

**IS THE UNITED STATES THE WORLD'S
DUMPING GROUND FOR STEEL? RECENT
INFLUXES IN STEEL IMPORTS IN THE
UNITED STATES, THE EFFECTS, AND THE
POSSIBLE REMEDIES**

I. INTRODUCTION	382
II. HISTORY OF THE DECLINING STEEL INDUSTRY IN THE UNITED STATES.....	386
III. THE ROLE OF THE WTO	390
A. <i>The General Agreement on Tariffs and Trade and the WTO Agreements</i>	390
1. <i>Anti-Dumping Actions</i>	392
2. <i>Subsidies and Countervailing Measures</i>	394
3. <i>Safeguards: Emergency Protection from Imports</i> .	395
B. <i>The Dispute Settlement Process</i>	397
C. <i>Required Notification of Corresponding Laws and Policies Implemented by Member Countries</i>	399
IV. THE CORRESPONDING U.S. TRADE LAWS AND RELATED ISSUES	400
A. <i>The Relevant U.S. Trade Laws</i>	400
1. <i>Anti-Dumping and Countervailing Duty Investigations</i>	400
2. <i>Section 201 Investigations</i>	401
B. <i>Is One Remedy More Appropriate to Handle the Current Crisis?</i>	402
C. <i>Conflicts Between U.S. Trade Laws and Obligations Under the WTO</i>	406
V. CONCLUSION	408

I. INTRODUCTION

Due to the repercussions from the tragic events of September 11, 2001, it is even more imperative that the general public be made aware of the current U.S. steel crisis. The economic devastation suffered in the United States resulting from the tragedy could be ameliorated by resurgence in the U.S. steel industry. Significant indications of the crisis began to emerge in 1998 when the American steel industry saw a strong U.S. steel market severely disrupted by record levels of increased imports at low prices.¹ To date, the American steel industry has suffered tremendously: thirty-five steel companies have filed for bankruptcy,² more than fifty thousand steelworkers have lost jobs,³ and steel prices have remained at or below their mid-2000 levels and their historical average.⁴ Although most industry experts agree that the 1997 Asian financial crisis (along with financial turmoil in other countries) indirectly led to the recent influx of steel imports,⁵ these experts disagree as to whether existing overcapacity in the steel industry, unfair trade practices, or both are to blame.⁶

1. See INT'L TRADE ADMIN., U.S. DEP'T OF COMMERCE, REPORT TO THE PRESIDENT: GLOBAL STEEL TRADE: STRUCTURAL PROBLEMS AND FUTURE SOLUTIONS 1 (July 2000), available at <http://www.ita.doc.gov/media/steelreport726.html> [hereinafter GLOBAL STEEL REPORT].

2. See United Steelworkers of America, *Steel Companies Filing for Bankruptcy: 1997-2002*, at [http://www.uswa.org/sra/pdf/Steel Bankruptcies 8-16-02.pdf](http://www.uswa.org/sra/pdf/Steel%20Bankruptcies%208-16-02.pdf) (Aug. 16, 2002) (documenting thirty-five bankruptcies since the end of 1997 when the Asian economic crisis hit).

3. United Steelworkers of America, *The Crisis in American Steel: 50,600 Steelworker Jobs Have Been Lost Since the Steel Crisis Began*, at http://www.uswa.org/sra/pdf/Job_Loss060702.pdf (June 7, 2002).

4. See PETER MORICI, THE IMPACT OF STEEL IMPORT RELIEF ON U.S. AND WORLD STEEL PRICES: A SURVEY OF SOME COUNTERINTUITIVE RESULTS 2, at http://www.steel.org/images/Morici_Paper.pdf (July 2002) [hereinafter COUNTERINTUITIVE RESULTS].

5. See GLOBAL STEEL REPORT, *supra* note 1, at 2; see also *infra* notes 32–35 and accompanying text.

6. See, e.g., Letter from David H. Phelps, President, Am. Inst. for Int'l Steel, Inc., to Donald Evans, Secretary, U.S. Dept. of Commerce (June 5, 2000), available at http://www.aiis.org/html/to_bushadministration2.html (attributing the problem to “non-economic steelmaking capacity” worldwide coupled with protectionist actions and

Given the effects of what some industry leaders call the most serious crisis for steel producers since the 1980s,⁷ representatives from both production mills and Congress have called for action.⁸ However, the appropriate remedial action that should be taken has been the subject of some debate.⁹ For example, some American companies have individually filed anti-dumping and countervailing duty cases under section 701 and section 731 of the Tariff Act of 1930¹⁰ against foreign importers,¹¹ while at the same time they have urged the President to initiate

subsidy programs by particular governments) [hereinafter AIIS]. Others insist, however, that the United States has one of the most productive and cost effective steel industries in the world and point to an unlevel playing field outside of the United States as the source of the problem. See United Steelworkers of America, *Facts on the Steel Crisis*, at <http://www.uswa.org/sra/pdf/SteelFacts020802.PDF> (last modified Feb. 8, 2002) [hereinafter *Facts*]; United Steelworkers of America, *The Crisis in American Steel* 19–20, at <http://www.uswa.org/sra/pdf/Steel Update Presentation 8-14-01.pdf> (Aug. 14, 2001) [hereinafter *Crisis*].

7. *Crisis*, *supra* note 6, at 2.

8. See, e.g., Press Release, Sen. Carl Levin, Levin and Stabenow Urge President to Use Trade Laws to Bring Relief to U.S. Steel Industry (Feb. 7, 2001), available at <http://levin.senate.gov/releases/020701pr1.htm> [hereinafter Levin]; Press Release, Sen. Jay Rockefeller, Rockefeller Implores President Bush to Initiate Section 201 Investigation to Save Steel Industry (May 2, 2001), available at <http://www.senate.gov/~rockefeller/2001/pr050201.html> [hereinafter Rockefeller]; Press Release, Nucor, Nucor, Others Win Trade Cases on Hot-Rolled Sheet Import Dumping; Ruling Adds Duties to Imports From 11 Nations (May 2, 2002), available at http://www.prnewswire.com/cgi-bin/micro_stories.pl?ACCT=111895&TICK=NUE&STOR (confirming by newswire that eleven anti-dumping cases were filed by Nucor, Steel Dynamics, IPSO, Gallatin, and five integrated producers in November 2001 for which the U.S. Department of Commerce affirmed preliminary anti-dumping duty margins) [hereinafter Nucor]; Rossella Brevetti, *New Antidumping Case Targets Five Countries Exporting Standard Pipe*, 18 Int'l Trade Rep. (BNA) 866, 866 (May 31, 2001) (reporting that ten U.S. producers of standard pipe charged China, Malaysia, Indonesia, South Africa, and Romania with dumping) [hereinafter *New Antidumping Case*].

9. See Alan Wm. Wolff, *The Escape Clause and Antidumping: A Case Study in Steel*, Address Before the American Enterprise Institute (July 19, 1999), available at http://www.dbtrade.com/publications/the_escape_clause_and_antidumping.htm (commenting that there are several drawbacks when resorting to a section 201 investigation and suggesting anti-dumping actions are more effective) [hereinafter *The Escape Clause*]. *But see* Levin, *supra* note 8 (specifically asking the President to initiate a section 201 investigation under the Trade Act of 1974).

10. Tariff Act of 1930 §§ 701, 731, 19 U.S.C. §§ 1671, 1673 (2000).

11. See Nucor, *supra* note 8; see *New Antidumping Case*, *supra* note 8, at 866.

an investigation under section 201 of the 1974 Trade Act.¹² Meanwhile, the European Union (E.U.), the American Institute for International Steel, Inc., and others condemn these actions as “protectionist” measures in order to save inefficient U.S. companies.¹³

On June 5, 2001, President Bush announced his three-pronged comprehensive initiative to address the challenges facing the U.S. steel industry.¹⁴ First, he directed the U.S. Trade Representative (USTR), in cooperation with the Secretary of Commerce and the Secretary of the Treasury, to initiate negotiations with trading partners to eliminate inefficient steel capacity worldwide.¹⁵ Second, the President instructed the USTR, along with the Secretaries of Commerce and Treasury, to initiate negotiations with trading partners concerning rules to govern steel trade in the future and eliminate market-distorting government subsidies.¹⁶ Finally, he instructed the USTR to request the U.S. International Trade Commission (ITC) to initiate an investigation concerning the injurious consequences on the U.S. steel industry under section 201 of the Trade Act of 1974.¹⁷

12. See Levin, *supra* note 8; see also Trade Act of 1974 § 201, 19 U.S.C. § 2251 (2000).

13. See, e.g., Press Release, U.K. Steel Ass'n, UK Steel Industry Blasts Threat of U.S. Import Restrictions (Apr. 9, 2001), available at <http://www.uksteel.org.uk/nw70.htm> (reporting that only inefficient U.S. companies are suffering and it is not fair to place all the blame on increased imports); AIIS, *supra* note 6 and accompanying text; Rossella Brevetti, *Bush to Ask for ITC Section 201 Case on Steel Imports, Seeks Multilateral Talks*, 18 Int'l Trade Rep. (BNA) 878, 879 (June 7, 2001) (quoting European Trade Commissioner Pascal Lamy who indicated that “[t]he cost of restructuring in the U.S. steel sector should not be shifted to the rest of the world”).

14. See Statement by the President Regarding a Multilateral Initiative on Steel, available at <http://www.whitehouse.gov/news/releases/2001/06/print/20010605-4.html> (June 5, 2001) [hereinafter Initiative].

15. *Id.*; see *infra* note 32 and accompanying text.

16. See Initiative, *supra* note 14.

17. *Id.*; see Letter from Robert B. Zoellick, U.S. Trade Representative, to Stephen Koplan, Chairman, U.S. Int'l Trade Comm'n 1 (June 22, 2001), available at <http://www.usitc.gov/steel/ER0622Y1.pdf> (requesting an investigation by the U.S. International Trade Commission); see also S. Res. 537, 107th Cong. (2001), available at <http://finance.senate.gov/steelresolution.pdf> (adopting resolution by the U.S. Senate Committee on Finance directing the International Trade Commission investigate certain steel imports under section 201 of the Trade Act of 1974).

On October 22, 2001, the ITC concluded its section 201 investigation and determined that twelve steel import products (out of thirty-three product categories) are being imported into the United States at such increased quantities as to be a substantial cause of serious injury or threat of serious injury to the U.S. industry.¹⁸ The ITC has also affirmatively concluded several of the anti-dumping investigations and found that certain steel products have been imported into the United States at prices that are less than fair value and by companies that are subsidized by their respective governments.¹⁹

This Comment focuses on two of the primary U.S. trade laws that may be utilized to remedy the deleterious effects from the increased imports of steel. These mechanisms, as identified above, are (1) anti-dumping and countervailing duty investigations under section 701 and section 731, respectively, of the Tariff Act of 1930²⁰ and (2) an investigation under section 201 of the Trade Act of 1974.²¹ Part II of this Comment briefly outlines the complex history of problems concerning the declining steel industry in the United States.²² Part III summarizes the background concerning the World Trade Organization (WTO) agreements and the role they play in the current steel crisis.²³ Part IV highlights the corresponding U.S. trade laws; discusses which remedy, if any, is more effective in

18. Press Release, Int'l Trade Commission, ITC Details Its Determinations Concerning Impact of Imports of Steel on U.S. Industry (Oct. 23, 2001), *available at* <http://www.usitc.gov/er/nl2001/ER1023Y1.PDF>.

19. *See, e.g.*, Carbon and Certain Alloy Steel Wire Rod From Brazil, Canada, Egypt, Germany, Indonesia, Mexico, Moldova, South Africa, Trinidad and Tobago, Turkey, Ukraine, and Venezuela, 66 Fed. Reg. 54,539 (Dep't Commerce Oct. 29, 2001) (determination); Certain Cold-Rolled Steel Products from Argentina, Brazil, China, Indonesia, Japan, Russia, Slovakia, South Africa, Taiwan, Thailand, Turkey, and Venezuela, 64 Fed. Reg. 41,458 (Dep't Commerce July 30, 1999) (determination); Hot-Rolled Steel Products from Argentina, China, India, Indonesia, Kazakhstan, the Netherlands, Romania, South Africa, Taiwan, Thailand, and Ukraine, 66 Fed. Reg. 805 (Dep't Commerce Jan. 4, 2001) (determination). *But see, e.g.*, Certain Cold-Rolled Steel Products from China, Indonesia, Slovakia, and Taiwan, 65 Fed. Reg. 44,076 (Dep't Commerce July 17, 2000) (determination).

20. Tariff Act of 1930 §§ 701, 731, 19 U.S.C. §§ 1671, 1673 (2000).

21. Trade Act of 1974 § 201, 19 U.S.C. § 2251 (2000).

22. *See infra* notes 25–56 and accompanying text.

23. *See infra* notes 57–132 and accompanying text.

dealing with the current crisis; and addresses any potential conflicts between the relevant U.S. trade laws and the obligations of the United States under the WTO agreements.²⁴

II. HISTORY OF THE DECLINING STEEL INDUSTRY IN THE UNITED STATES

During the early 1980s, the U.S. steel industry faced serious challenges.²⁵ Foreign competitors were reportedly producing massive quantities of inexpensive steel that eventually flooded the U.S. market during the same period the U.S. economy was hit by a devastating recession.²⁶ Throughout the 1980s and early 1990s, the U.S. steel industry underwent a painful restructuring.²⁷ Older, inefficient mills were shut down, capacity was cut, and billions of dollars were invested in new technology and training.²⁸ With these changes, productivity increased by three hundred percent and 330,000 jobs were eliminated.²⁹ Led by “mini-mill” companies, such as Nucor, the U.S. steel industry purportedly became a world leader in low-cost production and therefore felt “it would be difficult for foreign producers to deliver steel to the U.S. market at a lower cost than U.S. mills.”³⁰ Consequently, the 1998 steel crisis was especially

24. See *infra* notes 133–90 and accompanying text.

25. Stand Up for Steel Coalition, *History of the U.S. Steel Crisis*, at <http://www.fairtradewatch.org/steelcrisishistory091400.htm> (Sept. 14, 2000).

26. *Id.*

27. *Id.*; see also GLOBAL STEEL REPORT, *supra* note 1, at 6 (noting that the U.S. steel industry went through a “painful restructuring process in the 1980s and early 1990s”).

28. GLOBAL STEEL REPORT, *supra* note 1, at 6.

29. *Id.*

30. *Id.* at 7. Cf. Alan Wm. Wolff, Revitalizing American Trade Law: The President’s Use of Section 201, Address Before the New America Foundation (July 20, 2001), available at <http://www.dbtrade.com/publications/wolff201speech.htm> (reporting that the United States is one of the top producers in the world) [hereinafter Revitalizing American Trade Law]. Two types of production mills exist in the U.S. steel industry: (1) “mini-mill” companies produce steel by melting scrap in electric-arc furnaces and (2) “integrated” mills produce steel through utilizing blast furnaces or basic oxygen furnaces that convert iron ore into steel. See Thomas R. Howell & Brent L. Bartlett, *The New Crisis in Steel, A Report Submitted to the House Ways and Means Trade Subcommittee and the Senate Finance Committee*, at http://www.dbtrade.com/publications/the_new_crisis_in_steel/the_new_crisis_in_steel.htm (Apr. 1999). The “mini-mill” technology of

damaging to the U.S. steel industry because the American economy as a whole was doing well and both prices and demand for steel were up in the first half of 1998.³¹

The 1997 Asian financial crisis coupled with catastrophic drops in Asian demand possibly compounded the problem caused by overcapacity in the global steel industry.³² The Asian financial crisis suddenly led to deep recessions in several Asian economies, and investment in and consumption of steel plummeted in Asia.³³ Eventually, financial turmoil spread to other countries, such as Russia and Brazil, and increasing quantities of steel were diverted to the remaining healthy markets—the United States for one.³⁴ Considering the openness of the American market and continuing high demand and prices for steel, it was not surprising that the foreign-produced steel eventually found its way into the United States.³⁵

Beyond the immediate causes associated with the 1997 Asian financial crisis, other long-term factors contributed to the

melting scrap, rather than iron ore, in electric furnaces has been recognized as cheaper and more efficient and is one of many factors attributable to the continuing success and solvency of “mini-mills.” Interview with Gaile Henry, Jr., President, Beaumont Iron & Metal Corp., in Beaumont, Tex. (Mar. 4, 2002) (on file with author) [hereinafter Interview with Gaile Henry].

31. GLOBAL STEEL REPORT, *supra* note 1, at 7.

32. *Id.* at 2. Overcapacity exists when worldwide steelmaking capacity is consistently well-above long-term global production. *Id.* at 3. “In the case of steel, this may be attributable to the fact that less than perfect market forces dominate the industry, such that government supports and other activities have sustained uneconomic capacity and production.” *Id.* However, some members in the industry assert that the United States, unlike most countries, does not exhibit overcapacity and that the 1980 restructuring left the United States with insufficient steel-making capacity to meet domestic demand for steel. See R.M. CYERT & R.J. FRUEHAN, MEETING THE CHALLENGE: U.S. INDUSTRY FACES THE 21ST CENTURY, THE BASIC STEEL INDUSTRY 14–16 (Dec. 1996), at <http://www.ta.doc.gov/Reports/Steel/cd91a.pdf>; see also Revitalizing American Trade Law, *supra* note 30 (reporting that America does not have excess capacity). *But see* GLOBAL STEEL REPORT, *supra* note 1, at 3 (reporting that the London-based Iron and Steel Statistics Bureau (ISSB) estimated that the United States had approximately fifteen million metric tons of overcapacity, although lower when compared to any other country or region).

33. GLOBAL STEEL REPORT, *supra* note 1, at 2.

34. *Id.*

35. *Id.* at 4.

1998 U.S. steel crisis.³⁶ Purportedly, common structural problems found in the steel industries of four countries—Russia, Japan, Korea, and, to a lesser extent, Brazil—amplified the increase of import volume and sharp decline of import prices.³⁷ Market-distorting practices in each of these countries insulated their steel industries from competition and thereby facilitated unfair trading.³⁸ Some of these practices included direct government assistance, apparent coordination among steel producers, unsound banking practices, and import barriers.³⁹

In Russia, for example, state planners produced tremendous amounts of steel without regard for efficiency, productivity, competitiveness, or environmental protection.⁴⁰ Thus, from 1990 to 1998, demand for steel in Russia dropped by eighty-five percent.⁴¹ However, Russian central, regional, and local governments resisted restructuring to avoid layoffs and continued to keep most of the mills operating, which eventually led to an increase in steel exports by five hundred percent.⁴²

The Japanese steel market, on the other hand, purportedly was and still is dominated by a cartel of integrated producers who control prices and discourage imports.⁴³ Integrated steel producers thus collude to charge higher prices at home to turn higher profits and thereby allow exports to be “subsidized” at lower prices.⁴⁴ Consequently, after the Asian financial crisis hit, Japan actually reduced the volume of imports of hot-rolled steel from East Asian countries, while increasing exports to the United States from a monthly average of fifty thousand tons to

36. *Id.*

37. *Id.* at 37.

38. *Id.*; see also Revitalizing American Trade Law, *supra* note 30 (discussing steel trade distortions employed in various countries, including Russia, Japan, Korea, and Brazil, among others).

39. GLOBAL STEEL REPORT, *supra* note 1, at 37.

40. Revitalizing American Trade Law, *supra* note 30.

41. *Id.*

42. *Id.*

43. *Id.*

44. See GLOBAL STEEL REPORT, *supra* note 1, at 5–6. As proof of this collusion, steel experts in the United States and Japan have cited that production shares among the major Japanese companies essentially have not changed for twenty-five years. *Id.* at 38.

more than two million tons in just a seven-month period.⁴⁵

Structural problems concerning Korea, however, may be linked to excessive borrowing to fund over-investment in under-performing capacity.⁴⁶ These extensive new investments in the 1990s were funded by unsound, often government-influenced, bank lending practices that allowed many insolvent companies to remain in operation both before and during the crisis.⁴⁷ Thus, exports to the United States were increased from 1998 to 2001 in staggering amounts.⁴⁸

Although Brazil did not increase exports to the United States as much as Russia, Japan, and Korea, Brazil did engage in considerable price-cutting in order to sustain export volumes.⁴⁹ “With an investment of over [fifteen] billion [dollars] from the late seventies to the early 1990’s, the Brazilian government created a steel industry that ha[d] twice the capacity needed to meet domestic demand.”⁵⁰ Brazil, similar to Japan, purportedly limited domestic price competition and engaged in various import barrier practices, such as high tariffs and import licensing, which allowed producers to sell cheaply abroad.⁵¹

Economic growth in Asia and America during the early to mid-1990s initially obscured the fundamental structural problems resulting from the market-distorting practices of these four countries.⁵² Growth was significant enough that the Asian and American markets absorbed the record amounts of steel produced and exported, however, only for a limited period.⁵³ When Japan, Korea, Brazil, and Russia experienced economic recessions and other key export markets collapsed, millions of

45. Revitalizing American Trade Law, *supra* note 30.

46. GLOBAL STEEL REPORT, *supra* note 1, at 6.

47. *Id.*

48. Revitalizing American Trade Law, *supra* note 30.

49. GLOBAL STEEL REPORT, *supra* note 1, at 38.

50. Revitalizing American Trade Law, *supra* note 30.

51. See GLOBAL STEEL REPORT, *supra* note 1, at 6; Revitalizing American Trade Law, *supra* note 30.

52. GLOBAL STEEL REPORT, *supra* note 1, at 39.

53. *Id.*

tons of steel overcapacity had to be diverted to other markets.⁵⁴ Due to the large and open American market and its continued growth in demand and high prices, the United States naturally caught the attention of steel producers from these four countries.⁵⁵ The market-distorting tactics, which were tolerated and even encouraged by some foreign governments, further exacerbated the situation.⁵⁶

III. THE ROLE OF THE WTO

A. *The General Agreement on Tariffs and Trade and the WTO Agreements*

Signed in 1947, the General Agreement on Tariffs and Trade (GATT) was a multilateral agreement that regulated trade between more than one hundred countries.⁵⁷ In the preamble, the purpose of GATT is defined as the “substantial reduction of tariffs and other trade barriers and the elimination of preferences, on a reciprocal and mutually advantageous basis.”⁵⁸ Since the signing, there have been eight negotiation rounds—the Uruguay Round being the most recent—addressing various trade issues, such as tariffs and services.⁵⁹ The Uruguay Round lasted seven years and was completed on December 15, 1993.⁶⁰ This round resulted in an agreement among 117 countries, including the United States, to create more comprehensive and enforceable trade rules and to reduce the practice of trade barriers.⁶¹ This agreement, signed in April 1994, is formally known as the Final Act Embodying the Results of the Uruguay

54. *Id.*

55. *Id.*

56. *Id.*

57. *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter GATT]; *see also* Duke University School of Law Library, *Research Guides GATT/WTO*, at <http://www.law.duke.edu/lib/libser/publicat/researchGuides/gatt/gatt.html> (last visited Jan. 26, 2003) (outlining the history of GATT and the WTO) [hereinafter Duke].

58. Duke, *supra* note 57, at 1; *see also* GATT, *supra* note 57.

59. Duke, *supra* note 57, at 1.

60. *Id.*

61. *Id.*

Round of Multilateral Trade Negotiations (GATT 1994).⁶² The agreement was approved and implemented by the U.S. Congress in December 1994 and went into effect on January 1, 1995.⁶³

GATT 1994 also created the WTO, which came into being on January 1, 1995.⁶⁴ The main objective of the WTO is to “help trade flow smoothly, freely, fairly and predictably.”⁶⁵ This objective is met by (1) administering trade agreements, (2) providing a forum for negotiations concerning additional reductions of trade barriers, (3) settling policy disputes, and (4) enforcing trade rules.⁶⁶ Thus, before the WTO inception, GATT 1947 served as a “de facto” organization that settled trade disputes for almost fifty years.⁶⁷

As of January 2003, there are 144 members of the WTO, including the United States, Japan, Korea, and Brazil; the Russian Federation is an “observer” government.⁶⁸ The WTO agreements are the result of open negotiations among the members; the current set being those established during the Uruguay Round.⁶⁹ By establishing these agreements, WTO members are supposed to be able to manage a non-discriminatory trading structure that outlines the rights and obligations of each member.⁷⁰ Through these agreements, each country promises to treat imports fairly and consistently in the

62. *Id.*; see also Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994) [hereinafter Final Act].

63. Duke, *supra* note 57, at 1.

64. *Id.*

65. See WTO, The WTO in Brief: Part 2: The Organization, at http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr02_e.htm (last visited Jan. 26, 2003).

66. *Id.*; see Duke, *supra* note 57, at 1.

67. Duke, *supra* note 57, at 1.

68. See WTO, Trading into the Future: The Introduction to the WTO, The Organization: Membership, Alliances and Bureaucracy, at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm (last visited Jan. 26, 2003) [hereinafter Trading into the Future: The Introduction to the WTO]. Observer governments are those that are currently negotiating membership. *Id.*

69. See WTO, The WTO in Brief: Part 3 The WTO Agreements, at http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr03_e.htm (last visited Jan. 26, 2003) [hereinafter WTO in Brief].

70. *Id.*

domestic markets and also guarantees exports are treated in a similar manner.⁷¹ This entails a commitment to cut and “bind” custom duty rates or tariffs on imports of goods and lower other barriers to trade.⁷² Inherent in the agreements is an established procedure for settling disputes among members.⁷³

Although binding tariffs that apply equally to all members are key to the smooth flow of trade in goods, the agreements provide for exceptions.⁷⁴ These exceptions concern (1) actions taken against dumping, (2) subsidies and special countervailing duties to offset the subsidies, and (3) emergency measures to temporarily limit imports in order to “safeguard” domestic industries.⁷⁵

1. *Anti-Dumping Actions*⁷⁶

Dumping occurs when a company exports a product at a lower price than the price charged in the company’s domestic market.⁷⁷ The WTO agreement permits a government to take

71. *Id.*

72. *See* Trading into the Future: The Introduction to the WTO: The Agreements, at http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm0_e.htm (last visited Jan. 26, 2003). “Bound” tariff rates are those that are committed and difficult to increase. *Id.* Goods, services, and intellectual property are all included. *Id.*

73. *Id.*; *see infra* text accompanying notes 113–26.

74. *See* WTO, Trading into the Future: The Introduction to the WTO: The Agreements: Anti-dumping, Subsidies, Safeguards: Contingencies, etc., at http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm (last visited Jan. 26, 2003) [hereinafter Anti-dumping].

75. *Id.* A safeguard measure has also been referred to individually as an “escape clause.” *See* The Escape Clause, *supra* note 9, at 3. Therefore, the country suffering trade injury may “escape” from its obligations. *See* Revitalizing American Trade Law, *supra* note 30.

76. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31 (1994), 33 I.L.M. 81 (1994) [hereinafter Anti-dumping Agreement].

77. *See* Anti-dumping, *supra* note 74. Opinions differ as to whether “dumping” is considered an unfair trade practice; however, many governments take action against dumping in order to protect their own domestic industries. *Id.* The WTO does not take a formal position on whether dumping is an unfair trade practice, but rather focuses on how governments may respond to it. *Id.* This is delineated in the “Anti-dumping Agreement.” *Id.*

action against dumping when there is a genuine “material” injury to the competing domestic industry.⁷⁸ To take such action, the country alleging dumping must be able to demonstrate: (1) that dumping has taken place, (2) that the export price is lower compared to the exporter’s domestic market price and the extent of that difference, and (3) that the dumping has caused actual injury.⁷⁹ When a country takes action against dumping, this tactic typically entails charging an extra import duty on the exporting country that, in effect, brings the price closer to the “normal value” and hopefully alleviates the injury experienced by the importing country’s industry.⁸⁰

Many different methods may be employed when calculating the degree of dumping engaged in by a particular country.⁸¹ The WTO agreements narrow the options available and set forth three methods that may be used when calculating a product’s “normal value.”⁸² This determination, however, is only the first in a series of factors that must be determined before filing anti-dumping measures.⁸³ Before a country may direct anti-dumping measures, it must also establish that the dumping has actually hurt the related industry in the importing country.⁸⁴ To establish this factor, the country alleging that dumping occurred must conduct an investigation according to the specified rules.⁸⁵

78. *Id.*

79. *Id.*

80. *See* Anti-dumping, *supra* note 74.

81. *Id.*

82. *Id.* The most important method is based on the price in the exporter’s domestic market. *Id.* When this price is unavailable, two other choices are available: the price charged by the exporter in another country or a calculation based on the combination of the exporter’s production costs plus other expenses and normal profit margins. *Id.*

83. *See id.*

84. *See* Anti-dumping, *supra* note 74.

85. *Id.* Detailed procedures are set out explaining how to initiate an anti-dumping case, how to conduct the investigations, and how to ensure that all interested parties are provided an opportunity to be heard. *Id.* The investigation must assess all pertinent economic factors that have a bearing on the state of the industry in question. *Id.* Member countries must notify the Committee on Anti-Dumping Practices about all preliminary and final anti-dumping actions and must report on all investigations bi-annually. *Id.* If any dispute arises, members are encouraged to meet with each other; but if these efforts fail, they may also employ the WTO Dispute Settlement Procedures. *Id.*

If the investigation shows that dumping has taken place and that the domestic industry has been hurt, the importing country may apply the anti-dumping duty.⁸⁶ However, any measure applied must expire no later than five years after the date of imposition, unless an investigation demonstrates that terminating the measure would result in injury.⁸⁷

2. *Subsidies and Countervailing Measures*⁸⁸

Where dumping is an action taken by a company, subsidies are the equivalent action taken by a government or government agencies—the government or agency either pays out subsidies directly or requires companies to subsidize certain customers.⁸⁹ Dumping and subsidies are often linked together because of the similarities.⁹⁰ For instance, the response to dumping and subsidies is often a special offsetting import tax: countervailing duty (CVD) when dealing with subsidies and anti-dumping duty (AD) when dealing with dumping.⁹¹ After certain requirements are met, both duties are imposed on products from specific countries as provided for in the WTO agreements.⁹²

Before imposing a duty, the importing country must first conduct a thorough investigation, similar to that required for an anti-dumping action, which demonstrates that the domestic industry has been hurt.⁹³ The WTO agreements outline rules for determining whether a product is subsidized, criteria for

86. See Anti-dumping, *supra* note 74.

87. *Id.*

88. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, WTO Agreement, Annex 1A, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 31 (1994), 33 I.L.M. 81 (1994) [hereinafter Subsidies and Countervailing Measures].

89. See Anti-dumping, *supra* note 74. This is the fundamental difference between dumping and subsidies and is noted in the agreements. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* The agreements regulate the use of subsidies and the actions taken by countries to counter the effects of subsidies. See Anti-dumping, *supra* note 74. An injured country may first appeal to the WTO Dispute Settlement Mechanism to seek withdrawal of the subsidy or the removal of its adverse effects or the country may launch its own investigation and ultimately charge extra duties on the imports that are injuring the domestic producers. *Id.*

93. *Id.*

assessing whether subsidized imports are “causing injury to” the domestic industry, procedures for commencing and conducting investigations, and rules on the implementation and duration of countervailing measures.⁹⁴ Instead of incurring a countervailing duty, subsidized exporters may voluntarily agree to raise the export prices.⁹⁵

3. *Safeguards: Emergency Protection from Imports*⁹⁶

A WTO member may temporarily restrict product imports if the domestic industry is injured or threatened with injury caused by a surge in imports.⁹⁷ However, when implementing a safeguard measure, the injury must be serious and any actions taken are confined to set time limits.⁹⁸ A “surge” in imports that may justify the implementation of safeguard actions “[can] be a real increase in imports (an *absolute* increase); or it can be an increase in the imports’ share of a shrinking market, even if the import quantity has not increased (*relative* increase).”⁹⁹

Companies or industries from the injured country may request safeguard actions by their government.¹⁰⁰ The WTO agreements outline specific requirements for safeguard investigations that would be conducted by concerned national authorities.¹⁰¹ The methods and procedures used by the investigating national authority must be “transparent” and must follow established rules and practices, seeking to avoid an arbitrary process.¹⁰²

94. *Id.* Similar to anti-dumping measures, the duration is normally five years for countervailing duty measures. *Id.*

95. *See* Anti-dumping, *supra* note 74.

96. Agreement on Safeguards, Apr. 15, 1994, WTO Agreement, Annex 1A, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 31 (1994), 33 I.L.M. 81 (1994) [hereinafter Safeguards].

97. *See* Anti-dumping, *supra* note 74.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *See id.* The investigating authority must announce publicly when hearings will take place and provide appropriate means for interested parties to present evidence. *Id.* The evidence must include opinions whether a specific measure is in the public interest. *Id.*

The WTO agreements provide the criteria to determine whether “serious injury” has been caused or threatened and to establish which factors must be considered in assessing the impact of the imports.¹⁰³ Safeguard measures imposed may be applied only to the extent necessary to prevent or remedy the injury and to help adjust the affected industry.¹⁰⁴ When imposed, the quantitative restrictions—quotas—should not normally reduce the quantity of imports below the annual average for the last three representative years for which statistics are available, unless clear justification is provided demonstrating that a different level is necessary to prevent or remedy the injury.¹⁰⁵

Unlike anti-dumping and countervailing duties, safeguard measures may not be targeted at imports from a particular country nor last for more than four years.¹⁰⁶ Most importantly, if measures are imposed for more than one year, the WTO agreements stipulate that the measures must be liberalized progressively over the course of the remaining years.¹⁰⁷

According to the agreements, if a country imposes safeguard measures to protect domestic producers, in principle, the country must give something in return.¹⁰⁸ The WTO agreements state that the exporting country or countries may request compensation through consultations and, if no agreement is reached, the exporting country or countries may retaliate by taking similar action.¹⁰⁹ For example, the retaliating country may increase tariffs on exports from the country implementing the safeguard actions.¹¹⁰ However, sometimes the exporting

103. *Id.*

104. *Id.*

105. *See id.*

106. *Id.* However, the agreement does allow quotas to be allocated among supplying countries, including in the exceptional circumstance where imports from certain countries have increased disproportionately quickly. *Id.* Further, a measure may be extended up to eight years, but is subject to a determination by competent national authorities that the additional years are needed and evidence that the industry is, in fact, adjusting. *Id.*

107. *Id.*

108. *See id.*

109. *Id.*

110. *Id.*

country must wait three years before taking retaliatory action.¹¹¹ Finally, governments must report each phase of the safeguard investigations and related decision-making to the WTO Safeguards Committee, which reviews the reports for compliance.¹¹²

B. The Dispute Settlement Process

Disputes typically arise when a member country takes certain actions or adopts policy measures that another country believes violate or do not live up to the WTO agreements.¹¹³ When nations join the WTO, they agree that, if they believe a fellow member is violating the rules, they will adopt the multilateral system of settling disputes in place of unilateral action.¹¹⁴

Reportedly, the system is based on rules that are “clearly defined” and that establish flexible timetables for completing a case.¹¹⁵ First rulings are made by a panel and are rejected or endorsed by every member of the WTO.¹¹⁶ The real objective, however, is not to make rulings, but rather to facilitate agreements through consultations.¹¹⁷ Therefore, the first stage is, in fact, consultations between the interested member governments.¹¹⁸ If consultations prove unsuccessful, the Dispute Settlement Body assigns a panel of experts to hear the case and accepts or rejects the panel’s findings or the results on appeal.¹¹⁹ The Dispute Settlement Body has the authority to monitor

111. *See id.* The exporting country will have to wait, for example, if the measures applied conform to the agreement provisions and are taken as a result of an “absolute” increase in import quantity from the exporting country. *Id.*

112. *Id.*

113. *See* WTO, Trading into the Future: Introduction to the WTO, Settling Disputes: The WTO’s ‘Most Individual Contribution,’ at http://www.wto.org/english/thewto_e/whatis_e/tif_e/ disp1_e.htm (last visited Jan. 26, 2003) [hereinafter Settling Disputes].

114. *Id.*

115. *Id.* If a case proceeds all the way through to a first ruling, it should take no longer than one year or fifteen months if an appeal is pursued. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

implementation of the rulings and recommendations and also to sanction retaliation when a country does not comply with a ruling.¹²⁰

The Dispute Settlement Understanding¹²¹ is applicable to disputes arising under the Anti-dumping Agreement, the Agreement on Subsidies and Countervailing Measures, and the Agreement on Safeguards.¹²² However, for disputes that arise under the Anti-dumping Agreement, article 17.6 establishes a “special standard of review” to be applied to matters of fact and questions of interpretation relating to the Anti-dumping Agreement.¹²³ Furthermore, the Subsidies and Countervailing Measures Agreement includes extensive special or additional procedures that provide for expedited procedures and mechanisms.¹²⁴ These procedures concern allegations of prohibited subsidies and mechanisms for collecting information necessary to determine the existence of serious prejudice in actionable subsidy cases.¹²⁵ Article 14 of the Safeguards Agreement, however, simply states that any dispute arising under that agreement is to be settled under the general Dispute Settlement Understanding.¹²⁶

120. *Id.*

121. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement, Annex 2, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 31 (1994), 33 I.L.M. 81 (1994) [hereinafter Understanding Settlement of Disputes].

122. See Anti-dumping Agreement, *supra* note 76, art. 17.1; Subsidies and Countervailing Measures, *supra* note 88, art. 30; Safeguards, *supra* note 96, art. 14.

123. Anti-dumping Agreement, *supra* note 76, art. 17.6. “This standard gives a degree of deference to the factual decisions and legal interpretations of national authorities, and is intended to prevent dispute settlement panels from making decisions based purely on their own views.” *Id.*

124. See generally Subsidies and Countervailing Measures Agreement, *supra* note 88; see also WTO, Subsidies and Countervailing Measures: Overview, Agreement on Subsidies and Countervailing Measures (SCM Agreement), at http://www.wto.org/english/tratop_e/scm_e/subs_e.htm (last visited Jan. 26, 2003) [hereinafter SCM Agreement].

125. See SCM Agreement, *supra* note 124.

126. Safeguards, *supra* note 96, art. 14.

C. Required Notification of Corresponding Laws and Policies Implemented by Member Countries

WTO member nations are not legally bound by tariff reduction commitments made during GATT rounds or to actions taken through anti-dumping measures, countervailing duties or safeguard measures, unless these commitments and procedures are codified through legislation by the acting member nation.¹²⁷ Therefore, member nations must not only notify the appropriate WTO panel of the various investigations initiated concerning anti-dumping, subsidies, or safeguards, but also must notify the panel of domestic laws or regulations relating to these measures.¹²⁸ As of October 2001, the United States satisfied this requirement by notifying the appropriate panels of domestic legislation concerning these three measures.¹²⁹ The U.S. legislation that corresponds to the WTO Agreements on Anti-dumping, Subsidies and Countervailing Measures, and Safeguards are section 701 of the Tariff Act of 1930,¹³⁰ section 731 of the Tariff Act of 1930,¹³¹ and section 201 of the 1974 Trade Act,¹³² respectively.

127. See INTERNATIONAL ECONOMICS STUDY CENTER, U.S. TRADE LAW HIGHLIGHTS, available at <http://internationalecon.com/v1.0/ch20/20c040.html> (last modified May 23, 1999).

128. See Anti-dumping Agreement, *supra* note 76, art. 18.5; Subsidies and Countervailing Measures, *supra* note 88, art. 32.6; Safeguards, *supra* note 96, art. 12.6.

129. See, e.g., Report (2001) of the Committee on Anti-Dumping Practices, Doc. 01-5338 (G/L/495), available at http://www.wto.org/english/tratop_e/adp_e/adp_e.htm (annual reports) (Oct. 31, 2001); Report (2001) of the Committee on Subsidies and Countervailing Measures, Doc. 01-5389 (G/L/496), available at http://www.wto.org/english/tratop_e/scm_e/scm_e.htm (annual reports) (Nov. 1, 2001); Report (2001) of the Committee on Safeguards to the Council for Trade in Goods, Doc. 01-5335 (G/L/494), available at http://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm (Reports of the Safeguard Committee) (Oct. 31, 2001).

130. Tariff Act of 1930 § 701, 19 U.S.C. § 1671 (2000).

131. Tariff Act of 1930 § 731, 19 U.S.C. § 1673.

132. Trade Act of 1974 § 201, 19 U.S.C. § 2251 (2000).

IV. THE CORRESPONDING U.S. TRADE LAWS AND RELATED ISSUES

A. *The Relevant U.S. Trade Laws*

1. *Anti-Dumping and Countervailing Duty Investigations*

According to U.S. trade law, anti-dumping or countervailing duty investigations may be initiated either on the basis of a petition filed with the U.S. Department of Commerce on behalf of a specific domestic industry or an independent action by the U.S. Department of Commerce.¹³³ Domestic industries that are eligible to petition the government for an investigation include the manufacturers, producers, or wholesalers of the products being dumped on the U.S. economy.¹³⁴ The petitioners may allege that a particular product is being both subsidized and sold at prices lower than fair value.¹³⁵ After an investigation is completed, assuming that all statutory requirements and procedures are satisfied¹³⁶ and that the ITC issues an affirmative determination,¹³⁷ the U.S. Department of Commerce may issue a countervailing duty or anti-dumping duty order, requiring imposition of duties in the amount of the net subsidy or dumping margin.¹³⁸

133. See INTERNATIONAL TRADE COMMISSION, U.S. DEP'T OF COMMERCE, SUMMARY OF STATUTORY PROVISIONS RELATED TO IMPORT RELIEF (1996), at <ftp://ftp.usitc.gov/pub/reports/studies/PUB2944.PDF> [hereinafter Practice and Procedure].

134. *Id.*

135. *Id.*

136. See *id.* at 2-9 (detailing statutory requirements and procedures).

137. *Id.* at 6.

138. *Id.* Subtitle A of Title VII of the Tariff Act of 1930, as added by the Trade Agreements Act of 1979, provides for the following:

[C]ountervailing duties will be imposed when two conditions are met: (a) the U.S. Department of Commerce (Commerce) determines that the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of the subject merchandise that is imported or sold (or likely to be sold) for importation into the United States and (b) in the case of merchandise imported from a Subsidies Agreement country, the U.S. International Trade Commission (Commission) determines

2. Section 201 Investigations

Sections 201 through 204 of the Trade Act of 1974 concern investigations of injury to U.S. industries from increased imports.¹³⁹ The provisions dictate the procedures for investigations conducted by the ITC “as to 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.”¹⁴⁰ The ITC may conduct investigations based on its independent motion; a petition from an entity, a trade association, firm, certified or recognized union, or group of workers, that represents the industry; a request from the President or the USTR; or a resolution of the U.S. House Committee on Ways and Means or the U.S. Senate Committee on Finance.¹⁴¹

A section 201 investigation is confined to a specific time frame as set forth in the relevant provisions.¹⁴² When the ITC makes an affirmative finding, it recommends to the President the necessary action to facilitate positive adjustment by the industry in response to the import competition.¹⁴³ The ITC may recommend an increase in a duty; imposition of a quota; imposition of a tariff-rate quota, which is a two-tiered tariff

that an industry in the United States is materially injured or threatened with material injury, or that the establishment of an industry is materially retarded, by reason of imports of that merchandise.

Id. at 1; 19 U.S.C. § 1671 (2000). Subtitle B of Title VII of the Tariff Act of 1930, as added by the Trade Agreements Act of 1979, provides for the following however:

[A]ntidumping duties will be imposed when two conditions are met: (a) Commerce determines that the foreign subject merchandise is being, or is likely to be, sold in the United States at less than fair value, *and* (b) the Commission determines that an industry in the United States is materially injured or threatened with material injury, or that the establishment of an industry is materially retarded, by reason of imports of that merchandise.

Practice and Procedure, *supra* note 133, at 1–2; 19 U.S.C. § 1673.

139. Practice and Procedure, *supra* note 133, at 15; *see* 19 U.S.C. §§ 2251–2254.

140. Practice and Procedure, *supra* note 133, at 15.

141. *Id.* The current U.S. steel crisis is the first incidence in the history of section 201 when both the President and Congress requested initiation of a case. *See* Revitalizing American Trade Law, *supra* note 30.

142. *See* Practice and Procedure, *supra* note 133, 15–21 (detailing the time limits of an investigation).

143. *Id.* at 15–16.

under which goods enter at a higher duty after the quota is filled; trade adjustment assistance; negotiations to address underlying causes of the increase in imports; or any of these actions in combination.¹⁴⁴

Once the President receives and considers the recommendations submitted by the ITC, the President may take the specific action recommended or certain other actions.¹⁴⁵ The President must report to Congress on the action he employs. If he takes action that differs from the ITC's recommendation, or takes no action at all, Congress is empowered to direct the President to enforce the ITC's recommended action through a joint resolution.¹⁴⁶

B. Is One Remedy More Appropriate to Handle the Current Crisis?

As previously mentioned, the U.S. steel industry has suffered tremendously from the influx of low-priced steel imports.¹⁴⁷ Thirty-five companies have filed for bankruptcy and more than fifty-thousand steelworkers have lost their jobs since the beginning of the crisis.¹⁴⁸ Because of the crisis, even Nucor, a highly efficient U.S. "mini-mill" company, which previously refused to join in the administrative proceedings against unfair trade practices, was compelled to support such measures.¹⁴⁹

Most U.S. policymakers, steel industry representatives, and experts agree that some action must be taken to stop the flood of low-priced steel imports into the United States; however, they do not all agree on how to effectively resolve the problem.¹⁵⁰ On

144. See International Trade Commission, Global Safeguard Investigations—Frequently Asked Questions, at http://www.usitc.gov/er/safeguard/201_FAQ_BASIC.HTM (last visited Jan. 26, 2003).

145. Practice and Procedure, *supra* note 133, at 15.

146. *Id.* at 18.

147. See *supra* Part II.

148. See *supra* text accompanying notes 2–3.

149. GLOBAL STEEL REPORT, *supra* note 1, at 7 (reporting to the President on the magnitude of new imports and the extent of the detrimental effects on the U.S. steel industry).

150. See The Escape Clause, *supra* note 9 (advocating anti-dumping and countervail actions); Nancy E. Kelly, *Steelmakers Hedge '201' with CR Dumping Cases*, AM. METAL MARKET, Oct. 1, 2001, at 1 [hereinafter Kelly, *Steelmakers Hedge*]; Levin,

March 5, 2002, President Bush announced his determination, which was based on the investigation and recommendations of the ITC under section 201.¹⁵¹ As evidenced by the presidential proclamation Multilateral Initiative on Steel, utilization of either safeguard measures or anti-dumping and countervailing measures is only one part of the solution to the steel crisis.¹⁵²

As previously mentioned, remedies under both the safeguard measures and anti-dumping and countervailing duty measures have been requested due to the influx of steel imports at prices lower than market value.¹⁵³ Although some industry representatives filed anti-dumping and countervailing duty petitions prior to the initiation of the ITC section 201 investigation, other representatives subsequently filed petitions.¹⁵⁴ Commentators indicated that the subsequent filings were unusual in light of common trade law practices and they attributed the atypical ordering to the severity of injury suffered by the U.S. steel industry.¹⁵⁵

According to some trade lawyers and producers who filed anti-dumping and countervailing duty cases after the initiation of the section 201 investigation, the tactic serves as an “additional hedge” for the steel industry if the President does not impose a satisfactory remedy.¹⁵⁶ This reasoning illustrates the contention that some groups believe the section 201

supra note 8; Claude Barfield, *Steel: Use Safeguards Clause*, J. COM. ONLINE, Mar. 4, 1999, at <http://www.aei.org/ra/rabarfield2.htm>; *Dumping and Subsidy Laws: Best Way to Level Playing Field in Steel Trade*, 16 Int'l Trade Rep. (BNA) 232, 232 (Feb. 10, 1999); Greg Mastel, *Just Use the Escape Clause?*, J. COM., Apr. 18, 1999, available at <http://www.econstrat.org/jocescape.htm> [hereinafter *Just Use the Escape Clause*]; Alan Wm. Wolff, *The Positive Contribution of Antidumping to a Liberal World Trading System*, Address Before the World Business Forum (Oct. 9, 1999), available at http://www.dbtrade.com/publications/bretton_woods.htm.

151. See Proclamation No. 7529, 67 Fed. Reg. 10,553 (Mar. 5, 2002), available at <http://www.whitehouse.gov/news/releases/2002/03/print/20020305-7.html> [hereinafter Proclamation]; see also Steel Import Investigations, 66 Fed. Reg. 67,304 (Int'l Trade Comm'n Dec. 28, 2001) (determination), available at <http://www.usitc.gov/steel/i1220y1.pdf> (recommending tariffs up to 40% for key steel products).

152. See *supra* text accompanying notes 14–17.

153. See *supra* text accompanying notes 10–12.

154. See Kelly, *Steelmakers Hedge*, *supra* note 150.

155. *Id.*

156. *Id.*

safeguard is the weaker tactic, whereas anti-dumping and countervailing duty remedies are more effective.¹⁵⁷

Proponents of anti-dumping and countervailing duty measures point to several key shortcomings in the section 201 process.¹⁵⁸ First, they argue that the standard for obtaining relief under section 201 is too stringent.¹⁵⁹ Under section 201 of the 1974 Trade Act, the United States requires that the imports be the “substantial cause” of injury, which some consider a higher burden than the “serious injury or threat thereof” standard set forth in the WTO agreements.¹⁶⁰ Commentators contend that, in practice, it would be difficult to prove injury if an industry was simultaneously experiencing problems due to a recession; therefore, employing the WTO standard would be more reasonable.¹⁶¹ Second, according to industry professionals, the provision is not designed to address unique problems, such as that suffered by the U.S. steel industry from an intense surge of imports.¹⁶² Experts indicate that in the past the ITC’s section 201 procedures focused on import problems that developed slowly and the provisions need to be revised to address the unique problems created by these types of surges.¹⁶³ Finally, the section 201 concept of adjustment is criticized.¹⁶⁴ The goal of the section is short-term relief to help an injured industry adjust in order to become more competitive or go out of business in an orderly manner.¹⁶⁵ As previously indicated, opinions differ as to

157. See *The Escape Clause*, *supra* note 9; *Just Use the Escape Clause*, *supra* note 150. Even if the U.S. International Trade Commission recommends relief, “relief can be rejected if the [P]resident determines it is not in the national interest or threatens national security.” See *Just Use the Escape Clause*, *supra* note 150.

158. See *The Escape Clause*, *supra* note 9; *Just Use the Escape Clause*, *supra* note 150.

159. *Just Use the Escape Clause*, *supra* note 150.

160. *Id.*

161. *Id.*; see also *The Escape Clause*, *supra* note 9.

162. *Just Use the Escape Clause*, *supra* note 150.

163. *Id.*

164. *The Escape Clause*, *supra* note 9.

165. *Id.* Section 201 requires industries to draft plans for restructuring in order to obtain import restrictions for up to four years. See Nancy E. Kelly, *USTR to Mills: ‘201’ Ideas Must Entail Restructuring*, AM. METAL MARKET, Oct. 29, 2001, at 1 [hereinafter Kelly, *USTR to Mills*].

whether the U.S. steel industry needs further restructuring.¹⁶⁶

For example, opponents of the section 201 remedy as the solution for the current crisis contend that the U.S. steel industry dramatically modernized to become “the low-cost producer for the U.S. market”¹⁶⁷ However, others, such as USTR Robert Zoellick, asserted that there is further need for restructuring to make the U.S. industry more competitive.¹⁶⁸ In his address to the National Association of Manufacturers, USTR Zoellick stated that the Bush Administration repeatedly acknowledged excess steel capacity as a global problem and indicated that the Bush Administration “would use the Section 201 provision ‘creatively’ to help the steel industry if it was ‘courageous’ enough to proceed with restructuring.”¹⁶⁹

Proponents of anti-dumping and countervailing measures, however, emphasize other important reasons for using these measures.¹⁷⁰ For example, commentators vigorously assert that “[s]teel imports into the United States are in fact dumped and subsidized”¹⁷¹ and point out that anti-dumping and countervailing duty laws are more appropriate and effective to address such unfair trading practices.¹⁷² Anti-dumping and countervailing duty measures are considered more equitable because relief is selective and only unfairly traded goods are affected;¹⁷³ whereas section 201 of the 1974 Trade Act and the WTO Agreement on Safeguards are ostensibly applied globally because they relate less to unfair trade practices and more to remedying surges in imports.¹⁷⁴ Further, proponents argue that duties actually applied are limited to the established dumping margins, that is the rates of subsidy, and those duties are

166. See *supra* text accompanying notes 25–31 and note 32.

167. The Escape Clause, *supra* note 9.

168. See Kelly, *USTR to Mills*, *supra* note 165.

169. *Id.* at 1.

170. See The Escape Clause, *supra* note 9; *Just Use the Escape Clause*, *supra* note 150.

171. The Escape Clause, *supra* note 9.

172. *Just Use the Escape Clause*, *supra* note 150.

173. The Escape Clause, *supra* note 9.

174. See *supra* notes 106, 138 and accompanying text.

rescinded when the dumping ceases.¹⁷⁵ Finally, these proponents affirm that anti-dumping and countervailing duty cases are not hindered by foreign policy interests, unlike those under section 201 which afford the President wide discretion to accept or reject the ITC's recommendations.¹⁷⁶

Advocates for utilization of section 201 in steel crises validate their position by pointing out the failure of governmental findings and remedies to stem the import surges.¹⁷⁷ These individuals indicate that safeguard actions are more flexible in substance and duration, and they further contend that the presidential authority is a positive attribute as he may tailor the remedy to "match evolving competitive realities."¹⁷⁸ Finally, some believe the section 201 investigation may serve as "leverage" to encourage negotiations that the United States needs to address the problems in the global marketplace.¹⁷⁹ However, others contend that this policy backfired, considering the recent promise by the E.U. to retaliate if the United States does not abandon plans to "protect" the domestic steel industry.¹⁸⁰

C. *Conflicts Between U.S. Trade Laws and Obligations Under the WTO*

There is no doubt that U.S. trade laws are coming under intense fire. Consider, for example, the recent speech given by the E.U. Commissioner, Pascal Lamy, who labeled the ITC's recommendations as blatantly protectionist and fervently stated that any action based on these recommendations would be "a clear violation of the WTO rules."¹⁸¹ Commissioner Lamy further

175. The Escape Clause, *supra* note 9.

176. *Id.*

177. See Levin, *supra* note 8; Brevetti, *supra* note 13, at 878.

178. See Barfield, *supra* note 150.

179. See Brevetti, *supra* note 13, at 878.

180. Geoff Winestock, *Europe's Steelmakers Press EU to Threaten Sanctions on U.S.*, WALL ST. J., Jan. 11, 2002, at A6.

181. See Press Release, Delegation of the European Commission to the U.S., EU Ready to Take All Necessary Steps to Keep Foreign Markets Open to European Steel and to Prevent Flood of Imports into EU if U.S. Goes down Blatantly Protectionist Road (Dec. 13, 2001), at <http://www.eurunion.org/news/press/2001/2001096.htm>.

stated that one option the E.U. may consider to protect the E.U. industry is to bring the United States in front of the WTO.¹⁸²

Along the same lines, others contend that continued American insistence on U.S. trade laws that actually foster the U.S. commitment to the WTO is sparking controversy between the United States and its trading partners abroad.¹⁸³ Reportedly, in response to a series of challenges to U.S. trade laws and practices, the WTO Dispute Settlement Body made several affirmative rulings, holding that the U.S. government is in violation of its international obligations.¹⁸⁴

However, others contend that the WTO Dispute Settlement Mechanism has become ineffective.¹⁸⁵ They argue that this weakness is due to the fact that meaningful consultations no longer take place, even though required in the WTO agreements,¹⁸⁶ and that the WTO Secretariat uses the “dispute settlement [as] a legislative function, to fill in the gaps and clarify ambiguities in trade agreements that the nations negotiating them could not or consciously would not do.”¹⁸⁷ These experts explain that the practices of the WTO Dispute Settlement Panel are interfering with American and other nations’ sovereignty.¹⁸⁸ By fabricating obligations that do not currently exist in the WTO agreements and creating certain “new” rights while curtailing others, the Dispute Settlement Panels have obstructed the basic rights of member States in deciding to what they will and will not be bound.¹⁸⁹ The most controversial procedure is that the Dispute Settlement Panels

182. *Id.*

183. See Lewis E. Leibowitz, *Safety Valve or Flash Point? The Worsening Conflict Between U.S. Trade Laws and WTO Rules*, Center for Trade Policy Studies-Trade Policy Analysis No. 17, at <http://www.freetrade.org/pubs/pas/tpa-017es.html> (Nov. 6, 2001).

184. *Id.*

185. See Alan Wm. Wolff, *Problems with WTO Dispute Settlement*, Address Before the American Enterprise Institute (Apr. 3, 2001), available at http://www.dbtrade.com/publications/problems_with_WTO.htm [hereinafter *Problems with WTO Disputes*].

186. See *supra* text accompanying note 118.

187. See *Problems with WTO Disputes*, *supra* note 185.

188. *Id.*

189. *Id.*

are not directly accountable to any WTO member.¹⁹⁰

V. CONCLUSION

The steel crisis has brought to the forefront many critical issues concerning the role of the United States in the world trading system. Central to these issues is the problem of overcapacity in the global steel industry and the question of how to permanently resolve the problem.¹⁹¹ President Bush's Multilateral Initiative on Steel appears to be a concerted effort for a comprehensive approach; however, it naturally instigated conflicts among key industry leaders at home and abroad. Specifically, the conflicts involve a debate over the source or sources for the decline in the U.S. steel industry.

In line with the Multilateral Initiative on Steel of March 5, 2002, President Bush revealed the details of his Steel Products Proclamation, which outlines the highly anticipated remedy determinations for the steel industry.¹⁹² After considering the remedy recommendations of the ITC, based on the section 201 investigation, President Bush recommended three-year tariffs ranging from eight to thirty percent on a variety of steel imports.¹⁹³ Although the import relief plan fell short of the four-year, forty percent across-the-board tariff sought by the U.S. steel industry,¹⁹⁴ many representatives were optimistic that the executive plan would provide effective relief.¹⁹⁵ The tariffs took

190. *Id.*

191. Grant D. Aldonas, Letters to the Editor, *Steel Tariffs Are Part of Long-Term Strategy*, WALL ST. J., Sept. 25, 2002, at A15.

192. Proclamation, *supra* note 151.

193. See President's Memorandum for the Secretary of the Treasury, the Secretary of Commerce, and the United States Trade Representative; Action Under Section 203 of the Trade Act of 1974 Concerning Certain Steel Products, 67 Fed. Reg. 10,593 (Mar. 5, 2002) [hereinafter Memorandum]; Robert G. Matthews & Neil King Jr., *Breathing Room: Imposing Steel Tariffs, Bush Buys Some Time for Troubled Industry*, WALL ST. J., Mar. 6, 2002, at A1 [hereinafter *Breathing Room*].

194. See *Tough Talk on 201 Trade Relief*, AM. METAL MARKET, Feb. 25, 2002, at 9 (presenting the Roundtable discussion by American Metal Market staffers with key industry leaders).

195. See, e.g., Press Release, Nucor, Nucor Steel CEO Statement Regarding Bush Administration Decision on Imported Steel Tariffs (Mar. 5, 2002), available at <http://www.nucor.com/financials.asp?finpage=newsreleases>; Ted Pratt, *Steel Industry Reacts to Tariffs: Domestic Prices Expected to Rise*, BIRMINGHAM NEWS, Mar. 7, 2002, at

effect on March 20, 2002 and initially covered flat-rolled steel and other steel product imports from countries such as Brazil, Japan, Russia, South Korea, Germany, France, Turkey, China, Australia, and the Netherlands.¹⁹⁶

As expected, the executive plan polarized the world steel industry and set the stage for disputes in the WTO. On May 24, 2002, after consultations with the United States failed, the E.U., along with Korea, Japan, China, Norway, Switzerland, and later Brazil, followed through on their earlier threat to file a complaint with the WTO; the E.U. filed a formal request for a panel hearing, alleging the U.S. safeguard measures are inconsistent with WTO rules.¹⁹⁷ This request was granted, and a panel was established on June 3, 2002; a formal ruling by the panel is expected March 2003.¹⁹⁸ In the interim, the Bush Administration argues that the tariffs are permissible under the WTO Agreement on Safeguards.¹⁹⁹

The E.U. and Japan also announced that they are holding off on plans to retaliate against the U.S. steel tariffs by imposing domestic tariffs on certain U.S. products sold in their countries.²⁰⁰

1-D; Dave Anderton, *Steel Tariff Accord Praised*, DESERET NEWS, Mar. 6, 2002, at C01. *But see* Scott Thistle, *Lawmakers: More Tariffs Needed*, DULUTH NEWS TRIB., Mar. 7, 2002, available at <http://www.duluthsuperior.com/mld/duluthtribune/2809937.htm>.

196. See Proclamation, *supra* note 151; Memorandum, *supra* note 193. Imports from several countries were exempted: (1) Canada and Mexico due to their partnership with the United States in the North American Free Trade Agreement, (2) Israel and Jordan due to free trade agreements with the United States, and (3) developing countries that account for less than three percent of the total for individual steel product lines. See Proclamation, *supra* note 151; Memorandum, *supra* note 193.

197. See, e.g., WTO, United States: Definitive Safeguard Measures on Imports of Certain Steel Products, Doc. 02-2647 (WT/DS24//12), available at http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members4_e.htm (United States as Respondent-Safeguard Measures) (May 8, 2002).

198. See WTO, United States: Definitive Safeguard Measures on Imports of Certain Steel Products, Doc. 02-4178 (WT/DS348/14, WT/DS249/8, WT/DS251/9, WT/DS252/7, WT/DS253/7, WT/DS254/7, WT/DS258/11), available at http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members4_e.htm (United States as Respondent-Safeguard Measures) (July 29, 2002); see also *EU Delays Sanctions Against U.S. in Steel Dispute*, USA TODAY, Sept. 30, 2002, available at http://www.usatoday.com/money/economy/trade/2002-09-30-steel-sanctions_x.htm.

199. *Breathing Room*, *supra* note 193; Nigel Cope, *Trade Fight Escalates as WTO Targets U.S. Steel Tariff*, INDEPENDENT, June 4, 2002, at P13.

200. See *EU Delays Sanctions Against U.S. in Steel Dispute*, *supra* note 198;

This retreat is reportedly in response to the United States exempting more than seven hundred products from the steel safeguard measures; forty to fifty percent of Japanese and E.U. steel shipments, respectively, have been exempted.²⁰¹ The U.S. Department of Commerce reported that these products were excluded to avoid burdening U.S. steel consumers when it was determined that those products are not sufficiently available in the United States.²⁰² Naturally, these exemptions generated criticism by steel producers, who claimed that too many unfounded exemptions might undermine the gains made by the original tariffs imposed.²⁰³

Finally, in response to the steel tariffs imposed by the United States, the E.U. raised defensive barriers against steel imports from other markets, fearing a flood of metal blocked from the United States.²⁰⁴ In turn, the United States requested panel formation under the WTO Dispute Settlement Body. The panel

Japan Drops Steel Retaliation Plan, EU Proceeds, PAC. BUS. NEWS, Aug. 23, 2002, available at <http://pacific.bizjournals.com/pacific/stories/2002/08/19/daily70.html>. The United States has condemned these threats as unprecedented acts of retaliation. See Press Release, U.S. Trade Representative, USTR Says Retaliation Against U.S. Safeguard Measure Would be Unprecedented (Apr. 29, 2002), available at <http://www.ustr.gov/releases/2002/04/02-47.pdf> [hereinafter Unprecedented Retaliation].

201. See *EU Delays Sanctions Against U.S. in Steel Dispute*, *supra* note 198; see also *Japan Drops Steel Retaliation Plan, EU Proceeds*, *supra* note 200; Press Release, Dept. of Commerce, Department of Commerce and USTR Announce Final Set of Products to Be Excluded from Safeguard on Steel Products (Aug. 22, 2002), at <http://www.ustr.gov/releases/2002/08/2002-08-22-steel.PDF> [hereinafter Final Sets of Products to Be Excluded]. On August 22, 2002, the Department of Commerce and USTR announced the seventh and final set of products to be excluded from the safeguard measures. Final Sets of Products to Be Excluded, *supra*.

202. Final Sets of Products to Be Excluded, *supra* note 201.

203. See Terry Bonds, Federal Procurement and International Trade: Assessing the Federal Government's Efforts to Meet the Needs of Local Small Business (Sept. 3, 2002), Address Before the House Committee on Small Business, available at <http://www.house.gov/smbiz/hearings/107th/2002/020903/bonds.html>. But see AIIS, AIIS Applauds Bush Administration Steel Exemptions, But Sounds Alarm About Tariff Impact on Small Steel Consumers, at <http://www.steelnews.net/members/news/2002/aug/28/08282002-4.shtml> (Aug. 28, 2002) (stating that by implementing the exclusions, the Bush Administration recognized that the tariffs were having serious negative effects on some steel consumers).

204. Reuters, *EU, Asia Pressure U.S. over Steel Tariffs*, DAILY STAR, Sept. 21, 2002, available at <http://www.dailystarnews.com/200209/21/n2092105.htm#BODY6>.

was established on September 16, 2002.²⁰⁵ The United States asserted that the E.U. imposed measures without following the proper investigatory process and standards as outlined in the WTO agreements.²⁰⁶

Despite the intense criticism at home and abroad of the tariffs imposed by the United States, the Steel Products Proclamation and the Multilateral Initiative on Steel may represent the best efforts thus far by any administration addressing the U.S. steel crisis and the pervasive problem of global steel overcapacity.²⁰⁷ The Clinton Administration, in contrast, refused requests from steel companies and workers to shelter the domestic industry from increased imports regardless of strong union ties.²⁰⁸

The Bush Administration not only recognized the global overcapacity, but also acknowledged the need for further restructuring of the U.S. steel industry.²⁰⁹ This position lent credibility to the Administration, in that, it does not discount the domestic industry's partial responsibility in the crisis. In fact, some industry leaders quickly recognized their responsibility and actively pursued the recommendations for consolidation.²¹⁰ For example, Nucor recently won approval to acquire the assets of Birmingham Steel and Trico Steel, while the investment firm of

205. See WTO, WTO News: 2002 News Items, at http://www.wto.org/english/news_e/news02_e/dsb_17sep02_e.htm (Sept. 16, 2002).

206. *Id.*

207. *But see* Daniel Ikenson, *Steel Trap: How Subsidies and Protectionism Weaken the U.S. Steel Industry*, Center for Trade Policy Studies-Executive Summary, at <http://www.freetrade.org/pubs/briefs/tbp-014.pdf> (Mar. 1, 2002) [hereinafter *Steel Trap*] (arguing that the U.S. Steel industry would be better served if the President resisted the push toward new trade restrictions).

208. *Breathing Room*, *supra* note 193.

209. See *supra* notes 167–68 and accompanying text; see also Kelly, *USTR to Mills*, *supra* note 165 (stating key domestic industry leaders acknowledge both the integrated and “mini-mill” sectors need consolidation and restructuring).

210. See, e.g., Press Release, Nucor, Nucor Wins Approval from Delaware Bankruptcy Court for Purchase of Assets of Birmingham Steel (Sept. 12, 2002), at <http://www.nucor.com>; Press Release, Nucor, Nucor Acquires Assets of Trico Steel Company, LLC (July 22, 2002), at <http://www.nucor.com>; Press Release, SteelNews, SOLD!-LTV Integrated Steel Assets (Feb. 27, 2002), available at http://www.steelnews.com/north_american/feb02/ltv02.htm.

W.L. Ross & Co., L.L.C. agreed to acquire the LTV Corp.²¹¹

By implementing the tariff relief, the Bush Administration hopes that the resulting “breathing room” allows the industry to bring labor costs down and upgrade equipment.²¹² In an attempt to foster the industry reform, the Proclamation includes a built-in eighteen-month review process that allows the President to lift tariffs if the restructuring proves unsatisfactory.²¹³

Further, the President rightfully resisted pressure from the steel industry to take over costs for retiree health care, insurance, and other benefits owed by struggling integrated mills.²¹⁴ Although some industry representatives suggest that the government should pay these costs through federal subsidies, this approach ignores the root cause of problems in the world steel industry—overcapacity.²¹⁵ Not only would these subsidies punish efficient and solvent production companies, such as the “mini-mills”—who neither need nor have asked for relief—but they would also violate WTO rules.²¹⁶ The key solution, thus, is to reduce excess, inefficient steel-making capacity worldwide.²¹⁷ This solution requires cooperative efforts among all governments and is the second of three main elements in the Multilateral Initiative on Steel.²¹⁸

211. *Id.*

212. *Breathing Room*, *supra* note 193.

213. *Id.*

214. *Id.* These costs are often referred to as legacy costs and integrated steelmakers argue that they add about twenty dollars per ton of steel produced and are the main reason why the integrated steel mills cannot compete with imports. *Id.* These legacy costs reportedly date back to the 1950s and allegedly are a result of unionized labor, compelling companies to incur costs they could never afford. Interview with Gaile Henry, *supra* note 30; *see also* Steel Manufacturers Association, *SMA's Talking Points: Government Subsidies to Pay Legacy Costs of a Few Steel Companies Cannot Be Justified Under Any Rational Public Policy Agenda*, at http://www.steelnet.org/new/120301Legacy_costs.htm (last visited Jan. 26, 2003) [hereinafter *SMA's Talking Points*].

215. *SMA's Talking Points*, *supra* note 214.

216. *Id.* Others also argue that the U.S. bankruptcy laws in effect are a form of subsidy in that they allow “chronic money losers” to continue operations or to continue emerging from bankruptcy status. *See Steel Trap*, *supra* note 207. The resurgence of these inefficient companies poses a threat to the more profitable firms. *Id.*

217. *SMA's Talking Points*, *supra* note 214.

218. *Breathing Room*, *supra* note 193 (stating that the Bush “[A]dministration has also been pushing an international agreement among other steelmakers to reduce

As previously discussed, the Bush Administration's Steel Products Proclamation has its critics.²¹⁹ These critics, however, are not confined to foreign exporters. Manufacturers, including auto-part and car manufacturers across the United States, are extremely concerned about using steel to manufacture their particular products.²²⁰ Many experts predict that, in time, the tariffs will have devastating effects on steel users, especially small manufacturers that lack protection of long-term contracts.²²¹ However, the eighteen-month review process instituted by the Bush Administration empowers a president to adjust tariffs up or down "depending on realities in the U.S. economy and dynamics within the international steel market."²²²

Given the U.S. leadership on international trade issues and criticisms by other countries concerning the continued use by the United States of trade remedy laws, it seems that the Bush Administration is confronting a very difficult problem. Essentially, the Administration has been forced to put domestic industry concerns ahead of international free-trade obligations to help the U.S. steel industry recover.²²³ Foreign exporters of steel consistently failed to follow their obligations under the WTO agreements when employing government subsidies, engaging in collusion among steel producers, and using unsound banking practices and import barriers to "protect" the domestic steel industries.²²⁴ The second element of the Multilateral Initiative on Steel attempts to address this problem by initiating negotiations with trading partners concerning rules to govern future steel trade and eliminate market-distorting subsidies.²²⁵ This element, similar to the goal of remedying global overcapacity, is essential for the world steel market to run fairly and smoothly. For these

world overproduction, by as much as 100 million tons a year by 2006."). However, many experts argue that President Bush's imposition of tariffs probably disrupted those efforts. *Id.*

219. See *supra* text accompanying note 197; *Breathing Room*, *supra* note 193.

220. See *Breathing Room*, *supra* note 193.

221. *Id.* But see COUNTERINTUITIVE RESULTS, *supra* note 4, at 2-3 (stating that the effects of the tariffs on steel consumers has been limited).

222. See *Breathing Room*, *supra* note 193.

223. *Id.*

224. See Initiative, *supra* note 14; GLOBAL STEEL REPORT, *supra* note 1, at 37.

225. Initiative, *supra* note 14.

countries to cry “foul” because the Bush Administration and domestic industry employed remedies legitimately available under the WTO agreements—when they themselves are blatantly disregarding their obligations under WTO—is disingenuous and unjust.

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* This paper received the James Baker Hughes Prize on the Subject of International Economic Law.