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Trading Rights and Wrongs: The 2002 Bush Steel Tariffs

By
Kevin K. Ho*

I. INTRODUCTION

President Bush's trade policy vis-à-vis multilateral trade institutions, at a cursory glance, might seem to be in line with previous trade policy under President Clinton. The U.S. agenda pursued at the latest round of liberalizing trade talks at the Doha Round of the World Trade Organization (WTO) in fall 2001 appears to comport with Clinton's agenda. However, a closer examination of Bush's policy choices reveals this conclusion to be false. Clinton's commitment to multilateral trade organizations and their processes for dispute resolution has been abandoned by Bush. In particular, Bush's trade policy conflates domestic and foreign issues, resulting in a domestic-centric policy. The differences between the administration's rhetoric of promoting free trade and overt domestic political campaigning are difficult to reconcile. Based on the steel tariffs that the administration levied in March 2002, one might conclude that Bush is playing the "perpetual candidate" by emphasizing policy goals aimed uniquely at domestic political concerns. These steel tariffs were enacted purportedly in order to protect the domestic U.S. steel industry and its workers against foreign dumping. This tariff is a direct protectionist measure President Clinton was unwilling to impose without first submitting dumping claims to a multilateral dispute settlement process.

Moreover, these steel tariffs reveal a larger trend—that this administration is willing to dictate foreign policy to its trading partners on more adversarial terms than the Clinton administration. This administration has devalued foreign trade by clearly favoring domestic concerns instead. Added to this stance is the powerful device of associating trade policy with national security in light of the September 11, 2001 attacks. The domestically-focused policy, which gives trading partners reduced value in decision-making equations, is a result of a delegation-based decision-making process. The steel tariffs represent an unabashed unilateralist approach to trade policy. Instead of using the mechanisms of the World Trade Organization, this administration has relied upon domestic legisla-

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tion allowing the United States to escape its multilateral trade obligations. However, this policy has benefited no one, as any domestic political gains Bush may have begot through the tariffs were lost as they were rolled back by late August 2002. At a critical time when the next round of WTO trade negotiations gets underway, the Bush administration's credibility abroad as a free-trade proponent is diminished.

This article, through a close study of the March 2002 steel tariffs, examines the factors, alternatives and motivations that presented themselves to the Bush administration in the spring of 2002. The article is divided into six sections, with various subsections. Section II summarizes the events surrounding the March 2002 announcement, gives a background on steel trade policy and on dumping in general, and concludes by chronicling the reaction to the rollback of the tariffs by summer of 2002. Section III offers examples of alternatives available to the administration and compares the Clinton administration's actions under similar circumstances. Section IV examines the American relationship and obligations to the WTO and the legality of the tariffs under the WTO regime. Section V offers analysis of the decision and proposes decision-making models to explain how this policy came into being. Finally, future prospects for the trade round are examined.

II.

THE EVENT

In March 2002, President Bush imposed an average 30 percent tariff on selected foreign steel entering the United States.¹ This trade law was ostensibly enacted to temporarily protect the domestic steel industry. The steel tariffs were, in fact, a second-best and *ex post facto* attempt to protect an already ailing U.S. industry. The administration was motivated by domestic steel concerns to start an investigation under the Trade Act of 1974 by the International Trade Commission (ITC), a U.S. agency.² Since that investigation ultimately found dumping, Bush was then authorized to impose tariffs to effect a period of "positive adjustment." The thirty-percent figure was less than the forty percent the ITC recommended and was far less than the eighty-percent tariff some extreme policymakers suggested.³ The resulting tariffs ran the risk of violating international law and of costing more jobs than they purported to save domestically.⁴ A former U.S. Trade Representative from 1971-75, William Eberle, suggested

1. White House Press Release, Press Secretary, Steel Products Proclamation, (Mar. 5, 2002); Steel Products Proclamation, 65 Fed. Reg. 10,593 (Mar. 5, 2002).

2. Section 202 of the Trade Act of 1974 as amended in 1994 authorizes the president to initiate investigations into imports that materially harm domestic industry and further authorizes the president to implement temporary safeguards to protect the affected industry in the form of tariffs under section 203. *See generally* 19 U.S.C. § 2101 *et seq.* For investigations and safeguard measures, *see* 19 U.S.C. § 2252.

3. CENTER FOR STRATEGIC & INTERNATIONAL STUDIES, *Trade Policy Challenges in 2002: Six Former U.S. Trade Representatives Discuss WTO, China, EU Relations, FTAA, Fastrack, and the Steel and Lumber Cases*, 49 (Feb. 12, 2002).

4. Press Release, Sen. John McCain, McCain: Increased Tariffs on Imported Steel Raises Prices for Consumers (Mar. 1, 2002) available at: <http://mccain.senate.gov/steel02.htm>.

that a five- to ten-percent tariff may have been reasonable, but concluded, as this article will conclude, that most of the problems the American steel industry faces do not have international solutions.⁵ By August 2002, Bush effectively hobbled the tariffs by granting more than 700 exclusions.⁶ However, the damage was done as the administration lost out on many counts.⁷ In the international arena, the steel tariffs alienated trade partners; they provided WTO critics additional support for their case against free trade and diminished U.S. trade negotiation credibility; and, domestically, they failed to compensate displaced steel workers. It could have turned out differently.

If the administration was serious about promoting free trade while protecting displaced steel workers, Bush could have supported or even introduced affirmative domestic legislation concerning the problem of the "steel legacy" without having to resort to escapist clauses in U.S. trade law. Bills had already been introduced in Congress, many of which stemmed from the ITC's initial determination of alleged dumping of foreign steel on the U.S. market.⁸ Instead, Bush expended domestic and international political capital at the insistence of his advisors, who characterized the tariffs as the right thing to do. It was no mistake that the parties who stood to benefit the most from the tariffs happened to be major interests in key election swing states that Bush had co-opted from the Democrats during the 2000 election.⁹ Arguably, there was an equalization of foreign and domestic policy on the part of the administration.

In an extensive study of the theory of so-called American uniqueness and exceptionalism, Michael H. Hunt concludes his work by saying that the formulation of the post-Cold War American approach to foreign policy is problematic, as it forces policymakers to separate the two spheres that Bush merged:

Perhaps the most troublesome single requirement imposed by a new foreign-policy ideology is that it asks Americans to sustain a dual standard, or double vision, that distinguishes between domestic and foreign affairs. Though it would not force us to renounce liberty as a universal good [a major American policy goal as identified in Hunt's work], it would limit our active promotion of liberty to our own domestic sphere and have us accept as appropriate to some, perhaps even most, other societies' organizing principles that diverge from our own norms.¹⁰

By imposing these steel tariffs, it is clear that President Bush has taken a very different approach to trade policy than candidate Bush would have commit-

5. *Trade Policy Challenges in 2002*, *supra* note 3.

6. Press Release, Department of Commerce, Department of Commerce and USTR Announce Final Set of Products to be Excluded from Safeguard on Steel Products, (Aug. 22, 2002).

7. Affected steel constituencies such as West Virginia at first welcomed and supported the March steel tariffs, but by August it became apparent that the policy was not as robust as previously thought. Senator John Rockefeller from West Virginia, initially a staunch supporter of the tariffs, said later that he was "extremely disappointed" with the "unjustified" exclusions that only appeased U.S. trading partners. Press Release, Sen. John Rockefeller, Rockefeller Reacts to President Bush's Steel Exclusions, (Aug. 23, 2002) available at: <http://rockefeller.senate.gov/2002/pr082302.html>.

8. See *infra* note 38 and accompanying text.

9. Bob Zoellick's *Grand Strategy*, THE ECONOMIST, Feb. 28, 2002, available at: http://www.economist.com/PrinterFriendly.cfm?Story_ID=1011187.

10. MICHAEL H. HUNT, IDEOLOGY AND U.S. FOREIGN POLICY 198 (1987).

ted to when he talked about tearing down trade barriers.¹¹ Rather, as this article concludes and many sources have indicated President Bush has felt free to use the foreign sphere to affect a domestic political agenda.¹²

A staunch supporter of free trade in the Bush administration is current U.S. Trade Representative Robert Zoellick. He is a firm multilateralist who helped negotiate the NAFTA and 1994 WTO agreements and has a very close relationship to his EU counterpart, Pascal Lamy. Zoellick had to admit, perhaps grudgingly, that domestic politics was behind the steel tariffs during a visit to Brazil in March 2002.¹³ At a press conference, Zoellick said the tariffs arose out of a need to build domestic political support to advance the cause of free trade generally.¹⁴ This admission is striking, especially coming from a staunch supporter of free trade. Its tone and content did not match his record on the issue until that point.

A. *Dumping Defined*

In order to receive trade concessions in kind from its trading partners, the United States is internationally obligated under the multilateral agreement to which it is a signatory—the General Agreement on Tariffs and Trade (GATT) and its successor organization, the WTO—to abide by GATT Article VI, which prohibits nations from dumping products in other markets. The GATT and WTO also proscribe a series of justified barriers and safeguards that can be imposed to stop dumping after a member petitions the organization to invoke its dispute settlement procedures, as agreed to in 1994.¹⁵

Illegal dumping occurs when a foreign producer of a good intentionally exports their product at a *lower* price than it cost to produce the good during the ordinary course of trade.¹⁶ Under economic theory, the reason for producers to sell at a loss in a foreign market is to create long-term dominance while taking short-term losses.¹⁷ Under this reasoning, these producers practice predatory pricing in order to drive out local producers. They charge cut-rate prices initially only to secure a monopoly in the end, thus compensating for immediate losses. However tenuous the theory may be, it is one of the only clear cases of dumping that would justify WTO-approved safeguard measures.¹⁸ Further, Grimwade asserts that, in order for dumping to be successful, the demand in the importing country for the product must be flat (or rising) while remaining high

11. *Bush the Anti-Globaliser*, THE ECONOMIST, May 11, 2002, at 16.

12. *Id.*

13. Jennifer L. Rich, *U.S. Admits That Politics Was Behind Steel Tariffs*, N.Y. TIMES, Mar. 14, 2002, at W1.

14. Rich, *supra* note 5.

15. See *infra* Section III.; Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade, of the Agreement Establishing the World Trade Organization 1994, also Annex 2 Dispute Settlement Understanding available at: http://www.wto.org/english/docs_e/legal_e/legal_e.htm#wtoagreement

16. See generally NIGEL GRIMWADE, INTERNATIONAL TRADE POLICY 96-149 (1996).

17. *Id.*

18. MICHEAL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 177-189 (2d ed. 1999); see also Article 2 of the Uruguay Round Antidumping Agreement.

(or rising) in the exporting country, thus maximizing profits locally to cover losses abroad.¹⁹

The Bush administration and its Congressional supporters asserted that it was a glut of steel from Asia, Brazil and the EU that caused a surge of steel exports to the United States. The administration claimed the United States did not need this excess of steel and therefore the steel had been “dumped” on the U.S. market.²⁰ But these producers did not have a coordinated policy of active predatory pricing vis-à-vis the U.S. Therefore, under Grimwade’s theory the case for Section 203 safeguards was tenuous.²¹ Any price differences may be accounted for by natural market forces or inequities that come with any market cycle. Moreover, there were at least fifteen million tons of excess domestic production capacity.²² Importantly, WTO measures do *not* allow international action against trading partners and producers to cover domestic excess production capacity. The targeted countries immediately claimed that U.S. safeguard measures were used out of context and that the United States should have turned to the WTO’s dispute settlement process to investigate and calculate the alleged dumping.²³

Therefore, the “dumping” the Bush administration decried more closely resembled an excess capacity situation, which is not covered by the WTO. Excess capacity occurs where cyclical market signals lag behind current market conditions. This lag between demand signals and actual production will lead to a temporary excess that effectively gluts the market, driving prices down.²⁴ One last wrinkle that may be worth considering is a precipitous fall of foreign currency value which will inherently give an appearance of price differentiation that can also lead to erroneous charges of dumping. With the exception of *actual* predatory pricing, most economists agree that no economic justification exists for WTO-approved antidumping actions.²⁵

Nevertheless, the administration levied tariffs that averaged thirty percent against classified imports from most steel-producing countries, except Canada, Israel, Jordan, and Mexico. The tariffs were set at varying levels on such products as flat steel, hot-rolled bar, cold bar, stainless steel and rebar, steel wire and tin mill products.²⁶

19. GRIMWADE, *supra* note 16, at 97-8.

20. Statement of Senator John D. Rockefeller IV on the Senate Floor, The Introduction of the Steel Industry Consolidation and Retiree Benefits Protection Act of 2002, Apr. 17, 2002, *available at* <http://rockefeller.senate.gov/2002/pr041702.html>.

21. For more on the legality of the safeguard action *see infra* Section III.

22. CENTER FOR STRATEGIC & INTERNATIONAL STUDIES, *supra* note 3, at 49.

23. The Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the WTO Agreement, 1994.

24. GRIMWADE, *supra* note 16.

25. *Id.* at 104.

26. Steel Products Proclamation, 65 Fed. Reg. 10,593 (Mar. 5, 2002).

B. The Precarious U.S. Steel Industry

Once a dominant economic and social force, the American steel industry has suffered a long decline over the past thirty years.²⁷ American-produced steel lost out to foreign steel because increasing domestic costs made foreign labor comparatively appealing. After World War II, developing countries like India, China, Brazil and South Korea benefited from increasing liberalization of trade and easier capital transfers.²⁸

D'Costa argues that the U.S. industry pursued a different path. While Japan and South Korea aggressively invested in large-scale, blast-furnace production facilities, the U.S. steel industry instead focused on using new technologies to make previously low-yield, electricity-hungry mini-mills more productive by drawing on vast quantities of U.S. scrap metal. This strategy, of course, required significant capital investment but also increased production capacity. While the industry began to shed workers and cut costs, it could not match foreign productivity. India, for example, pursued a hybrid mix of the two approaches and benefited from considerable government assistance.²⁹ Not surprisingly, the U.S. industry started to turn to the government when it realized its situation. D'Costa illustrates:

The slow diffusion of modern technology and import competition in the U.S. undermined the financial strength of American steel firms, leading to obsolete excess capacity. The industry responded with major restructuring at the plant level, reorganizing production assets by eliminating capacity and selectively modernizing plans. Unable to cope with the crisis, the industry also abandoned its self-regulatory approach in favor of a more cooperative business-government partnership.³⁰

The resultant decline of the American steel industry has been severe. Since 1997, more than thirty domestic steel companies have filed for bankruptcy protection, displacing more than 45,000 steelworkers. More than 100,000 retired steelworkers lost all medical and life insurance benefits as well. Billions in costs of the steel legacy went uncovered.³¹ Further, the prospect of laying off an additional 70,000-75,000 American steelworkers is very real.³² These steel legacy costs are more complicated than they first appear. The costs are unevenly spread among individual companies. They also include non-worker related costs, such as brown field recovery and shuttering plants.³³ Adding to the

27. Steel Industry Consolidation and Retiree Benefits Protection Act of 2002, S. 2189, 107th Cong. (2002) [hereinafter Steel Industry Consolidation Act]; See generally ANTHONY P. D'COSTA, *THE GLOBAL RESTRUCTURING OF THE STEEL INDUSTRY* (1999).

28. *Id.*

29. D'COSTA, *supra* note 27, 140-43. For the growth of the Japanese and South Korean steel industries, see D'COSTA at 57-80.

30. D'COSTA at 30.

31. S. 2189 107th Cong. (Apr. 2002); CENTER FOR STRATEGIC & INTERNATIONAL STUDIES, *supra* note 3, at 49.

32. CENTER FOR STRATEGIC & INTERNATIONAL STUDIES, *supra* note 3, at 48.

33. In fact, such large producers as Bethlehem Steel has health care burdens of \$27 for each ton of steel it sells, while another company, Nucor, have a health care burden of \$27 a ton. Other Legacy costs, such as shutdown costs may run as high as \$250 a ton as well, CENTER FOR STRATEGIC & INTERNATIONAL STUDIES, *supra* note 3 at 52.

problem, the prices of imported steel from Asia fell markedly after the 1998 financial crisis and global prices have remained low ever since. The resulting surplus of steel has lowered prices globally. The problem of extremely efficient American steel plants producing too much steel in an already flooded market with ever increasing worker and non-worker related costs is perplexing.

Attempts to stave off disaster for an ailing U.S. steel industry, which is facing a looming recession, have been varied. For example, in 1999, James Traficant, Jr., former Democratic Representative from Ohio and an adamant supporter of steel, introduced a bill that would have imposed a year-long total ban on foreign steel imports if *any* dumping was found by the Commerce Department.³⁴ Other attempts to revitalize the steel industry include consolidation, reorganization, specialization or merger with foreign producers.

Interestingly, due to a commonly applied calculation, called “zeroing,” any special trade investigation by the United States and the EU will almost certainly yield a determination of dumping.³⁵ Calculations of dumping margins can be distorted through the use and non-use of averaged prices. Grimwade uses the example of a product that costs \$100 to produce. If twenty units of the good were sold, ten at \$90, and the other ten at \$110, the \$110 is automatically discarded in the calculation by the EU and United States on the basis that only sales *below* production costs are relevant. Once the sales at \$110 are excluded, the average price margin is ten percent below cost ($100 - 90 = 10$), leading to the illusion that dumping has occurred.³⁶ The fact that there were goods being sold above production costs does not affect the calculations.³⁷ This suggests that local political special interests (in this case the steel concern) can easily spur a sympathetic member of Congress into action with their leverage as voters and with campaign contributions. Moreover, special interests in the steel industry are bolstered by an assumption that the Commerce Department will necessarily arrive at a finding of dumping. This finding lent the steel lobby legitimacy, even though it was not supported by international law, nor by normal and accepted accounting practices.

Other attempts to revitalize the steel industry include consolidation, reorganization, specialization or merger with foreign producers.

34. H.R. Res. 442, 106th Cong. (2000); *see also* H.R. Res. 502, 106th Cong. (1999). This follows closely upon Traficant's introduction of the “Fair Steel Trade Act” which sought to impose an outright three month ban on steel imports from Japan, Russia, South Korea, and Brazil.

35. GRIMWADE, *supra* note 16 at 112-114; *see also* Brian Hindley, “The Economics of Dumping and Antidumping Action: Is there a Baby in the Bathwater?” Paper Presented to a Workshop on Policy Implications of Antidumping Measures of the European Institute for Advanced Studies in Management, Brussels (October 1989); Brian Hindley, *Safeguards, VERs and Anti-Dumping Action, THE NEW WORLD TRADING SYSTEM*, OECD 97-99 (1994).

36. GRIMWADE, *supra* note 16, at 112.

37. P.K.M. Tharakan, *Is Dumping Here to Stay?*, *WORLD ECONOMY* 181, Vol. 22, No. 2 (1999).

C. March Madness

In early March 2002, President Bush faced an ITC deadline of casting the deciding vote in approval of the agency's preliminary findings of a "reasonable indication" that the U.S. steel industry was being materially injured from foreign steel imports.³⁸ The report, issued in November 2001, was a result of the petition by several U.S. steel companies for a dumping investigation, as defined by the Tariff Act of 1930 and the Trade Act of 1974.³⁹

If, subsequent to his evaluation and approval of the ITC's findings, a determination of dumping was made, Bush would be entitled to enact and impose safeguard measures, namely authorization to impose tariffs. Bush's economic team presented him with a series of data and proposals. Of chief concern was to make good on a series of campaign pledges candidate Bush made to the steel industry and its workers in such places as West Virginia.⁴⁰ More importantly, Bush's decision would have obvious electoral consequences both on the November 2002 midterm elections and the 2004 presidential election in the critical swing states of Ohio, Pennsylvania and West Virginia, which are all facing staggering "steel legacy" costs.

A few days after news of the policy debate broke, Bush approved the ITC findings and, under the guise of enforcing law in the maintenance of free-trade, imposed tariffs of up to thirty percent on foreign steel entering the United States, effective until March 2006.⁴¹ Like many policy choices by the Bush administration, these steel tariffs were imposed with a selective deliberateness that was underlined with a political calculus: many key countries were exempted from the tariffs.⁴² As mentioned above, the tariff structure differentiated between rates applicable to different types of steel. For example, tin-sheet steel, produced in West Virginia and South Korea, was included in the schedule of tariffs at a *higher* rate than the rate imposed upon an unrefined type of imported call steel slab used by automakers in Michigan.⁴³

A look at the electoral map and the 2000 election results will no doubt lead to the conclusion that domestic political considerations played a dominant role in the decision to impose the tariffs. Indeed, three key electoral swing states, Pennsylvania, Ohio and West Virginia, are also major steel producing states.

38. The president has seventy-five days to make the administrative determination in case of a split commission under 19 U.S.C. § 1671d; *See also Certain Cold-Rolled Steel Products from Argentina, Australia, Belgium, Brazil, China, France, Germany, India, Japan, Korea, Netherlands, New Zealand, Russia, South Africa, Spain, Sweden, Taiwan, Thailand, Turkey, and Venezuela*, USITC Pub. 3471, Inv. Nos. 701-TA-422-425, 964-983 (Preliminary Nov. 2001), available at: <ftp://ftp.usitc.gov/pub/reports/opinions/PUB3471.PDF>.

39. 19 U.S.C. § 1671b(a).

40. David E. Sanger and Joseph Kahn, *Bush Weighs Raising Steel Tariffs But Exempting Most Poor Nations*, N.Y. TIMES, Mar. 4, 2002, at A1; *Romancing Big Steel*, THE ECONOMIST, Feb. 14, 2002, available at http://www.economist.com/PrinterFriendly.cfm?Story_ID=988825.

41. David E. Sanger, *Bush Puts Tariffs Of As Much As 30% on Steel Imports*, N.Y. TIMES, Mar. 6, 2002, at A1.

42. Steel Products Proclamation, 65 Fed. Reg. 10,593 (Mar. 5, 2002), *supra* note 37. *See supra* note 26 and accompanying text.

43. Sanger & Kahn, *supra* note 40, at A1.

Moreover, in each of these states the margin separating the 2000 presidential vote was less than six percent with an average of two percent.⁴⁴ At the time tariffs were imposed, a combined forty House seats from these states were at stake in the midterm election of 2002. Both the Senate races in Minnesota and South Dakota highlighted the lengths the White House would go at making “party-political” decisions.⁴⁵

On his visit to Brazil, USTR Zoellick acknowledged the political dimensions of the tariffs and warned then President Cardoso against imposing retaliatory tariffs on American commodities such as cotton and oranges, veiling his threat as concerns of potential market instability associated with retaliatory tariffs.⁴⁶ With that threat, Zoellick conveyed that, no matter what the practical implications of the Bush policy or reaction it garnered, the policy was justified as purportedly the “right” thing to do and Bush’s officials were not particularly open to criticism or public debate of the policy.⁴⁷ In the eyes of the administration, the decision was final and it was the morally correct one at that, with no need to convince others.

Some protectionists like Rep. Traficant wanted the tariffs set as high as eighty percent while the ITC proposed a forty percent tariff.⁴⁸ Thirty percent meant that steel prices would rise across the board by as much as ten percent, thus raising the costs to U.S. consumers of various steel goods.⁴⁹ In fact, steel prices rose from just under \$200 a ton to more than \$300 a ton in mere anticipation of the tariffs.⁵⁰ Critics such as Senator John McCain estimated that for every steel job saved, thirteen others were put at risk in steel-consuming industries. Also, McCain argued that the added cost to steel would raise consumer prices across the economy.⁵¹ Of course, these consequences were never realized as the tariffs were effectively rolled back in August 2002. Coincidentally, days before the final set of exclusions were announced by the Commerce Department, the ITC *reversed* its 2001 determination and found that there was *no* dumping on the basis of “new” trade data. That data, which directly contradicted the

44. In the 2000 election Al Gore won Pennsylvania with fifty-one percent while Bush won Ohio with 50 percent and West Virginia with fifty-two percent of the vote in each state. The Washington Post 2000 Elections, available at <http://www.washingtonpost.com/wp-srv/onpolitics/elections/2000/res ults/whitehouse/> (last visited Oct. 31, 2002).

45. *On His High Horse*, THE ECONOMIST, Nov. 9, 2002, at 27.

46. Jennifer L. Rich, *U.S. Admits That Politics Was Behind Steel Tariffs*, N.Y. TIMES, Mar. 14, 2002, at W1; see also Robert Zoellick, Transcript of USTR Robert Zoellick Press Conference in Sao Paulo, Brazil (Mar. 13, 2002) at <http://www.ustr.gov/releases/2002/03/2002-03-13-brazilpress.htm>.

47. Matt Bai, “Rove’s Way,” N.Y. TIMES MAG., Oct. 20, 2002, at 60; see also *Germany’s Stumbling Government*, THE ECONOMIST, Nov. 14, 2002, at http://www.economist.com/Printer-Friendly.cfm?Story_ID=1445049 (considering the action against terrorism and the efforts against Iraq were paramount, then the chill in relations with Germany’s Gerhard Schroder would come as no surprise as Schroder campaigned against these efforts).

48. Press Release, Senator Jay Rockefeller, Rockefeller Meets with President on Steel: Senator Urges President to Impose 40 Percent Tariffs to Save U.S. Steel (Feb. 28, 2002), at <http://rockefeller.senate.gov/2002/pr022802.html>.

49. Sanger & Kahn *supra* note 40 at A1.

50. *Rust Never Sleeps*, THE ECONOMIST, May 7, 2002.

51. Press Release, Senator John McCain, McCain: Increased Tariffs on Imported Steel Raises Prices for Consumers (Mar. 1, 2002) at <http://mccain.senate.gov/steel02.htm>.

March 2002 findings, indicated that foreign imports were only having a “negligible” effect on domestic steel production.⁵²

The ITC’s second and final determination, combined with the Commerce Department’s announcement of more than 700 exclusions, killed the effectiveness of the tariffs. Previously-placated domestic interests were outraged. Senator John Rockefeller disagreed with the ITC’s final determination by saying, “plain and simple, the ITC got this one wrong.”⁵³ Moreover, Rockefeller accused Bush of turning his back on American steel workers:

I am extremely disappointed that the president has buckled under foreign pressure at the expense of the American steel industry. Now the president has turned his back on those same steel workers and their companies by granting excessive, unjustified exclusions aimed at appeasing our trading partners and undermining the effectiveness of the steel tariffs.⁵⁴

III.

DOMESTIC ALTERNATIVES

A. *Why not steel legacy alternative?*

Initially, the Bush administration stated that the sole goal of the steel tariff policy was to provide workers, communities and steel producers purported relief from surges of imported steel. In their subsequent postmortem White House officials deny that politics had anything to do with the tariffs.⁵⁵ That aside, the administration had legislative alternatives. Almost any one of these alternatives would have respected international obligations and would have had *directly* be-fitted displaced steel workers in these swing states.

One House bill, the Steel Industry Legacy Relief and Transition Act of 2002, would have created an agency to oversee healthcare benefits to steel retirees, and pooled resources to handle nearly \$13 billion in steel industry liability to retirees.⁵⁶ Another Senate bill would have established a steel worker health-care trust fund.⁵⁷

52. Certain Cold-Rolled Steel Products from Argentina, Australia, Belgium, Brazil, China, France, Germany, India, Japan, Korea, Netherlands, New Zealand, Russia, South Africa, Spain, Sweden, Taiwan, Thailand, Turkey, and Venezuela, USITC Pub. 3551, Inv. Nos. 701-TA-432-425, 964, 966-970, 973-978, 980, and 982-983 (Final Nov. 2002), available at [ftp://ftp.usitc.gov/pub/reports/opinions/PUB3551.PDF](http://ftp.usitc.gov/pub/reports/opinions/PUB3551.PDF). While listing the factors that go into their final determinations, the Commission said that there was not one factor that would be ultimately dispositive. The ITC also said the statute allowed the ITC to give more or less weight on certain data and factors during a pendent investigation, and that any change related to the “pendency” of an investigation was rebuttable. USTIC at 9.

53. Press Release, Senator Rockefeller, Senator Rockefeller’s Statement on ITC Ruling on Cold-Rolled Steel, Aug. 27, 2002, at <http://rockefeller.senate.gov/2002/pr082702.html>.

54. Press Release, Senator Rockefeller, Rockefeller Reacts to President’s Steel Exclusions (Aug. 27, 2002), at <http://rockefeller.senate.gov/2002/pr082302.html>.

55. Bai at 60.

56. H.R. 4574 107th Cong. (2002).

57. Save the American Steel Industry Act of 2001, S. 910 107th Cong. (2001).

A third bill, introduced by Senator Rockefeller, sought to divert tariff revenues from the steel tariffs to a proposed trust fund for steel worker retirees.⁵⁸ In introducing this bill, Rockefeller attributed the “unprecedented crisis” to foreign steel that allegedly reaped the unfair benefits of subsidies and protection from their own governments.⁵⁹ Rockefeller claimed that inaction would lead to a disintegration of the domestic industrial base and pose a threat to national defense. However, instead of relying strictly upon tariffs, Rockefeller and other Democrats in the Senate also proposed a variety of bills with varying costs.⁶⁰ Others in the Senate, like Senator McCain, argued that any tariff policy would impose a great deal of hidden costs on the rest of the economy. In the long run, these costs would eventually outstrip the value of even the most generous government-sponsored assistance program.⁶¹

During the early March 2002 deliberations, indications were that Bush would not support industry efforts to expand pension and Medicare benefits afforded by legislation, but nothing was yet set in stone. The subsequent preference for tariffs is indicative of a clear policy choice in favor of an indirect solution and against legislation that would have directly benefited those Bush had promised to help. Even USTR Zoellick said that none of the legal tools available to Bush could stop the long-term decline of the steel industry.⁶² Of course, a few weeks before the tariffs were imposed, Zoellick also said that tariffs were nothing more than taxes that hurt low- and moderate-income sectors of the economy.⁶³ Thus Zoellick’s comments suggest that the state of the steel industry could be improved through domestic rather than exclusively international strategies.⁶⁴

B. President Clinton’s Previous Approach

While a direct comparison may be unfair, the second Clinton administration faced similar calls for action from the steel lobby to protect U.S. producers from foreign steel. Facing surges of steel imports from Japan, Brazil and South Korea, the steel lobby ran a series of campaigns during 1998-99 urging Americans to “Stand Up for Steel.” In tandem with its efforts in Congress, the lobby wanted to strengthen anti-dumping laws in favor of domestic steel interests. Rather than turning to tariff relief, though, in January 1999, the Clinton adminis-

58. Steel Industry Consolidation and Retiree Benefits Protection Act of 2002, S. 2189, 107th Cong. (2002).

59. Press Release, Senator John D. Rockefeller, Introduction of Steel Industry Consolidation and Retiree Benefits Protection Act of 2002 (Apr. 17, 2002) at <http://rockefeller.senate.gov/2002/pr041702.html>.

60. Various examples from the 107th Congress include: H.R. 808, the Steel Revitalization Act of 2001; H.R. 3982; the Steel Workers Relief Act of 2002; H.R. 2394, the Steel and National Security Act.

61. Press Release, Senator John McCain, McCain: Increased Tariffs on Imported Steel Raises Prices for Consumers (Mar. 1, 2002) at <http://mccain.senate.gov/steel02.htm>.

62. Sanger & Kahn, *supra* note 40.

63. Paul Krugman, *Testing His Metal*, N.Y. TIMES (Op-Ed), Mar. 8, 2002, at A21.

64. The Trade Act of 1974, 19 U.S.C. § 2251 (calls for the president to take “appropriate and feasible” action to effect a period of “positive adjustment” so that a domestic industry may be better suited to compete against foreign competitors).

tration offered steel makers a \$300 million package of tax breaks to provide relief.⁶⁵ While Clinton did not have ITC-based pressure confronting him, he was under pressure to take a more protectionist stance. Clinton pledged to use enhanced Section 301 trade law investigatory powers more frequently. At the same time, though, Clinton was still pushing for a new WTO trade round and drumming up support for multilateral institutions while using his diplomatic power to achieve substantial results. According to the press, it apparently worked. Japanese and South Korean steel makers both responded to threat of anti-dumping duties through "voluntary export restraints," reducing exports to America.⁶⁶

Several questions remain as to why President Bush did not attempt to achieve similar results through personal pressure or appeals to multilateralism. Explanations for Bush's policymaking apparatus are more substantially addressed in Section V below, but this brief comparison speaks to a greater level of personal charisma or political sophistication at work under the Clinton administration.

IV. INTERNATIONAL OBLIGATIONS

A. The WTO's Dispute Settlement Structure and the Legality of the Tariffs

Trade liberalization under the GATT and WTO has been incremental over past sixty years.⁶⁷ Usually, there is a corresponding liberalization of individual domestic laws of member states that lowers trade barriers as more products are included under the WTO's auspices. Ceding this trade control has been a point of contention for many countries. Oftentimes that trade-off has been characterized as a positive one with long term benefits. With increasing concessions that reach deeper into previously exclusive domestic areas, however, members have increasingly turned to protectionism to shield these socially sensitive core markets.⁶⁸ The United States and the EU have both maintained fairly reluctant trade liberalizing positions due to their relatively equal trade dominance.⁶⁹ The United States has managed to preempt WTO dumping and safeguard provisions

65. *Throwing sand in the gears*, THE ECONOMIST, Jan. 28, 1999. Naturally, the EU contemplated legal action in response to what they deemed as a massive steel subsidy.

66. *Id.* See *infra* note 74 and accompanying text.

67. The WTO is the multilateral constitutional successor to the GATT. The GATT was meant to be a temporary trade liberalizing agreement that was originally just a set of schedules of agreed-upon tariffs that would reduce trade tariffs amongst its signatories to pave the way to another proposed Bretton Woods institution, the ITO (International Trade Organization). However, with the failure of major markets like the United States to ratify the ITO, the relatively informal GATT became the primary organization and forum to initiate multilateral trade liberalization. The WTO came into being in 1994 after the Uruguay Round of trade negotiations. Since the inception of the GATT in 1947, the understanding between countries is that on an average of every ten years there would be a new 'round' of negotiations where countries would put more and more of their trade barriers up for negotiation for reciprocal reduction by fellow members to everyone's benefit. As of this writing, there are now 144 members of the WTO.

68. Tina Rosenberg, *Globalization*, N.Y. TIMES MAG., Aug. 18, 2002, at 28; *At Daggers Drawn*, THE ECONOMIST, May 8, 1999 at 18.

69. *Id.*

through a series of reservation-like clauses when it incorporated various trade agreements into U.S. law.

In fact, in some form or another the allowance of positive structural adjustments and reservation preemption clauses have been in every U.S. trade agreement since President Truman issued an executive order decreeing so in 1947.⁷⁰ The Trade Act of 1974 reflects this predilection for a high degree of autonomous trade control.⁷¹ When the 1994 Uruguay Round was implemented, the United States reserved special investigative powers that authorized the president and his agencies—the Commerce Department and the ITC—to retain investigatory power independent of the WTO to determine trade imbalances.⁷² Generally known as Section 301 and recently enhanced to become “Super 301,” these provisions allow an American industry to request an investigation if the industry perceives that it is sustaining material injury attributable to an illegal surge of imports.⁷³ Over European objections, Sections 301 and 302 authorize the president to perform these investigations unilaterally and outside of WTO mechanisms.⁷⁴ If it is determined that there is “substantial injury,” then the president may take “appropriate and feasible” measures to enforce a “positive adjustment” period to allow domestic industry to recover from import pressure.⁷⁵

As already contended the, U.S. steel industry was *not* suffering from serious injury at the hands of foreign steel. The industry’s troubles have actually been caused by excess capacity, a cause not actionable under the WTO. Safeguard protection is only authorized when there is *actual* dumping.⁷⁶ More specifically, the WTO only allows a member to protect its domestic market “if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.”⁷⁷ The increase in the imported good can be an absolute increase or an increasing share in a shrinking market.⁷⁸ Since excess steel (that is not dual-priced) from Asia and the EU is a part of a normal market cycle of production, it can be concluded that the Bush tariffs had no international legal basis.

70. JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTER-NATIONAL ECONOMIC RELATIONS* 179 (1997).

71. 19 U.S.C. §§ 2101 *et seq.*

72. P.K.M. Tharakan, *Political Economy and Contingent Protection*, *POLITICAL ECONOMY* 1550-51, Nov. 1995. In fact, during the period from 1970 to 1979, the ITC conducted 172 anti-dumping cases and during the 1980s conducted 494 anti-dumping investigations of the nearly 2000 recorded to the GATT Secretariat.

73. 19 U.S.C. § 2252 (2003). (Section 301 is part of Public Law 103-465, which was passed in 1994 and was the general implementation of the 1994 Uruguay Round).

74. 19 U.S.C. § 2252 (Section 301 amends Section 201 investigations slightly; both are addressed in Public Law 103-465); *At Daggers Drawn*, *THE ECONOMIST*, May 8, 1999, at 18.

75. 19 U.S.C. § 2251.

76. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Article 2.2.1.

77. *Id.*

78. WTO: Trading into the Future: Safeguards: emergency protection from imports, discussing GATT Article 19, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm.

B. Enter the WTO's Dispute Settlement Process

Membership in the WTO not only entails lower tariffs, but also means that countries must refrain from using discriminatory trade practices like voluntary trade exports and dumping of artificially cheap products upon each other's markets.⁷⁹ Moreover, one of the innovations of the 1994 Round was strengthening the WTO's dispute settlement process. Countries which are members of the WTO benefit from the preferential trade arrangements negotiated amongst its members, as a result of which world tariffs declined from forty percent in 1947 to five percent in 1990; however, once a member, submission to WTO dispute settlement is mandatory in order to secure those benefits. These member states would face group-sanctioned retaliation and damage awards if they did not abide by WTO-sponsored dispute settlement. Indeed, all of these multilateral efforts have led to more cases being settled by the WTO's DSB (Dispute Settlement Body).⁸⁰ Only the United States and EU can disregard WTO-mandated policies by their sheer market size and dominance.

By April 2002, several leading U.S. trade partners filed charges with the WTO's Dispute Settlement Body in Geneva asking for mandatory consultations.⁸¹ Charges varied according to targeted products, but commonly included the claims that: there was no causal link between non-U.S. steel imports and depressed steel prices in the United States; the problem was rather excess domestic capacity; U.S. safeguards were not uniformly applied; the investigation performed by the ITC was insufficient with regard to the injury it sought to identify; and lastly, the relief sought was excessive.⁸² While the prospects for a full-blown trade war (which would have included nearly \$2 billion of retaliatory tariffs on American exports to the EU) dissipated with the August rollbacks, many of these cases still remain in litigation.⁸³

The WTO's dispute provisions require a mandatory period of consultation amongst members within thirty days of a request by an aggrieved country. If consultations are refused or futile, the complaining country can move to form a panel to adjudicate the dispute either immediately or at the conclusion of the consultation period.⁸⁴ The parties then agree on a panel membership (if no agreement can be reached discretion falls to the Director-General) and the panel

79. See, generally, The General Agreement on Tariffs and Trade (GATT 1947) Articles I—XVII, at http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm.

80. John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 144 HARV. L. REV. 511 (2000) at 516 n.24.

81. Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) Article 4, under GATT 1994, Article XXII:1 and Article 14 of the Agreement on Safeguards.

82. For all cases and updates see at: http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm#2002. (Request for Consultations by the EC, Mar. 13, 2002; Japan and Korea, Mar. 26, 2002; China, Apr. 2, 2002; Switzerland, Apr. 8, 2002; and Norway, Apr. 10, 2002. Brazil filed a nearly identical consultation request on May 23, 2002. Japan, Korea and the EC joined a number of other affected countries in supporting Japan's June 3, 2002 second request to form a panel to investigate. As of this writing, proceedings have only advanced to the consultation stage and the request for countervailing duty protection).

83. *Steel, rolled*, THE ECONOMIST, Aug. 29, 2002, at 54.

84. The WTO Legal Texts: Summary of the Final Act of the Uruguay Round, "Understanding on Rules and Procedures Governing the Settlement of Disputes," at <http://www.wto.org/english/>

investigates. Within six months the panel issues a report of its findings. The report then goes to the DSB itself, and unlike the previous GATT structure, will be adopted unless *all* members vote against the implementation of the Panel's findings.⁸⁵ Parties, though, can appeal, and these proceedings take place within 60 days. The reviewing appellate body will then issue a report that is binding upon all members unless the entire DSB votes against implementation. All in all, the period of resolution can range from a year to fifteen months with appeals.⁸⁶

One of the key features of the modified Dispute Settlement Understanding (DSU) of the 1994 WTO agreement is that "members themselves shall *not* make determinations of violations or suspend concessions, but shall make use of the dispute settlement rules and procedures of the DSU."⁸⁷ Yet, when member states perceive that a material and immediate threat to an industry exists, states are permitted to use escape clauses that allow emergency safeguard measures that would otherwise violate GATT.⁸⁸ This multilateral regime with reservations for local, unilateral self-help is inherently contradictory to WTO goals of unified trade regimes. The reservations reflect, however, the unwillingness of many states, foremost the United States, to cede total trade policy control to outsiders.

It appears that complying and adhering to the DSB process is contrary to the Bush administration's unilateralist approach to protecting the U.S. steel industry. Interestingly, the United States under the Bush administration is instead inadvertently defining the contours of acceptable international practice. The United States is, in fact, normalizing global trade policy, albeit in an adversarial and indirect fashion, by urging the EU to submit their claims to the WTO. The Commerce Department's curtailment of the tariffs demonstrates a tacit acknowledgement of the power and risk of alienating the global trading system. However, the current administration chose not to go through these channels and instead confined mention of the WTO to rhetorical purposes only.⁸⁹

This administration is more willing than the Clinton administration to incur these short-term costs due to an enlargement of domestic political interest and narrowing of foreign concerns. By contrast, in the spring of 1999, under the Clinton administration, the United States appeared three times to combat EU

docs_e/legal_e/ursum_e.htm. Parties can also voluntarily opt out of the process and submit to good office, conciliation, mediation and arbitration.

85. Previously, this process was exactly reverse where all reports could only be implemented with the consensus of all members, therefore one holdout member could scuttle the whole effort.

86. See, The WTO: Trading into the Future, Dispute Overview, at http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm.

87. *Id.*

88. Tharakan, *supra* note 72, at 1554.

89. Robert Zoellick, Press Conference, Sao Paulo, Brazil (Mar. 13, 2002) available at <http://www.ustr.gov/releases/2002/03/2002-03-13-brazilpress.htm>.

banana preferences before actually imposing WTO-allowed retaliatory tariffs in April 1999.⁹⁰

Economists will agree that the hidden costs of a sustained tariff policy are broad and deep, but since the curtailment of the tariffs was announced a few months later these costs were never realized. Also intangible are the incalculable symbolic costs of the tariffs in damaged relationships with trading partners and diminished American trade negotiation credibility.

V.

ANALYSIS AND PROSPECTS

A. *A Federalist-based Critique*

Two conservative scholars, John McGinnis and Mark Movsesian, have compared the global trading system with Madisonian concepts of American federalism.⁹¹ They argue that deference given to multilateral agreements under the WTO's constitutional system will increase overall social welfare and reduce inefficient policymaking that caters to the whim of domestic special interests. Such domestic special interests are considered harmful to overall social welfare.⁹² The two further argue that external international obligations hedge against domestic special interests. This hedge benefits society because it causes more efficient policymaking. Further, the two argue that since the WTO's conditions were implemented by Congress and by President Clinton, a democratic commitment was already made to free trade, which reflects the will of the majority.⁹³ However, no apparent international authority is in place to check Bush's executive power granted by "fast track" authority, as in the domestic setting. McGinnis and Movsesian claim that special interests can and do assert a disproportionate amount of influence at the expense of general welfare. This influence is particularly disproportionate in the area of proposed increased WTO regulation of non-trade areas, such as the environment and labor standards. Enlarging the purview of the WTO will be a viewpoint the EU will push in the Doha Round of WTO negotiations.⁹⁴

Relying on simple Ricardian economics, McGinnis and Movsesian note that increased free trade will displace workers who lack the competitive skills vis-à-vis workers in countries with comparative economic advantage and cheaper wages.⁹⁵ Affected and displaced workers lack job mobility as their skills have been too specialized to be applied to other sectors of the market; thus they stand to lose the most under free trade.⁹⁶

90. *Throwing Sand in the Gears*, THE ECONOMIST, Jan. 28, 1999, available at http://www.economist.com/PrinterFriendly.cfm?Story_ID=184376; *At Daggers Drawn*, THE ECONOMIST, May 8, 1999, at 18.

91. See McGinnis & Movsesian, *supra* note 80, at 526, n.75 (citing Federalist Paper no. 10).

92. *Id.* at 512.

93. See Public Law 103-465 which incorporates the 1994 Uruguay Round into U.S. law.

94. McGinnis & Movsesian, *supra* note 80, at 516-18 n.18; Robert Zoellick, *Unleashing the trade winds*, THE ECONOMIST, Dec. 7, 2002.

95. *Id.* McGinnis & Movsesian, *supra* note 80 at 522.

96. *Id.*

McGinnis and Movsesian add that this displacement will often fuel sentimental and nationalistic arguments as industries such as steel and manufacturing have deep social significance. Such industries can be especially potent in affecting protectionist arguments in policymaking.⁹⁷ The two respond to criticisms that international constitutionalism should not properly dictate democratically adopted U.S. trade policy by saying that Congress and local legislatures have *already* adopted these trade standards and regimes, having incorporated them into U.S. statutory law democratically. Furthermore, tensions with special interests can be reconciled as a normal function of a majority-minority system.⁹⁸

Moreover, they warn of the consequences of trade restrictions and suggest the alternative of direct government subsidies to injured sectors. Direct transfer payments offer a solution that both checks protectionist measures and gives special interests compensation:

Trade restrictions secured by protectionist interest groups are particularly deleterious to social welfare. It is well established in economic theory that the most effective way to increase the income of disadvantaged groups is through *direct transfer payments*. . . . For example, instead of pressuring the Japanese automobile industry to adopt voluntary export restraints in the 1980s, the United States could have paid cash compensations to American autoworkers. This strategy would have cost far less than the \$3 billion that American consumers ultimately spent in higher car prices.⁹⁹

The Clinton administration apparently understood and abided by this welfare-maximizing strategy when it was confronted with a similar situation in 1999.¹⁰⁰ By contrast, the Bush administration did not choose to adopt this strategy and felt free to circumvent international obligations to institute protectionist measures. The Bush administration arguably side-stepped the rhetorical devices and was merely being honest about its viewpoint of international law and obligation. To concede the point, it is true that GATT-member countries retain safeguard provisions to escape these obligations in "overriding circumstances."¹⁰¹

B. Analysis of the Decision-making Process: The Wrong Rule for the Wrong Problem

Drawing upon theoretical models that Allison and Zelikow use to analyze decision-making in international politics, the problem of the Bush steel tariffs can be understood in three distinct ways.¹⁰² Using the "Classical Rational Actor" model, analysts attribute government action to "bounded rationality." In other words, government action is assumed to be dictated by a rational decision-maker that is ultimately bounded by an upper capacity to process and interpret information. This model assumes that a unified national executive (which

97. *Id.*

98. *Id.* at 541.

99. *Id.* at 524-25 (citing work done by Jim Chen, *Globalization and Its Losers*, 9 MINN. J. GLOBAL TRADE 157, 212 (2000)).

100. See *supra* text accompanying note 62.

101. P.K.M. Tharakan, *Political Economy and Contingent Protection*, POLITICAL ECONOMY at 1554.

102. GRAHAM ALLISON & PHILIP ZELIKOW, *ESSENCE OF DECISION* (2d ed. 1999) at 143.

would depend on having a very strong central executive), having a series of objectives and options to pick from, will make a value-maximizing choice that is similar to a lay person making a decision.¹⁰³ Allison and Zelikow go on to add that, in making the policy decision, there is a net valuation of costs and benefits, an identification of relevant values and objectives and a balancing of these values.¹⁰⁴ Therefore, under this model and given the themes discussed herein, the Bush steel tariff policy choice would seem to be irrational at best, and misguided calculation at worst. Indeed, the benefits were already uncertain and the costs should have been plainly identifiable to Bush policymakers, as evidenced by the high-level internal debates that took place within the administration.¹⁰⁵ Therefore, under the Classical Rational Actor model, the decision to impose the tariffs can be attributed simply to miscalculation based on faulty information, or simply due to human error.

However, Allison and Zelikow present an organizational output model—Model II—which may be more helpful.¹⁰⁶ This model accounts for the bureaucratization of government and policy coordination amongst various government interests and expertise.¹⁰⁷ This model emphasizes the expectations and regularity that government rules, regulations and processes provide. Things are done in a certain way; procedure and process become the regular convention in the mid-level of the relevant government body generating proposed solutions to policy questions. The purposes and practices behind the “output” become central under this paradigm. The constellation of decision options available to policy makers is constrained by agency specialty and an institutional myopia of sorts emerges.¹⁰⁸ Therefore, this limited decision-making process focuses on meshing and adopting pre-existing “rules” to new situations. The application of Bush’s senior advisor’s, Karl Rove’s, election-winning strategy of appealing to previously untouchable constituencies, that is, steel labor unions and the AFL-CIO in swing states, can provide useful inferences. Bush and Rove appeared to have applied a political rule to the steel glut problem based on their understandings, expectations and solutions *with regards to winning elections*. Under this paradigm then, it can be argued that different relevant factors were given a disproportionate amount of weight when they were considered under this election-winning rubric. Re-election concerns gained more weight than they were due, while international concerns and the practicality of the tariff policy were given diminished weight.

The third model—Model III—emphasizes governmental politics and a policy as an output of various “games.” Allison and Zelikow point out that, under this paradigm, foreign policy is an “extension of politics to other realms.”¹⁰⁹ Organizations, then, do not necessarily act in concert, and policy may be a result

103. *Id.* at 24-5.

104. *Id.*

105. *See supra* note 40.

106. *See generally* ALLISON & ZELIKOW, *supra* note 102, at 143.

107. *Id.*

108. *Id.* at 145.

109. *Id.* at 256.

of Kabuki-style (scripted and predetermined) policymaking plays in the internal and external setting, severely bounded by selfish ends and constraints placed upon individual actors and agencies. Resulting coalition-building among these factions is more varied since every facet of a policy question is contested by various elements engaged in a turf battle for influence.¹¹⁰ Model III is much more relevant when an organization's leader's preferences are known. Policy is formed underneath the leader's constraints and "rules of the game" are widely known, but the resulting policy is more narrow as the goal has been predetermined.

In addition, Bush is the first president to have an MBA and is notorious for delegation and a hands-off approach to the job.¹¹¹ Policy is dictated by case-study and Bush thus considers a set of various proposals, determines what is relevant and decides the *final* course of action.¹¹² This process is problematic because, whereas CEOs may have conclusive and final decision-making abilities in the business setting, the political realm seldom works along these lines.¹¹³ Therefore, considering all three models, it can be argued that Models II and III offer the most robust methods of understanding the policy choices made in this administration.

C. Prospects

The WTO has been criticized from many angles for a variety of reasons. One of the most dominant criticisms is that it is unfairly dominated by the very richest countries.¹¹⁴ Indeed, observers claim that rich countries exploit their position with developing countries in the areas of intellectual property and trade-in-services in exchange for concessions in commodities and agriculture.¹¹⁵

More importantly, many say that structural inequalities ingrained in the WTO will breed cynicism and cause many members to withdraw from the system; entering into bilateral or regional agreements that are not multilateral. Thus, the winners under this regime are those economies and countries strong enough to dictate bilateral terms to weaker developing economies.¹¹⁶ Add to these criticisms the often-cited cynicism regarding "self-interested" U.S. trade policy (and this latest demonstration of that notion from the Bush administra-

110. *Id.* at 258.

111. David E. Sanger, *Trying to Run a Country Like a Corporation*, N.Y. TIMES, July 8, 2001, at WK 1.

112. *Id.*

113. *Id.* at WK 3.

114. ROSENBERG, *supra* note 68.

115. T. Ademola Oyejide, *Africa and the Uruguay Round*, WORLD ECONOMY 427, 433 Sept. 1990. (For example, the GATT was the best place for African countries to pursue an open international trading system that institutionally allowed for differences amongst its members. Significant concessions, such as tariff cuts, were granted to African countries under the 1994 Round. However, the concessions the African nations made were arguably more significant but not readily apparent. Oyejide asserts: "The paucity of Africa's human and material sources and its limited knowledge-base in relation to many of the issues being addressed in the negotiations are serious binding constraints on the regions ability to secure a full appreciation of the implications of the issues and the proposals being discussed in various negotiating groups.").

116. ROSENBERG, *supra* note 68.

tion), and it becomes easy to see that these arguments are gaining popularity. As such, the administration has not completely withdrawn from the multilateral system. Far from it, it can be argued that it is still within the national interest for the Bush administration to operate within the multilateral system when doing so offers the administration desirable results.

More troubling though are the concessions—deeper and more controversial than those at Doha in November 2001—that the United States will be expected to make at the newest trade round. By summer of 2002, there was already great consideration given to the EU being allowed to impose \$1 to \$4 billion worth of tariffs on American products.¹¹⁷ Foreign trade partners have been especially critical of the farm bill that was passed in May 2002 that authorized more than \$80 billion of new subsidies over the next ten years to Midwestern farmers, significantly exceeding the WTO-agreed to ceiling of \$19.1 billion.¹¹⁸ The United States and the EU are facing looming controversies over genetically modified foods and technical barriers to trade, reforming anti-dumping rules and the EU Common Agricultural Policy.¹¹⁹ USTR Zoellick has said that the 2002 Farm Bill serves as a starting point for a more aggressive negotiating position for the Doha Round and he argues that the bill is no more generous than European subsidies.¹²⁰

Zoellick also argued that U.S. trade policy should be offensive as it enters the Doha Round.¹²¹ Zoellick adopted a three-pronged approach that took into account economic, political and security aims. Also, he said the United States would use its leverage to push for more liberalization in services, finance and manufactured goods, while blocking EU core efforts to create super-national governance via the WTO. However, any concessions made in agriculture and textiles and gains made in areas like intellectual property would, of course, be “aligned with America’s values.”¹²² Interestingly, Zoellick also acknowledged that Bush “recognized that he has to reverse the retreat on trade policy at home.”¹²³

The ground work for potential animosity is also being laid with developing country concerns. The Cairns agricultural group of developing commodity-based countries are exerting more pressure and improving their negotiating stances by driving hard bargains in the areas of textiles, commodities and agriculture in order for the United States to gain access to still-protected service-related areas of developing economies.¹²⁴ The developing countries’ position

117. *Dangerous Activities*, THE ECONOMIST, May 9, 2002, available at: http://www.economist.com/background/PrinterFriendly.cfm?Story_ID=1120348.

118. *Id.*

119. *Id.*

120. Robert Zoellick, *Bringing Down the Barriers*, FIN. TIMES, July 26, 2002, at 21.

121. Robert Zoellick, *Unleashing the trade winds*, THE ECONOMIST, Dec. 7, 2002.

122. *Id.*

123. *Id.* Interestingly, Zoellick also wrote of promoting U.S. interests in whatever means possible, saying that free trade areas and bilateral agreements “mutually reinforce gains” even though these structures are seemingly counter to the WTO’s general multilateral liberalizing intent (see GATT Article 24).

124. Zoellick, *Bringing Down the Barriers*, *supra* note 120.

has been boosted with the election of Supachai Panitchpakdi as WTO Director-General, over U.S. objections. Supachai is a man who promises to advocate developing country initiatives. For the United States this will complicate even further the prospects of obtaining trade concessions on the Doha Round. In a recent speech, Supachai indicated his concern for trade and sustainable development for developing countries:

Trade offers one solution. But for sustainable development to work, we will also need solutions in other areas and we need these solutions now and not in some hypothetical future. And finding solutions begins with recognising that shared problems cannot be solved by unilateral approaches. The reality today is that multilateralism is the only sustainable way to secure our global future.¹²⁵

This statement indicates that Supachai is going to push developing country agendas in succeeding rounds of negotiations. Areas that Supachai is likely to push are commodities, agriculture and access to service sectors of developing country economies.

With the passage of Fast Track "Trade Promotion Authority," which gives the president expedited authority to negotiate trade agreements, the picture grows all the more complicated. It is unclear whether Bush will use the broad authority with which he has been empowered. A cautionary viewpoint:

Add together steel, the TPA [Fast Track "trade promotion authority"] compromises and agriculture, and America's commitment to freer trade looks laughable. Its trading partners, poor ones in particular, could be forgiven for doubting Washington's ability to stand up to domestic interests. This doubt threatens the Doha round. Europeans will be reluctant to push politically tough liberalisation of their own agricultural policy if they see America doing the reverse. Poor countries will be even more suspicious of the multilateral system if they reckon America is unwilling to deliver its part of the bargain. Such backsliding may not cause an immediate world economic crisis. But in the long run it could put globalisation itself at risk.¹²⁶

Other prospects look brighter. Bush's continued retention of USTR Zoellick, who is a multilateralist with a close relationship with his EU counterpart, combined with his previous campaign rhetoric of free trade and promotion of regional trade areas may carry the day in the end. Those prospects are, however, counterbalanced by paradigms and considerations influencing Bush's policy. His unification of the domestic and international settings is equally troubling as well.

125. Director-General Supachai Panitchpakdi, WTO, Speech, delivered Johannesburg, South Africa, September 3, 2002: Trade and Sustainable Development: The Doha Development Agenda: World Summit on Sustainable Development High-Level Special Roundtable: The Future of Multilateralism at http://www.wto.org/english/news_e/spsp_e/spsp01_e.htm. In the same speech, Supachai goes on to emphasize various areas of trade negotiations that have previously been associated with developing country concerns; agriculture, textiles and clothing, tariff peaks and escalation.

126. *Dangerous Activities*, *supra* note 117.

VI.

CONCLUSION

True free traders argue that protectionist trade measures are inefficient. If the ostensible goal of a protectionist policy is to help or protect a disadvantaged domestic interest or industry, rather than passing the costs on to society in general through higher prices, economic theory will reveal that the most effective way to increase income to these segments of a domestic market is through direct transfer of payments to those groups.¹²⁷ Moreover, direct subsidies, tax credits or assistance would have expended less political capital and would have been more effective at accomplishing the goal of providing relief to the “steel legacy” problem.¹²⁸ Since the administration pursued a tariff policy that has questionable international legality, the advantages outlined above should have convinced Bush to pursue a direct payment legislative alternative in its place. However, a flawed decision-making process resulted in a different choice. As a result of that choice, the prospects for the next trade round and further trade liberalization are compromised, as is the legal structure of the international trading regime, itself. The administration has been relegated to a defensive position in the next round, in which it is also not clear which elements in the administration will dominate. What is clear is that those left facing the steel legacy problem in the swing states of Ohio, Pennsylvania and West Virginia have lost out for the time being.

POSTSCRIPT

Press reports published after this writing indicated that the WTO’s DSB would issue a Preliminary Report in April 2003 that determined that the Bush steel tariffs violated international trade law as highlighted in this article. The administration, according to these reports, plans to appeal the determination and will keep the sanctions in place until a final determination can be made. U.S. steel concerns decried the report as “inconsistent with facts and inconsistent with the law.” The steel concerns urged a full appeal and accused the WTO of deliberately weakening U.S. trade policy. Meanwhile, forecasts of lost jobs in steel consuming industries were seemingly confirmed by the Consuming Industries Trade Action Coalition. The industry group said that nearly 200,000 jobs had been lost as a result of the tariffs. The case history rests against the United States as the press reports also highlighted that no Preliminary Report has been reversed and that the WTO has struck down every safeguard measure imposed between its members. One official suggested the best solution to the problem would be for the administration to repeal the tariffs at a midterm review slated for September 2003.

127. MCGINNIS & MOVSESIAN, *supra* note 67 at 525 (discussing deadweight loss associated with special interest protectionism).

128. *Id.* note 68 at 525 (discussing the cost effectiveness of providing housing vouchers opposed to trade barriers).