WTO Disputes: Building International Law on Safeguards

by Robert A. Rogowsky

The WTO dispute settlement system has changed the face of international trade and trade policy in a fundamental way. It has and will continue to affect trade negotiations, international commerce, and increasingly, domestic policy formulation. It poses the most likely path toward internationalizing commercial law by authorizing a supranational body to develop a body of international common law that supercedes much of what has heretofore been domestic law and regulation. The influence of this body, and the law it is developing, is felt well beyond strictly trade matters, like tariffs and quotas. It reaches into a broad range of economic activity, health and safety regulations, shelf-life standards for agricultural products, taxation, intellectual property rights and environmental laws.

The WTO Dispute Settlement Body (DSB) is a vehicle for internationalizing the special interests that must be considered in any substantial piece of legislation or regulation from any of the roughly 140 members of the WTO (about 30 more countries have applications pending). The interests of American beef farmers need to be taken into account in European health and safety standards, as in the *Beef Hormone* case. Similarly, European distillers must be considered when Korea imposes a liquor tax. As the reach of the WTO agreements expands, the authority of the DSB to rule on laws and regulations will grow commensurately.

The current DSB is in many ways the result of American ambition to add teeth to the dispute settlement system that had evolved over 40 years under the General Agreement on Tariffs and Trade (GATT). The teeth come because under the WTO, unlike under the GATT, decisions are actually binding unless all parties, including the winner in the dispute, agree that the decision should be changed. (Under GATT the decision was not binding unless everyone, including the loser in the settlement decision agreed it should be; that happened exactly once in the 40 years of GATT.) The United States' interest in a more rigorous and binding dispute settlement system in the WTO stems from its perception that as the world's leading exporter and suppliers of foreign direct investment, it is a prime beneficiary from effective WTO dispute settlement.[1] Indeed, the United States is both the chief user and chief victim of the system it championed in the Uruguay Round negotiations.

The WTO's dispute settlement mechanism so far has proven a dramatic success, if use is an indication. Parties to GATT brought 115 cases in the 1980s.[2] Since the WTO commenced in 1995 until May of 2001, 231 cases have been filed.[3] One hundred six of these have involved the United States, either as complainant or respondent. Of these, 42 have been litigated; 32 completed and 10 pending as of this writing (the remainder were settled or are still in consultation). Of those completed, the United States has won 16 and lost 16.[4] All victories but one have been cases in which the United States is a complainant. In these litigated cases, the WTO has clarified the meaning of the Uruguay Round Agreement (URA) in the specifics raised by the members in these cases. In this way, the DSU is creating a body of law that guides countries in their trade policy, their trade negotiations, in their regulatory proceedings and in their national legislation. The implications for international commerce and for sovereignty are clear and profound.

This article focuses on one specific, but important area of disputes: safeguards. The article's goal is two-fold. It seeks to inform, albeit only lightly, on safeguard measures and the cases that have reached the WTO. Second, it intends to illustrate how the WTO's dispute settlement system is forming coherent law in this important trade remedy area, with certain implications for national sovereignty. The article will summarize the WTO's *Agreement on Safeguards* (AS), the enforcement process in the United States. It will consider selected issues being addressed by the WTO in these cases, focusing primarily on the most recent WTO case, involving the United States guarding against lamb meat imports from Australia and New Zealand. The issues that were selected—unforeseen developments, definition of domestic industry, threat of injury and causation—highlight the substantive contribution the WTO is making and the requirements it is placing on domestic law and enforcement.

Safeguards (Escape Clause)

The formation of the GATT in 1947 as a multilateral trade pact to reduce tariffs needed an "escape clause" to permit the signatories to address political pressures from potential losers at home. Article XIX, titled "Emergency Actions on Imports of Particular Products," often referred to as the escape clause or safeguard clause, provided countries quick access to short-term relief by restricting imports for domestic industries facing "serious injury" due to the agreement.[5] In the early years of the GATT, this was a continuation of the negotiation. If imports caused or threatened serious injury to domestic producers, the country could take emergency action to restrict those imports, typically restoring a duty or quota that had been negotiated away. Exporters had to be consulted. If not provided some satisfactory compensation, they could retaliate. This form of pressure valve was used 110 times by 1963.[6] Through May 1993, 151 safeguard actions under Article XIX were notified to the GATT.[7]

Efforts were building to make the application of the escape clause more rigorous, but it could not overcome the resistance by many nations fearful of the loss of control over this safety valve. In the Tokyo Round, negotiators failed to reach agreement on a code of conduct for measures applying Article XIX. Hence, one of the more important achievements in the Uruguay Round was the completion of the AS. The AS detailed provisions to "clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX (Emergency Action on Imports of Particular Products), to re-establish multilateral control over safeguards and eliminate measures that escape such control."[8] These measures refer particularly to voluntary export restraints (VERs) and other inter-industry arrangements.[9]

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Since 1995, when the AS was established, the international community has seen a significant increase in the use of this instrument. From just two cases notified to the WTO in 1995, 10 cases were notified in 1998 and 26 in 2000. Of the 61 cases initiated between 1995 and 2000, 20 of them were opened by India (11) and the United States (9). It is noteworthy that the European Commission does not use safeguards and Canada has initiated no cases under the AS. Twenty-one countries have initiated cases over the past five years. Only 16 percent of those are by the four main users of the antidumping laws (U.S., EU, Australia and Canada). Safeguards seem primarily to be a trade remedy of new users. Seven countries (Bulgaria, El Salvador, Japan, Jordan, Poland and Venezuela) initiated their first cases in 2000. Safeguard analysis is less complex and more straightforward than antidumping adjudication, so it may be more attractive to new users and to countries with fewer resources to devote to trade remedy adjudication processes. It is further interesting that two industrial sectors—animals/food and chemicals/plastics/rubber—account for almost 70 percent of all investigations since 1995. Ten of India's 11 investigations have involved chemical products. Only four of the 61 cases involve steel, a heavy user of antidumping and countervailing duty remedies.[10]

Increasingly, WTO members are challenging adverse safeguard and antidumping/countervailing duty rulings by national authorities. Four recent rulings on safeguards defined with more precision the general parameters set forth by the AS, and are offering an object lesson, at this point primarily for the United States, on how national authorities should be revising its safeguard laws and enforcement to comply with that higher authority.

Safeguard Rules

The Safeguard Agreement of the WTO

A safeguard measure may be applied:

1) if a product is being imported in such increased quantities, absolutely or relatively, "as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products" (Art. 2:1). Serious injury is a "significant overall impairment in the position of the domestic industry;" threat of serious injury is injury that is "clearly imminent," and "based on facts and not merely on allegation, conjecture or remote possibility." Here, the domestic industry is the set of producers as a whole or major portion of those supplying like or directly competitive products (Art. 4:1a-c).

2) following an investigation by competent authorities using set and transparent procedures, including ample public notice. The authorities must publish a report with "findings and reasoned conclusions" (Art. 3:1).

3) if all relevant factors are evaluated in determining if there is serious injury; in particular, the rate and amount of increased

imports, the share of the domestic market taken, changes in the level of sales, production, productivity, capacity utilization, profits and employment (Art. 4:2a).

4) if objective evidence supports a determination of "a causal link between increased imports of the product concerned and serious injury or threat thereof," and "a detailed analysis . . . as well as a demonstration of the relevance of the factors examined" (Art. 4:2b,c).

5) only to the "extent necessary to prevent or remedy serious injury and to facilitate adjustment" (and reduce imports no more than the average of the previous three years if the remedy is a quota) (Art. 5:1), and where actions are applied against imports from all sources not country-specific (although the agreement does allow exceptions where imports "have increased in disproportionate percentage in relation to the total increase of imports . . . .")(Art. 5:2b).

6) "only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment," and shall not exceed four years, unless determined after that time that an extension is needed, which shall not exceed 4 years (Art. 7:1-3).

7) if after three years, adequate compensation is provided to the members against whom the remedy is applied, otherwise that party may suspend the application of substantially equivalent concessions or other WTO obligations (Art. 8:1-3).

8) against a developing country only if its share of imports exceeds three percent, and total imports from LDCs do not exceed nine percent (Art 9:1). (An LDC will have an extra two years to hold a safeguard action in place (Art. 9:2)).

9) if the national authority immediately notifies the Committee on Safeguards (WTO) upon initiating, making a finding, and applying a safeguard measure (Art. 12:1a-c), including evidence of injury by increased imports, a precise description of the product and the proposed measure and date of introduction and expected duration and timetable for progressive liberalization (Art. 12:2).

Enforcement in the United States

Sections 201 to 204 of the Trade Act of 1974 (19 U.S.C. §§2251 to 2254) set out the statutory authority for implementing procedures for safeguard enforcement in the United States; that is, 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 a domestic industry (Sec. 201a). A petition is filed before the U.S. International Trade Commission (USITC) by a firm, trade association, union or group of workers from the relevant industry, or the President, USTR, Congress or the USITC on its own motion. The USITC then conducts an investigation, which should be completed within 120 days of the petition.[11]

The USITC examines three criteria set forth in statutory standards: (i) increased imports, (ii) that a domestic industry producing a like or directly competitive product is seriously injured or threatened with serious injury, and (iii) imports are a substantial cause of the injury. Substantial cause is defined in section 202(b)(1)(B) to mean "a cause that is important and not less than any other cause." Thus, for purposes of this determination, the increased imports must be both an important cause of the threat of serious injury and a cause that is equal to or greater than any other cause. All three criteria must be satisfied to make an affirmative injury determination.

If the USITC makes an affirmative determination as to injury, it recommends (within 180 days of the petition) action to the President that can include a duty; tariff-rate quota; quota; or other assistance such as trade adjustment assistance, auctioning international import licenses, initiating negotiations; or any combination of these. Within 60 days the President is to take action based on the USITC's Report, industry efforts to adjust to import competition, the national economic interest, and certain other statutory factors.[12] Relief is to last fours years; extensions can be granted but are not to exceed eight years. Tariff relief cannot exceed 50 percent ad valorem, quantitative restrictions cannot (except under special conditions) reduce imports below value entered during the most recent three years, and any relief has to be phased down at regular intervals.[13]

The President must report to Congress on the action that he is taking. If it differs from the commission's recommendation, Congress may, through joint resolution within 90 days, direct the President to implement the USITC's recommendation. The USITC monitors the industry and submits a report on progress at the midpoint of the prescribed relief.[14]

WTO Cases Building Safeguard Law

Four safeguard cases have completed the WTO dispute settlement process and AB opinions rendered: *Korea—Definitive Safeguard Measures on Imports of Certain Dairy Products (hereinafter "Korea—Dairy Products"), Argentina—Safeguard Measures on Imports of Footwear ("Argentina—Footwear"),*[15] *United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, ("United States—Wheat Gluten")*[16]*, and United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia ("United States—Lamb Meat").*[17] Through these cases the WTO has developed the basic requirements of the law to be implemented by the member nations based on the broad outlines set forth in the SA negotiated in the Uruguay Round. For illustration purposes, the focus for this brief paper will be primarily on the most recent of these, *United States—Lamb Meat.*

United States—Lamb Meat

In February 1999, the USITC unanimously found that lamb meat was being imported into the United States in quantities that would constitute a substantial cause of the threat of serious injury to the industry.[18] The USITC forwarded its finding and proposed relief to the President in April 1999. After consultation with Australia and New Zealand the President imposed a definitive safeguard measure on imports of lamb meat.[19] Canada, Mexico, Israel and beneficiaries of the Caribbean Basin Economic Recovery Act or the

Andean Trade Preference Act or certain developing countries receiving GSP treatment were excluded. Australia and New Zealand challenged the U.S. ruling before the WTO. A Dispute Settlement Body Panel was convened.[20] It rendered a decision on December 21, 2000.

The panel raised a number of issues of legal interpretation and analytical form. Among these, it concluded that the United States acted inconsistently with:

1) Article XIX:1(a) by failing to demonstrate that the injury was coming from an "unforseen development" in the market place.

2) Article 4.1(c) of the AS by defining the domestic industry to include growers and feeders of live lamb as producers of the like product (lamb meat), and by failing to obtain data on producers representing a major proportion of the total domestic production.

3) Article 4.2(b) of the AS because the USITC did not demonstrate the required causal link between increased imports and the threat of serious injury, nor did it "establish that increased imports were, by themselves, a necessary and sufficient cause of threat of serious injury, and in that the determination did not ensure that threat of serious injury caused by 'other factors' was not attributed to increased imports." As a result, the United States also violated Article 2.1 of the AS since the serious injury, which is necessary to permit safeguard measures, was not proven.

Conversely, the panel found that complainants Australia and New Zealand failed to establish:

- that the USITC's analytical approach to determining threat of serious injury (the prospective analysis and time-period used), was inconsistent with Article 4.1B(b) (assuming the USITC had defined the industry properly).

- that the USITC's approach to evaluating all the factors listed in Article 4.2(a) is inconsistent with that provision (assuming the USITC had defined the industry properly).

Appeals were made by all parties in January 2001. A third party submission was offered by the European Communities. A hearing was held in March and the Appellate Body (AB) released its report on May 1. The appeals raised questions that had appeared in the earlier decisions *Korea—Dairy Products, Argentina—Footwear, and United States—Wheat Gluten*. In *Lamb Meat* the AB further clarified certain key factors that members must consider in applying safeguard measures, in particular unforeseen developments, defining domestic industry, and serious injury/causation. These are of interest here because they are central to applying safeguard measures and because they are illustrative of the influence of the WTO dispute settlement mechanism on domestic law.

Unforeseen Developments

The unforeseen developments problem is two-fold. First, Article XIX of the GATT 1994 requires for a safeguard measure that the competent national authority demonstrate the existence of unforeseen developments. In contrast, the AS (Article 2.1) makes no mention of it. If unforseen developments create a condition for imposing a safeguard remedy, the two provisions are in conflict. Second, no guidance is given as to what constitutes an unforseen development.

Reversing the panels in both *Korea—Dairy Products* and *Argentina—Footwear,* the AB affirmed that GATT Article XIX was in no conflict with the AS since they applied cumulatively:[22] "all provisions of one treaty, the WTO Agreement."[23] The AB concluded that Article XIX "describes certain circumstance which must be demonstrated as a matter of fact for a safeguard measure to be applied consistently with the provisions of Article XIX of the GATT 1994."[24] The United States ran into trouble again on this matter when the panel in *United States—Lamb Meat* found that the United States failed to "demonstrate as a matter of fact the existence of unforeseen developments."[25] The United States appealed the panel's more narrow finding that a written "reasoned conclusion" was necessary, that is one written out and dealing with the unforseen development specifically. The AB found no indication in the USITC report that the issue of "unforseen developments" had been raised at all. While granting that the USITC report considered changes in the type of lamb meat imported and of the substitutability of imported and domestic lamb, the AB observed "that the USITC report does not discuss or offer any explanation as to why these changes could be regarded as 'unforeseen developments' within the meaning of Article XIX:1(a) of the GATT 1994. It follows that the USITC report does not *demonstrate* that the safeguard measure at issue has been applied, *inter alia,* '. . . as a result of unforeseen developments . . . .'"[26] (emphasis in original).

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More noteworthy, the AB noted that conclusions it had drawn requiring demonstration of the unforeseen developments were not known to the USITC at the time they completed their investigation and proposed a remedy to the President. "The USITC's failure to address the existence of unforeseen developments, in the USITC report of April 1999, is not surprising, *as the USITC is not obliged by any United States legislation, regulation, or other domestic rule, to examine the existence of unforeseen developments in its investigation into the situation of a domestic industry"* (emphasis added).[27] The implication of this statement is, of course, that members will adjust their laws to comply with the new standards set forth by the WTO.

Defining Domestic Industry

A second important issue was defined more clearly in *United States—Lamb Meat,* at the expense of the United States, and in this case against a substantial body of U.S. law. The USITC defined the domestic industry as growers and feeders, as well as packers and breakers of lamb meat, arguing a "continuous line of production from the raw to the processed product" among whom there was "a substantial coincidence of economic interests."[28] The USITC report points to a long line of cases, primarily antidumping/countervailing duty matters, in which this line of reasoning has been employed and sustained in the U.S. courts.[29] The AB, like the original panel, found the economic logic, and the long line of legal precedent in the United States, underlying this argument unpersuasive: "This interpretation may well have a basis in the USITC case law, but there is no basis for this interpretation in the Agreement on Safeguards."[30] The AB went on to argue: "If an input product and an end-product are not "like" or "directly competitive," then it is irrelevant, under the *Agreement on Safeguards,* that there is a continuous line of production between an input product and an end-product, that the input product represents a high proportion of the value of the end-product, that there is no use for the input product other than as an input for the particular end-product, or that there is a substantial coincidence of economic interests between the producers of these products. In the absence of a 'like or directly competitive' relationship, we see no justification, in Article 4.1(c) or any other provision of the *Agreement on Safeguards,* for giving credence to any of these criteria in defining a 'domestic industry'."[31] Again, the implication is that the members will adjust their enforcement even, as in the United States, in the face of a well-established legal framework on which to base defining the domestic industry.

Threat of Serious Injury/Causation

Serious injury or the threat thereof is the heart of a safeguard case. As pointed out above, the AS provides eight specific measurements that contribute to an understanding of the seriousness of the injury. Moreover, the injury must be caused by the increasing imports or threat thereof. The DSB cases have clarified a number of uncertainties and controversial issues of the law.

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In *Korea—Dairy Products,* the AB clarified (re-affirmed in *Argentina—Footwear*) that it was necessary, but not sufficient, for investigating authorities to evaluate all eight factors noted in Article 4.2(a). National authorities can dismiss those that are found not to be relevant, but all must be considered. The consideration of each and every factor, however, is just a first step to demonstrating a significant overall impairment in the position of a domestic industry. The accumulated evidence would have to tell a clear story of significant injury and the evidence would have to be set out in a written final investigation report. The appropriate weight given to any factor would be left to the national authorities, but adequate reasoning and the use of representative data would be important.[32]

In *United States—Wheat Gluten,* the AB raised the bar further. The EC argued that the USITC failed to examine the relationship between the protein content of wheat and the price of wheat gluten, which according to the EC is "the single, most important, factor determining the price of wheat gluten."[33] The panel concluded that 4.2(a) requires a demonstration that competent authorities evaluated all relevant factors enumerated in the AS and other relevant factors "that are *clearly* raised before them as relevant by the interested parties in the domestic investigations" (emphasis in original). As the protein content/price issue was not clearly raised before the USITC by interested parties, the USITC was justified in not addressing it. The AB disagreed. Competent national authorities must consider all relevant factors, not just those raised by the interested parties. The authorities, not interested parties, are responsible for deciding what is truly relevant.[35] The USITC should have come to know what is important regardless of the issues raised by parties. This is a demanding requirement, especially for national authorities with limited resources.

The AB, in *United States—Lamb Meat,* addressed the complicated issue of attributing causation. Domestic competition (aggressive new entrant) and increased domestic capacity, in addition to imports, potentially contributed to the injury suffered by the industry. Nevertheless, the USITC concluded that "but for the increased imports" the industry would have operated nearly at the capacity utilization level when the industry was reasonably profitable.[36] The panel posed a stronger standard, that "the increased imports must be sufficient, in and of themselves, to cause injury which achieves the threshold of 'serious' as defined in the Agreement."[37] In other words, "Article 4.2(a) and (b) require that increased imports *per se* [looked at alone] are causing serious injury."[38] The AB took a broader view of "causal link." "[T]he language of Article 4.2(a), as a whole, suggests that 'the causal link' between increased imports and serious injury may exist, *even though other factors are also contributing, 'at the same time,' to the situation of the domestic industry*"[39] (emphasis in original). Even more, national authorities must distinguish clearly the effect of the other factors from those of the imports.

> "The need to ensure a proper attribution of 'injury' under Article 4.2(b) indicates that competent authorities must take account, in their determination, of the effects of increased imports *as distinguished from* the effects of other factors. However, the need to distinguish between the effects caused by increased imports and the effects caused by other factors does not necessarily imply, as the Panel said, that increased imports *on their own* must be capable of causing serious injury, nor that injury caused by other factors must be *excluded* from the determination of serious injury[40] (emphasis in original).

The AB proceeded to reject the U.S argument about imports causing injury. "It follows, in this case, that the USITC has *not* demonstrated adequately, as required by Article 4.2(a), that any injury caused to the domestic industry by increases in average capacity has not been 'attributed' to increased imports, and, in consequence, the USITC could not establish the existence of 'the causal link' Article 4.2(b) requires between increased imports and serious injury."[41] A higher standard for economic analysis is created by, which to distinguish more rigorously, the influence of different economic forces on a domestic industry.

In a related issue, the United States excluded imports from Canada in the application of the safeguard remedy. The USITC found that although imports from Canada were substantial, they did not contribute importantly to the serious injury caused by imports.[42] The panel concluded that the United States acted inconsistently with Article 2.1 of the AS by so excluding a substantial supplier after including imports from all sources in its analysis of the effects of wheat gluten imports. The United States' appeal, on grounds that the panel did not adequately consider the subsequent and additional analysis the UISTC conducted on imports from Canada, fell to an unsympathetic AB. The board clarified the standard.

> The United States did examine the importance of imports from Canada separately, but it did not make any explicit determination relating to increased imports, *excluding imports from Canada*. In other words, although the safeguard measure was applied to imports from all sources, *excluding* Canada, the USITC did not establish explicitly that imports from these *same* sources, excluding Canada, satisfied 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*. Thus, we find that the separate examination of imports from Canada carried out by the USITC in this case was not a sufficient basis for the safeguard measure ultimately applied by the United States.[43]

And what is the role of the WTO dispute panels and the AB in reviewing this increasingly rigorous analysis? The appellate panels claim no *de novo* review: "The applicable standard is neither *de novo* review as such, nor 'total deference,' but rather the 'objective assessment of the facts'."[44] The DSB's role is to make sure the national authorities have "examined all the relevant facts and had provided a reasoned explanation of how the facts supported their determination."[45] This standard is more than a checklist, however. It is a two-step test: "First, a panel must review whether competent authorities have evaluated *all relevant factors,* and second, a panel must review whether the authorities have provided a *reasoned and adequate explanation* of how the facts support their determination."[46]

While panels and the AB are "not entitled to conduct a *de novo* review, nor substitute their own conclusions for those of the competent authorities, this does not mean that panels must simply *accept* the conclusions of competent authorities."[47] To the contrary, in *United States Lamb Meat,* the AB opines:

> a panel can assess whether the competent authorities' explanation for its determination is reasoned and adequate *only* if the panel critically examines that explanation, in depth, and in the light of the facts before the panel. Panels must, therefore, review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data. A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some *alternative explanation* of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation. Thus, in making an "objective assessment" of a claim under Article 4.2(a), panels must be open to the possibility that the explanation given by the competent authorities is not reasoned or adequate[48] (emphasis in the original).

Conclusion

The WTO is a trade organization. And, like its predecessor, the GATT, its primary mission is trade liberalization. With the strengthened dispute settlement mechanism in place, the WTO can take on a more defined and more powerful role breaking down barriers and prying loose the trade restrictions embedded within national laws. It is this feature that makes the WTO both attractive and scary. It can bring to bear the heavy artillery of trade sanctions to enforce its determinations. These determinations increasingly refine domestic laws and regulation and modulate the enforcement of them within its member states. By limiting the ability of nations to establish or maintain unjustifiable barriers to trade, the WTO enhances global welfare. On the other hand, the WTO's dispute settlement mechanism's tendency to constrain the authority of nation states to define and enforce their own laws re-weaves the threads of national sovereignty. The evolving guidance from the WTO on the appropriate form and application of safeguards law is an illustrative case in point. ⚖

Endnotes are available on the next page.

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Endnotes

1 As John Jackson notes, "Certainly [the decisions] are binding in the traditional international law sense. In fact, for many national legal systems, they are also binding in the "traditional sense" domestically, although not always in a "statutelike" sense. In the United States, it can be argued (and this author has so argued), that the WTO rules, and certainly therefore the results of a dispute settlement panel, do not "ipso facto" become part of the domestic jurisprudence that courts are bound to follow as a matter of judicial notice, etc . . . ." (John H. Jackson, "The WTO Dispute Settlement Understanding–Misunderstandings on the Nature of Legal Obligations," 91 *Am. Int'l L.* 60 (January 1997) (footnotes excluded).

2 R. Hudec, "The New WTO Dispute Settlement Procedure," *Minn. J. Global Trade,* Vol. 8:1, 1999, p. 4. Dispute settlement under GATT evolved over time from a relatively informal review of complaints and general recommendations for remedial action into a quite formalized adjudicatory system. The peer pressure of a finding by the GATT was a relatively effective enforcement mechanism, Nevertheless, the consensus process limited the effectiveness since no rulings by the GATT could be considered binding.

3 WTO Secretariat as of 23 March 2001.

4 Winning and losing are sometimes elusive when compliance is the real goal and it is here that the system is weakest. The DSU does not provide as thoroughly for enforcement and the several recent EU cases of resistance to compliance *(Beef Hormone and Bananas)* have highlighted this weakness.

5 The GATT gave each party the right to renegotiate any of its concessions after three years and also provided swifter relief through Article XXVIII's "sympathetic consideration" procedures in which an injured party could renegotiate any of its concessions more quickly.

6 Michael Finger, "GATT Experience with Safeguards: Making Economic and Political Sense of the Possibilities that the GATT Allows to Restrict Imports," mimeo, World Bank, 2000.

7 Jeffery Schott, *The Uruguay Round: An Assessment,* (IIE,) 1994, p. 94 About one-third had been imposed since the end of the Tokyo Round in 1979; 18 times by the EU. The US only invoked it 4 times during that period.

8 Preamble, Agreement on Safeguards.

9 These have been viewed as particularly pernicious trade restraints through the 1970s and 1980s. In the SA, members commit not to "see, take or maintain any voluntary export restrains, orderly marketing arrangements or any other similar measure on the export or the import side." (Article 11:1b)

10 Cliff Stevenson, *Global Trade Protection Report 2000,* April 2001 (Rowe & Maw)

11 Special procedures are in place for perishable goods and critical circumstances. For perishable goods, the Commission will within 21 days make a provisional determination and recommendation to the President for provisional tariff relief. The President has seven days to accept or reject the recommendation. If an industry claims critical circumstances (injury is likely and delay will make any repair difficult), the Commission has 60 days to determine if it is critical and make an early recommendation to the President, who has 30 days to accept or reject. These remedies are terminated if the Commission goes negative on injury.

12 The President will exclude imports from NAFTA countries from relief action if he termines that these imports do not contribute importantly to the injury. These imports will be re-added if a surge from a NAFTA country adds to the injury.

13 If the Commission finds injury, the Secretary of Labor must give expedited consideration to petitions by workers for certification of eligibility to apply for adjustment assistance, as is the Secretary of Commerce for petitions from firms.

14 Upon request the Commission will advise the President on the probable economic effect of adjustments to the relief. Between 6 and 9 months before termination of relief, the Commission will file a report as to whether continued relief is needed and as to adjustments the industry is making. For each concluded action, the Commission must hold a hearing and issue a report on the effectiveness of the action.

15 For a comprehensive discussion of the *Korea* and *Argentina* cases, see Yong-Shik Lee, "Critical Issues in the Application of thbe WTO Rules on Safeguards," *Journal of World Trade,* 34(2): 131-147, 2000.

16 WT/DS166/AB/R, 22 December 2000 (AB-2000-10)

17 WT/DS177/AB/R, May 1, 2001.

18 As required, the U.S. government notified the Committee on Safeguards of the WTO of this determination in February of 1999. (G/SG/N/8/USA/3 = Corr.1 and Corr.2 (Exh. US-4).

19 The actual safeguard measure is a bit complicated. The Commissioners disagreed on the appropriate relief and sent three separate proposals (one supported by three Commissioners, another by two Commissioners and a third by one Commissioner) to the President—creating a legal dilemma as to what the majority recommendation was. The final remedy involved country specific, rising tariff rate quotas phased in over three years. See *United States—Safeguard Measures on Imports of Fress, chilled or Frozen Lamb Meat from New Zealand and Australia,* WT/DS177/R, 21 December 2000, p.3.

20 A Panel is a selection from a large group of available candidates of three trade experts who are convened to judge the merits of the case and issue an opinion.

21 The Panel distinguished between "unforeseen" and "unforeseeable," (Panel Report, paras. 7.22 and 7.24), a distinction that was not appealed.

22 WT/DS98/AB/R, para.77.

23 AB Lamb Meat Report, para. 69, WT/DS177/AB/R. "We reiterate: Articles 1 and 11.1(a) of the *Agreement on Safeguards* express the full and continuing applicability of Article XIX of the GATT 1994, which no longer stands in isolation, but has been clarified and reinforced by the *Agreement on Safeguards*." para. 70

24 WT/DS98/AB/R, para. 85.

25 WT/DS/177/AB/R, cited in para. 66.

26 AB Lamb Meat Report, para. 73, WT/DS177/AB/R

27 AB Lamb Meat Report, para. 74, WT/DS177/AB/R

28 USITC Report, pp. I-12-14.

29 Notably the 1981 CV case on Lamb Meat (*Lamb Meat from New Zealand,* Inv. No. 701-T-80 (Preliminary), USITC Publ. 1191, (Nov. 1981)). For a substantial list of other cases see p.11, note 31.

30 Lamb Meat Report, para. 90, WT/DS177/AB/R

31 Lamb Meat Report, para. 90, WT/DS177/AB/R

32 Appellate Body Report *United States—Wheat Gluten,* para. 71, footnote 19. WT/DS166/AB/R

33 *United States—Wheat Gluten,* para 45.

34 Panel Report, *United States—Wheat Gluten,* para. 8.69.

35 Appellate Body Report *United States—Wheat Gluten,* para. 55. WT/DS166/AB/R The Appellate Body went on to conclude that the USITC was, in fact, justified in not reviewing the wheat gluten protein/price relationship because it affects price only when the protein content is unusually high or low and that happens very infrequently, and only in one year included in the investigation.

36 USITC Report, p. I-17.

37 Panel Report, *United States—Wheat Gluten,* para. 8.138.

38 Panel Report, *United States—Wheat Gluten,* para. 8.143.

39 Appellate Body Report *United States—Wheat Gluten,* para. 67. WT/DS166/AB/R

40 Appellate Body Report *United States—Wheat Gluten,* para. 70. WT/DS166/AB/R

41 Appellate Body Report *United States—Wheat Gluten,* para. 91. WT/DS166/AB/R

42 USITC Report, p. I-19.

43 Appellate Body Report *United States—Wheat Gluten,* para. 98. WT/DS166/AB/R

44 *European Communities—Hormone,* Appellate Body Report, footnote 25, para. 117.

45 *Argentina—Footwear,* Appellate Body Report, para. 121.

46 *United States—Wheat Gluten,* Appellate Body Report, para. 103. The Panel then describes this as a *formal* part (have the authorities evaluated all relevant factors) and a *substantive* part (reasoned and adequate explanation for their determination).

47 Lamb Meat Report, para. 106, WT/DS177/AB/R

48 Lamb Meat Report, para. 106, WT/DS177/AB/R