

WILMER, CUTLER & PICKERING

**BEFORE THE WORLD TRADE ORGANIZATION APPELLATE BODY**

United States – Definitive Safeguard Measures on Imports of Certain Steel Products

(AB-2003-3)

AMICUS CURIAE SUBMISSION OF THE  
AMERICAN INSTITUTE FOR INTERNATIONAL STEEL

16 September 2003

## I. Introduction

1. Recognizing the legal authority<sup>1</sup> of the Appellate Body to accept and consider an unsolicited *amicus curiae* submission, the American Institute for International Steel [“AIIS”] respectfully submits this brief through the Appellate Body Secretariat.
2. The AIIS was founded in 1950 to promote economic growth through free trade, the support of free markets in the buying and selling of steel, and the preservation of unhampered access in world markets. Free trade in steel and other commodities promotes international specialization and thereby contributes to rapid economic development and a higher standard of living.
3. On 11 August 2003, the Panel reports in *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*<sup>2</sup> were appealed by the United States.
4. Under Rule 16(1) of the *Working Procedures for Appellate Review*, a Division of the Appellate Body has authority to adopt an Additional Procedure to structure better the filing of written briefs by persons who are not parties.<sup>3</sup>
5. No procedure *ad hoc* has been adopted in this matter, for example, one containing a requirement that persons first submit an application for leave to file a written brief. Therefore, no formal application appears to be needed.
6. The following information may be helpful to the Appellate Body in its consideration of whether to admit this brief *amicus curiae*:

-- The address of the AIIS is 1325 G Street NW, Suite 980, Washington, D.C., 20005, United States. Its phone number is (001) 202-628-3878. Its email is aiis@aiis.org.

-- The AIIS is a membership organization. Membership is open to persons, companies, and corporations resident in the United States of America, Canada and Mexico that are engaged in the international steel trade business. The legal status of the AIIS is that of an incorporated trade association. The general objective is to promote the role of steel in free trade and economic growth. The activities of the AIIS center around the advocacy of free

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<sup>1</sup>Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, adopted 7 June 2000, paras. 39, 42. Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, paras. 157, 160.

<sup>2</sup>Panel Reports, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248, 249, 251, 252, 253, 254, 258, 259/R (11 July 2003) [“Steel Safeguard Panel Reports”].

<sup>3</sup>See Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, para. 50.

trade policies and collecting and disseminating accurate and reliable information to members, the public, and government agencies. The AIIS is funded through membership fees and related activities. The AIIS was on the list of Nongovernmental Organizations accorded accreditation by the WTO Secretariat for attendance at the Cancún Ministerial Conference.

-- The AIIS's interest in the appeal is derived from its support for free trade in steel consonant with the rules of the World Trade Organization. The AIIS seeks to represent the views of users of steel in public policy debates. The AIIS has been and continues to be an active participant in the policy debate within the United States on the Section 201 tariffs being applied to certain steel products.

-- The AIIS intends its written brief to make a contribution to the resolution of this dispute that is *not* likely to be repetitive of what has been and is likely to be submitted by a party or third party to this dispute.<sup>4</sup> The legal arguments being put forward by AIIS in this brief arise out of its concern about the proper implementation of the requirement in the Agreement on Safeguards that a safeguard investigation consider whether a safeguard measure will be in the public interest.<sup>5</sup> In prior Safeguards jurisprudence in the WTO, Member governmental submissions to panels and the Appellate Body have not given much attention to this "public interest" requirement.

-- The AIIS believes that it is appropriate for the Appellate Body to consider legal perspectives that are trans-Member, or transnational, in nature. The views of consumers is one such perspective that is likely to be under-represented in WTO dispute proceedings.

-- The AIIS does not have any relationship, direct or indirect, with any party or third party to this dispute. The AIIS has not received any assistance, financial or otherwise, from a party or third party to this dispute in the preparation of this written brief.

## **II. Identification of Issues of WTO Law Being Addressed in this *Amicus Curiae* Brief**

7. The AIIS believes that the decision of the Panel is persuasive in its finding that the U.S. Section 201 safeguard applied to certain steel products is violating Articles 2.1, 3.1, and 4.2 of the Agreement on Safeguards and Article XIX:1(a) of the General Agreement on Tariffs and

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<sup>4</sup>Notwithstanding Paragraph 3 of Appendix 3 (Working Procedures) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), the availability on the WTO website of non-confidential summaries of Member submissions to panels or the Appellate Body is rare. This lack of transparency by Members makes it difficult for persons submitting an amicus brief to be certain whether or not their views are repetitive of Member governments.

<sup>5</sup>See Agreement on Safeguards, art. 3.1.

Trade. This *amicus curiae* submission, however, is limited to only one issue before the Appellate Body on appeal, as discussed below.

8. In preparing this brief, the AHS made use of the United States' Appellant Submission, posted on the website of the U.S. Trade Representative.<sup>6</sup>

9. In its report, the Panel states that it agrees with New Zealand that it would be improper for competent authorities to reduce to a nullity the obligation to explain how “unforeseen developments” resulted in increased imports causing or threatening to cause serious injury.<sup>7</sup> The Panel notes that, in some cases, the explanation may be simple but, in other situations, a detailed analysis may be needed to make clear the relationship that exists between the unforeseen developments and the increased imports.<sup>8</sup> The Panel then states:

The nature of the facts, including their complexity, will dictate the extent to which the relationship between the unforeseen developments and increased imports causing injury needs to be explained. The timing of the explanation, its extent and its quality are all factors that can affect whether a[n] explanation is reasoned and adequate.<sup>9</sup>

10. The United States objects to this statement by the Panel. According to the Appellant's submission:<sup>10</sup>

However, immediately after noting that an explanation may be simple, the Panel added that “[t]he timing of the explanation, its extent and its quality are all factors that can affect whether an explanation is reasoned and adequate.”<sup>Footnote 21</sup> The Panel cites no basis in the Safeguards Agreement for finding that “timing”<sup>Footnote 22</sup> or “extent” are relevant to whether the competent authorities' explanations are reasoned and adequate. In fact, there is none.

<sup>Footnote 21</sup> Panel Reports, para. 10.115.

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<sup>6</sup>Appellant's Submission of the United States, 21 August 2003, available at <http://www.ustr.gov/enforcement/2003-08-21-steelsafeappeal-appealsubmission.pdf> [“Appellant's Submission of the United States”].

<sup>7</sup>Steel Safeguard Panel Reports, para. 10.115.

<sup>8</sup>*Id.*

<sup>9</sup>*Id.*

<sup>10</sup>The posted Appellant's brief has dropped the closed quotation mark (“) in many places. For reader ease, this *amicus curiae* brief reinserts them in places where they appear to be warranted.

<sup>Footnote 22</sup> It is not even clear what the Panel means by “timing.” If that term refers to the sequence in which the competent authorities present elements of their explanation, that is already addressed by the “quality” of the explanation, *i.e.*, whether it is “reasoned.” If “timing” refers to the schedule of release of various volumes of the competent authorities’ report, the Panel considered and rejected the notion that the report must take a particular form.<sup>11</sup>

11. In addition to asserting that there is no basis in the Agreement on Safeguards for the panel to look at the “timing” and the “extent” of a report, the United States also objects to the Panel’s use of the terms “explanation” and “adequate.”

12. Regarding the term “explanation,” the United States points out that this word does not appear in the Agreement on Safeguards, and thus can only be understood as a shorthand for the obligations that *are* in the Agreement.<sup>12</sup> These obligations, in Article 3.1, are that “The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.”<sup>13</sup>

13. Regarding the term “adequate,” the United States points out that this word does not appear in the Agreement on Safeguards, and thus can only be understood as a shorthand for the obligations that *are* in the Agreement.<sup>14</sup> According to the United States, the Agreement on Safeguards requires that the published report contain “reasoned conclusions” on “all pertinent issues” and “a detailed analysis of the case,” including a demonstration of the relevance of the factors examined.<sup>15</sup>

14. After examining past WTO reports, the United States further argues that the findings from those reports raise another important point—that the competent authorities’ report need not contain findings or conclusions beyond those needed to support the determination.<sup>16</sup>

15. Although the precise subject of the United States’ appeal is the Panel’s determination regarding the findings and reasoned conclusion, or lack thereof, about the connection between unforeseen developments and alleged serious injury by the U.S. authorities in their steel safeguard determination, the appellant’s objection to the Panel’s analysis has broader implications for Safeguards jurisprudence. This is so for two reasons: First, the United States’

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<sup>11</sup>Appellant’s Submission of the United States, para. 58. *See also* para. 10.

<sup>12</sup>*Id.*, para. 59.

<sup>13</sup>Agreement on Safeguards, art. 3.1.

<sup>14</sup>Appellant’s Submission of the United States, para. 62 n. 29.

<sup>15</sup>*Id.*

<sup>16</sup>*Id.*, para. 62.

argument addresses the correct interpretation of Article 3.1 in general. Second, whatever decision the Appellate Body reaches may be read as applying to explanations of all issues that are pertinent to a safeguard determination, not just the factor of “unforeseen developments.”

16. As shown below, the legal error being claimed in the United States’ appeal would seem to apply equally to any factor in Article 3.1 considered by competent national authorities and then reviewed by a WTO Panel:

--In the Appellant’s submission, the Roman Numeral II.A. caption on Page 4 refers to “General Errors in the Panel’s Findings Under Article 3.1 of the Agreement on Safeguards.”

--This caption about “General” Errors is repeated on Page 12.

--The United States Submission states that “. . . several errors appear repeatedly in the Panel’s analysis with respect to the requirements of Article 3.1, indicating overarching conceptual flaws in the Panel’s approach.”<sup>17</sup>

17. Given the text of Article 3.1, if the Appellate Body were to agree with the United States that the Panel has erred, this holding would presumably also be applicable to all of the other pertinent issues of fact and law addressed in safeguard investigations by the competent authorities. Indeed, the United States is also appealing determinations by the Panel that the U.S. Steel Safeguard determination was inconsistent with Article 3.1 because of a failure to provide reasoned and adequate explanations of two other factors.<sup>18</sup> Therefore, the proper interpretation of the Article 3.1 requirement for an explanation of “findings and reasoned conclusions” regarding “unforeseen developments” will have implications for the other issues encompassed by Article 3.1.

18. The AIIS is particularly concerned with one pertinent issue of fact and law that is often omitted in safeguard investigations, namely, the public interest. In that regard, one may recall the entire text of Article 3.1:

A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public in consonance with Article X of GATT 1994. This investigation shall include reasonable public notice to all interested parties and public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, *inter alia*, as to whether or not the application of a safeguard measure would be in the public interest. The competent authorities shall publish a report setting

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<sup>17</sup>*Id.*, para. 53.

<sup>18</sup>*Id.*, para. 397(B) (increased imports), (D) (causal link between imports and injury).

forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.<sup>19</sup>

Because the penultimate sentence (above) requires competent authorities to provide for the opportunity to “present evidence” and “views” as to whether a safeguard measure would be in the “public interest,” logic suggests that this is a “pertinent issue” that should be explained in the published report of the competent authorities. In the opinion of the AIIS, the published report should set forth a reasoned conclusion as to why a safeguard would or would not be in the public interest. Although the Agreement on Safeguards does not define “public interest,” that term surely encompasses the interests of consumers.<sup>20</sup> The consumer interest is also a relevant consideration in the requirement in the Agreement on Safeguards that “A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.”<sup>21</sup> A safeguard that imposes a high cost on consumers may make it less likely that a safeguard/import restriction can facilitate, rather than hinder, adjustment in the domestic economy. The Agreement on Safeguards appears to recognize that reality in its Preamble which, among its recitals, includes: “*Recognizing* the importance of structural adjustment and the need to enhance rather than limit competition in international markets; . . . .”<sup>22</sup>

19. Interested parties will often be eager to present evidence and views as to whether a safeguard measure would be in the public interest. For example, in the Section 201 Investigation on Steel, the Consuming Industries Trade Action Coalition [“CITAC”] submitted a brief to the U.S. International Trade Commission.<sup>23</sup> Among the views presented in the brief were that:

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<sup>19</sup>Agreement on Safeguards, art. 3.1.

<sup>20</sup>For example, see WTO, “10 Benefits of the WTO Trading System,” No. 5. “It Gives Consumers More Choice, and a Broader Range of Qualities to Choose From,” available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/10ben\\_e/10b05\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/10ben_e/10b05_e.htm).

<sup>21</sup>Agreement on Safeguards, art. 5.1. In the *Korea Dairy* case, the Appellate Body stated its agreement with the Panel that the wording of the first sentence of Article 5.1 leaves no room for doubt that it imposes an obligation on a Member applying a safeguard measure to ensure that the measure is commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment. Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, para. 96. In the more recent *United States Line Pipe from Korea* case, the Appellate Body stated that its findings in *Korea Dairy* establish that Article 5.1 imposes a general substantive obligation, namely, to apply safeguard measures only to the permissible extent. Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002, para. 234.

<sup>22</sup>Agreement on Safeguards, Preamble.

<sup>23</sup>Prehearing Brief of Consuming Industries Trade Action Coalition, Before the International Trade Commission, 10 September 2001 (Attached).

--The Commission should consider “that the welfare of consuming industries is at stake in the injury phase of the case.”

--Nationwide, the number of workers in steel-consuming industries “outnumbers steel workers by a ratio of 50:1.” Every State has more workers in downstream industries than in steel production jobs.

--Import restrictions on steel products would “cost nine jobs in downstream industries for every steel job saved, at an annual cost to the economy of over \$565,000 per job.”

--Only 75–80 percent of United States needs can be filled from domestic producers.

--There are many specific products (numbering in the hundreds if not the thousands) that are not made in the United States at all, or are not available in adequate supply.

20. In summary, a key issue before the Appellate Body is whether the Panel committed an error of law by (i) misapplying the “reasoned conclusions” standard in Article 3.1 or (ii) incorrectly imposing additional requirements not present in Article 3.1. The United States is alleging these errors.<sup>24</sup>

### **III. The Appellate Body Should Uphold the Panel**

21. In some previous cases, the Appellate Body has properly counseled caution regarding reasoning by a Panel that is based on terms not actually present in the WTO Agreement. For example, in *United States – Standards for Reformulated and Conventional Gasoline*, the Appellate Body noted that the phrase “primarily aimed at” used by the Panel was not itself treaty language.<sup>25</sup> In *United States – Tax Treatment for “Foreign Sales Corporations”*, the Appellate Body noted that the phrase “but for” used by the Panel was not treaty language, and further remarked that it had certain abiding reservations about applying any legal standard in the place of the actual treaty language.<sup>26</sup> In neither appeal, however, did the Appellate Body reverse the panel regarding the use of those terms.

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<sup>24</sup>Appellant’s Submission of the United States, paras. 10, 56, 58, 76.

<sup>25</sup>Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, at 18–19.

<sup>26</sup>Appellate Body Report, *United States – Tax Treatment for “Foreign Sales Corporations”*, WT/DS108/AB/R, adopted 20 March 2000, para. 91.

22. Thus, the Appellant Submission appropriately takes note that Article 3.1 of the Agreement on Safeguards does not include some terms used by the Panel in its analysis, such as “adequate” and “explanation.”<sup>27</sup>

23. Nevertheless, the Panel has *not* committed an error in law in employing words not in the Agreement on Safeguards to explicate the meaning of words contained in that Agreement. Judicial bodies regularly do that to communicate their reasoning.

24. The United States’ claims on the textual aspects of Article 3.1 boil down to two points:

--that there is no basis in Article 3.1 for the Panel to consider the “extent” of the findings and reasoned conclusions of the competent authorities,<sup>28</sup> and

--that there is significance in the fact that Article 3.1 does not contain the terms “adequate” and “explanations” which were used by the Panel.<sup>29</sup>

In contradistinction to using these terms, the United States characterizes the WTO obligation regarding a published report as being only:

. . . that the published report contain “reasoned conclusions” on “all pertinent issues” and “a detailed analysis of the case,” including “a demonstration of the relevance of the factors examined.”<sup>Footnote 25</sup>

<sup>Footnote 25</sup> See *US – Wheat Gluten*, Panel Report, para. 160.<sup>30</sup>

and

. . . that the published report contain “reasoned conclusions” on “all pertinent issues” and “a detailed analysis of the case,” including “a demonstration of the relevance of the factors examined.” Actions by competent authorities consonant with those explicit obligations are by definition consistent with the Safeguards Agreement.<sup>31</sup>

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<sup>27</sup>See Appellant’s Submission of the United States, paras. 59, 62 n. 29.

<sup>28</sup>*Id.*, paras. 10, 58.

<sup>29</sup>See *id.*, paras. 62 n. 29, 59.

<sup>30</sup>*Id.*, para. 59. Article 4.2(c) of the Agreement on Safeguards provides that “The competent authorities shall publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined.”

<sup>31</sup>*Id.*, para. 62 n. 29.

25. The problem with this characterization of WTO law by the United States is that it ignores key obligations. Under Article 3.1, the published report has to set forth “findings and reasoned conclusions reached on *all pertinent issues of fact and law*” (emphasis added).<sup>32</sup> By pointing out the need for an “explanation” that is “adequate,” and by referring to the “extent” of the explanation,<sup>33</sup> the Panel apparently is only trying to say that a report has to set forth *both* the findings and the reasoned conclusions reached on *all* pertinent issues of fact as well as of law. Thus, if the extent of a report (of competent authorities) fails to discuss some pertinent issues of fact or some pertinent issues of law, then such a report is not adequate under WTO Safeguards law.

26. The statement by the United States may arguably be correct that the competent authorities’ report need not contain findings or conclusions beyond those needed to support the determination.<sup>34</sup> Nevertheless, the Agreement on Safeguards is clear that the report must contain findings and reasoned conclusions on *all* pertinent issues of fact and law, including the public interest.<sup>35</sup>

#### **IV. Conclusion**

27. Because the obligation in Article 3.1 has many facets and is so important, it was not legal error for the Panel to employ words not in the text of the Article in order to explicate the meaning of the Article to Members, particularly for Members who have repeatedly failed to comply with the Agreement on Safeguards.

28. The Panel’s use of the terms “extent,” “adequate,” and “explanation” was justifiable in pointing out the inadequacies of the United States’ Section 201 Safeguards determination. Furthermore, the Panel’s analysis does not have any “overarching conceptual flaws,” as alleged by the United States, in how the Panel interprets and adjudicates Article 3.1.

29. Therefore, the AIIS urges the Appellate Body to uphold the Panel Report.

WILMER, CUTLER & PICKERING

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<sup>32</sup>Agreement on Safeguards, art. 3.1.

<sup>33</sup>Steel Safeguard Panel Reports, para. 10.115.

<sup>34</sup>See Appellant’s Submission of the United States, para. 62.

<sup>35</sup>Agreement on Safeguards, art. 3.1.