

America's *Sorry* Trade Performance

BY ROBERT Z. LAWRENCE AND NATHANIEL STANKARD

*Whatever happened
to all that talk
about rule of law?*

When the Appellate Body of the World Trade Organization recently ruled the United States' steel tariffs invalid, members of Congress complained bitterly. They pointed to the ruling as yet another example of a WTO body exceeding its charge and misinterpreting the rules. But their fingers were pointing in the wrong direction. The steel debacle was simply the latest example of America's chronic inability to play by the safeguard rules. WTO provisions allow countries to apply safeguards when imports are "a substantial cause of serious injury," but in five out of the six times the United States has adopted such measures over the past decade, they have been successfully challenged by affected trading partners. The steel finding marks the fourth year in a row in which the United States has had to abandon a safeguard measure approved by the President. Actions on wheat gluten, lamb meat, and line pipe all met a similar fate at the WTO; a broom corn safeguard was successfully challenged by Mexico under Chapter 20 of NAFTA.

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This is not a record of which the United States should be proud. The behavior of its International Trade Commission (ITC) deserves as much attention as that of the WTO. America's international reputation as a law-

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abiding global trader is at stake. In addition, U.S. industries that merit relief need to be sure that the protection they have been granted can withstand WTO scrutiny. The ITC needs to write decisions that cannot be overturned.

Safeguards play an important role in encouraging countries to sign new trade agreements. Free trade brings benefits in the long run, but it may cause unemployment and require painful adjustments in the short run. By giving countries the ability to invoke temporary protection when imports are more disruptive than expected, the Safeguards Agreement encourages countries to sign WTO agreements in the first place. Safeguard measures also operate as a safety valve, helping to preserve the rules by permitting temporary protection without threatening the entire system. It is ironic, therefore, that this system, set up to preserve the rules, has been associated with so many violations.

These violations raise troubling questions. The United States surely has an interest in creating a trading system based on the rule of law, not to mention preserving its reputation for adhering to international agreements. Indeed, those interests are why, although not without delay and complaint, America has eventually complied with the adverse WTO rulings. But why, as a nation so fond of preaching the virtues of adherence to the law, does the United States violate its agreements in the first place?

One reason is that the changes made in the Uruguay Round with a view to making safeguards more

“user-friendly” created an incentive for abuse. Under the original GATT rules, when a country adopted a safeguard, its trading partners were immediately entitled to either retaliate with equivalent tariffs or demand compensation in the form of offsetting reductions in tariffs on other imports. To escape having to provide compensation, countries sometimes preferred to pressure their trading partners to agree to so-called “voluntary” export restraints (VERs). VERs violated essential GATT principles because they discriminated among suppliers and involved quotas, but they escaped GATT scrutiny because they were voluntary. To encourage safeguards instead of VERs which were officially prohibited, the Safeguards Agreement negotiated in the Uruguay Round did not require countries to provide compensation. Retaliation is not allowed if the safeguard lasts for only three years and is a response to an absolute increase in the volume of imports.

But the new agreement is flawed. The Safeguards Agreement grants national authorities considerable berth to interpret the standards in a manner favorable to domestic industry. Since WTO review only occurs after a safeguard is imposed, and since disputed measures must go through a lengthy process of investigation and appeal, the current system provides an incentive to protect now and deal with the repercussions later. George W. Bush knew, for example, that even if his steel measures violated the rules, he could get away with them for almost two years before they would be found illegal by the WTO.

This combination of no retaliation and the long dispute resolution process has created a loophole that

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SAFEGUARD ACTION	MAIN APPELLATE BODY FINDINGS	CURRENT STATUS
Wheat Gluten Quantitative restriction imposed May 30, 1998.	Adopted March 19, 2001. ITC did not adequately explain its treatment of "profits and losses" or how injury from non-import sources was not attributed to imports. It also did not establish that the imports subject to the safeguard were alone sufficient to meet the legal threshold for action.	Action made "not inconsistent" with AB Report by ITC consistency determination, May 2001. Action expired, June 1, 2001.
Lamb Meat Tariff-rate quota imposed July 7, 1999.	Adopted May 16, 2001. ITC did not establish that the safeguard was applied because of "unforeseen developments" and used improper standards for defining the domestic industry. It also did not adequately explain aspects of its price analysis or how injury from non-import sources was not attributed to imports.	Action terminated by executive order, November 15, 2001.
Line Pipe Tariff imposed March 2, 2000.	Adopted March 8, 2002. ITC did not establish that imports subject to the safeguard action (which excluded Canada and Mexico) were alone sufficient to meet the legal threshold for action. It also did not adequately explain how injury from non-import sources was not attributed to imports.	Action modified by agreement with Korea, September 1, 2002. Action expired, March 1, 2003.
Steel Tariffs and tariff-rate quotas imposed March 20, 2002.	Circulated November 10, 2003. ITC did not adequately explain recent import declines in several products or what "unforeseen developments" resulted in increased imports. It also failed to establish that imports subject to the safeguard action (which excluded Canada, Mexico, Israel, and Jordan) were alone sufficient to meet the legal threshold for action.	Action terminated by executive order, December 5, 2003.

needs to be corrected. One approach would be to restore the option of immediate retaliation, or to permit punitive retaliation. But this would raise the pressures for the return of VERs. A better remedy would be to speed up dispute resolution.

The current system may help explain why there's an incentive to violate the rules, but it does not fully explain why the United States in particular took advantage of that incentive. In America, the ITC is responsible for determining whether a proposed safeguard is warranted. The ITC, in a published report, also makes a recommendation for relief to the President if it deems action to be appropriate. The ITC has been given this responsibility to help deflect the political pressures on Congress and the President and to base protection on an objective and impartial determination. Since the ITC report sets out the explanation for protection, it naturally becomes the focus of WTO review. In all four WTO cases concerning U.S. safeguards, those reports have been found wanting. Why does the United States,

and the ITC in particular, have such trouble devising a safeguard that can withstand WTO scrutiny?

One reason is that America has succumbed to political pressures. When President Bush ordered tariffs on several steel products in March 2002, it was widely thought the safeguard would fail to pass muster at the WTO. The steel industry had originally asked President Clinton to initiate an investigation in 2000. Even though the President sympathized with the difficulties faced by the steel industry and believed it was in crisis, his advisors argued that the industry's circumstances did not meet the standards required for safeguard protection. They thought the steel industry crisis reflected the domestic recession, not a surge in imports.

Another reason that ITC determinations have not been upheld is that WTO law is not U.S. law. The ITC conducts its analysis under Sections 201 to 204 of the U.S. Trade Act of 1974. While the WTO agreements echo some of the language of the

U.S. law, each framework demands different criteria be satisfied for a safeguard to be valid. Even if the ITC is fully compliant with the Trade Act, its report may still fail to comply with the GATT and Safeguards Agree-

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ment. While the WTO has not questioned the validity of the U.S. safeguard law itself, it has repeatedly indicted ITC explanations based upon that law as inadequate.

For instance, the WTO requires that a national authority identify “unforeseen developments” and explain how those conditions led to increased imports. The U.S. statute establishes no such requirement, and the Appellate Body in the lamb and steel cases faulted the ITC reports for their silence. The WTO also obligates the national authority to explicitly avoid attributing injury to imports that is caused by other sources—for example, a decline in domestic demand. Under U.S. law, the ITC is simply required to determine that no other cause is more important than increased imports in causing the injury. The Appellate Body has rejected the ITC methodology as insufficient alone to meet the provisions of the WTO agreements. For an ITC report to satisfy the WTO, the U.S. law would need to be changed to encourage WTO-compliant explanations or the ITC would need to voluntarily undertake more than its statutory duties.

Even bringing the laws into uniformity will not be a panacea. Different legal bodies can have different opinions of the facts. Whatever its legal proclivities, the WTO is not obliged to take the ITC report without question. While the Appellate Body has made it clear that review is not *de novo*, a dispute settlement panel in a safeguard case is expected to conduct a two-part examination. First, it makes a “formal” review of the national report to ensure that “all relevant factors” were considered. Such factors are not limited to those raised by interested parties in the national investigation. Sec-

ond, the panel, in a “substantive” review, examines whether or not the national report provides a “reasoned and adequate” explanation for its finding. The panel is expected to consider alternative interpretations of the data and whether the national authority has satisfactorily dispensed with those views.

This standard of review affords the WTO considerable latitude in rebutting the factual conclusions of the ITC. For example, the ITC concluded that “increased imports” were present in ten product categories in the steel case. After examining the data, the panel refused to accept the ITC assessment in several categories; it considered the explanation of recent import declines inadequate. Even if the gaps between U.S. and WTO law were mended, the ITC reasoning could still be rejected if it failed to consider a relevant factor or was deemed inadequate. The ITC needs to make its case more persuasively.

The troubles of the U.S. safeguard process thus stem as much from U.S. law and politics as they do from aggressive legal and factual review by the WTO. While the WTO has not been shy in imposing its particular interpretation of the rules, the U.S. safeguard process does little to maximize the chances of compliance. The ongoing conflict doesn’t help to foster legitimate industry adjustment to the rigors of free trade. It also injures U.S. credibility as an advocate of open markets and further weakens the besieged WTO.

To stop this corrosive effect, the United States should create an impartial panel of the nation’s foremost trade law experts. This council of legal advisers would consider safeguards proposed by the ITC and advise the President on their compliance with U.S. obligations under the WTO. At a minimum, this sorry

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experience should make Americans somewhat slower to point the finger at others for failing to follow WTO rules. If the United States and its sophisticated legal system run into trouble, it should come as no surprise that others will have similar difficulties. ◆