

**How to Successfully Integrate China into the World Economy:  
China-Specific Safeguards and its Future Implications**

**Table of Contents**

- I. Introduction
  - a. Research Question
  - b. Purpose and its Relations to Economics of Community Building
  - c. Outline of the Paper
  - d. Main Argument
  
- II. Historical Precedence and Comparison of the Rules on Safeguards
  - a. The *ad hoc* escape clause: a past practice
    - i. Accession Protocol of Poland
    - ii. A Country Specific Safeguard: Poland vs. China
  - b. GATT Article XIX, Safeguard Agreement, & China's Accession of Protocol
    - i. Unforeseen development
    - ii. Increased imports
    - iii. Serious injury
    - iv. Causation
    - v. Others
  
- III. Case Analysis: UNITED STATES – MEASURES AFFECTING IMPORTS OF CERTAIN PASSENGER VEHICLE AND LIGHT TRUCK TYRES FROM CHINA
  - a. General Background
  - b. Legal basis for each party's claim
  - c. USITC Methods of Safeguard Assessment
    - i. Procedural requirement
    - ii. Unforeseen development
    - iii. Substantial cause and serious injury
  
- IV. The Practice of Softer Implementation
  - a. US vs. EU Trade Law
  - b. The Current Practice of the EU
  
- V. Conclusion

## I. Introduction

On 12 March 2010, the WTO Dispute Settlement panel was established as a response to China's request on the claims against the U.S. and their imposed safeguard measure exclusively towards certain Chinese tires.<sup>1</sup> Normally, "safeguard" under the WTO refers to a trade protectionist measure for other Member states to either apply higher tariff or higher quota only for the Chinese imports. China-Specific Safeguard (hereinafter CSS) is a much narrower protectionist measure in which it allows other Member states to apply the terms *specifically* to the Chinese imports. CSS was part of the agreement made between China and the WTO Members which can be found in Section 16 of the Accession Protocol of China<sup>2</sup>.

The dilemma here is that while international rules exist for the purpose to treat states fairly, in fact, applying the same rules to states with different conditions can be problematic. This paper seeks to find the proper application of economic trade law to enhance the global community building. In other words, how can it be interpreted in such a way to justify, what it seems so blatantly discriminatory, that CSS does not create trade diversion or bias against the Chinese imports? The proper analysis in the legitimate usage of such country-specific trade law is of vital importance as it is the trend of the international community to expand the role of states with notably different economic conditions such as the BRICs.

The paper will be divided into three sections. First, it will present the precedence of such *ad hoc* escape clause of Poland that is similar in trait with the CSS. It will then provide descriptive analysis by comparing the WTO Safeguard Agreement and GATT Article XIX with the CSS. This section points out that the kind of *ad hoc* escape clause has been practiced under the WTO before and that the implementation of such safeguard is largely dependent upon the interpretation of the applicable domestic laws. Second part of the paper will closely look at the current dispute between U.S and China. This part will especially pay more attention to the U.S. procedural methods of how they reached conclusion to implement the protection measure and how the U.S. International Trade Commission (hereinafter USITC) is designed in favor of the domestic protectionism. Third section of the paper will suggest alternative ways to approach CSS by applying the EU trade remedy policies as an example. The distinction between the USITC and EU trade law will clearly indicate the need for U.S trade law to come to conformity with the WTO and EU trade law.

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<sup>1</sup> WTO website, DS399: UNITED STATES – MEASURES AFFECTING IMPORTS OF CERTAIN PASSENGER VEHICLE AND LIGHT TRUCK TYRES FROM CHINA: Constitution of the Panel Established at the Request of China, [online] Available at: [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds399\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds399_e.htm) [3-19-2010]

<sup>2</sup> Annex 1 of this paper attached.

This paper will thus argue that a country-specific measure will not necessarily result in trade distortion and that the matter of whether the existence of CCS brings adverse effect to trade or not will be largely dependent on how each Member's domestic trade law is designed in a way to assess the requirements for implementing CSS.

## II. Historical Precedence and Comparison of the Rules on Safeguards

### *The ad hoc Escape Clause: Historical Precedence*

Although such *ad hoc* measure is against the fundamental principle of nondiscrimination<sup>3</sup>, the “WTO-plus”<sup>4</sup> obligations is not new to the legal practice of GATT and that it has been “legally accepted and applied within a framework in which non-discrimination still appeared to be the main parameter of conduct.”<sup>5</sup> Spadi, for instance, points out the historical precedence of how the discriminatory safeguards were previously practiced on the three Eastern European Communist Countries, Poland, Romania and Hungary, that have entered WTO in the 1960s and 1970s.<sup>6</sup> For example, Accession Protocol of Poland reads as follows:

- (a) If any Product is being imported into... a contracting party from the territory of Poland in such increased quantities or under such conditions to cause or threaten serious injury to domestic producers in the former territory of the like or directly competitive products, the provisions of (b) to (e) of this paragraph shall apply.<sup>7</sup>

Nevertheless, the difference between Poland and the other two countries, Romania and Hungary, was that safeguard was initiated by Romania and Hungary itself on the imports coming into their country to protect their own domestic market whereas in the case of Poland, the safeguard measure was only available for use upon the other Members on imports coming in from Poland. The paper will thus omit the special safeguards on Romania and Hungary and focus on the comparison between the escape clause of Poland and that of China.

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<sup>3</sup> Article I states that WTO Members is obliged to give unconditional treatment of Most-Favored-Nation (MFN) to other Member States; Article III states that Members must afford national treatment to those goods.

<sup>4</sup> The Secretariat Note, cited from Julia Ya Qin, ““WTO-Plus” Obligations and Their Implications for the World Trade Organization Legal System: An Appraisal of the China Accession Protocol,” *Journal of World Trade*, vol. 37, no. 3 (2003) p. 489.

<sup>5</sup> Fabio Spadi, “Discriminatory Safeguards in the Light of the Admission of the People's Republic of China to the World Trade Organization,” *Journal of International Economic Law*, vol. 5, no. 2 (2002) pp. 421-427.

<sup>6</sup> *ibid.*

<sup>7</sup> Protocol of Accession of Poland, cited in Spadi, *op. cit.*, p. 426.

### *Accession Protocol of Poland*

Poland was the first planned economy nation that entered GATT in 1967.<sup>8</sup> As the first socialist country to have joined GATT, other Member states were in doubt as to how the fairness in trade could be applied to a socialist planned economy with the existing GATT rules when the system itself was solely a market-based system. Insuring fairness was in regards to a) whether the commercial transaction had political priority and b) to balance out the different pricing mechanism of the planned economy.<sup>9</sup> Eventually, Poland's Accession Protocol was built upon the following five major points<sup>10</sup> in order to tackle the two mentioned problems: 1) Other Member states are required to lower their tariff/quotas against Poland during the transition period and the transition period was to be determined at the third annual review 2) Safeguards (termed as "emergency action" at the time) against imports from Poland 3) Agreement in terms of "normal value" pricing 4) Poland's requirement to increase imports at the rate of 7% for three years in which they can choose the country and product of the import 5) Annual review to check record of trade between Poland and other Member states.

Several problems arose in assessing the efficiency of the Protocol. One of the most critical problems pointed out by Ian Douglass was lack of cooperation from the other Member states. The annual review, which was required by all the contracting parties to determine the trading status with Poland that was needed to determine the proper use of discriminatory trade barriers against Poland, 30 out of 73 Member states were found to have responded and 14 reports among them were found to have kept the discriminatory quota restrictions against Poland.<sup>11</sup>

### *A Country Specific Safeguard: Poland vs. China*

So why does CSS attract more attention to something that have already existed before? There are differences that lie in between the historical precedence and the current CSS at issue. One reason in particular that is not hard to spot is China's size of trade that is substantially larger than that of Poland, Romania or Hungary in the past. Since China's trading scale is so huge, it evidently affects the trading partners with greater impact, (especially the big trading power) which leads to the desirability of more severe protection measure against the Chinese imports. Unlike the aforementioned country-specific safeguards, CSS was known as a transitional mechanism; a transitional mechanism in which Member states can impose safeguard on imports from China until China "commit[s] itself to a price system in which

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<sup>8</sup> Andrew Ian Douglass, "East-West Trade: The Accession of Poland to the GATT," *Stanford Law Review*, vol. 24, no. 4, (April, 1972) p. 748.

<sup>9</sup> Douglass, *op. cit.*, p. 749.

<sup>10</sup> Douglass, *op. cit.*, pp. 756-758.

<sup>11</sup> Douglass, *op. cit.*, p. 760.

commodity prices would reflect supply and demand...”<sup>12</sup> leaving out any direct reference as to the duration of such transitional period. The commitment required by China to determine the price through market forces created a fundamental clash with its special feature of low level of labor and production input cost. Hence, more requirements with less specified rules gave extra harness for China.

Another difference is that U.S. has been the leading country to make exceptional rules for China. It is interesting to note that while EU was the main actor for the creation of escape clause for Poland, U.S, a country that was against such escape clause, was now actively promoting the same condition to China.<sup>13</sup> In fact, China’s Accession Protocol was largely influenced by the U.S. – China Agreement in 1999,<sup>14</sup> and the new distinct terms that are introduced in the CSS clause, such as “market-disruption,” is derived from the U.S. trade law that was applied only to products of Communist countries.<sup>15</sup> The significance of the U.S. involvement is largely to do with how the USITC is designed to implement safeguard towards the imported goods. Basically, the U.S. trade law established loosened guidelines for the safeguard assessment to pass the implementation threshold. This part will be elaborated later on in two upcoming sections where the process of implementing safeguard is noticeably different between the U.S and the EU.

#### *GATT Article XIX, Safeguard Agreement vs. China-Specific Safeguards*

CSS is narrower in a sense that it is specifically targeting Chinese imports, and yet much broader in terms of conditions that must be met for applicability of the measure. Inevitably, this led to concerns of many observers that the utilization of such *ad hoc* escape clause can be abused since it will be much easier for other Member states to impose trade protectionist measure.

For a country to implement a safeguard measure, it needs to satisfy the following criteria: 1) whether it was an unforeseen development, 2) increase in the amount of imports, 3) noticeable or the threat of serious injury, and 4) the causation link between the increased imports and the serious injury. This section will analyze the two existing rules on safeguards (GATT Article

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<sup>12</sup> H.K. Jacobson and M. Oksenberg, *China’s Participation in IMF, World Bank, and GATT*, Ann Arbor, MI: The University of Michigan Press, 1999) p. 100 cited in Spadi, *op. cit.*, p. 428.

<sup>13</sup> Spadi, *op. cit.*, p. 428.

<sup>14</sup> Marco Bronckers, “The Special Safeguards Clause in WTO Trade Relations with China: (HOW) Will it Work?” in Mitsuo Matsushita & Dukgeun Ahn (eds.) *WTO and East Asia: New Perspective*, London: Cameron May, 2004, p. 39.

<sup>15</sup> Scott Andersen and Christian Lau, “Hedging Hopes with Fears in China’s Accession to the World Trade Organization: The Transitional Special-Product Safeguards for Chinese Exports, *The Journal of World Intellectual Property*, vol. 5, no. 405 (202) p. 414, p. 449.

XIX and Safeguard Agreement) and how CSS is likely to be favored over the other as a result of a lower threshold for meeting the aforementioned criteria.

Section 16 of the China Accession Protocol introduces two different kinds of safeguard measures that are only applied exclusively to “products of Chinese origin.” From Section 16.1 to 16.7 the rules are laid out for “market-disruption safeguards” and Section 16.8 for “trade-diversion safeguards.”<sup>16</sup> The difference between the two safeguard measures is that the latter safeguard measure can be imposed only after the implementation of market-disruption safeguards.

*a) Unforeseen development*

In the case of CSS, the need to show the “unforeseen development”<sup>17</sup> is omitted. It is also noteworthy that USITC also does not include the requirement of “unforeseen development” to be met in the safeguard risk assessment. This is probably because the establishment of the CSS *per se* was due to the “foreseen” injuries that would be caused by the inflow of Chinese goods. Hence, a Member state adopting CSS over the existing WTO Safeguards, justifies the omission of the unforeseen development because it is already assumed in the CSS measure itself.

*b) Increased imports*

Article 2.1 of the Safeguard Agreement requires that imports be “in such increased quantities, absolute or relative to domestic production.” The intricacy in meeting the qualification for this specific criterion was further added after the Appellate Body’s decision in the Argentina Footwear case where it established that the increased of imports should be “recent enough, sudden enough, both quantitatively and qualitatively, to cause or threaten to cause serious injury.”<sup>18</sup> However, The CSS only mentions rapid increase of imports either in absolute or relative terms.

*c) Serious injury*

The term “serious injury” is replaced by the term “material injury.” Article 4.1 (b) of the Safeguard Agreement defines the serious injury as “clearly imminent” and that all relevant factors must be taken into consideration in order to meet the qualifications. Material injury is not defined in any of the Section 16 of China Accession Protocol. It only implies that the

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<sup>16</sup> Scott Anderson and Christian Lau, *op. cit.* p. 420.

<sup>17</sup> “Unforeseen development” is one of the requirements to launch a safeguard measure where the threat of increased amount of imports has to be sudden enough to be not foreseen.

<sup>18</sup> ARGENTINA – SAFEGUARD MEASURES ON IMPORTS OF FOOTWEAR

existence of “material injury” is the determination for the existence of market disruption.<sup>19</sup> The market-disruption is defined under Section 16.4 of the Protocol as follows:

*Market disruption shall exist whenever imports of an article, like or directly competitive with an article produced by the domestic industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury or threat of material injury to the domestic industry. In determining if market disruption exists, the affected WTO Member shall consider objective factors, including the volume of imports, the effect of imports on process for like or directly competitive articles, and the effect of such imports on the domestic industry producing like or directly competitive products.<sup>20</sup>*

This intentionally broad, vague and ambiguous term led to the conclusion by many that it would be easier for the Members to meet the given criterion, not to mention the fact that there were no previous Appellate Body hearings to establish a more specific interpretation of the term.

#### *d) Causation*

The causation link between the increase of Chinese imports and material injury is not as strongly stressed as the WTO Safeguard Agreement. Andersen and Lau scrutinize the wording “a significant” factor that such wording was not found anywhere else in the WTO Agreements. What they argue is that “a” significant cause (instead of “the” significant cause) implies that increase in Chinese imports can merely be one of the many factors that led to the material injury.<sup>21</sup>

#### *e) Others: Provisional safeguards, forms of remedy, time limit, and reciprocity*

Besides the four main criteria, there are no requirements for showing clear evidence and no restrictions of the kind of remedies (usually it is only in the form of tariffs) when a Member state wants to impose a provisional safeguard. There is no such time limit as there is on the WTO Safeguards (four years) and once the measure is initiated, it can survive until 2013, after twelve years in which the CSS application to China as a whole terminates. While cross-suspension is allowed after two or three years, the stark contrast between the market-disruption and trade-diversion safeguards is that under trade-diversion safeguard, it is stipulated in Section 16.8 of the Protocol that China is given no right to take any counter-measures.

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<sup>19</sup> Yong-Shik Lee, “The Specific Safeguard Mechanism in the Protocol on China’s Accession to the WTO: A Serious Step Backward from the Achievement of the Uruguay Round,” *The Journal of Intellectual Property*, vol. 5, issue 2 (November 2002) p. 222.

<sup>20</sup> *ibid.*

<sup>21</sup> Scott Anderson and Christian Lau, *op. cit.* p. 423.

### III. Case Analysis: UNITED STATES – MEASURES AFFECTING IMPORTS OF CERTAIN PASSENGER VEHICLE AND LIGHT TRUCK TYRES FROM CHINA

#### *General Background*

Pursuant to section 421 (b)(1) of the Trade Act of 1974, the USITC launched the investigation to assess that certain passenger vehicle and light tires from China are being imported into the United States in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of like or directly competitive products.<sup>22</sup> The investigation was effective from April 24, 2009 with the support of petition filed by private firms such as the United Steel, and was quickly spread to public with public hearings and public notices on the USITC website. The proposed remedy from the Commission against the damages caused by the Chinese imported tires was 55 percent *ad valorem*<sup>23</sup> in the first year, 45 percent *ad valorem* in the second year, and 35 percent *ad valorem* in the third year.<sup>24</sup> Hence, the safeguard measure of higher tariff was active from September 26<sup>th</sup> 2009. Below are the brief timeline of events.<sup>25</sup>

• September 14, 2009	• Request for consultation
• September 26, 2009	• Safeguard measure took effect (continue in effect today)
• November 9, 2009	• Consultations were held (failed)
• December 9, 2009	• Request for panel
• January 19, 2010	• Panel to be established (no agreement)
• March 2, 2010	• Panel established (appointed by Director General) <sup>26</sup>

#### *Legal Basis for Each Party's Claims*

The measure at issue is higher tariffs on certain Chinese made tires for three years. China considers this as not properly having been justified pursuant to the WTO rules as well as the existing Safeguard Agreement. In other words, China is attacking the United States by

<sup>22</sup> USITC website, "Certain Passenger Vehicle and Light Truck Tires From China: Investigation No. TA-421-7," (July 2009) [online] Available at: [www.usitc.gov/publications/safeguards/pub4085.pdf](http://www.usitc.gov/publications/safeguards/pub4085.pdf) [3-20-2010]

<sup>23</sup> *Ad valorem* refers to proportion to value, especially of import duties of a percentage of the value of the imports.

<sup>24</sup> *ibid.*

<sup>25</sup> WTO website, DS399: UNITED STATES – MEASURES AFFECTING IMPORTS OF CERTAIN PASSENGER VEHICLE AND LIGHT TRUCK TYRES FROM CHINA, [online] Available at: [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds399\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds399_e.htm) [3-19-2010]

<sup>26</sup> WTO website, DS399: UNITED STATES – MEASURES AFFECTING IMPORTS OF CERTAIN PASSENGER VEHICLE AND LIGHT TRUCK TYRES FROM CHINA: Constitution of the Panel Established at the Request of China, [online] Available at: [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds399\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds399_e.htm) [3-19-2010]



relying on the general rules of the WTO claiming that such safeguard measure imposed by the U.S. are inconsistent with Article I:1, Article II and Article XIX of the GATT 1994.

The U.S., on the other hand, has not been showing even an attempt to justify its measures under the WTO rules as well as other GATT provisions related to safeguard measure. Instead, the sole justification mentioned for their imposing safeguard was pursuant to the Accession Protocol of the People's Republic of China.<sup>27</sup> Having established from the previous section, CSS contained in the Accession Protocol of China provides a viable safeguard measure that could be imposed under the lower threshold compared to the existing safeguard rules. Hence, if the U.S. were to successfully base its legal challenge by defending themselves with the use of CSS, the U.S. does not necessarily have the burden of proof to show neither the general standard of increase of imports nor does it have to satisfy the requirement of "unforeseen development."

China challenges such notion and claims that the application of U.S. law to determine restrictions on CSS is inconsistent with the U.S. obligations under the Accession of Protocol. Below are the claims against the United States<sup>28</sup>:

- (1) The US statute authorizing these restrictions, 19 U.S.C. 2451, is inconsistent on its face with Article 16 of the Protocol of Accession in that the US statute impermissibly weakens the standard of "significant cause" by imposing a definition of the term that contradicts Article 16.4 of the Protocol of Accession.
- (2) The restrictions imposed pursuant to 19 U.S.C. 2451 in this particular case are inconsistent with the following provisions of the Protocol of Accession.
  - Article 16.1 and 16.4, because imports from China in this case were not "in such increased quantities" and were not "increasing rapidly," and instead had begun to decline in response to changing US demand conditions.
  - Article 16.1 and 16.4, because imports from China in this case were not a "significant cause" of material injury or threat of material injury, and are being improperly blamed by the US for the condition of the industry that, in fact, reflected other factors in the market.
  - Article 16.3, because the restrictions in this case are not necessary, and are being imposed beyond the "extent necessary to prevent or remedy" any alleged market disruption, and should not have been set at the high tariff levels being imposed
  - Article 16.6, because the restrictions in this case are being imposed for a period of time longer than "necessary to prevent or remedy" any alleged market disruption, and need not have been imposed for three years.

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<sup>27</sup> WTO website, DS399: UNITED STATES – MEASURES AFFECTING IMPORTS OF CERTAIN PASSENGER VEHICLE AND LIGHT TRUCK TYRES FROM CHINA: Request for the Establishment of a Panel by China, [online] Available at:

[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds399\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds399_e.htm) [3-19-2010]

<sup>28</sup> *ibid.*

### *USITC's Method of Safeguard Assessment*

Precedents of the WTO dispute settlement cases exist which indicate that the clash between the U.S. trade law and the WTO rules is not relatively new. Cases such as *Wheat Gluten, Lamb, Line Pipe, Wire Rod, and Steel* are the recent safeguard cases that were dealt with by the panels and Appellate Body that pointed out several factors of the USITC laws that were lacking in conformity with the existing WTO rules. The purpose of this section is to pinpoint how the standard of the U.S. trade law differs from the existing WTO Safeguard rules and such inconsistency implies a possible detrimental effect in the outcome of the present tires case between China and the U.S. in regards to CSS.

#### *a) Procedural Requirements: Who can initiate the Safeguard Proceedings?*

Section 201 of the Trade Act of 1974 allows the safeguard measure to be active in the United States under several given conditions. This is also pursuant to Article 2.1 of the Safeguard Agreement where the WTO Members “may apply a safeguard measure to a product only if that member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.”<sup>29</sup> The clause itself is vague in that there are no set standards to determine whether a Member State has met the provisions since, as apparent in the case of the U.S. trade law, different Member states have different domestic trade laws and determination methods to carry out the risk assessments. Having said that there already exists a gray-area measure in the original Safeguard rules, many scholars have criticized the ad hoc escape clause such as the CSS that there is “no separate safeguard mechanism [to be] called for.”<sup>30</sup>

In terms of procedural requirements to implement the safeguard, first, the USITC has to receive a petition from a domestic industry. In the case of the present dispute, the petition made by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union was taken into account to trigger the initial investigation. It is noteworthy that U.S. is particularly known for its “privatization”<sup>31</sup> of the trade foreign policy. The role of the interest groups and active petition has been the tradition of

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<sup>29</sup> WTO Safeguard Agreement

<sup>30</sup> Yong-Shik Lee, *op. cit.*, p. 229.

<sup>31</sup> Claude E. Barfield, “The Role of Interest Groups in the Design and Implementation of U.S. Trade Policies,” *Social Dimensions of U.S. Trade Policy*, Alan V. Deardorff and Robert M. Stern (eds), Ann Arbor: The University of Michigan Press, 2000) p. 271.

the U.S trade sector and thus it is not surprising to note that the proceedings to take safeguard measure may be initiated upon the filing of a petition by any entity (including a trade association, firm, certified or recognized union or group of workers) which is a representative of an industry.<sup>32</sup> After the petition has been filed, the Commission is required to conduct an investigation “to determine whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article.”<sup>33</sup>

*b) Omission of the “Unforeseen Development”*

The inconformity of U.S. Trade Act of 1974 to the WTO rules was mentioned and the requirement for “unforeseen development” is one of the examples. Not in any of the U.S. trade law does it require the demonstration of increase in imports as a result of “unforeseen development”.<sup>34</sup> Nevertheless, in the case of US – Lamb and US – Steel Safeguard cases, Appellate Body overruled the U.S. domestic requirement and stated that the “unforeseen development” factor must be apparent in the risk assessment.

However, such precedence might not be so effective in the case of tires dispute between China and the U.S if U.S. successfully establishes its claim based on the CSS instead of the original safeguard rules. CSS does not require a Member state to show the presence of “unforeseen development,” which is often considered as one of the highest hurdles that a Member have to pass in order to implement a normal safeguard measure. This is the situation where it shows the precise overlap of the U.S law and CSS, which works against China.

*c) Problematic Determination of “Serious Injury” and “Significant Cause”*

Another inconsistent feature of the U.S trade law is related to the requirements phrased as “serious injury” and “substantial cause.” The definition of “serious injury” is laid down in 202 (c)(6) Trade Act of 1974 as “a significant overall impairment in the position of a domestic industry,” which is fairly identical to the definition laid out in 4.1 of the Safeguard Agreement. Nevertheless, when determining a serious injury to the domestic industry, all relevant economic factors must be taken into account but not only are these factors different with those outlined in the WTO Safeguard Agreement but also the determination of relevance must be

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<sup>32</sup> Rudiger Wolfrum, Peter-Tobias Stoll, and Michael Koebele, *WTO: Trade Remedies*, Leiden, Boston: Martinus Nijhoff Publishers, 2008, p. 839.

<sup>33</sup> Quotations to US law, cited from Douglas A. Irwin, “Causing Problems? The WTO review of causation and injury attribution in US Section 201 cases,” *World Trade Review*, (2003), vol. 2, no. 3, pp. 297-325.

<sup>34</sup> Rudiger Wolfrum, Peter-Tobias Stoll, and Michael Koebele, *op. cit.*, p. 836.

decided upon the Commission.<sup>35</sup> In other words, the existence or non-existence of a sole dominant factor is not a decisive one in determining whether one has met the requirement for the “serious injury.”

One of the claims raised by China, as a claimant, was that the U.S. statute defined the “significant cause” more narrowly than what was required by the Accession Protocol (Recalling Article 16.4 of the Protocol requiring that the increased imports must be a “significant cause of material injury”). The U.S. trade law, indeed, specifies that the “substantial cause” refer to its contribution to the material injury of the domestic injury, but that it does not need to be equal to or greater than any other cause.

The WTO panels and Appellate Body have pointed out in various cases that the Commission’s risk assessment has failed to distinguish the significant injurious factors from other existing factors that were not attributed to the increased imports. Nevertheless, with the requirement of lower threshold laid out in CSS, the burden of proof can possibly shifted over to China in order to demonstrate that factors attributing to the cause of serious injury must be greater than any other factors.

#### **IV. The Practice of Soft Implementation**

##### *U.S. vs. EU Trade Law*

With the analysis of the existing conflicts in related to the U.S trade law and to suggest a proper use of CSS, the paper now seeks for a possible solution by how other existing domestic trade laws can differently interpret CSS. This part of the paper argues that EU trade law is a proper model that demonstrates an adequate implementation of CSS in situations where it is genuinely necessary for Member states to apply a protectionist measure.

First, unlike the U.S. that has never developed a set of trade bureaucracy, EU has firmly established its trade bureaucracy. From trade negotiations to the execution of administrative policies such as safeguards, antidumping, or countervailing duty orders, it operates with less transparency and less pressures from outside private interest groups<sup>36</sup>, which is a stark contrast with that of the U.S. For example, U.S. have unlimited petition right to industry representative and it is the initial requirement for the Commission to file a petition to carry out a safeguard assessment. On the other hand, in the case of the EU, there is no private petition right given to initiate the CSS against China.<sup>37</sup> That is, a particular European industry is not eligible to

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<sup>35</sup> Rudiger Wolfrum, Peter-Tobias Stoll, and Michael Koebele, *op. cit.*, pp. 836-837.

<sup>36</sup> Claude E. Barfield, *op. cit.*, pp. 271-272.

<sup>37</sup> Marco Bronckers, “The Special Safeguards Clause in WTO Trade Relations with China: (HOW) will it work?,” Mitsuo Matsushita and Dukgeun Ahn, (eds) *WTO and East Asia: New Perspective*, London: Cameron May, 2004.

request the omission to investigate a request for safeguard measures. Hence, CSS is much less subjected to be vulnerable for the abused implementation of the measure when approached with the EU trade law. Second factor that is distinct from the U.S. trade law is that EU law is relatively in conformity with that of the WTO rules. No standards are substantially remote from the general rules of the WTO. Third factor is that the EU requires the interest of the EU for the application of the safeguard measure. The interest has to be balanced in terms of how all EU parties would be affected by the launching of the safeguard measure and even considers the possible retaliatory effect.

Despite the fact that EU was the Member state that initially demanded quantitative restrictions on Poland, Romania and Hungary, it shows general reluctance to implement safeguard measure overall. This is explained by Groombridge and Barfield that it has always been the characteristics of the EU to have always “disliked strong transparency, detailed legal rules, and complex calculations in constructing its trade-remedy system.”<sup>38</sup>

#### *The Current Practice of the EU*

The EU has initiated its first investigation in July 2003 under CSS in regards to the imports of preserved citrus from China. This investigation was put forth under the request from Spain and the EU Commission is carrying out the risk assessment by conducting “parallel investigations” under three Regulations as stated below<sup>39</sup>:

• Regulation 427/2003	• China-Specific Safeguard
• Regulation 3285/94	• The general safeguard regime
• Regulation 519/94	• Safeguards regime applicable to non-market economies

By comparing and contrasting the investigation carried out by these three Regulations, EU Commission will determine which will be the most appropriate Regulation to apply. Hence, with how the EU trade law is structured and its tendency of not fancying the use of safeguard measure has not raised many disputes in terms of its legality.

### **V. Conclusion**

With the analysis of the first ever case on CSS measure, the paper attempted to show that what seems to be the potential problem is not the existence of a seemingly discriminatory *ad hoc* escape measure of the China’s Accession Protocol, but rather it is the appliance of the other Member’s domestic trade law that could bring adverse effect to the outcome of such a

<sup>38</sup> Mark A. Groombridge, and Claude E. Barfield, *Tiger by the Tail: China and the World Trade Organization*, Washington D.C.: The American Enterprise Institute Press, 1999, p. 56.

<sup>39</sup> Marco, Bronckers, *op. cit.*, p. 48.

country-specific measure. Hence, the paper suggested that it is the U.S. law *per se*, and not the CSS, that must come into conformity with the existing WTO rules and further suggests that with the application of procedural rules like that of the EU, CSS would be utilized in a way that would act as an effective balancing measure, necessary to prevent the possible trade diversion. That is, only in circumstances where a particular domestic law is applied as to manipulate its investigation results to meet the CSS standards will it distort the use of CSS and deprive the rights of China as the Member of the WTO. Therefore, if any existing inconsistencies can be fixed so as to ensure the possible Member states that will join with any other “WTO-plus” obligations, an *ad hoc* escape clause, like CSS, would be an appropriate measure to enhance more balanced trade community building in the future.

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## **Report of the Appellate Body**

ARGENTINA – SAFEGUARD MEASURES ON IMPORTS OF FOOTWEAR

UNITED STATES – DEFINITIVE SAFEGUARD MEASURES ON IMPORTS OF CERTAIN STEEL PRODUCTS

UNITED STATES – SAFEGUARD MEASURES ON IMPORTS OF FRESH, CHILLED OR FROZEN LAMB MEAT FROM NEW ZEALAND AND AUSTRALIA



## *Annex 1*

### Section 16 of the China Accession Protocol

#### **16. Transitional Product-Specific Safeguard Mechanism**

1. In cases where products of Chinese origin are being imported into the territory of any WTO Member in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of like or directly competitive products, the WTO Member so affected may request consultations with China with a view to seeking a mutually satisfactory solution, including whether the affected WTO Member should pursue application of a measure under the Agreement on Safeguards. Any such request shall be notified immediately to the Committee on Safeguards.
2. If, in the course of these bilateral consultations, it is agreed that imports of Chinese origin are such a cause and that action is necessary, China shall take such action as to prevent or remedy the market disruption. Any such action shall be notified immediately to the Committee on Safeguards.
3. If consultations do not lead to an agreement between China and the WTO Member concerned within 60 days of the receipt of a request for consultations, the WTO Member affected shall be free, in respect of such products, to withdraw concessions or otherwise to limit imports only to the extent necessary to prevent or remedy such market disruption. Any such action shall be notified immediately to the Committee on Safeguards.
4. Market disruption shall exist whenever imports of an article, like or directly competitive with an article produced by the domestic industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat of material injury to the domestic industry. In determining if market disruption exists, the affected WTO Member shall consider objective factors, including the volume of imports, the effect of imports on prices for like or directly competitive articles, and the effect of such imports on the domestic industry producing like or directly competitive products.
5. Prior to application of a measure pursuant to paragraph 3, the WTO Member taking such action shall provide reasonable public notice to all interested parties and provide adequate opportunity for importers, exporters and other interested parties to submit their views and evidence on the appropriateness of the proposed measure and whether it would be in the public interest. The WTO Member shall provide written notice of the decision to apply a measure, including the reasons for such measure and its scope and duration.
6. A WTO Member shall apply a measure pursuant to this Section only for such period of time as may be necessary to prevent or remedy the market disruption. If a measure is taken as a result of a relative increase in the level of imports, China has the right to suspend the application of substantially equivalent concessions or obligations under the GATT 1994 to the trade of the WTO Member applying the measure, if such measure remains in effect more than two years. However, if a measure is taken as a result of an absolute increase in imports, China has a right to suspend the application of substantially equivalent concessions or obligations under the GATT 1994 to the trade of the WTO Member applying the measure, if such measure remains in effect more than three years. Any such action by China shall be notified immediately to the Committee on Safeguards.
7. In critical circumstances, where delay would cause damage which it would be difficult to repair, the WTO Member so affected may take a provisional safeguard measure pursuant to a preliminary determination that imports have caused or threatened to cause market disruption. In this case, notification of the measures taken to the Committee on Safeguards and a request for bilateral consultations shall be effected immediately thereafter. The duration of the provisional measure shall not exceed 200 days during which the pertinent requirements of

paragraphs 1, 2 and 5 shall be met. The duration of any provisional measure shall be counted toward the period provided for under paragraph 6.

8. If a WTO Member considers that an action taken under paragraphs 2, 3 or 7 causes or threatens to cause significant diversions of trade into its market, it may request consultations with China and/or the WTO Member concerned. Such consultations shall be held within 30 days after the request is notified to the Committee on Safeguards. If such consultations fail to lead to an agreement between China and the WTO Member or Members concerned within 60 days after the notification, the requesting WTO Member shall be free, in respect of such product, to withdraw concessions accorded to or otherwise limit imports from China, to the extent necessary to prevent or remedy such diversions. Such action shall be notified immediately to the Committee on Safeguards.

9. Application of this Section shall be terminated 12 years after the date of accession.