there must be indicia that Congress intended for the agency's interpretations to be granted deference. The Court notes that Customs' own interpretations of the HTSUS are not granted *Chevron* deference, at least when embodied in the form of letter rulings. *Mead Corp.*, 533 U.S. at 221 (2001). Labor's determination here appears analogous to a letter ruling, as it was not made subject to formal procedures, and there is no indication that it is meant to bind parties or persons other than those

Moreover, even had Congress delegated to Labor the authority to enforce or administer the HTSUS, *Chevron* still requires that the agency's interpretation be "reasonable." *Chevron*, 467 U.S. at 844. Labor's interpretation of the HTSUS, however, for reasons discussed below, is faulty, because of its misapprehension as to the scope and coverage of the schedule. . . . In addition, the flaws in Labor's interpretation of the HTSUS deprive that interpretation of the "power to persuade." *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

The terms of the Act's provision regarding judicial review, the failure of Congress to assign Labor a role in the administration of the HTSUS, and the failure of Labor to put forth a reasonable or persuasive interpretation of the HTSUS all lead the Court to conclude that deference is not warranted in this case. Therefore, on the record here, Labor's statutory interpretation is subject to *de novo* review.

DISCUSSION

Having identified the standard of review appropriate to this case, the Court now turns to the legal issues. Labor has made two legal findings in its negative determination on remand: that Plaintiff is not eligible for TAA because Plaintiff's company does not produce "articles" within the meaning of 19 U.S.C.A. § 2272(a) (West Supp.2003) and that Plaintiff is not eligible for assistance as an "adversely affected secondary worker" because Plaintiff's company does not produce a "component part" for a certified company within the meaning of 19 U.S.C.A. § 2272(b) (West Supp.2003). ... The Court's opinion will focus on the first finding.

Defendant bases its negative determination of eligibility for assistance under 19 U.S.C.A. § 2272(a) (West Supp.2003) on two sources–the HTSUS and the North American Industry Classification System ("NAICS")–both of which it cites as support for the legal finding that Plaintiff's company does not produce "articles" within the meaning of 19 U.S.C.A. § 2272(a) (West Supp.2003). . . .

Labor argues that the HTSUS furnishes a guide for determining whether Murray's designs are "articles." . . . Labor appears to argue that recourse must be had to the HTSUS to determine whether a given object is an "article" because "[t]hroughout the Trade Act, an article is often referenced as something that can be subject to a duty." . . . Indeed, the Act does so reference articles. *See, e.g.*, 19 U.S.C. §§ 2119, 2252(d)(4)(B)-(C)(2000) (discussing "rate of duty on any article", "amount of duty with respect to any article," suspension of liquidation "with respect to an imported article," and imposition of duty "with respect to an imported article").

Labor therefore looked to the HTSUS in deciding whether or not the designs created by Murray were "articles," or objects that could be subject to a duty. . . . Specifically, Labor looked to the terms of heading 4906, HTSUS, which provide, in part, for "[p]lans and drawings for architectural, engineering, industrial, commercial, topographical or similar purposes, being originals drawn by hand." . . . Labor appears to have taken this provision, which singles out hand-drawn originals, to imply that Congress intended to deny to plans and drawings made with the aid of computers the status of "articles." . . . The provisions of the HTSUS, however, do not support the implication that Labor drew.

Heading 4906 is located within chapter 49 of the HTSUS. Chapter 49 deals generally with printed matter. Chapter 49, HTSUS. While it contains numerous headings for specific types of printed matter, it also contains a basket provision, heading 4911,

---

under review. *See id.* at 231-32; *see also supra* note 8.

HTSUS, for "[o]ther printed matter." Heading 4911, HTSUS. The basket provision does not discriminate between printed matter that is generated with the aid of a computer and other types of printed matter. *Id.* Because engineering plans and drawings have already been placed into the scope of chapter 49 by their inclusion in heading 4906, HTSUS, the logical implication is that heading 4911, HTSUS, for "[o]ther printed matter," encompasses Murray's computer-generated designs, at least to the extent that these are printed. In fact, this conclusion is explicitly indicated by the Explanatory Notes to the HTSUS.[11]

Explanatory Note 49.06 states, in part: "[t]his heading does not cover ... printed plans and drawings (*heading 49.05* or *49.11*)." Harmonized Commodity Description and Coding System, Explanatory Note 49.06 (3d ed.2002) at 905 (emphasis in original).[12] The reference to heading 4911 in this Explanatory Note indicates that because printed plans and drawings are not covered specifically within a tariff provision of chapter 49, they should fall into heading 4911, HTSUS; chapter 49's "basket provision." *See* chapter 49, HTSUS, heading 4911, HTSUS.[13] Thus, it appears that Murray's designs, when printed, are covered "articles." However, in addition to heading 4906, for plans and drawings, there exists in one of the general notes to the HTSUS language which might appear to exempt drawings and plans from the HTSUS's definition of "goods" and therefore, from the Act's definition of "articles."

General note 19 of the HTSUS provides a list of items which are exempted from the HTSUS. General note 19, HTSUS. General note 19 states, in part: "[f]or the purposes of general note 1-... records, diagrams and other data with regard to any business, engineering or exploration operation whether on paper, cards, photographs, blueprints, tapes or other media ... are not goods subject to the provisions of the tariff schedule." General note 19, HTSUS. Such goods, therefore, cannot be the subject of a duty, and would fall outside of the meaning of "articles" under the Act. Thus, because "records, diagrams and other data" may appear to include "plans and drawings," the language of general note 19(c) might seem to be in tension with the language of headings 4906 and 4911, HTSUS, which provide for the classification of "[p]lans and drawings for architectural, engineering, industrial, commercial, topographical or similar purposes," whether hand-drawn or printed. Heading 4906, HTSUS; *see also* heading 4911, HTSUS. Unfortunately, a survey of lexicographical resources does not dispel this tension.[14]

[Reference to the MCGRAW-HILL DICTIONARY OF SCIENTIFIC AND TECHNICAL TERMS

---

11. While not legally binding, the Explanatory Notes furnish a helpful guide to the interpretation of the HTSUS. *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1378 n. 1 (Fed.Cir.1999) (citation omitted).

12. Heading 4905 covers "[m]aps and hydrographic or similar charts of all kinds, including atlases, wall maps, topographical plans and globes, printed." Heading 4905, HTSUS. Because the designs provided by Murray would not appear to be "maps" or "topographical plans," they would therefore fall into heading 4911, which as noted above, covers "[o]ther printed matter." Heading 4911, HTSUS.

13. The Court notes that subheading 9813.00.30, HTSUS, covering "[a]rticles intended solely for testing, experimental or review purposes, including specifications" may cover engineering designs. Subheading 9813.00.30, HTSUS. The *Oxford English Dictionary* defines "specification" as "[a] detailed description of the particulars of some projected work in building, engineering, or the like, giving the dimensions, materials, quantities, etc., of the work, together with directions to be followed by the builder or constructor; the document containing this." XVI *Oxford English Dictionary* 159 (2d ed.1989). Though such a definition might include Murray's designs, the designs are not for "experimental or review purposes," and so the Court does not discuss the provision in detail. However, because the provision does not restrict the form that the specifications take, it lends credence to the notion that Congress did not mean to exclude non-hand-drawn designs from the definition of "articles."

14. When interpreting the HTSUS, the United States Court of International Trade has recourse to the current common and commercial meanings of the words therein. *See GKD-USA, Inc. v. United States*, 20 CIT 749, 754-55, 931 F.Supp. 875, 879-80 (1996) (citation omitted). In identifying the common and commercial meanings of words, the Court looks to dictionaries, encyclopedias, and other lexicographical sources. *See id.* Because this case, to the extent it requires the Court to distinguish "diagrams" from "plans and drawings," refers to them as they exist in the specific world of engineering, the Court has looked to technical and scientific dictionaries and encyclopedias for guidance.

was not helpful to the court. The dictionary defined all three terms–"diagram," "drawings," and "plans"–in a way that revealed "very little reasonable difference between them." Other dictionaries consulted by the court either failed to define the terms, defined them in terms of one another, or contained particular definitions that did not appear to have any bearing on the case.]

The Court therefore must examine the legislative history of the relevant statutory provisions. The legislative history of general note 19(c), HTSUS, in particular, indicates that there is a distinction to be made between those "diagrams" that fall under general note 19(c) and those "plans and drawings" which fall under headings 4906 and 4911, HTSUS.

The earliest version of the general note 19(c) exemption for "diagrams" was added to the Tariff Act of 1930, as amended, by Congress in 1962, as Para. 1827, a duty-free tariff provision encompassing "records, diagrams, and other data with regard to any business, engineering, or exploration operation conducted outside the United States, whether on paper, cards, photographs, blueprints, tapes or other media." Act of May 21, 1962, Pub.L. No. 87-455, 76 Stat. 72 (1962).[17]

The next act passed by Congress was the adoption of the Tariff Schedules of the United States, ("TSUS"), the predecessor to the HTSUS. (Tariff Classification Act of 1962, Pub.L. No. 87-456, 76 Stat. 72 (1962). With the adoption of the TSUS, "Para. 1827" of the Tariff Act of 1930, as amended, became subheading 870.10, TSUS. *See* subheading 870.10, TSUS (1963). The newly adopted TSUS included, in addition to subheading 870.10 covering "records" and "diagrams," a provision for engineering "drawings and plans" under headings 273.45-.55, TSUS. *See* subheadings 273.45-.55, TSUS (1963).

When the language of heading 870.10, TSUS, was originally proposed as a tariff provision in 1962, it was described as providing for the duty-free importation of documents from the foreign offices of U.S. companies. 108 Cong. Rec. 8,009 (1962) (statement of Rep. Mills). In explaining the provision, Rep. Mills assured his fellow congressmen that the documents that would be covered by the provision were not those which are for sale, but which are the internal documents of the importing business. *Id.* This legislative history indicates that designs sold by one company to another company, when imported, would not be covered by the language of subheading 870.10, TSUS, but rather that the language of general note 19(c) is restricted to internal business documents.

In 1982 it was proposed that heading 870.10, TSUS, be struck, and that rather than providing for duty-free entry of internal business documents, such documents should be exempted from the schedule entirely. *See* H.R.Rep. No. 97-837, at 37 (1982). The reason for this change is not particularly clear, but its sponsor appears to have proposed the change as part of a series of changes meant to clarify entry procedures generally.[19] 128

---

17. The phrase "conducted outside the United States" was apparently meant to narrow the language so that the duty-free provision would not apply to business records merely processed abroad and then re-imported into the United States. . . . The language was removed in 1982. . . .

19. By federal regulation, items considered "intangibles" under the general notes to the TSUS could be brought into the country without the making of entry. *See* 19 C.F.R. § 141.4 (1981)-(1983). The substance of this regulation remains in the Code of Federal Regulations to this day, and was in force at the time Plaintiff brought his petition before Labor, although it had been amended to reflect the change from the TSUS to the HTSUS, and the subsequent changed numbering of the general notes. *See* 19 C.F.R. § 141.4 (2003). Thus, by striking heading 870.10, TSUS, and reinstating it as an exemption, Congress ensured entry procedures would not have to be followed with regards to internal business documents brought into the United States. Statements made by the sponsor of the proposed changes, when read in conjunction with the language of H.R.Rep. No. 97-837, indicate that the changes proposed were prompted by the rise of international courier services. Making entry on

Cong. Rec. 24,249 (1982) (statement of Rep. Frenzel). Nothing in the legislative history of this change contradicts the statements made in 1962 that the language of subheading 870.10, TSUS, was meant to apply only to internal documents. Accordingly, because the legislative history of general note 19(c) specifies that it applies only to business documents created for internal use, the Court cannot conclude that general note 19(c) precludes a plain language interpretation of the scope of headings 4906 and 4911, HTSUS.[21] Therefore, because Murray creates its designs not for its own internal use, but solely for sale to a customer, the general note 19(c) exemption does not apply.

Labor's finding that Murray's products are not "articles" within the meaning of the Act is therefore in error. However, the classification of engineering designs, according to the provisions of the HTSUS, may vary according to the form in which they are embodied. The Court therefore remands this matter to the Secretary of Labor for further investigation into the actual nature of the items produced by Murray, for investigation into what proportion of them are printed, or embodied on CD-ROM or diskette, and for investigation as to how this affects Plaintiff's claim for TAA.

Having discussed the effect of the HTSUS on the status of Murray's designs as "articles," the Court moves on to discuss the effect of the NAICS on this question. The NAICS is a system developed jointly by the governments of the United States, Mexico, and Canada for statistical purposes. United States Census Bureau, North American Industry Classification System (NAICS), *at* http://www.census.gov/epcd/www/naics.html (last visited May 4, 2004). NAICS classifies various industries as either manufacturing or service sector industries. *See id.* Because "engineering design" is classified in the NAICS as a service, Labor argues that the engineering designs drafted by Murray are not goods or "articles" within the meaning of 19 U.S.C.A. § 2272(a) (West Supp.2003). . . .

However, as Labor has already argued, the word "articles" is used in the Act to refer to items that may be subject to a duty. Whether or not an item is dutiable is not the subject of the NAICS. The NAICS is therefore not relevant to the case at bar. Moreover,

---

internal business documents brought into the country by such couriers was burdensome; moreover, changes needed to be made to the HTSUS to regulate the making of entry with regard to other sorts of articles brought into the country by couriers who were not the ultimate owners or purchasers of the good. *See* 128 Cong. Rec. 24,249 (1982) (statement of Rep. Frenzel); H.R.Rep. No. 97-837, at 36- 37 (1982).

21. The Court notes that classification of some of Murray's designs could possibly be affected by the form in which they are embodied. Although Labor made no factual findings on the question, the record indicates that Murray provides its designs, according to the customer's wishes, either printed, on CD-ROM, on computer diskette, or via electronic mail. . . . CD-ROMs and diskettes containing recorded information fall under subheading 8524.39.40, HTSUS, covering:

> Records, tapes, and other recorded media for sound or other similarly recorded phenomena ...
> Other:
> For reproducing representations of instructions, data, sound, and image in a machine readable binary form....

Subheading 8524.39.40, HTSUS.

Presumably, heading 8524 would also cover other forms of storage devices that can be removed from a computer. *See* Headquarters Ruling ("HQ") 965276 (Jan. 23, 2002) (suggesting that software embodied in a non-removable storage device, such as a computer's hard-drive, are not classifiable in heading 8524). The heading does not discriminate between the type of information recorded on the storage device, whether it be picture files, songs, software, or other information; it requires only that some data be recorded onto the media. Arguably, this would include saved files representing designs such as those provided by Murray to its customers. In CD-ROM or 3.5-inch diskette form, then, these designs, so long as they are not internal "records" or "diagrams" under general note 19(c), appear to be goods or "articles" within the meaning of the HTSUS, and hence "articles" within the meaning of 19 U.S.C.A. § 2272(a) (West Supp.2003). Designs which cross the border via electronic mail, however, are exempt under the HTSUS, and are therefore not "articles" within the meaning of 19 U.S.C.A. § 2272(a) (West Supp.2003). General note 19(b), HTSUS; *see also* HQ 114459 (Sept. 17, 1998); HQ 960179 (Apr. 17, 1997). As Labor has made no determinations regarding how this issue affects Plaintiff's claim, the Court will not consider the issue here.

even to the extent it might be relevant, Labor's citation of the NAICS begs the question: while the NAICS appears to classify engineering design as a service, it does not speak to the status of the designs resulting from the service.[22]

3. Imports of Agricultural Products

In the agricultural sector, import relief issues are governed by section 22 of the Agricultural Adjustment Act, 7 U.S.C. § 624, as amended, which provides in pertinent part as follows:

> (a) Whenever the Secretary of Agriculture has reason to believe that any article or articles are being or are practically certain to be imported into the United States under such conditions and in such quantities as to render or tend to render ineffective, or materially interfere with, . . . any loan, purchase, or other program or operation undertaken by the Department of Agriculture, or any agency operating under its direction, with respect to any agricultural commodity or product thereof, or to reduce substantially the amount of any product processed in the United States from any agricultural commodity or product thereof with respect to which any such program or operation is being undertaken, he shall so advise the President, and, if the President agrees that there is reason for such belief, the President shall cause an immediate investigation to be made by the United States International Trade Commission, which shall give precedence to investigations under this section to determine such facts. Such investigation shall be made after due notice and opportunity for hearing to interested parties. . . .

7 U.S.C. § 624(a) (emphasis added). If, based on the ITC investigation and report, the President finds the existence of the facts complained of, he is required to issue a proclamation imposing fees not in excess of 50 percent of the value of the articles or quantitative restrictions on the articles, as he finds necessary. *Id.* § 624(b). However, no such proclamation can impose any limitation on the *total* quantity of any article that would reduce the permissible total quantity to proportionately less than 50 percent of the total quantity of such article imported during a prior representative period determined by the President. *Id*. The president may suspend or terminate any such proclamation or provision thereof whenever he finds that the circumstances requiring the proclamation or provision no longer exist. *Id*. § 624(d). Furthermore, the president may modify the proclamation or provision whenever he finds that changed circumstances require such modification to carry out the purposes of the section. *Id*.

Since the enactment of legislation implementing the WTO,[23] however, section 22 has contained a provision prohibiting imposition of quantitative limitations or fees with respect to articles that are products of WTO member countries. *Id*. § 624(f). Hence, the future utility of the section as a source of relief from increased agricultural imports is limited.

NOTES AND QUESTIONS

1. Why is it that section 22 of the Agricultural Adjustment Act is expressly prohibited from application to WTO member exports, while section 201 of the Trade Act of 1974

---

22. The Court notes that the record suggests that Murray's customers view themselves as purchasing a product, rather than a service. The record suggests that many of Murray's customers pay by the design, and not by the hour. This could suggest that contracts between Murray and its customers are framed as contracts to purchase a product, rather than to pay for services rendered.. . .

23. Pub.L. 103-465, Title IV, § 401(a)(1), 108 Stat. 4957 (Dec. 8, 1994).

is not?

2. Compare the triggering language of section 22 and that of section 201. The essential elements that trigger a section 22 investigation (and eventually, perhaps, import relief) are the following:

- article being or practically certain to be imported into the United States
- under such conditions and in such quantities
- as to render or tend to render ineffective, or materially interfere with
- an Agriculture Department loan, purchase, or other program or operation with respect to an agricultural commodity or product, ***or***

[- to reduce substantially the amount of a product processed in the United States from an agricultural commodity or product under such program]

By contrast, the essential elements that trigger a section 201 investigation (and eventually, perhaps, import relief) are the following:

- article imported into the United States
- in such increased quantities
- substantial cause of serious injury, or the threat thereof
- to a domestic industry
- producing a like or directly competitive article

As a practical matter, which set of elements imposes the heavier factual burden? Why the differences between the two?

4. Imports from Nonmarket Economies

Imports from "nonmarket economies"[1] are treated differently from other imports. First, when the allegation is an excessive volume of imports, Section 406 of the Trade Act of 1974, with its lower injury standard, is employed instead of § 201. Pursuant to § 201, the petitioner must establish that the increased imports are a substantial cause of serious injury, while under § 406 the president may limit nonmarket economy imports following an ITC finding of "market disruption," which has much lower injury and causation criteria than § 201.[2] The 1979 and 1980 anhydrous ammonia cases involving U.S.S.R. imports[3] demonstrate the political sensitivities to imports from nonmarket economies, and it is fair to say that § 406 is a highly politicized statute.

A second distinction involving imports from nonmarket economies occurs with respect to unfairly traded goods that are either dumped or subsidized. As we shall see in Chapter 5, dumping is a term of art, with specific legal connotations and definitions, although the term is frequently used loosely by non-lawyers to mean merely the unloading of a lot of imports into an export market. Dumping is generally defined in the

---

1. The statute uses the term "communist country"–rather than the euphemistic "nonmarket economy" or "controlled economy." Section 406(e)(1), 19 U.S.C. § 2436(e)(1), defines the term to mean "any country dominated or controlled by communism.." Of course, there are considerably fewer such countries today than there were in 1974.

2. Section 406(e)(2) defines market disruption as follows: "Market disruption exists within a domestic industry whenever imports of an article, like or directly competitive with an article produced by such domestic industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat thereof, to such domestic industry."

3. Anhydrous Ammonia from the U.S.S.R., determination of no market disruption, 45 Fed. Reg. 27,570 (1980) (Investigation No. TA-406-6, U.S.I.T.C. Pub. No. 1051); Anhydrous Ammonia from the U.S.S.R., determination of market disruption 44 Fed. Reg. 61,269 (1979) (Investigation No. TA-406-5, U.S.I.T.C. Pub. No. 1006).

U.S. statutes to mean sales in the U.S. market at a price lower than in the home market. But with goods from nonmarket economies, a different test is used. Commerce Department officials will instead calculate a constructed value based on the third country price of a market economy at a comparable stage of economic development. The application of this third-country test can lead to the imposition of very high levels of additional antidumping duties equal to the margin of dumping, which is defined as the difference between the "fair value" and the U.S. price. Again, those importing from nonmarket economies should be particularly aware of the U.S. price situation prevailing in the marketplace before launching any import campaign, and avoid low-priced sales that substantially undercut the sales prices of U.S. competitors. The petitioner confronting rapidly increasing, low-priced sales from a nonmarket economy has an election of remedies between Section 406 and the U.S. dumping laws; the former leads to quantitative restraints as the remedy, while the latter leads to the imposition of additional antidumping duties as the solution.

Another form of unfair competition is the subsidization of foreign goods entering the U.S. marketplace, an issue we shall consider in some detail in Chapter 6. If exports are subsidized by what is deemed by Commerce Department officials to be a bounty or grant, and they are causing material injury to a U.S. industry, a special additional countervailing duty may be assessed equal to the amount of the export subsidy. In 1985 the Court of International Trade held that the U.S. countervailing duty law applies to nonmarket economies as well as market economies. The 1985 case involved the importation of wire rod, a steel product, from Poland and Czechoslovakia.[4] The court found that the Congress had had many opportunities to make it clear that the countervailing duty laws were not intended to reach planned economy imports but had never done so. The Commerce Department had initially refused to extend the countervailing duty law to communist country imports, but it has now been mandated to undertake the task. But the following question now presents itself: What is an export subsidy in a nonmarket economy run on the basis of five-year plans, where decisions that in market economies that would normally be made by the market are instead made by governmental officials?

Historically, the core problem with respect to imports from nonmarket economies revolved around the fact that for the U.S.S.R. and certain other communist countries, most-favored-nation (MFN) duty treatment was denied, due to the failure to meet freedom of emigration conditions established by the Congress. The linkage between freedom of emigration and MFN trade privileges was established by Sen. Henry Jackson and Rep. Charles Vanik, and has come to be known as the Jackson-Vanik Amendment. The Jackson-Vanik Amendment has worked to limit imports from nonmarket economies that do not permit free emigration.

Why has trade with nonmarket economies been discriminated against by the United States? The answer to this question has pervasive political overtones. Whereas trade policy with market economies is typically controlled by economic motivations, trade with nonmarket economies tends to be dominated by political and national security considerations.

5. Import Restraints for National Security Reasons

---

4. Continental Steel Corp. v. United States, Slip Op. 85-77, 7 I.T.R.D. 1001 (C.I.T. 1985).

As amended in 1988, section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862, provides that if the Secretary of Commerce finds that an "article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security,"[1] the president is authorized to take "action that, in [his] judgment . . . , must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security."[2] This authority may seem somewhat redundant. For example, this authority was used in November 1985 to prohibit imports of refined petroleum products from Libya,[3] with which the United States was experiencing foreign policy difficulties. And yet, by January 1986 extensive sanctions–including an import and export embargo–were imposed against Libya[4] under general U.S. economic sanctions authority, the International Emergency Economic Powers Act (IEEPA).[5] National security controls are also available under the Export Administration Act (EAA),[6] of course, but this act only authorizes controls over exports, not imports.

6. Textiles and Apparel: A "Managed Trade" Approach

The preceding sections described procedures for the government to intervene in trade on a case-by-case basis at the request of individual parties. Textiles and apparel present a contrasting pattern of "managed trade," in which the government plays a much larger role.

The textile and apparel sector is significant both economically and politically. As of 1995, it directly employed about 1.5 million workers; by 2004, that figure had declined to .7 million. Together with corresponding industries in Europe and even in Japan, this sector is highly sensitive to competition, especially from developing states, and is thus often troubled economically. At the same time, it is extremely important politically to many in the U.S. House and Senate. It is not surprising then that it was subject to a special arrangement: The Multifiber Arrangement (MFA) of 1974, done December 20, 1973, 25 U.S.T. 1001, T.I.A.S. 7840–since replaced by the Uruguay Round Agreement on Textiles and Clothing (ATC), which phased out and finally terminated the global quota system on 1 January 2005. The fundamental concept of the MFA was that each importing state would accept at least a six percent increase in imports each year from each exporting state. This provided both protection for threatened industries and opportunities for new exporters. There evolved a practice, formalized in the 1977 renewal, that states could sign bilateral agreements, providing for deviations from this six percent norm. These bilaterals were usually much more restrictive; they also often provided specific ceilings for particular categories (*e.g.*, manmade fiber gloves), with detailed provisions setting ceilings that could be modified by consultation and governing whether unfilled quotas can be rolled over from one year to another. The result was an elaborate global network of detailed specific quotas (although not all quotas were actually filled,

---

1. 19 U.S.C. § 1862(b)(3)(A).
2. *Id*. § 1862(c)(1)(A)(ii).
3. Ex. Order No. 12538, 50 F.R. 47,527 (1985).
4. Ex. Order No. 12,543, 51 Fed. Reg. 875 (1986); Ex. Order No. 12,544, 51 Fed. Reg. 1235 (1986).
5. 50 U.S.C. §§ 1701 *et seq.* The IEEPA is discussed in Chapter XIII, *infra* at ▬.
6. 50 U.S.C. app. §§ 2401 *et seq*. The EAA is discussed in Chapter XIII, *infra* at ▬.

nor were quotas set on all exporter-importer-product combinations).[1]

United States implementation, authorized by § 204 of the Agricultural Act of 1956, 7 U.S.C. § 1854, involved an interdepartmental Committee for the Implementation of Textile Agreements (CITA) and a Commerce Department Office of Textiles and Apparel (OTEXA). OTEXA, together with the Customs Service, monitored imports by category; CITA negotiated agreements and conducts the consultations. In addition, advisory committees reflected the interests of U.S. manufacturers, of importers, and of exporters.

Pursuant to the Uruguay Round Agreements Act (URAA),[2] the MFA expired on 31 December 1994, and was succeeded by the Uruguay Round Agreement on Textiles and Clothing ("ATC").[3] The ATC was approved by Congress and entered into force under the URAA, effective 1 January 1995.[4] This led to the termination of textile and apparel quotas, on a staged basis over the ten years that followed. While the end of the quota system altered CITA's role, it continues to administer a number of U.S. textile and apparel import programs, such as quota arrangements with non-WTO members.

NOTES AND QUESTIONS

1. The end of textile and apparel quotas has serious implications for U.S.-China trade relations. The two states signed their first textile and apparel agreement in 1980. China became a major exporter of textiles and apparel in the 1990s, and with China's accession to the WTO, the United States began removing quotas on Chinese textile and apparel products in accordance with the ATC. Still, a majority of these imports remained subject to quota limits. In the termination of quotas as of 1 January 2005, the last quota restrictions on about 62 percent ($7 billion) of U.S. textile and apparel imports from China were removed. What is the likely long-term impact on the U.S. sector?

2. In anticipation of China's accession to the WTO, the United States negotiated an agreement with China providing for a textile safeguard that allows WTO members to impose temporary quotas on Chinese-origin textile and apparel imports to limit disruptive import surges, consistent with the long-standing U.S.-China bilateral agreements. Initially, the United States and China agreed on safeguards in the negotiations that led to Congress granting China permanent normal trade relations status and cleared the way for that country to become a member of the WTO. The following excerpt assesses the effectiveness of this mechanism. In reviewing the report of the General Accountability Office (GAO), consider the following questions:

a. How effective is the safeguard mechanism in restraining Chinese textile and apparel imports to the United States?

b. Are the GAO's recommendations likely to be implemented? If implemented, are they likely to be effective?

c. What happens when the U.S.-China safeguard agreement terminates at the end of 2008?

---

1. For an example of the operation of these bilateral agreements, see *Target Sportswear, Inc. v. United States*, 70 F.3d 604 (Fed. Cir. 1995) (considering effect of U.S.-Dominican Republic bilateral agreement).

2. Pub. L. No. 103-465, 108 Stat. 4809, 4815 (1994).

3. On the ATC and its effects on import restraints, see *Fieldston Clothes, Inc. v. United States*, 903 F.Supp. 72 (C.I.T. 1995).

4. 19 U.S.C. § 3511(a)-(b), (d)(4). *See Presidential Memorandum of December 23, 1994*, 60 Fed. Reg. 1003 (1995), *reprinted in* 19 U.S.C. § 3511 note.

UNITED STATES GENERAL ACCOUNTING OFFICE, U.S.-CHINA TRADE: TEXTILE SAFEGUARD PROCEDURES SHOULD BE IMPROVED

GAO-05-296, 2005 WL 760335 (Apr. 4, 2005)

Concern about textile and apparel imports from China has increased over the last several years as the 50-year-old global quota system that regulated trade in this industry was phased out and finally terminated on January 1, 2005. Since China joined the World Trade Organization1 (WTO), U.S. imports of textile and apparel products from that country have grown rapidly in value from about $7 billion in 2001 to about $15 billion in 2004 and may increase further now that all remaining quotas have been removed.

In anticipation of China's joining the WTO, the United States sought and obtained that country's agreement to a textile safeguard that allows WTO members to impose temporary quotas on Chinese-origin textile and apparel imports thus permitting the United States to limit disruptive import surges in ways consistent with long-standing U.S.-China bilateral arrangements. The United States and China originally agreed on the safeguard language in the negotiations that led to Congress granting China permanent normal trade relations status and cleared the way for that country to become a member of the WTO. Relevant U.S. government agencies have received requests for relief from U.S. industry and have applied safeguard measures. However, domestic producers and importers of textile and apparel products have expressed some concerns about the procedures the United States has employed for China textile safeguard cases. . . .In this report, we

- describe the China textile safeguard,
- describe the requests for safeguard action filed by domestic industry and the results of these requests, and
- evaluate agency procedures for transparency and access to safeguard measures and identify additional issues that may affect application of such measures in the future.

Results in Brief

The China textile safeguard allows WTO members to place defined limits on particular textile and apparel imports from China through the end of 2008, despite the general elimination of most textile quotas on January 1, 2005. When a member finds that certain Chinese-origin imports are "due to market disruption, threatening to impede the orderly development of trade" in these products, it may request consultations with China and, at the same time, impose specific quota limits. When requesting consultations, the importing member provides China with a statement showing the existence or threat of market disruption and the role of Chinese imports in that disruption or threat. If the two members cannot agree on another solution, the quota limits remain in place. In the United States, the interagency Committee for the Implementation of Textile Agreements (CITA) has adopted procedures that explain the process it follows in considering safeguard action requests from the public. CITA's procedures stipulate that requests must include import, market share, and U.S. production data, and additional information showing how imports from China have adversely affected the domestic industry, such as their effect on prices in the United States, or any other data deemed to be pertinent. They also establish a 15-week approximate time frame for deciding whether to impose safeguard measures. The duration of any safeguard applied can vary a great deal from 3 months to a year depending on when U.S. producers submit their requests. During

2003 and 2004, U.S. producer groups claimed market disruption and requested safeguard actions against five Chinese products, including brassieres and dressing gowns. In 4 of these cases, CITA determined, among other things, that the market had been disrupted and that Chinese imports had played a role in that disruption, and applied safeguard measures. During 2004, U.S. producers also filed 12 ..threat-based.. requests for safeguard action to prevent future market disruption. In 9 of these requests, U.S. producers sought action to control expected growth in products to be removed from quota restrictions on January 1, 2005. In the remaining 3 instances, U.S. producers requested reapplication of previously imposed safeguards slated to expire in December 2004 on the grounds that this expiration threatened a renewal of disruptive import surges. CITA agreed to consider these 12 requests and began investigating. Decisions on these cases were due beginning in February 2005, but have remained unresolved due to a pending lawsuit against CITA by U.S. textile and apparel importers.

Procedural shortcomings have impaired application of the China textile safeguard. First, we found that CITA was slow to issue procedures and that the procedures do not provide clear guidance about threat-based requests. The procedures were not issued until about 17 months after China joined the WTO and after producer groups requested safeguard actions. When issued, the procedures focused primarily on market-disruption -based requests. U.S. importers and producers that we consulted in preparing this report experienced uncertainty about whether or how threat-based cases would proceed. In December 2004, U.S. importers filed a lawsuit to prevent CITA from considering these threat-based requests, alleging that CITA violated its own procedures in accepting them. The Court of International Trade has enjoined CITA from considering threat-based requests pending further judicial review. Regardless of the result, this situation will affect the speed, scope, and duration of potential relief available to U.S. producers. Second, we found that uneven availability of production data hinders access to the safeguard. U.S. government production data are unavailable on about half of the total value of textile and apparel imports from China. In the event that producer groups want to file a safeguard request on a product for which production data are unavailable, they must collect their own data to meet the safeguard filing requirements. This can be a difficult and time-consuming process that limits access to the safeguard for some U.S. producers. . . .

Background

U.S. textile and apparel production and employment have both declined over the past decade. Textile and apparel imports have grown throughout this period, with China recently playing a major role in this growth. Until recently, CITA limited this growth by administering quota limits, including limits on imports from China. However, with the final removal of all quotas on January 1, 2005, textile and apparel trade is now governed by the same WTO rules as apply to trade in other sectors.

U.S. Textile Production and Employment Have Declined

U.S. textile and apparel production and employment have both declined over the last decade. Production of apparel (and textiles to a lesser extent) tends to be relatively labor intensive. Consequently, developing countries, which tend to have significantly lower labor costs, have a competitive advantage. . . . U.S. producers. shipments of apparel products fell by over half between 1995 and 2004, to about $56 billion in 2004. Similarly, shipments by textile mills (yarns, threads, and fabrics) fell by about a third, to about $41 billion. On the other hand, textile product mills (carpets, curtains, bedspreads) remained relatively stable over the time period, with about $38 billion in shipments in 2004.

. . . U.S. employment losses in this industry are also largely attributable to declines in the apparel sector. From 1995 through 2004, overall employment in this industry fell by over half, from about 1,502,000 employees in 1995 to about 701,000 in 2004. During that time, the apparel sector lost 65 percent of its employment, while the textile mills sector contracted by 49 percent and the textile product mills sector contracted by 19 percent.

Textile and Apparel Imports Have Grown, Especially from China

. . . U.S. imports of textile and apparel products from all countries have grown significantly in the past decade, rising from about $44 billion in 1995 to about $83 billion in 2004. While other U.S. trade partners, such as Mexico, accounted for much of this growth in earlier years, imports from China grew rapidly following its accession to the WTO in 2001. . . . [T]he value of U.S. textile and apparel imports from China grew from about $5 billion in 1995 to about $15 billion in 2004, with much of that growth occurring since 2001. While China's share of the U.S. textile and apparel market fell during the late 1990s, that country's share of the market increased from about 9 percent in 2000 to 18 percent in 2004. Much of that growth was in categories of products that were already removed from quota or were removed from quota in 2002. China is now the largest supplier of textile and apparel imports to the United States.

Import Growth No Longer Subject to Regulation by Quota

Until recently, the United States governed growth in textile imports through a system of quotas established through approximately 45 bilateral agreements with individual supplier countries. In 1994, however, the United States (as well as Canada and the European Union, which also maintained broad-ranging quota arrangements) agreed in the WTO Agreement on Textiles and Clothing to remove these quota restrictions in a series of stages beginning on January 1, 1995, and ending with the removal of all remaining quotas on January 1, 2005. Now textile and apparel trade is subject to the same WTO rules that apply to trade in other sectors. . . .

China Textile Safeguard Permits Control over Surging Imports

The purpose of the China textile safeguard is to limit surging imports and foster the orderly development of trade in textiles and apparel from China. Safeguards are import restrictions, normally of limited duration and extent, that provide an opportunity for domestic industries to adjust to increasing imports. The China textile safeguard permits WTO members, including the United States, to temporarily restrict growth in specific imports from China even though textile and apparel quotas in general have been eliminated.

The safeguard is transitional in nature in that it may be applied only through the end of 2008. CITA, an interagency group chaired by Commerce, has published procedures that explain the process it follows in considering safeguard action requests from the public.

WTO China Textile Safeguard Permits Application of Quota Limits

China's WTO accession agreement contains a textile safeguard that allows WTO members, including the United States, to impose time-limited restrictions on the growth of specific textile and apparel imports from China. . . . When a member finds that imports of specific textile and apparel products from China are ..due to market disruption, threatening to impede the orderly development of trade.. in such products, it may request consultations with China, and at the same time impose quota limits. When making such a request, the member is required to provide China with a detailed statement of reasons and justifications that demonstrates the existence or threat of market disruption and the role of Chinese imports in that disruption. Unless China and

the importing country reach agreement on another satisfactory solution within 90 days, the quotas remain in place.

The terms of China's accession agreement define the scope and duration of relief. In the absence of a bilateral agreement on some other solution, the importing member can generally limit growth in relevant Chinese imports to 7.5 percent above the level imported during the first 12 months of the previous 14-month period. The term of any quota begins on the date of the request for consultations with China and ends on December 31 of the same year. When 3 or fewer months remain in the year at the time of the request for consultations, the quota ends 12 months after the request date. No quota may remain in effect longer than 1 year without reapplication, unless the member and China agree otherwise.

The China textile safeguard can only be applied through the end of 2008. After that, WTO members concerned about the effects of rapidly increasing or unfairly traded Chinese-origin textile and apparel products will have to rely on other import relief mechanisms. Other WTO agreements (and U.S. law) provide a number of possible alternatives, including other safeguard mechanisms and antidumping duties.

CITA Has Established Procedures for the Safeguard

In May 2003, CITA published procedures that explain to the public how it will consider safeguard action requests. These procedures inform producers of the information they must submit when requesting action, describe U.S. producers' standing to submit such requests, and establish time frames for processing requests and putting safeguard measures, if any are found appropriate, into place.

CITA determined that these procedures fall outside the rule-making provisions that apply to most federal agencies under the Administrative Procedure Act because they pertain to foreign affairs. Therefore, CITA did not provide the public with an opportunity to comment on the procedures prior to issuing them.

Requesters Must Provide Import, Market Share, and U.S. Production Data

To obtain the information needed to determine whether a safeguard action is justified, CITA.s procedures stipulate that those requesting such actions must submit (1) import and market share data from all foreign and domestic sources and from China in particular, (2) U.S. production data, and (3) additional information that shows how imports from China have adversely affected the domestic industry, such as their effect on prices in the United States "or any other data deemed pertinent." The import data "should demonstrate that imports of [the subject] Chinese origin textile and apparel product[s] are increasing rapidly in absolute terms."

The relevant language in China's WTO accession agreement neither defines "market disruption" or "orderly development of trade" nor establishes any criteria for making determinations on these matters. CITA's procedures also do not provide any specific criteria or benchmarks. CITA officials informed us that in considering whether safeguard action is warranted, they typically consider a wide range of factors to determine whether imports from China are playing a role in any actual market disruption or threat thereof. Those factors usually include the following: (1) all U.S. imports of the products in question, (2) the quantity of imports from China, (3) the extent to which imports of the product are increasing relative to other imports, (4) pricing and average unit values of U.S. imports from China relative to imports from the rest of the world, (5) the degree to which U.S. production is declining, and (6) trends in the share of the market held by imports from China and by the world.

CITA Proceedings Designed to Take about 15 Weeks

The process for determining whether to impose a safeguard has three phases. First,

CITA procedures provide business days to review safeguard requests and determine whether the request provides the information necessary for consideration. Second, if CITA determines that the request provides the information required, it publishes in the Federal Register a notice seeking public comments within 30 calendar days. For example, U.S. importers opposing a safeguard can submit information that contradicts the requester.s claims. Finally, CITA then has up to 60 calendar days after the close of the comment period to decide on the merits of a request. After any positive finding of market disruption or threat thereof, CITA requests consultations with China and, as set forth in China.s WTO accession agreement, provides that country with a ..detailed factual statement of reasons and justifications.. that shows ..the existence or threat of market disruption.. and the role that Chinese products have played in that disruption. At the same time, CITA notifies the public via a Federal Register notice, and announces quotas on the subject imports from China. The quotas remain in place unless consultations between U.S. and Chinese officials yield an alternate agreement. As shown in figure 5, the entire process is designed to take up to about 15 weeks.

Duration of Relief Depends on When Industry Files Case

Under CITA procedures, and as outlined in China's WTO accession agreement, import limits are effective from the date that the U.S. requests bilateral consultations to December 31 of the same calendar year. However, if 3 or fewer months remain in the year at the time of the request for consultations, the limit can be applied for one year from the consultation request date. Therefore, the length of time that safeguard measures remain in effect can vary by months, depending on when industry requests application and when CITA requests consultations. For example, if U.S. producers submit their request to CITA in mid-June, and CITA subsequently requests consultations in late September, safeguard measures can only remain in effect for a little over 3 months (that is, until the end of the calendar year in question). However, if producers wait until mid-July to submit their request, such that CITA initiates consultations with China in October, measures imposed may remain in effect until the following October or for 12 months.

CITA procedures allow producer groups to request reapplication of safeguard measures. However, the procedures specify that CITA will reapply safeguards only in the event of a new determination that Chinese imports are, due to market disruption, threatening to impede the orderly development of trade. The timeline for processing reapplication requests is the same as for initial safeguard requests.

CITA Procedures Grant Standing to Producers of Finished Goods and Components

CITA procedures give broad standing to producers of both finished goods (e.g., garments) and components (e.g., fabric) to submit requests for safeguard actions. Requests may be filed by an entity that represents either (1) domestic producers of a product ..like or directly competitive with.. the Chinese textile or apparel product or (2) domestic producers of a component used in such a product. CITA officials explained that component producers have long had standing to request imposition of quota restrictions on textile and apparel products. CITA officials explained that although component producers may request safeguard actions, the data they submit in support of their request must address the subject Chinese imports. Entities eligible to file a request include trade associations, firms, and certified or recognized unions or groups of workers in relevant industries. CITA itself may also initiate a safeguard action.

Over the last two decades, U.S. producers of apparel have come to rely heavily on outward processing arrangements. In such arrangements, U.S. factories focus on the relatively capital-intensive operations, such as fabric production. These fabrics and

components are then shipped to Caribbean, Andean, or African countries that participate in certain U.S. trade preference programs. Factories in these countries conduct the relatively labor-intensive business of assembling the fabric and other components into finished garments.

CITA Has Applied Market-Disruption-Based Safeguards but Threat-Based Requests Remain Unresolved

During 2003 and 2004, CITA applied safeguard measures on four Chinese-origin products that had previously been freed from quota limits, based on evidence of both actual market disruption and the threat of continued market disruption. . . . [T]hese products accounted for about 7 percent of U.S. imports of textile and apparel products from China.18 More recently, producers groups have filed threat-based requests for safeguard action on a number of products, alleging that there would be disruptive import surges once quotas on those products expired on January 1, 2005. The main difference between the market-disruption-based requests and threat-based requests is that the market-disruption-based requests allege that market disruption has occurred and that Chinese imports have played a role in that disruption, whereas the threat-based requests allege that market disruption will occur in the future and that Chinese imports will play a role in that disruption. Figure 6 shows that these threat- based requests account for an additional 11 percent of U.S. imports of textile and apparel products from China. These requests remain unresolved pending resolution of a lawsuit, filed by U.S. importers, that opposes CITA.s processing of threat-based requests.

Safeguards Applied in Four of Five Market-Disruption-Based Requests

U.S. producer groups requested that CITA impose safeguards on imports of knit fabric, brassieres, robes and dressing gowns, and gloves from China in July 2003, and in June 2004 they requested safeguards on socks from China as well.20 Almost all of these products had been removed from quota protection well in advance of the requests for relief either when China joined the WTO in December 2001 or shortly thereafter in January of 2002.

In four out of these five cases, CITA imposed 7.5 percent growth limits on relevant imports from China, as provided in China.s WTO accession agreement, and these limits remained in place when U.S.-China consultations failed to produce agreement on any alternate solution. In each case, CITA determined that U.S. markets for the products in question had been disrupted and that imports from China had played a significant role in this disruption. In each case, CITA also determined, based on a number of factors, that the subject Chinese imports posed a threat of further market disruption in the future. First, CITA found that China had a significant capacity to export textile and apparel products. Second, CITA found that the prices of textile and apparel products from China were lower than the average prices from other supplier countries. Third, CITA noted that since the U.S. removed quotas on these products, trends in prices, production, and imports had changed markedly. Consequently, CITA determined that without action, the trends would continue. CITA also considered the imports of the subject products to be increasing dramatically. Finally, CITA noted significant Chinese investment in its textile and apparel industry. See appendix III for more detail on each of the four CITA determinations.

CITA refused to consider the fifth case a July 2003 market-disruption-based request concerning knit and woven, cotton and man-made fiber gloves because (1) woven gloves were still subject to product-specific quotas under the Agreement on Textiles and Clothing and therefore would already be subject to limits during the period of safeguard relief, and (2) the production data provided by the requester were from 2001, and 2002

data were to be released shortly. As of March 2005, however, U.S. producers have not filed an updated request.

Threat-Based Requests Remain Unresolved

In the last three months of 2004, U.S. producer groups filed 12 threat-based requests. Nine of the threat-based requests focused on products that would be removed from quota restrictions on January 1, 2005. These included cotton trousers, man-made fiber knit shirts/blouses, cotton knit shirts/blouses, man-made fiber trousers, man-made fiber shirts (not knit), and man-made fiber underwear. The remaining three requested reapplication of safeguard restrictions on knit fabric, brassieres, and dressing gowns on the grounds that disruptive imports of these products would resume when previously imposed restrictions ceased to apply in December 2004.

CITA agreed to consider these 12 threat-based requests, but has not yet completed action on them. CITA had been scheduled to decide upon all of them between February and March 2005. However, as a result of a December 30, 2004, court-ordered injunction [*see* excerpts, *infra* at ▬] granted in response to a motion by importers, CITA is not permitted to process threat-based requests until judicial review of its authority to impose safeguards in such cases has been completed. Therefore, these cases remain unresolved.

Procedural Shortcomings Have Impaired Application of China Textile Safeguard

Although CITA has completed action on several textile safeguard requests and U.S. producers have received relief, procedural shortcomings have impaired use of the safeguard. First, we found that CITA was slow in issuing its procedures and a lack of clarity in those procedures created uncertainty about when, how, and under what circumstances CITA would consider threat-based requests and that this uncertainty resulted, and continues to result, in decisions being delayed while imports from China increase. Second, we found that the lack of production data on some textile and apparel products data that is necessary to fulfill CITA filing requirements has inhibited equal access to the safeguard. Beyond these issues, uncertainty about future developments in global textile trade makes the future impact of the China textile safeguard unclear.

Procedural Shortcomings Created Uncertainty

U.S. producers considering requests for safeguard action and U.S. importers of textiles and apparel that might oppose such safeguards have faced uncertainty because CITA was slow in issuing procedures and a lack of clarity in those procedures. A significant period of time elapsed before CITA issued procedures for the China textile safeguard, substantially delaying action on the initial market-disruption-based requests. Once issued, CITA's procedures were unclear about whether or how it would proceed on threat-based requests. The uncertainty surrounding threat-based cases has resulted in a court-ordered injunction preventing action on these requests and created additional delays both for those interested in seeking safeguard actions and those seeking a clear determination that such actions should not be taken.

CITA Slow to Issue Procedures

CITA issued procedures about the textile safeguard contained in China's WTO accession agreement approximately 17 months after China joined the organization. Until these procedures were issued, it was not clear when, how, or under what circumstances CITA would consider safeguard action requests from the public. China's WTO accession agreement, which became effective December 11, 2001, outlined some aspects of the safeguard mechanism, but did not fully explain what or how much information national authorities should consider in deciding whether to apply safeguards. Member governments were left to clarify such matters. Even though CITA had not yet provided any guidance, in September 2002 U.S. trade associations representing textile manufac-

turers requested application of safeguards against Chinese knit fabric, gloves, dressing gowns, brassieres, and luggage. CITA did not act on these requests.

In May 2003 CITA issued procedures describing the information that it would require in order to consider safeguard requests. U.S. producers of knit fabric, gloves, dressing gowns, and brassieres subsequently refiled their requests, and CITA applied safeguards on these products (except gloves) in December 2003 15 months after these industry groups had originally requested action. Imports of some of these products grew significantly during the intervening months. . . . [I]mports of Chinese-origin brassieres increased by about half between the first and second industry filings.

Commerce officials pointed out that the procedures issued for the China textile safeguard marked the first occasion that CITA had published guidance on how it would consider requests for new quota restraints. They noted that because CITA had not had this level of transparency in the past when administering the wide-ranging U.S. textile quota system, the procedures took longer than might be expected to prepare. Additionally, CITA officials indicated that the procedure of soliciting comments prior to requesting consultations and imposing limits was also unprecedented. Previously, CITA put out notices for public comment only after delivering a request for consultations to establish a quota.

Procedures Unclear on Threat-Based Requests for Safeguard Action

CITA's China textile safeguard procedures are not clear on how it will proceed in threat-based cases. CITA officials told us that the procedures utilize the WTO language through which members can request consultations on the existence as well as threat of market disruption. However, the procedures focus on market-disruption-based requests. For example, they state that a request will only be considered if it includes specific information set forth in support of a claim of market disruption. Similarly, the procedures state that reapplication will only take place if CITA makes a new affirmative market disruption determination. They also specify that the import data submitted with a request "should demonstrate that imports of Chinese-origin textile and apparel products that are like or directly competitive with the product produced by the domestic industry concerned are increasing rapidly in absolute terms." . . .

CITA Officials Accepted Threat-Based Requests and Announced Indicative Factors

CITA officials emphasized that China's accession agreement provides for taking safeguard actions on the basis of threat. These officials further explained to us that their procedures do not preclude U.S. producers from requesting safeguard action solely on the basis of threatened market disruption. Therefore, even if U.S. procedures do not focus on threat, CITA may still consider requests on that basis. Finally, administration officials maintained that they were under no obligation to issue procedures and can independently consider safeguard measures based upon the government's best information and judgment. Although CITA's procedures do not clearly describe the information that requesters should submit in support of threat-based requests, Commerce officials observed that the Federal Register notices requesting public comment on threat-based requests have indicated the types of information that CITA would take into consideration in determining whether safeguard actions should be applied. These notices requested that interested parties submit information as to

- whether Chinese imports are entering the market at prices substantially below the prices of the equivalent U.S. product and whether the Chinese imports will likely depress prices of the U.S. product;
- whether Chinese imports are likely to rise due to increasing production capacity in

China;
- whether there will be an imminent diversion of Chinese-origin products and other third markets to the United States;
- changes in inventory levels of the Chinese-origin products in question;
- the extent to which conditions in the domestic industry demonstrate that market disruption is likely (*e.g*., factory closures or production declines); and
- whether U.S. managers, retailers, purchasers, importers, or other market participants have recognized Chinese producers as potential suppliers.

CITA officials noted that these factors are indicative but not necessarily determinative. Moreover, they have not been integrated into their official procedures.

Some U.S. Importers and Producers Experienced Uncertainty about Threat-Based Requests

In July 2004, a number of producers and producer associations observed that CITA had thus far refused to consider threat-based requests for safeguard action even though, in the associations. view, WTO rules allowed consideration of such requests. One industry representative at the time stated: "Specifically, the U.S. textile industry has asked the administration to recognize that China poses a severe threat to the domestic textile industry and to use appropriate safeguard actions, as allowed under WTO rules. To date, the administration has refused to consider safeguard actions before the actual occurrence of damage in the marketplace." In concert with other organizations, the same industry association subsequently filed a number of threat-based requests for safeguard action in early October 2004. . . .

Court Suspends CITA Consideration of Threat-Based Requests

Uncertainty over threat-based cases and the disagreement that ensued between U.S. textile importers and the administration led to a court order that CITA may not consider threat-based requests, pending further judicial review [*See U.S. Association of Importers of Textiles And Apparel v. United States, infra*]. At this point, it is not clear when the court will render a final decision. . . .

Delays Impact Timing and Level of Relief

Lengthy legal action against CITA or a court decision that CITA may only process cases that present evidence of actual market disruption will postpone determinations on whether to apply safeguard measures and may result in imposition of quota limits that remain in place for shorter periods of time and are less restrictive of Chinese imports.

Because of the wording in China's WTO accession agreement, decision-making delays on the pending requests for application of threat-based safeguards may shorten the duration of any measures imposed. Prior to the court issuing its preliminary injunction, CITA had been scheduled to decide whether to take action on the threat based requests submitted in October 2004 by early February 2005. . . . [H]ad CITA decided in favor of safeguard actions in accord with its original timetable, quota limitations on cotton trousers, for example, would have been in place for 11 months (from February 1 through the end of 2005). In the event of a court ruling in its favor, CITA may yet impose threat-based safeguards. However, as provided in China.s WTO accession agreement, any safeguard measure imposed prior to October 1 of a given year will expire at the end of that year. Through September, therefore, each month of delay means that any safeguard measures imposed will remain in place for a correspondingly shorter period of time. For example, measures imposed at the end of April would remain in effect for 8 months. Lengthy delays or a court ruling against CITA may result in U.S. producers choosing (or being required) to file new requests based only on actual market

disruption. . . . [A]ny relief they receive would come at a significantly later date than would have resulted from their original threat-based requests. Since supporting import data in a market-disruption-based case should demonstrate a rapid increase in imports from China, any petitioner requesting relief based on actual market disruption on a product removed from quota on January 1, 2005 would likely have to wait until at least mid-March to file a request. The reason is that they will probably need at least one month's import data after the quota expires to demonstrate an increase in imports that is leading to actual disruption in the U.S. market. In addition, it takes about 6 weeks for the federal government to make import data publicly available so that domestic producers may include it in their requests. Given CITA's 3-month decision-making timeline, U.S. producers could not expect a decision on a case filed in mid-March until around July 2005. In this scenario, U.S. producers would receive about 6 months of relief. Alternatively, domestic producers could wait until midyear to file a market-disruption-based request. . . . [A]n affirmative determination would then result in a year of relief. However, a decision to postpone filing is likely to result in less effective relief for the domestic producer. As already noted, China's WTO accession agreement provides that quota restrictions will be calculated based on the import levels recorded during the first 12 months of the 14-month period leading up to the quota action being taken. In an environment of rapidly rising imports, the longer an organization waits to file a request, the higher import levels grow and the higher subsequently imposed quota limits become.

Unavailability of Production Data Hinders Access to the Safeguard

Equal access to the China Textile Safeguard is impaired by the lack of publicly available U.S. production data on some textile and apparel products. As mentioned earlier, CITA requires that safeguard action requests include import, market share and U.S. production data. CITA officials review production data (for example, the amount of knit fabric produced in the United States) to determine the nature and extent of disruption in the U.S. market. According to CITA procedures, if production data are not available from government sources, those requesting safeguard actions must provide the data themselves, along with a complete list of all sources from which the data were obtained. The submission must include an affirmation that, to the best of the requester.s knowledge, the data represent substantially all of the domestic production of like or directly competitive products. The Bureau of the Census collects and publishes production data for many textile and apparel products. The Census Bureau surveys U.S. industry to obtain production information as part of the bureau.s Current Industrial Reports program. Census officials send questionnaires to manufacturers on a monthly, quarterly, or annual basis, depending on the product. The purpose of the bureau.s program is to provide data on production and shipments of certain products for use by both government and the private sector.

Commerce's Office of Textiles and Apparel (OTEXA) takes the production data, converts it, and publishes it in category form in order to compare it with trade data. The purpose of the category system is to allow the United States to implement quotas under international textile agreements by grouping products in directly competitive Harmonized Tariff Schedule headings together into single categories. For example, bow ties and other types of ties enter the United States under different tariff headings, but for quota management purposes, data on all types of ties are added together to form one "neckwear" category.

Since the two classification systems were developed for different purposes, Census production categories and CITA import categories differ to varying degrees. Because

OTEXA is not able to match Census production data to all of CITA.s categories, the availability of production data for safeguard investigations can be affected. In addition, because of the small number of producers in some industries, data are collected but not released publicly because they would disclose private business information. In total, U.S. production data are not available for 32 of 167 textile and apparel categories. OTEXA and Census officials provided the following accounting of why data are not available in these categories:

- For 9 categories, Census does not collect production data. OTEXA believes many of these the categories are composed of products for which there is little or no domestic production. For 3 sock categories, Census did not start surveying the industry until the end of 2004. Also, in 1 category (nonwoven fabric), OTEXA believes the industry is large, but not import sensitive.
- For 11 categories, Census may collect some data, but Census production descriptions do not match CITA categories. For example, CITA maintains a category called "other man-made fiber apparel," which includes a range of products from swimwear to shawls. Census collects data for some, but not all, of the products in this category.
- For 12 categories, Census does collect domestic production data, but the data cannot be published to avoid disclosure of individual company information. Suppression across these 12 categories affects approximately 100 establishments, or about 1 percent of the total number of textile and apparel establishments from which Census collects data.

The unavailability of production data might disadvantage an unknown number of U.S. producers facing market disruption. We found that most (25 of 32) Chinese-origin imports in categories for which there are no publicly available production data have increased both in absolute terms and in relation to imports from other countries. This suggests that U.S. producers of these products face increased competition from Chinese imports, and thus may be more likely to seek safeguard action. In its past decisions to impose safeguards, CITA has cited relative and absolute Chinese import increases as factors in its market disruption determinations. Additionally, in some categories recently removed from quota, such as "other man-made fiber apparel," the Chinese producers largely filled their quota in the past several years. In its recent threat-based requests, the domestic industry cited import increases and high quota fill rates as evidence that Chinese imports will increase significantly upon removal of the quotas.

. . . About half of the total value of textile and apparel imports from China (48 percent) fell into product categories for which data on U.S. production are unavailable. Furthermore, for imports from China removed from quota on January 1, 2005, about half also fell into product categories in which data on U.S. production are unavailable. . . .

Safeguard's Future Impact Unclear

Uncertainty about future patterns in the global textile and apparel trade and the applicability of other U.S. import relief mechanisms make the future impact of the China textile safeguard unclear. It is unclear to what extent safeguards imposed on China will provide relief to the U.S. industry or will instead increase the market share obtained by other foreign producers. . . . U.S. textile and apparel imports from producers such as India, Pakistan, and especially Vietnam have also increased over the past decade, and the China textile safeguard cannot be applied to non-Chinese imports. While China is widely expected to become a more dominant force in global textile and apparel markets, it is too early to predict how other major producing countries will fare in the postquota environment. Other WTO members have expressed concern about changing trade

patterns resulting from the termination of the quota limits. These members note that, while some studies suggest overall benefits from the liberalization of textile and apparel trade, certain developing countries will face difficult adjustment costs.

The Chinese government's recent announcement that it will impose export taxes on a range of textile and apparel products to ensure a smooth transition from the end of the quota system further clouds future developments in U.S. textile trade. The Chinese government has indicated that these taxes are intended to encourage the export of higher-value-added products while discouraging export surges. The impact of these taxes remains to be seen.

Other import relief mechanisms available under the terms of China's WTO accession agreement and U.S. law may or may not prove useful for U.S. textile and apparel producers. The "product-specific" safeguard established under the accession agreement may in theory be applied to textile and apparel imports from China through the end of 2013. However, no one has yet made such a request. Other import relief mechanisms available under U.S. law such as noncountry and nonsector-specific safeguard measures and antidumping duties might be used to deal with imports from China and other WTO members. However, to our knowledge these remedies have not been applied in the textile and apparel industry recently, and thus it is difficult to predict how effective they might prove.

It is also possible that a portion of the textile industry will not have recourse to any U.S. trade remedies after the China textile safeguard expires on December 31, 2008. Two industry representatives told us they had concerns about their eligibility to use other trade remedies. CITA procedures explicitly give standing to U.S. component producers to request application of the China textile safeguard against imports of finished products. However, the industry representatives observed that the laws and regulations governing antidumping and other import relief mechanisms have standing requirements that may preclude component producers from requesting relief through these other mechanisms. Thus, U.S. government agencies may determine that component manufacturers do not have standing because their component is not "like or directly competitive to" the subject Chinese import.

Conclusions

The China textile safeguard provides a mechanism for limiting growth in imports from that country in certain circumstances thus helping to avoid market disruption and facilitate orderly adjustment to China.s growth as a source of textile and apparel products. The four requests that the United States has decided upon thus far have demonstrated that once removed from quota restrictions, imports from China can rise rapidly and significantly disrupt U.S. markets. The termination of all remaining quotas on Chinese imports at the beginning of this year may bring additional import surges and associated disruption in U.S. markets.

Procedural shortcomings have impaired effective application of the China safeguard, leading to, among other things, uncertainty and delay that may weaken safeguard actions on some products that were recently released from quota restrictions. Similarly, lack of production data impaired access to safeguard measures for U.S. sock producers, and may pose similar problems should other producers in similar circumstances seek application of this mechanism.

The extent to which vigorous application of the China-specific textile safeguard will assist U.S. producers or create opportunities for other exporting nations is unknown, and in any case, the safeguard is only available through the end of 2008. Nonetheless, China is expected to continue to be a major source of U.S. textile and apparel imports, and the

usefulness of alternative U.S. import relief mechanisms remains untested by textile and apparel producers. Since the safeguard was an integral part of the framework that led to Congress approving permanent normal trade relations with China and cleared the way for that country to join the WTO, it is important that CITA and the Department of Commerce take action to enhance the procedures employed in applying this mechanism while it remains available.

Recommendations for Executive Action

In the event that the courts rule that CITA may process threat-based requests for China textile safeguards, we recommend that CITA amend its procedures to clarify how it will proceed in threat-based cases, including the information that producers should submit in such cases.

To enhance access to safeguard relief for all segments of the textile and apparel industry that may face import surges, we recommend that the Department of Commerce, as CITA.s chair, review the products and categories for which U.S. Bureau of the Census production data are unavailable and, with public input, conduct a risk assessment aimed at identifying industry sectors at high risk of experiencing import surges from China and associated market disruption. We further recommend that on the basis of the risk assessment, Commerce's Office of Textiles and Apparel work with the Census Bureau to explore options to make production data concerning these industry sectors available for safeguard requests. We realize that in some instances it might not be feasible to make such data publicly available due to disclosure limitations and that data (or analysis of trends in that data) possibly may need to be limited to CITA.

NOTES AND QUESTIONS

1. What do you think of the idea, mentioned in passing by the GAO report, that generally applicable safeguard and antidumping measures might be used to deal with textile and apparel imports from China and other WTO members? Are such measures likely to be effective alternatives to action under the U.S.-China safeguard agreement?

2. By their nature, "threat-based" cases cannot rely on information claiming that market disruption has already taken place, but rather focus on prospects for future market disruption. For example, in requests filed by U.S. producers in the fall of 2004, import data demonstrating that a rapid increase had already occurred have been important in CITA's determinations in market-disruption-based requests, but they would not be as important for threat-based requests. A majority of the threat-based requests made in late 2004 asserted that imports were unlikely to increase rapidly until 2005 because these products had, until recently, been subject to quotas that made substantial import increases improbable. U.S. producers requesting threat-based actions submitted information on such matters as China's productive capacity, performance in other apparel categories already removed from quota, price behavior of products removed from quota, and information about alleged unfair trade practices in China. CITA's procedures do not specifically call for any of these types of information, but requesters were allowed to submit other information deemed pertinent.

3. In opposing CITA's decision to accept threat-based requests and initiate investigations as to whether safeguards should be applied, one association representing importers argued that the administration had changed its position on threat-based requests. The importers contended that administration officials had informally indicated to them that the safeguard was intended for market-disruption-based requests, as opposed to threat-based requests. In addition, the association argued that, when CITA

decided to consider threat-based requests, it did not modify its procedures or make a formal announcement to reflect the change in its position.

4. The association filed a challenge before the Court of International Trade in December 2004, requesting that the court enjoin CITA from considering threat-based requests. The association argued, *inter alia*, that CITA had violated its own procedures and the Administrative Procedure Act by deciding to consider threat-based petitions and exceeded its authority in taking any action under the China Textile safeguard, because Congress had not authorized CITA to do so. In response, the administration argued that CITA was not obligated to promulgate regulations implementing the textile safeguard and that, in any event, CITA acted within its authority in considering threat-based requests. In the first decision excerpted below, the CIT granted the association's motion for a preliminary injunction and enjoined CITA from taking any further action on China textile safeguard actions based on threat of market disruption. In its second decision, the CIT rejected further arguments from the government. Do you agree with the court's reasoning in these two decisions? Aside from appealing the court's decisions, is there anything else that the government might do to satisfy the court's concerns and get threat-based requests back on track?

U.S. ASSOCIATION OF IMPORTERS OF TEXTILES AND APPAREL v. UNITED STATES (I)

350 F.Supp.2d 1342 (CIT 2004)

GOLDBERG, SENIOR JUDGE.

Before the Court is a Motion for a Preliminary Injunction from plaintiff U.S. Association of Importers of Textiles and Apparel, dated December 1, 2004. Plaintiff requests that the Court enjoin defendant, during the pendency of this action, from accepting, considering, or taking any further action on requests filed under the procedures issued by the Committee for the Implementation of Textile Agreements ("CITA") in 68 Fed.Reg. 27787 (May 21, 2003) that are based on the *threat* of market disruption upon the elimination of quotas or safeguards on textile or textile products from the People's Republic of China ("China"). Defendant United States opposes the Motion and also moves to dismiss.[1] . . .

Background

On January 1, 2005, all quotas on the importation of textile and apparel products made in World Trade Organization ("WTO") member countries will be eliminated, pursuant to the Uruguay Round Agreements. *See Agreement on Textiles and Clothing* ("ATC"), Apr. 15, 1994, Agreement Establishing the World Trade Organization, Annex 1A; *see also* 19 U.S.C. § 3511 (codifying approval of and general provisions relating to the Uruguay Round Agreements). Although China is entitled to the benefits of the ATC, under the terms of China's accession to the WTO, the United States may impose temporary textile-specific safeguard measures on Chinese imports of textile and apparel products under certain circumstances ("textile-specific safeguards"). *See Protocol on the Accession of the People's Republic of China*, § 1.2, WT/L/432 (Nov. 23, 2001); *Report of the Working Party on the Accession of China*, paras. 241-42, 342, WT/MIN(01)/3 (Nov. 10, 2001) (together "China's Accession Agreement").

On behalf of defendant, CITA has assumed the administration of the textile-specific

1. The Court reserves judgment on defendant's motion to dismiss until briefing on the issues raised therein is complete.

safeguards based on its general authority to "supervise the implementation of all textile trade agreements." Exec. Order 11651, 37 Fed. Reg. 4699 (Mar. 3, 1972), *as amended by* Exec. Order 11951, 42 Fed.Reg. 1453 (Jan. 6, 1977), *as further amended by* Exec. Order 12188, 45 Fed. Reg. 989 (Jan. 2, 1980); *see also* 7 U.S.C. § 1854 (delegating authority to executive branch to negotiate agreements with foreign governments limiting the exportation of textiles and textile products to the United States and to promulgate regulations to carry out such agreements). CITA is an interagency committee that includes representatives of the Office of the U.S. Trade Representative, the U.S. Department of Commerce, the U.S. Department of Labor, the U.S. Department of State, and the U.S. Department of the Treasury.

In May 2003, CITA published in the *Federal Register* a *Notice of Procedures* describing the rules that would govern CITA's consideration of requests from the public for textile-specific safeguards on Chinese imports (the "China Textile Safeguard Regulations"). *See Procedures for Considering Requests from the Public for Textile and Apparel Safeguard Actions on Imports from China*, 68 Fed.Reg. 27787 (May 21, 2003). As a procedural matter, CITA explained that it had determined that its *Notice of Procedures* was not subject to the Administrative Procedure Act ("APA") requirements to provide prior notice and opportunity for public comment, pursuant to 5 U.S.C. § 553(a)(1) (foreign affairs exception) and 5 U.S.C. § 553(b)(A) (exception for interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice). *Id.* at 27788. CITA further stated that it believed that any of its actions under the textile-specific safeguards were not subject to the APA rulemaking provisions under the foreign affairs exception. *Id.*

Substantively, in describing the scope of the China Textile Safeguard Regulations, the *Notice of Procedures* directed that:

> A request [for a textile-specific safeguard] will only be considered if the request includes the specific information set forth below in support of a claim that the Chinese origin textile or apparel product is, *due to market disruption*, threatening to impede the orderly development of trade in like or directly competitive products.

Id. (emphasis added). Supporting information was specified as: (A) a product description; (B) import data, which "should demonstrate that imports of Chinese origin textile and apparel products ... are increasing rapidly in absolute terms"; (C) production data; and (D) market share data. *Id.* at 27788-89.

Further, the *Notice of Procedures* specified a three-tier process for CITA's consideration of requests under the China Textile Safeguard Regulations. *Id.* at 27789. First, upon receipt of a safeguard request from the public, CITA determines within 15 days whether the request falls within the scope of the China Textile Safeguard Regulations. *Id.* Second, if CITA determines that a request meets the necessary requirements, CITA publishes a Notice Seeking Public Comments in the *Federal Register* and opens a 30-day public comment period. *Id.* Third, within 60 days of the close of the public comment period, CITA determines whether to impose the safeguard. *Id.* In case of an affirmative determination, CITA simultaneously imposes the safeguard (calculated pursuant to the terms of China's Accession Agreement) and initiates negotiations with China "with a view to easing *or avoiding* market disruption." *Id.*

(emphasis added).[2]

Beginning in July 2003, domestic textile producers filed four safeguard requests on a variety of textiles, including Chinese gloves that were still under quota. *See* 68 Fed.Reg. 49440 (Aug. 18, 2003). In August 2003, CITA agreed to consider three requests. *See id.* at 49441, 49445, 49449. However, CITA rejected consideration of the fourth request concerning Chinese gloves still under quota. In a letter to the National Textile Association, CITA's Chairman indicated that the request was rejected because CITA would not accept requests for safeguards on products still under quota. . . . However, in June 2004, CITA accepted for consideration a request for safeguards on several merged categories of Chinese socks, including cotton socks that were still under quota. Thereafter, CITA decided to act on the merged request for safeguards because it determined that "imports of socks from China play a significant role in the existence of and *threat* of market disruption." 69 Fed.Reg. 63371, 63372 (Nov. 1, 2004) (emphasis added). CITA imposed quotas on the merged categories of Chinese socks, resulting in a double quota on Chinese cotton socks for the remainder of 2004, and initiated negotiations with the Chinese government. *Id.*

From July to August 2004, CITA and U.S. Department of Commerce officials made statements to various publications indicating that the China Textile Safeguard Regulations "were intended for cases of actual market disruption rather than the threat of such disruption." BNA Daily Report for Executives, No. 141, *China Textile Safeguards to Focus on Market Disruption Cases, Official Says,* at A-28 (July 23, 2004). Then, in September 2004, CITA announced that "existing U.S. regulations would allow safeguards based on threat of a possible surge in imports, rather than an actual surge." China Trade Extra, *Aldonas Insists China Textile Regs Can Handle Import Threat Cases* (Sept. 3, 2004). None of these statements were made in the *Federal Register*.

Since October 2004, CITA has accepted for consideration 12 requests for safeguards under the China Textile Safeguard Regulations which allege threat of market disruption (rather than actual market disruption) by Chinese textile imports ("threat-based requests"). *See* 69 Fed.Reg. 64034 (Nov. 3, 2004); 69 Fed.Reg. 64911 (Nov. 9, 2004); 69 Fed.Reg. 64912 (Nov. 9, 2004); 69 Fed.Reg. 64913 (Nov. 9, 2004); 69 Fed.Reg. 64914 (Nov. 9, 2004); 69 Fed.Reg. 64915 (Nov. 9, 2004); 69 Fed.Reg. 68133 (Nov. 23, 2004); 69 Fed.Reg. 70661 (Dec. 7, 2004); 69 Fed.Reg. 71781 (Dec. 10, 2004); 69 Fed.Reg. 75516 (Dec. 17, 2004); 69 Fed.Reg. 77232 (Dec. 27, 2004); 69 Fed.Reg. 77998 (Dec. 29, 2004). CITA has not yet acted on any of these requests.

Plaintiff commenced this action by filing a complaint on December 1, 2004. In its complaint, plaintiff alleges that its members made their business plans for 2005 in reliance on CITA's rules and public representations that it would not consider threat-based requests. However, given CITA's recent acceptance of threat-based requests, plaintiff's members have felt compelled to reconfigure their sourcing plans for 2005, since they fear that China will be subject to extremely tight quota restrictions earlier than they had anticipated. As a result, plaintiff asks the Court to enjoin CITA from further accepting, considering, or otherwise proceeding with requests for safeguard measures based on a threat of market disruption.

Discussion

---

2. CITA issued a clarification of its rules in August 2003 indicating that it would also maintain an official record for each safeguard request made pursuant to the China Textile Safeguard Regulations. *See Clarification of Procedures for Considering Requests from the Public for Textile and Apparel Safeguard Actions on Imports from the People's Republic of China,* 68 Fed.Reg. 49440 (Aug. 18, 2003).

To prevail on its Motion for a Preliminary Injunction, plaintiff must show: (1) that it will be immediately and irreparably injured; (2) that the balance of hardship on all the parties favors the petitioner; (3) that there is a likelihood of success on the merits; and (4) that the public interest would be better served by the relief requested. *Zenith Radio Corp. v. United States,* 710 F.2d 806, 809 (Fed.Cir.1983).

The Court agrees with plaintiff in both its Motion for a Preliminary Injunction and arguments made at the hearing. Accordingly, the Court finds that plaintiff is entitled to injunctive relief.

1. *Immediate and Irreparable Injury*

To demonstrate immediate and irreparable injury, "plaintiff must prove that unless the injunction is awarded, some harm will result to it that cannot be reasonably redressed in a court of law." *Am. Customs Brokers Co. v. United States Customs Serv.,* 10 CIT 385, 386, 637 F.Supp. 218, 220 (1986).

Plaintiff alleges that, unless a preliminary injunction is issued, its members have been and will continue to be irreparably harmed by CITA's consideration of threat-based requests under the China Textile Safeguard Regulations. . . . Plaintiff contends that CITA's consideration of these requests is unsupported by the text of the China Textile Safeguard Regulations and represents an impermissible departure from CITA's precedent and public statements. . . . Plaintiff alleges that its members reasonably relied on CITA's rules and precedent with regard to the textile-specific safeguards in designing 2005 business plans. . . . As a result of CITA's insupportable actions, plaintiff alleges that its members' operations have been and will continue to be disrupted, and its members are being forced to make sub-optimal business decisions that cannot be undone or reimbursed if plaintiff ultimately succeeds on the merits of the case. . . .

The Court finds that several of plaintiff's irreparable harm allegations involve pure economic loss, . . . As noted by defendant . . . , economic loss alone is insufficient to justify preliminary injunctive relief. *See, e.g., Wis. Gas Co. v. Fed. Energy Regulatory Comm'n,* 758 F.2d 669, 674 (D.C.Cir.1985). However, the Court also finds that plaintiff has shown much more than just economic loss. Because of CITA's *mere acceptance* of threat-based requests, plaintiff's members have found it prudent to cancel or consider canceling orders in China and move them to other countries where possible. . . . However, it has been difficult for plaintiff's members to find suitable substitute factories because other importers are also scrambling to secure alternative production facilities. . . . This difficulty is exacerbated by the unrefuted fact that Chinese factories generally have fewer audit failures, ensure more on-time deliveries, employ highly skilled workers, and operate as some of the most efficient production facilities in the world. . . . By being forced to move production to less efficient factories in other countries, . . . plaintiff's members face the real possibility that they may not be able to deliver products to their customers in a timely manner, which will impair their goodwill and business reputation.[4] This constitutes irreparable injury. *See Zurn Constructors, Inc. v. B.F. Goodrich Co.,* 685 F.Supp. 1172, 1181 (D.Kan.1988) ("Numerous cases support the conclusion that loss of customers [and] loss of goodwill ... can constitute irreparable harm."); *Am. Customs Brokers,* 10 CIT at 387, 637 F.Supp. at 221 (finding irreparable injury where plaintiff demonstrated substantial harm to business goodwill, business reputation, and a significant loss of new business).

---

4. By moving orders to other countries, plaintiff's members also risk jeopardizing the longstanding business relationships they have developed with several of the major garment factories in China. . . . These relationships are of the utmost importance to plaintiff's members, . . . and their impairment constitutes another form of irreparable injury.

In addition, plaintiff's members' inability to stock shelves in a timely manner will create an unquantifiable ripple effect, as shortages of merchandise in one category can affect sales in other categories. . . . Moreover, because of the slower production and transit times from countries other than China,[5] plaintiff's members are finding it necessary to place orders earlier than they normally would. . . . This, in turn, inhibits the member companies' ability to respond to trend-specific demand, thereby creating an unquantifiable inventory risk. . . . The slow production and transit times also mean that plaintiff's members will be impeded in reordering and timely delivering high-demand items. . . . All of this constitutes irreparable injury as well. *See Lois Jeans & Jackets, U.S.A., Inc. v. United States*, 5 CIT 238, 241-42, 566 F.Supp. 1523, 1526-27 (1983) (finding irreparable injury where plaintiff demonstrated an inability to fill its customers' orders, injury to its reputation as a reliable supplier, potential unquantifiable costs required for altering its production methods, and a loss of past and future sales); *Am. Air Parcel Forwarding Co. v. United States*, 1 CIT 293, 300, 515 F.Supp. 47, 54 (1981) (finding irreparable injury where plaintiff demonstrated significant disruption of its business operations).

Finally, plaintiff provided affidavits indicating that China is the only country from which some of its members are able to obtain certain goods. . . . For instance, one of plaintiff's members is only able to obtain fine gauge knit sweaters from China. . . . However, these sweaters are the subject of threat-based requests that CITA has already accepted for consideration. . . . Thus, the member company has been unable to place its full commitment of orders in China for fear that a quota may be filled before it receives the sweaters. . . . This inability of plaintiff's members to obtain certain specialized products from countries other than China constitutes yet another type of irreparable harm. *See Green Stripe, Inc. v. Berny's Internacionale*, 159 F.Supp.2d 51, 57 (E.D.Pa.2001) (finding irreparable harm where defendant's violation of an exclusivity clause in a sales contract prevented plaintiff from being able to sell a unique, perishable product for which there was no available substitute on the market); *Reuters Ltd. v. United Press Int'l, Inc.*, 903 F.2d 904, 907-08 (2d Cir.1990) (finding that termination of the delivery of a unique product results in irreparable harm that is nearly impossible to value).

Defendant argues that plaintiff's assertions of irreparable injury are purely speculative because it is unknown whether CITA will actually impose safeguards. ... The Court disagrees. The irreparable harm suffered by plaintiff arises directly from CITA's *mere acceptance* of threat-based requests, since such acceptance makes it necessary for plaintiff's members to detrimentally alter their 2005 business plans. Moreover, contrary to defendant's assertion, . . . this irreparable harm is ongoing because plaintiff's members typically place about 30 percent of their orders for the second half of 2005 by January 2005. . . . Thus, a full 70 percent of plaintiff's members' orders for this period remain in limbo as a result of CITA's actions. . . .

For all these reasons, the Court finds that plaintiff has suffered, and will continue to suffer, irreparable injury if the Court does not enjoin CITA from accepting, considering, or taking any further action on threat-based requests.

2. *Balance of Hardships*

Before granting the requested injunctive relief, the Court must also evaluate the

---

5. For example, the transit times from several of the countries to which plaintiff's members have moved their production are typically 25 to 30 days, whereas transit times from China are as few as 11 days. . . .

balance of hardships in this case, *i.e.,* "determine which party will suffer the greatest adverse effects as a result of the grant or denial of the preliminary injunction." *Ugine-Savoie Imphy v. United States,* 24 CIT 1246, 1250, 121 F.Supp.2d 684, 688 (2000).

The balance of hardships favors granting the requested relief. As discussed above, plaintiff will suffer irreparable injury if an injunction is not issued enjoining CITA's consideration of threat-based requests under the China Textile Safeguard Regulations. In contrast, defendant will not suffer any cognizable harm by issuance of the requested injunction. Contrary to defendant's contention, . . . defendant will still be able to effectively administer the textile-specific safeguards guaranteed by China's Accession Agreement. For example, under the China Textile Safeguard Regulations, CITA may still consider safeguard requests from the public based on *actual* market disruption caused by Chinese products. 68 Fed.Reg. at 27789. As conceded by defendant, . . . CITA may also self-initiate such an inquiry. 68 Fed.Reg. at 27789. Further, since the commencement of this action, CITA has exercised its authority to deny immediate entry into the United States of any products (including Chinese products) shipped in 2004, in excess of 2004 quota limits, for importation in January 2005. *See* Entry of Shipments of Cotton, Wool, Man-Made Fiber, Silk Blend and Other Vegetable Fiber Textiles and Apparel in Excess of 2004 Agreement Limits or Certain China Safeguard Limits, 69 Fed.Reg. 72181, 72181-82 (Dec. 13, 2004). This measure will certainly enable CITA to limit the volume of Chinese products entering the United States in early 2005. As such, defendant has failed to show that the requested injunctive relief would adversely affect the ability of the United States to implement the terms of China's Accession Agreement or protect the domestic textile industry from a surge of Chinese imports. *See Associated Dry Goods Corp. v. United States,* 1 CIT 306, 311, 515 F.Supp. 775, 779-80 (1981) (denying preliminary injunction where CITA's ability to conduct foreign policy, implement trade agreements, and protect domestic industry would be impeded).

Where " 'little if any harm will befall other interested persons,' " the balance of hardships test favors granting injunctive relief. *Id.* at 312, 515 F.Supp. 775, (quoting *Wash. Metro. Area Transit Com'n v. Holiday Tours, Inc.,* 559 F.2d 841, 844 (D.C.Cir.1977)). However, as argued by defendant, . . . even where the balance of hardships favors the movant, injunctive relief is nonetheless inappropriate where it would effectively grant the relief ultimately requested. *Id.* at 311, 515 F.Supp. at 780 (citing *Selchow & Righter Co. v. W. Printing & Lithographing Co.,* 112 F.2d 430, 431 (7th Cir.1940)) (denying preliminary injunction against imposition of quotas by CITA in part because interlocutory injunction would achieve ultimate relief sought). The rationale for this rule is that "[a] court should not grant temporary relief in the form of a preliminary injunction which will dispose of the case on the merits." *Manhattan Shirt Co. v. United States,* 2 CIT 270, 274 (1981) (denying preliminary injunction against enforcement of CITA-embargoed merchandise in part because injunction would dispose of the case on the merits). Here, the scope of plaintiff's complaint clearly exceeds that of the requested preliminary injunction. In its complaint, plaintiff has raised an important question as to whether CITA's delegated authority to administer textile agreements includes the authority to issue regulations pursuant to China's Accession Agreement. Whether a WTO accession agreement is a "textile agreement" within the meaning of 7 U.S.C. § 1854 is a question of first impression. If plaintiff is fully successful on the merits of the case, CITA's China Textile Safeguard Regulations will be invalidated *in toto.* Such an order would far exceed the more limited scope of the requested preliminary injunction. As such, the balance of the hardships tips in favor of

granting preliminary injunctive relief.

3. *Likelihood of Success on the Merits*

The Court must also consider whether plaintiff has demonstrated a likelihood of success on the merits of its case before a preliminary injunction may be issued. *Sanho Collections, Ltd. v. Chasen*, 1 CIT 6, 12, 505 F.Supp. 204, 208 (1980). To satisfy this requirement, it is ordinarily sufficient for the party requesting the preliminary injunction to raise " 'serious, substantial, difficult and doubtful' questions that are the proper subject of litigation" where it is clear that "the moving party will suffer substantially greater harm by the denial of the preliminary injunction than the non-moving party would by its grant." *Ugine-Savoie Imphy*, 24 CIT at 1251, 121 F.Supp.2d at 689 (quoting *PPG Indus., Inc. v. United States*, 11 CIT 5, 8 (1987)).

In this case, plaintiff has raised sufficiently serious and difficult questions regarding the propriety of CITA's actions to warrant issuance of the preliminary injunction. Specifically, plaintiff's complaint alleges that CITA's acceptance of threat-based requests violates its own regulations and the APA. This allegation raises questions as to the applicability of APA rulemaking procedures to CITA's consideration of public requests for safeguards made pursuant to CITA's own published regulations. This important issue was not addressed by the Court's opinion in *Mast Industries, Inc. v. Regan*, 8 CIT 214, 596 F.Supp. 1567 (1984) (finding APA rulemaking procedures inapplicable to regulations that define or alter quantitative limitations imposed pursuant to a bilateral trade agreement or unilateral action). In addition, plaintiff's complaint alleges that CITA has exceeded its delegated authority by assuming administration of the textile-specific safeguards without a clear Congressional mandate to do so. CITA's ability to administer the terms of a WTO accession agreement is a novel question–both as a matter of first impression and in light of express Congressional action to delegate the administration of other aspects of China's Accession Agreement to the International Trade Commission. *See* 19 U.S.C. § 2451. Given the seriousness of these questions presented, a preliminary injunction is justified in this case.

4. *Public Interest*

Finally, "[a]ssuming plaintiff has overcome the burden of showing the probability of irreparable harm and the likelihood of success on the merits, or alternatively, that the parties have presented serious questions of law and that the balance of the hardships tips in favor of the plaintiff, the court must still protect the public interest." *Associated Dry Goods Corp.*, 1 CIT at 311, 515 F.Supp. at 779.

In this case, the public interest would be served by granting the requested relief. It is clearly in the public interest that the trade laws be properly administered. *PPG Indus., Inc. v. United States*, 14 CIT 18, 22-23, 729 F.Supp. 859, 863 (1990) (finding preliminary injunction against liquidation of entries ordered by the International Trade Administration appropriate to ensure fair interpretation of trade laws). Plaintiff, as the representative of multiple interested parties, has the right to participate in the judicial review process to challenge serious perceived errors in CITA's administration of those laws. *See Ceramica Regiomontana, S.A. v. United States*, 7 CIT 390, 397, 590 F.Supp. 1260, 1265 (1984) (granting preliminary injunction where plaintiff raised serious concerns about the International Trade Administration's methodology and findings affecting the public interest). Here, plaintiff has raised substantial questions bearing upon the propriety of CITA's actions when considering requests for textile-specific safeguards from the general public. An injunction will "preserve plaintiff's rights until the merits and the issue of compliance with the law are fully considered. It will provide interim relief until those doubts that have been raised are eliminated." *PPG Indus.*, 11

CIT at 10 (finding preliminary injunction against liquidation of entries ordered by the International Trade Administration to be in public interest). Moreover, although there is a "valid public interest in a policy of quantitative import restrictions on textile products[,]" *Sanho,* 1 CIT at 12, 505 F.Supp. at 208, injunctive relief in this case will not impede CITA's ability to *impose* textile-specific safeguards. Accordingly, the public interest will be served by issuance of the requested injunction.

U.S. ASSOCIATION OF IMPORTERS OF TEXTILES AND APPAREL v. UNITED STATES (II)

— F.Supp.2d —, 2005 WL 645970 (CIT 2005)

GOLDBERG, SENIOR J.

Before the Court is a Motion to Dismiss from defendant United States, dated December 15, 2004. Defendant requests that the Court dismiss the complaint filed by plaintiff U.S. Association of Importers of Textiles and Apparel seeking review of the decision by the Committee for the Implementation of Textile Agreements ("CITA") to accept socalled "threat-based" requests pursuant to its rules governing consideration of public requests for safeguards on Chinese textile and apparel imports (the "China Textile Safeguard Regulations"). *See Procedures for Considering Requests from the Public for Textile and Apparel Safeguard Actions on Imports from China,* 68 Fed. Reg. 27787 (May 21, 2003). . . . [T]he Court granted a preliminary injunction in this case and reserved judgment on defendant's Motion to Dismiss until full briefing on the issues raised therein was completed. . . .

For the reasons stated below, defendant's Motion to Dismiss is denied in part and deferred in part.

Discussion

I. The Court Has Jurisdiction Over Plaintiff's Claims.

[The United States argued that the Association's claims were not ripe for review, and that the Association had not exhausted its administrative remedies. The Court found these arguments to be without merit.]

A. Plaintiff's Claims Are Ripe for Review.

All cases are subject to the ripeness requirement of Article III of the U.S. Constitution, which bars judicial review of non-final and interlocutory actions. U.S. Const. art. III, § 2, cl. 1. In determining whether a claim is ripe for judicial review, the Supreme Court has fashioned a two-part test for U.S. courts to apply: (1) determine whether the issues tendered are appropriate for judicial resolution and (2) assess the hardship to the parties if judicial relief is denied at this stage. *Toilet Goods Ass'n, Inc. v. Gardner,* 387 U.S. 158, 162 (1967). The Court finds that both prongs are satisfied in this case.

. . . CITA's final *substantive* decision is not, and indeed could not be, at issue in this case. This Court has held that CITA's substantive decision to impose import restrictions pursuant to an appropriate exercise of validly delegated authority is nonjusticiable. *See Am. Ass'n of Exps. & Imps.-Textile & Apparel Group v. United States,* 7 CIT 79, 87, 583 F.Supp. 591, 599 (1984) (*"AAEI-TAG I"*) (holding that CITA's decision to impose restrictions on textile imports and request consultations with foreign governments concerning such restrictions was beyond judicial review), *aff'd, AAEI-TAG II,* 751 F.2d 1239 (Fed.Cir.1985). Rather, the Court's review is limited to a consideration of whether CITA, in making a substantive decision, has (1) exceeded its delegated authority or (2) failed to conform to relevant procedural requirements. *Mast,* 8 CIT at 224, 596 F.Supp.

at 1577; *see also Motion Sys. Corp. v. Bush,* 28 CIT ----, ----, 342 F.Supp.2d 1247, 1256-57 (2004) (finding procedural predicates to final presidential action suitable for judicial review under § 1581(i) jurisdiction).

Applying that precedent to this case, it is clear that plaintiff's claims, and the injury suffered in connection therewith, are properly focused solely on questions of (1) *ultra vires* agency action and (2) procedural regularity. From this perspective, CITA has already taken final agency actions suitable for judicial review: (1) CITA's decision to administer China's accession agreement to the World Trade Organization ("China's Accession Agreement") as a textile agreement within its delegated authority and (2) CITA's decision to accept threat-based requests to impose safeguards pursuant to the China Textile Safeguard Regulations. . . .

[P]laintiff will suffer more serious hardship if judicial relief is denied at this stage in CITA's proceedings than defendant will experience if judicial relief is granted. This Court has already found that plaintiff has suffered and, absent a preliminary injunction, would continue to suffer irreparable harm as a result of CITA's acceptance of threat-based requests. . . . The Court remains unconvinced that defendant will suffer any significant cognizable harm if judicial resolution is pursued at this stage in CITA's proceedings. While this case is pending, defendant still has the ability to fully administer the China Textile Safeguard Regulations with regard to safeguard requests based on actual market disruption.[3] In addition, defendant has the ability, through the U.S. Congress, to clarify the authority delegated to CITA pursuant to the terms of China's Accession Agreement. Indeed, Congress has already chosen to expressly delegate other aspects of China's Accession Agreement to the U.S. International Trade Commission. *See* 19 U.S.C. § 2451. In light of these options, defendant has failed to show how it would be adversely affected by judicial resolution at this stage of CITA's proceedings.

B. Plaintiff's Claims Are Not Barred by the Exhaustion Doctrine.

. . . [T]his case is simply not about CITA's non-reviewable substantive decisions concerning the imposition of safeguards. Plaintiff challenges the existence of CITA's regulations and CITA's actions pursuant thereto. The Federal Circuit has held that such regulatory challenges do not require the exhaustion of administrative remedies. *See AAEI-TAG II,* 751 F.2d at 1245-46 (not requiring exhaustion under protest procedures where importers challenged existence of CITA-directed regulations imposing import restrictions); *see also Fieldston Clothes,* 19 CIT at 1185, 903 F.Supp. at 76-77 (finding question of CITA's *ultra vires* actions ripe for judicial review absent final agency action).

Further, even if exhaustion were appropriate, the Court routinely asserts jurisdiction prior to exhaustion where delay would be prejudicial to the plaintiff. *See Fieldston Clothes,* 19 CIT at 1184-86, 903 F.Supp. at 76- 77 (excusing potential exhaustion requirement where quota category was nearly full and delay was prejudicial to plaintiff); *B-West Imports, Inc. v. United States,* 19 CIT 303, 306-08, 880 F.Supp. 853, 858-59 (1995) (rejecting exhaustion requirement where time frame for agency deliberation was uncertain and delay was prejudicial to plaintiff), *aff'd,* 75 F.3d 633 (Fed.Cir.1996); *Mast,* 8 CIT at 221, 596 F.Supp. at 1573-74 (rejecting exhaustion requirement where

---

3. Further, defendant has the ability to publish, in the *Federal Register,* a formal amendment to the China Textile Safeguard Regulations expanding their scope to include threat-based requests. Although the Court does not comment on the propriety of such action in light of the scope of the instant proceedings, the Court notes that if defendant had only chosen to formally amend its regulations–a fully reasonable action given defendant's earlier publication of a formal clarification of those same regulations–plaintiff may have been dissuaded from initiating this case altogether.

regulations created import embargo prejudicial to plaintiff and administrative remedy provided "manifestly inadequate" relief). Here, the only available administrative "remedy"–CITA's comment period for each threat-based request–affords illusory relief. Defendant cannot seriously argue that requiring full participation in CITA's administrative proceeding, the very legitimacy of which is at issue in this case, is an appropriate application of the exhaustion doctrine.[4] Further, plaintiff has already demonstrated a threat of irreparable harm sufficient to warrant imposition of preliminary injunctive relief. . . . Because the available administrative remedy provides manifestly inadequate relief and plaintiff would be prejudiced by delayed judicial review, waiver of the exhaustion requirement is appropriate in this case.

II. The Court Defers Judgment of Whether Plaintiff's Complaint States Claims for Which Relief May Be Granted.

The Court, in its sound discretion . . . deems it proper and in the interest of justice to defer its determination of the portion of defendant's Motion to Dismiss pertaining to plaintiff's alleged failure to state claims for which relief may be granted. The Court has determined that it would benefit from more fulsome [*sic*] development, by both parties, of the evidence and legal arguments squarely concerning the issues presented in this case either at a trial on the merits or, if more appropriate, in the parties' motions for summary judgment.

B. THE ECONOMICS OF IMPORT RESTRAINTS

A bewildering array of possible government responses to fairly traded goods has been presented in this chapter. These include tariffs, quotas, orderly marketing agreements (OMAs), voluntary export restraints (VERs), congressional “signals,” and negotiated shares of the U.S. market.

The political imperatives for protection need to be tempered by the economics of import restraints. Once import protection for an industry has been decided upon, the issue becomes one of allocating the domestic costs of protection for the U.S. industry. The following excerpt demonstrates that the Federal Trade Commission and the International Trade Commission have very different philosophies, despite the similarity of their names.

M. MORKRE AND D. TARR, FEDERAL TRADE COMMISSION (BUREAU OF ECONOMICS) STAFF REPORT ON EFFECTS OF RESTRICTIONS ON UNITED STATES IMPORTS: FIVE CASE STUDIES AND THEORY

34-51 (1980)

Tariffs vs. Quantitative Restraints

The traditional preference of tariffs to QR’s [Quantitative Restraints] is primarily based on two arguments. The first involves international distribution effects. A QR

---

4. Nevertheless, the Court notes that plaintiff represents that it has participated in each of the relevant comment periods made available to it prior to the issuance of the Court's preliminary injunction order. . . .

generates scarcity rents that need not accrue to the importing country, but a tariff yields customs revenue. . . . [T]he "Voluntary Export Restraints" (VER's), and the newer Orderly Marketing Agreements (OMA's) are similar to quotas and do not yield customs revenue. The second argument concerns flexibility when underlying demand/cost conditions change. . . .

. . . [S]econdary features should also be noted. Because of the fixity of QR's they tend to sponsor wasteful (resource consuming) efforts to obtain permission to export or import the restricted product. An example might be the old sugar quota arrangements. In the mid-1950's it was alleged that there was a "sugar subgovernment." As reported by Gerber,[49] Washington was ". . . literally throbbing with (sugar) lobbyists and lawyers, jockeying to secure for their client countries a larger share of the sugar quota pie." QR's however offer an advantage to domestic firms and workers precisely because they are fixed. . . . QR's impose greater administrative costs, on the U.S. or foreign countries, or possibly both. Finally, there are the issues of discrimination and political repercussions. Tariff rates for particular products are the same for nearly all important foreign suppliers and, therefore, are much less discriminatory than QR's which tend to be imposed only on a few specific countries.

Comparison of Quotas and OMA-VER's

Deadweight Losses

In terms of ranking, OMA's and VER's will be lumped together and contrasted with quotas. The first issue to consider is the degree of restrictiveness of imports, which means assessing the likely deadweight losses produced by quotas and OMA-VER's. Bergsten[50] argues that quotas are expected to be more restrictive. First, OMA-VER's usually do not cover all suppliers. The administration typically looks to the countries which have most recently been very successful in increasing their exports to the U.S. and whose share of the market has become significant. Second, imports from noncovered suppliers typically increase to partly offset the initial import reduction. This has been a prominent feature, for example, in textiles, nonrubber footwear, and color TV's. Finally, since OMA-VER's involve negotiation between the U.S. and a foreign supplier there is some opportunity for the supplier to lessen the severity of the quantity limits and introduce provisions which enhance flexibility. Flexibility is particularly important for goods like textiles, which are subject to abrupt demand skills in response to changes in fashion, and durables and semi-durables, the purchase of which is postponable during general economic downswings.

To sum up, the deadweight losses of a quota are expected to be larger than those for an OMA-VER in a particular situation. Overall losses, deadweight plus rent losses may, however, be larger for the OMA-VER as this depends on how the quota arrangement deals with the disposition of the scarcity premium. If the premium goes to exporters the overall loss of the quota will be larger than that of an OMA-VER. But, if rents are retained by the U.S., the ranking may be reversed. . . .

An advantage of OMA-VER's is that the foreign country undertakes the task of regulating its exports leaving U.S. officials with the less onerous chore of monitoring the agreement. The U.S. Government, therefore, escapes the problems of administering a quota program and granting (or auctioning) import licenses to domestic interests.

---

49. The United States Sugar Quota Program: A Study in the Direct Congressional Control of Imports, 19 J. Law & Econ. 103, 120 (1976).

50. On the Equivalence of Import Quotas and "Voluntary" Export Restraints, in C. Bergsten (ed.), Toward a New World Trade Policy: The Maidenhead Papers, 239, 241-45 (1975).

However, the OMA-VER surrenders the scarcity rents to foreigners. A complete assessment of the two policy alternatives must, therefore, estimate (marginal) U.S. administrative costs of a quota but it is unlikely this would significantly alter quota costs. However, it would raise distributive questions (e.g. which U.S. individuals/firms obtain import quota entitlements and on what terms) which are politically delicate.

A major premise in the foregoing discussion is that supplying countries capture the scarcity rents created by OMA-VER's. Empirical evidence on the issue is scanty, primarily because recipients of export licenses are, not surprisingly, reluctant to reveal the value of the surplus involved. After a review of available pieces of information, Bergsten concludes that the VER quota premium is captured by exporters, except where the U.S. has raised a tariff on the imported articles which recaptures a portion of the rent.

NOTES AND QUESTIONS

1. *The Auctioning of Import Relief*? Morkre and Tarr suggest that the OMA-VER model surrenders scarcity rents to foreigners. Should import relief in the form of quota shares be auctioned domestically? As the authors suggest, it would be possible to auction import licenses and keep some of the "rents" from protection in the United States. In 1985 the International Trade Commission proposed, for the first time, the auctioning of import licenses as part of its relief for the footwear industry in a § 201 proceeding.

2. Given all the arguments just presented for the economic superiority of a tariff to a quota, why, do you think, have quantitative restrictions of various forms become so popular in the last few years?

3. How would a domestic content approach requiring a certain amount of internal production compare economically with tariffs and quotas?

4. Suppose the automobile industry has reached the point at which individual firms find that the returns to scale are achieved only at the global level--in other words, each firm finds it economical to have only one transmission plant and only one engine plant, etc., each of which can be located *somewhere* to serve the entire world. Would you be more sympathetic with a domestic content approach in such a case?

C. THE GATT AND THE WTO

Within the GATT, the escape clause is governed by Article XIX (*see* Selected Documents Supplement), whose interpretation and reform was a leading issue during the Tokyo Round. The underlying concern was that developed nations would be particularly tempted to use this clause to protect their older industries from the competition of new developing nation industries. This concern led to disputes over whether escape clause duties should be applied on an MFN basis or a selective basis. Some nations feared the effect on their exports if such duties were applied on an MFN basis in response to exports from other nations; other nations feared that a derogation of MFN principles would make it easier to target restrictions against their own exports. Compromises were sought, based on such approaches as international reviews of the application of the escape clause protection in each case, but the efforts failed.

The following two excerpts provide more detail on these concerns and on the politics of the escape clause.

MEIER, EXTERNALITY LAW AND MARKET SAFEGUARDS: APPLICATIONS IN THE GATT MULTILATERAL TRADE NEGOTIATIONS

18 Harv. Intl. L. J. 491 (1977)

As one observer has said,

> It is worth noting that the dominant place accorded to the MFN principle in postwar international trade relations tended to make them even more fragile and subject to the accidents of bargaining than they had been before. MFN is in fact a ready-made instrument for setting in motion a downward spiral in the process of bargaining, once nations begin to adopt an adversary posture towards one another; for a dispute between two countries which leads one of them to withdraw a trade concession originally made as part of a general bargain between them is almost bound to inflict some injury on the trading interests of other countries who happen to be exporters of the products affected. Assuming that everyone insists on precise reciprocity, there is no end to the series of consequent adjustments that may have to be made.[73]

The nondiscriminatory basis of article XIX may appear particularly inequitable to developing countries who are small suppliers or new entrants but are denied access to the safeguard-invoking country's market even though the safeguard was initially invoked because of injury from another large developed-country supplier. In most cases in which article XIX action has been taken by GATT members, only a limited number of large suppliers were responsible for injurious imports, but all sources suffered from the MFN provision.

On the other hand, the only contracting party injured by a retaliatory suspension if the MFN clause is not applied is the party invoking article XIX. If the purpose of retaliation is punitive, then the MFN clause should be inapplicable for retaliatory increases. Even if it is meant only to pressure the invoking party to complete speedily its adjustment process, there is no reason to injure other contracting parties unnecessarily. Furthermore, the application of the MFN clause to retaliatory increases also carries with it the danger of chain reactions of further tariff increases by third countries. This dilemma can be avoided by eliminating the principles of most-favored-nation treatment and reciprocity from the regulation of emergency protection.

The waiver of the MFN rule and reciprocity does not mean, however, that there should be no international discipline with respect to the use of article XIX. On the contrary, the principle of multilaterality might be strengthened without a MFN principle.

> The principle of multilaterality would stand for common responsibilities, joint decisions and international surveillance–the continuous presence of a concerned forum in which a country can complain and seek mediation for its grievance against another country can complain and seek mediation for its grievance against another country, or even seek adjudication. . . . [E]xperience . . . suggests that this principle is more important than non-discrimination pure and simple for ensuring that emergency protection will be limited to real emergencies, where there would be a right to protect and no need to compensate, and that the protective measures will be eventually lifted. The pragmatic course would be to

---

73. Shonfield, International Economic Relations of the Western World: An Overall View, in I International Economic Relations of the Western World 1959-1971, 47-48 (1976).

seek ways of compromising with the MFN principle without sacrificing multilaterality.[76]

The provision that under article XIX a concession may be suspended, withdrawn, or modified "to the extent and for such time as may be necessary to prevent or remedy" the injury resulting from the concession has allowed the invoking country to make emergency protection in essence permanent. A working party long ago stated that "action under Article XIX is essentially of an emergency character and should be of limited duration. A government taking action under that Article should keep the position under review and be prepared to reconsider the matter as soon as this section is no longer necessary to prevent or remedy a serious injury."

Most of the tariff increases made under article XIX have not, however, been rescinded. Reform of this article should therefore also involve some commitment, and a procedure, giving other countries an effective assurance of a continually growing access to the protected market and of a foreseeable removal of the market safeguard. This is especially important for LDCs that are entering new export markets. To this end, the right to invoke the article might be conditioned by requirements that (a) the protection afforded by the safeguard measure be degressive over a certain number of years, and terminal within some designated time period; (b) the invoking country is obligated to promote adjustments that will reduce the dislocation costs; and (c) the use of the safeguard measures and the adjustment efforts must be open to multilateral surveillance.

If the situation of "serious injury" is to be ameliorated, and dislocation costs reduced, governments must give special attention to adjustment policies. Otherwise industries that prefer protection to adjustment will continue the pressure for retention of the market safeguard.

It must be emphasized, as Johnson has, that

> from the standpoint of the advanced countries, adjustment assistance and safeguards against market disruption need to be considered as complementary and not as substitute policies. Adjustment assistance is designed to increase the speed with which change can be absorbed and digested; safeguards against market disruption are designed to slow down the speed of the change that has to be absorbed and digested. Optimum policy with respect to change associated with shifting comparative advantage in response to the development and diffusion of technology requires joint optimization with respect to both types of policy, not prior choice of one line or other of policy and subsequent optimization with respect to it alone. Both policies also require drawing a fine line between optimal pacing of change and protectionist resistance to change, a line which is probably significantly easier to draw and maintain where the two policies are considered jointly than when the full weight of responsibility for controlling the rate of change and absorption of it is placed on one type of policy only.[80]

The adjustment assistance must ensure adjustment out of the industry that is losing its comparative advantage: it cannot merely perpetuate the retention of inefficient resources in the depressed industry. It must either promote measures to increase productivity or stimulate an exodus of factors from the industry. No matter what their

---

76. Tumlir, [Emergency Protection Against Sharp Increases in Imports, in J. Tumlir, In Search of a New World Economic Order (1974)] at 266.

80. Johnson, Technological Change and Comparative Advantage: An Advanced Country's Viewpoint, 9 J.W.T.L. 1, 13 (1975).

particular form, adjustment measures must avoid trade-distorting effects: an inefficient adjustment-assistance measure has no more merit than does an inefficient VER or tariff or QR.

Not only should assistance facilitate the conversion of resources to higher productivity uses, but it should do so as early as possible. Instead of delaying an investigation and an adjustment assistance program until "serious injury" has been determined, it may be more sensible to shift to an "early warning" approach that makes it possible both to anticipate probable difficulties and to deal with these at an earlier stage. In essence, the problem is to devise an anticipatory, comprehensive approach that will be harmonious with the changing character of the international division of labor and facilitate the movement of resources in the direction of more efficient international resource allocation. This problem of dislocation will become more acute–and the time for adjustment shorter–as technology is diffused more rapidly to the LDCs, transnational corporations expand, and the developing countries accelerate their industrialization process. As these countries acquire a wider comparative advantage in the well-standardized, labor-intensive manufacturing industries they will become increasingly competitive with the older labor-intensive, import-sensitive industries of the more developed countries. . . .

4. Differential Treatment for LDCs

This leads to the question implicit throughout this paper, and that should now be examined directly: is there a case for differential treatment for LDCs in the application of market safeguards? While advocating financial compensation only for LDCs, Bhagwati devotes only one short paragraph in justification of such differential treatment. He merely states that

> They [LDCs] are after all, the countries which have been seriously affected by the textile restrictions and by VERs. . . .Further, there is greater willingness, as part of the new international economic order, to grant LDCs reasonable accommodation *via* framing new rules regarding their trade. Moreover, the flow of funds to be generated are far more likely to be significant, relative to their needs, for LDCs than for DCs. Finally, discriminatory adjustment of trade rules, in favor of LDCs, is well-embedded in GATT reform, as in the enactment of Article XXIII for them at GATT.[91]

Can more be said? From a sense of distributive justice or redistributive justice, one might maintain that the poorer party should not be made to stand a loss which the richer party could stand better. Indeed, it has been submitted that "the idea of need as a basis for entitlement" is

> the central feature of the contemporary international law of development. When we reflect on it, it may seem extraordinary how we have come to accept it and how far-reaching its implications may extend. Can we reconcile need as a basis of entitlement with other fundamental legal principles such as equality among states or their established rights? How can need fit into the still prevailing conception of a world market economy based on principles of comparative advantage and non-discriminatory trade? We have in fact already experienced the conflicts and dilemmas which these general questions suggest. It is clear enough that in treating need as a basis of entitlement, states have to diverge from other principles. And to a considerable extent, that is exactly what is being done . . . .The

---

91. Bhagwati, [Market Disruption, Export Market Disruption, Compensation and GATT Reform, 4 World Dev. 989 (1976)] at 1009.

> present rationale for international assistance and preferential treatment on the basis of need is more in keeping with the premises of the modern welfare state– that is, to provide for the minimal human needs of the most disadvantaged segments of society. For this reason, it does not seem so utopian or so revolutionary as the abstract formulation may suggest. Yet we should not underestimate its impact in international affairs.[92]

Although most international lawyers would consider a doctrine that "needs are right" to be too revolutionary, many might nonetheless recognize the inappropriateness of formal equality and reciprocity as governing principles of the relations between DCs and LDCs on the basis of an attempt to counterbalance existing inequalities. This principle has been variously termed the "welfare" principle, the principle of "the double standard," or the principle of "capability." Alternatively, one may admit to the reality of discrimination, and recognize special treatment for the LDCs on the basis that law must accurately reflect community expectations, rather than consist of a mere statement of often unheeded rules.

It can not be maintained that an LDC is "at fault" in exporting to a DC. A country has a reasonable expectation to improve its standard of living by following its comparative advantage. This is especially relevant for a developing country which is entering an "infant trade" of manufacturing. Other provisions of GATT allow preferential treatment for infant industries, and the same may be extended to "infant trade."

On the negative side, the invocation of market safeguards weighs more heavily on less developed than on developed countries. The capacity to transform from one industry to another within the LDC is limited because of compartmentalized markets, factor immobility, and absence of a well-defined integrated price system, so that resources are much more specific to the export industry and less transferable to another sector than in a developed country. The element of uncertainty is therefore especially deleterious to an LDC, as the LDC is less capable than a DC of bearing the uncertainty of having its exports encounter trade barriers.

Another reason for special differential treatment for LDCs is that in return for improved access for their exports in advanced country markets, the LDCs might commit themselves to refrain from organizing commodity markets with price-raising objectives and might guarantee stable supplies of primary commodities. Both LDCs and DCs may gain if in the negotiating process the issue of market access for LDCs were linked with the issue of supply access to primary commodities for DCs.

C. PEARSON, EMERGENCY PROTECTION IN THE FOOTWEAR INDUSTRY

9-13 (1983)

Purpose of Proposed Safeguards

A principal reason why safeguard actions remain contentious is that there is no universal agreement as to their purpose. Indeed, the differing views on purpose imply quite different features with respect to eligibility criteria, time limit and type of trade restraint employed. Features that promote one purpose can be inconsistent with others.

---

92. Schachter, The Evolving International Law of Development, 15 Colum. J. Transnatl. L. 1, 10 (1976). See also O. Schachter, Sharing the World's Resources at pt. I (1977).

Four views on purpose can be identified. The first, generally held by the domestic industry, is that trade relief offers a temporary breathing spell from intense import competition, during which the domestic industry can regain its competitive position in essentially the same product lines. The second view, often held by economists, is that temporary import restraint following sudden surge in imports allows an orderly transfer of domestic resources, both labour and capital, to more productive activity. The premise is that social adjustment costs, mainly due to unemployed resources, can be reduced by slowing the pace of the industry's decline and relying on attrition rather than involuntary unemployment to reduce the workforce. The third view is based on consideration of equity or fairness. It holds that trade relief is a method for preventing concentrated injury to specific groups (the industry and its workers) when the general interest is served by a liberal trade policy. The fourth view is pragmatic; it argues that a government can "buy" a more liberal trade policy if it has a credible method for compensating politically important groups that perceive the possibility of injury from trade. In other words, the safeguard mechanism is a price to be paid to secure liberal trade legislation or to forestall more severe trade restrictions.

These four views on purpose have internal weaknesses and inconsistent features. For example, the first view would require a government granting import relief to determine that a domestic industry has not permanently lost comparative advantage and that its decline is reversible. This is an extraordinarily difficult determination to make. The second view would require that an industry use its period of relief to shed resources in an orderly fashion. Trade measures by their nature, however, raise prices and profits in the protected industry, quite possibly attracting additional resources to the industry. The third view of purpose, that trade restraints can remedy injury by maintaining employment, offers protection to all firms and workers in the industry and thus cannot target benefits to those firms and workers actually injured by import competition. The pragmatic view, by promoting safeguard actions, threatens the underlying objective of freeing trade. Textile restraints, originally justified to forestall more severe import restrictions, are a case in point.

The inconsistencies among these views on purpose are equally troubling. For example, the first view would limit trade relief to industries that have a fair chance of regaining competitiveness, and would encourage new resources to flow into the industry, especially capital and technology, whereas the second view would make orderly contraction of the industry a criterion for temporary trade relief. The first view would welcome price increases from trade restraints as a source of financing for new investment, whereas the second view would consider price increases as a cost, to be set against the benefit of avoiding unemployed resources. The confusion centres on what is meant by adjustment to imports–regaining competitiveness in the same products or re-employing resources elsewhere in the economy.

The third view of purpose, to compensate for injury, is generally inconsistent with both types of adjustment. Rationalising existing productive capacity to become more competitive involves substitution of capital and technology for labour and often increases concentration of domestic production among fewer firms. Both effects displace labour and undercut the equity purpose. Also, trade relief that simply maintains employment in the affected industry frustrates and delays the adjustment of resources to other activities, the principal purpose of adjustment according to the second view. Finally, for credibility, the pragmatic view of purpose requires that the safeguard mechanism be readily available as political needs dictate, without much attention to the adjustment prospects of the industry. The more credible the safeguard mechanism, the

less likely that it will be used in a discriminating fashion to further adjustment.

If this confusion of purpose is not enough, the availability of trade adjustment assistance (TAA) programmes as an alternative to trade relief ensures a problem. TAA programmes have exactly the same divergence of views as to purpose, and thus the same inconsistences. Trade adjustment assistance is designed to: (i) make the domestic industry look more competitive through technical assistance and financing; (ii) retrain and relocate workers in more productive activity (shorten unemployment); (iii) compensate labour through more generous unemployment benefits than are generally available; and (iv) "buy" more liberal trade legislation. These are clearly inconsistent objectives for the reasons given above, and the record of the United States TAA programme documents the resulting problems. The main difficulties are that generous assistance for equity purposes delays adjustments, as workers have less incentive to seek other jobs, and that attempts to salvage a declining industry, through government infusion of financing and technical assistance, cannot succeed if the loss of comparative advantage is permanent.

American trade legislation does not help in resolving the divergent views as to purpose. Section 201 of the Trade Act of 1974 allows a petition to be filed for import relief "for the purpose of facilitating orderly adjustment to import competition" where purpose "may include such objectives as facilitating the orderly transfer of resources to alternative uses and other means of adjustment to new conditions of competition." Once a petition is filed, the main responsibility of the International Trade Commission in escape clause cases is to determine if there is serious injury due to imports and to recommend a duty or other import restriction that will "prevent or remedy" such injury or to recommend adjustment assistance.

There are three ambiguities in this formulation. First, it gives no guidance as to when trade adjustment assistance is to be recommended in lieu of trade relief. Second, the language does not specify whether the principal purpose of trade relief is to make the industry more competitive or to transfer resources to other economic activities (the two divergent views on adjustment). Finally, the injunction to recommend a trade restriction that will prevent or remedy injury is especially vague. Is injury remedied by adjustment or by compensation? Is it even possible to remedy injury by restricting trade?

NOTES AND QUESTIONS

1. Why, do you think, was Congress interested in Article XIX in 1974?

2. As between the U.S. the European, and the developing countries' positions on the linkage of MFN and Article XIX, which do you think is right? Is it in the long-term interest of those who propound it? For a good discussion from the European viewpoint, see Bronckers, *The Non-Discriminatory Application of Article XIX GATT; Tradition or Fiction?* 1981/82 Legal Issues of European Integration 35 (1982).

3. Do you see any chance of the more substantial reforms that Professor Meier proposes? Note that multilateral surveillance has been used, even leading to a finding against the United States, in the context of the Multifibre Arrangement. *See* 9 Intl. Trade & Invest. Mgmt. 1035 (I.T.A. May 23, 1984).

4. Would you favor a code governing adjustment assistance? What would you include? How would it help? Review the Agreement on Safeguards. Does this resolve any of Professor Meier's concerns?

5. Compare the provisions of articles 2-7, 9 and 11 of the Agreement on Safeguards with the provisions of 19 U.S.C. §§ 2252-2254. Do the U.S. statutory provisions comply

with the Agreement?

6. What about § 201 measures that were already in place prior to the Agreement? Review article 10 of the Agreement.

7. Pursuant to the article 12.1 of the Safeguards Agreement, the President formally notified the WTO of the steps that he was taking in response to the ITC recommendations concerning certain steel products. The ensuing controversy is detailed in § 1, *supra*, at pages ▬▬-▬▬. Does the outcome of that dispute represent a vindication of the WTO regime with respect to safeguards measures, or perhaps the beginning of a process of deterioration in the multilateral consensus over the appropriate rules governing such measures?

Bibliographical Note

Harry G. Hutchison, *Distributional Consequences, Policy Implications of Voluntary Export Restraints on Textiles and Apparel, Steel, and Automobiles*, 38 Wayne L. Rev. 1757 (1992).

John M. Jennings, Comment, *In Search of a Standard: "Serious Damage" in the Agreement on Textiles and Clothing*, 17 Nw. J. Int'l L. & Bus. 272 (1996).

Kevin C. Kennedy, *Presidential Authority under Section 337, Section 301, and the Escape Clause: The Case for Less Discretion*, 20 Cornell Int'l L.J. 127 (1987).

Eun Sup Lee, Safeguard Mechanism in Korea under the WTO World, 14 Transnat'l Law. 323 (2001).

Jorge F. Perez-Lopez, *GATT Safeguards: A Critical Review of Article XIX and its Implementation in Selected Countries*, 23 Case W. Res. J. Int'l L. 517 (1991).

Alan O. Sykes, *Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations*, 58 U. Chi. L. Rev. 255 (1991).

Daniel K. Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 Harv. L. Rev. 547 (1987).

Sanghan Wang, *U.S. Trade Laws Concerning Nonmarket Economies Revisited for Fairness and Consistency*, 10 Emory Int'l L. Rev. 593 (1996).

Diane P. Wood, *"Unfair" Trade Injury: A Competition-based Approach*, 41 Stan. L. Rev. 1153 (1989).