



# Chinese Tire Imports: Section 421 Safeguards and the World Trade Organization (WTO)

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## Summary

On April 20, 2009, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union filed a petition with the U.S. International Trade Commission (ITC) requesting an investigation under Section 421 of the Trade Act of 1974, 19 U.S.C. §2451, a trade remedy statute addressing import surges from China, to examine whether Chinese passenger vehicle and light truck tires were causing market disruption to U.S. tire producers. Market disruption will be found to occur under Section 421 whenever imports of a Chinese product that is “like or directly competitive with” a domestic product “are increasing rapidly ... so as to be a significant cause of material injury, or threat of material injury, to the domestic industry.” The ITC initiated the investigation (TA-421-7) on April 24, 2009.

As a result of its investigation, the ITC in June 2009 voted 4-2 that imports of the subject tires were causing domestic market disruption and recommended that the President impose an additional duty on these items for three years at an annually declining rate. The ITC also recommended expedited consideration of trade adjustment assistance (TAA) applications filed by affected firms or workers. On September 11, 2009, President Obama proclaimed increased tariffs on Chinese tires for three years effective September 26, 2009, albeit at lower rates than those recommended by the ITC. The tariff increase is 35% ad valorem in the first year, 30% in the second year, and 25% in the third year. The President also directed the Secretaries of Labor and Commerce to expedite TAA applications and to provide other available economic assistance to affected workers, firms, and communities. While the President was authorized to review the tariffs after six months and to modify, reduce, or terminate them, he did not take any of these actions. Six petitions had been filed under Section 421 in the past, with the ITC finding market disruption in four out of six of its investigations. President Bush decided not to provide import relief in these earlier cases.

Section 421 was enacted as one element of an October 2000 statute that also permitted the President to grant most-favored-nation (MFN) tariff treatment to Chinese products upon China’s accession to the World Trade Organization (WTO). Section 421 authorizes the President to impose safeguards—that is, temporary measures such as import surcharges or quotas—on Chinese goods if domestic market disruption is found. The statute implements a China-specific safeguard mechanism in China’s WTO Accession Protocol that may be utilized by WTO members through December 2013. The provision is separate from Article XIX of the General Agreement on Tariffs and Trade (GATT) 1994 and the WTO Agreement on Safeguards, which allow WTO members to respond to injurious import surges but on a stricter basis than under the Protocol. A major difference is that the Protocol permits a safeguard to be applied only to Chinese products while the Safeguards Agreement requires that any safeguard be applied to a product regardless of its source.

China filed a WTO complaint against the United States in September 2009, claiming that the Section 421 tariffs violate U.S. GATT obligations to accord Chinese tires MFN tariff treatment and not to exceed negotiated tariff rates, that the United States imposed tariffs under the Protocol safeguard mechanism without first attempting to justify them under GATT and WTO safeguard provisions, and that Section 421 and its application in this case violate U.S. obligations under the Protocol. In a report issued December 13, 2010, the WTO panel rejected all of China’s claims. China appealed the report on May 24, 2010, arguing that the panel misinterpreted and misapplied certain standards in the Protocol as they relate to the ITC determination. The Appellate Body is expected to issue its report in late July or August 2011.

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## Introduction

On September 11, 2009, the White House announced that additional tariffs would be placed on imports of certain Chinese tires for three years under Section 421 of the Trade Act of 1974, 19 U.S.C. §2451, a trade remedy statute aimed at import surges from China. The action was based on earlier findings by the U.S. International Trade Commission (ITC) that Chinese tire imports into the United States were causing market disruption to domestic tire producers. The new tariffs took effect on September 26, 2009. Although six petitions had been filed under Section 421 in the past to remedy surges of other Chinese products and the ITC found that U.S. market disruption existed in four out of six of its Section 421 investigations, this was the first time that a President chose to grant import relief under the statute. Further, while President Obama was authorized to review the tariffs after six months and to modify, reduce, or terminate them, he allowed the tariffs to remain in place as originally imposed.

Section 421, which was enacted as one element of an October 2000 statute addressing various issues involving the accession of China to the World Trade Organization (WTO), authorizes the President to impose safeguards—that is, temporary measures such as import surcharges or quotas—on Chinese products in the event that the ITC finds that these imports have resulted in market disruption in the United States. Market disruption occurs under Section 421 if an import surge of a Chinese product is a significant cause of material injury or threat of material injury to the domestic industry producing the like or directly competitive product. China's WTO Accession Protocol permits WTO members to impose safeguards to remedy domestic market disruption caused by imports of Chinese goods until December 2013. This provision is separate from XIX of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and the WTO Agreement on Safeguards, which allow WTO members to respond to injurious import surges generally but on a stricter basis than provided for under China's Accession Protocol.

China requested consultations with the United States under the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes on September 14, 2009, and requested a panel on December 21, 2009, claiming that the additional tariffs are inconsistent with U.S. GATT obligations to accord Chinese tires MFN tariff treatment and not to exceed negotiated tariff rates, that the United States imposed tariffs under the special safeguard mechanism in China's Accession Protocol without first attempting to justify them under general GATT and WTO safeguard provisions, and that Section 421 and its application in this case are inconsistent with U.S. obligations under the Protocol. A dispute panel was established in January 2010, with panelists appointed the following March. In a report issued December 13, 2010, the WTO panel rejected all of China's claims. China has since appealed the panel report.

This report discusses WTO safeguards provisions contained in Article XIX of the GATT and the Agreement on Safeguards; the WTO China-specific safeguard and how it differs from pre-existing WTO provisions; authorities and procedures set out in Section 421 of the Trade Act of 1974; the ITC determination and the President's decision to provide relief in the 2009 China tires case; and China's WTO case against the U.S. tire safeguard.<sup>1</sup>

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<sup>1</sup> For an overview of trade issues involving the United States and China, see CRS Report RL33536, *China-U.S. Trade Issues*, by Wayne M. Morrison. For background information on the U.S. tire industry, see CRS Report R41551, *The U.S. Tire Industry: Technological Change and Import Competition*, by Glennon J. Harrison and Michaela D. Platzer.

## GATT Article XIX and the WTO Agreement on Safeguards

Article XIX of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and the WTO Agreement on Safeguards permit WTO members to apply safeguards—that is, to suspend temporarily GATT tariff concessions or other GATT obligations owed other WTO members—in order to remedy serious injury to domestic industries caused by surges of imported products from other WTO member countries.<sup>2</sup> The China-specific safeguard contained in China’s WTO Accession Protocol, discussed below, raises the possibility that a WTO member may impose safeguards under the stricter provisions of the GATT and the Safeguards Agreement instead of under the China-specific provision. Safeguard measures are generally authorized under U.S. law in Title II of the Trade Act of 1974, 19 U.S.C. §§2251-2254.<sup>3</sup>

Article XIX of the GATT 1994, captioned “Emergency Action on Imports of Particular Products” and referred to as the GATT “escape clause,” was intended to provide GATT parties with a means of addressing temporary emergencies that might arise as a result of their GATT commitments to reduce tariffs and adopt other trade liberalizing laws and policies.<sup>4</sup> Article XIX:1(a), which sets out the WTO legal foundation for safeguards, provides as follows:

If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party [i.e., WTO member] under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part.

A safeguard may take the form of a tariff surcharge, which involves the suspension of a negotiated tariff concession under Article II of the GATT, or an import quota, which involve the suspension of the obligation in GATT Article XI:1 not to impose quantitative restrictions on imports from other WTO members. Another option is a tariff-rate quota (TRQ), under which a specified volume of goods may be entered under a lower tariff rate, with out-of-quota items subject to higher rates.

Article XIX safeguards are to be considered exceptional measures. As explained by the WTO Appellate Body:

As part of the context of paragraph 1(a) of Article XIX, we note that the title of Article XIX is: “*Emergency Action on Imports of Particular Products*”. The words “emergency action” also appear in Article 11.1(a) of the *Agreement on Safeguards*. We note once again, that Article XIX:(1)(a) requires that a product be imported “*in such increased quantities and under such conditions as to cause to threaten serious injury to domestic producers*”.

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<sup>2</sup> For a recent legal and economic analysis of safeguards, see World Trade Organization, *World Trade Report 2009; Trade Policy Commitments and Contingency Measures* 47-65 (2009), at [http://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/world\\_trade\\_report09\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report09_e.pdf).

<sup>3</sup> For additional information on Title II of the Trade Act of 1974, see CRS Report RL32371, *Trade Remedies: A Primer*, by Vivian C. Jones.

<sup>4</sup> John H. Jackson, *WORLD TRADE AND THE LAW OF GATT* 553-55 (1969).

(emphasis added). Clearly, this is not the language of ordinary events in routine commerce. In our view, the text of Article XIX:1(a) of the GATT 1994, read in its ordinary meaning and in its context, demonstrates that safeguard measures were intended by the drafters of the GATT to be matters out of the ordinary, to be matters of urgency, to be, in short, “emergency actions.” And, such “emergency actions” are to be invoked only in situations when, as a result of obligations incurred under the GATT 1994, a member finds itself confronted with developments it had not “foreseen” or “expected” when it incurred that obligation. The remedy that Article XIX:1(a) allows in this situation is temporarily to “suspend the obligation in whole or in part or to withdraw or modify the concession”. Thus, Article XIX is clearly, and in every way, an extraordinary remedy.<sup>5</sup>

The Agreement on Safeguards expands on Article XIX, providing that safeguards may only be imposed if the importing member has conducted an investigation to determine if the conditions for imposing a safeguard have been met<sup>6</sup> and stating that a WTO member may not “take or seek any emergency action on particular products as set forth in Article XIX of the GATT 1994 unless such action conforms with the provisions of this Article as applied in accordance with this Agreement.”<sup>7</sup> It adds that the increased quantities of imports that are a prerequisite of a finding of serious injury may be “absolute or relative to domestic production.”<sup>8</sup> The Agreement also sets out requirements for domestic safeguards investigations and for determinations of serious injury made in the course of such investigations. In addition, a WTO member imposing a safeguard is subject to detailed obligations to notify the WTO Committee on Safeguards and the WTO Council on Trade in Goods and to consult with other affected WTO members.<sup>9</sup>

Although the Agreement on Safeguards does not contain language requiring the existence of “unforeseen developments,” the WTO Appellate Body has determined that the requirement continues to apply. In a 1999 report (which also contains the paragraph quoted above), the Appellate Body found that a safeguard measure must comply with both Article XIX and the Safeguards Agreement, that Uruguay Round negotiators intended that the provisions of the GATT and the provisions of the Safeguards Agreements “would apply *cumulatively* except to the extent of a conflict between specific provisions,” and that, there being no such conflict in this situation, “unforeseen developments” must exist in order to impose a safeguard measure.<sup>10</sup>

The “serious injury” standard contained in Article XIX and carried forward in the Safeguards Agreement is defined in the Agreement as meaning “a significant overall impairment in the position of a domestic industry.”<sup>11</sup> The WTO Appellate Body has found that this standard is “on its face, very high” or “exacting,” particularly when contrasted with the “material injury” standard contained in the WTO Antidumping Agreement, the Agreement on Subsidies and Countervailing Measures, and Article VI of the GATT.<sup>12</sup> According to the Appellate Body, this

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<sup>5</sup> Appellate Body Report, *Argentina—Safeguard Measures on Imports of Footwear*, para. 93 WT/DS121/AB/R (December 14, 1999) [hereinafter *Argentina Footwear AB Report*].

<sup>6</sup> Agreement on Safeguards art. 2.1, at [http://www.wto.org/english/docs\\_e/legal\\_e/25-safeg.pdf](http://www.wto.org/english/docs_e/legal_e/25-safeg.pdf).

<sup>7</sup> *Id.* art. 11.1.

<sup>8</sup> *Id.* art. 2.1.

<sup>9</sup> *Id.* art. 12.

<sup>10</sup> *Argentina Footwear AB Report*, *supra* note 5, at paras. 76-90.

<sup>11</sup> Agreement on Safeguards art. 4.1(a).

<sup>12</sup> Appellate Body Report, *United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, para. 124, WT/DS177/AB/R, WT/DS178/AB/R (May 1, 2001) [hereinafter *U.S. Lamb AB Report*]. The term “material injury,” as used in the Article VI of the GATT 1994, the WTO Agreement on (continued...)

“much higher standard of injury” is consistent with the object and purpose of the Safeguards Agreement since the application of a safeguard is predicated on the existence of increased import volume and not on “‘unfair’ trade actions [i.e., dumping or subsidization], as is the case with anti-dumping or countervailing measures.”<sup>13</sup>

The Safeguards Agreement makes clear that an Article XIX safeguard must be applied on a nondiscriminatory basis, that is, it must be applied to the product at issue regardless of its source.<sup>14</sup> The Agreement also places a time limit on a safeguard measure, providing that it may not be initially applied for more than four years.<sup>15</sup> The safeguard may be extended, however, so long as the full period of application does not exceed eight years.<sup>16</sup> While WTO members may apply quantitative restrictions or quotas under the Safeguards Agreement,<sup>17</sup> they may not “seek, take or maintain any voluntary export restraints, orderly marketing agreements or other similar measures on the export or the import side,” whether such actions are taken by a single member or as actions under “agreements arrangements and understandings entered into by two or more members.”<sup>18</sup>

Article XIX requires that the WTO member intending to impose the safeguard notify the WTO “as far in advance as may be practicable” before doing so and afford the WTO and WTO members having a substantial export interest in the subject product an opportunity to consult on the proposed action. These consultation requirements are expanded upon in the WTO Safeguards Agreement, which requires the member to notify the Committee on Safeguards immediately upon initiating an investigation relating to serious injury or threat as well as at other stages of the process.<sup>19</sup> A member may apply a provisional safeguard in the event of “critical circumstances,” that is, “where delay would cause damage which it would be difficult to repair,” so long as the member has preliminarily determined that “there is clear evidence that increased imports have caused or are threatening to cause serious injury” and that it has notified the Safeguards Committee.<sup>20</sup>

Article 8 of the Safeguards Agreement requires that the member proposing to apply a safeguard measure “endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and the exporting members which would be affected by such a measure.”<sup>21</sup> To achieve this objective, the members may agree on “any

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Antidumping, and the WTO Agreement on Subsidies and Countervailing Measures, is not defined in any of these agreements.

<sup>13</sup> *Id.*, quoting Argentina Footwear AB Report, *supra* note 5, para. 94.

<sup>14</sup> Agreement on Safeguards art 2.2.

<sup>15</sup> *Id.* art. 7.1.

<sup>16</sup> *Id.* arts. 7.1-7.3.

<sup>17</sup> See *id.* art. 5.1.

<sup>18</sup> *Id.* art 11.1(b). For purposes of this prohibition, “similar” measures include “export moderation, export-price or import-price monitoring systems, export or import surveillance, compulsory import cartels and discretionary export or import licensing schemes, any of which afford protection.” Members may, however, mutually agree that an import quota will be administered by the exporting member. *Id.* note 3.

<sup>19</sup> *Id.* art. 12.1.

<sup>20</sup> *Id.* arts. 6, 12.4.

<sup>21</sup> *Id.* art 8.1.

adequate means of trade compensation for the adverse effects of the measures on their trade.”<sup>22</sup> GATT Article XIX:3(a) provides that if the importing member and the affected exporting members cannot reach an agreement regarding the safeguard, the importing member is “free to” impose or continue to impose the measure. If the member applies the safeguard, the affected exporting members have a conditional right to suspend “substantially equivalent concessions or other obligations” under the GATT owed that member.<sup>23</sup>

The Safeguards Agreement, at Article 8.2, provides that the right to suspend concessions owed the importing member, sometimes referred to as a “rebalancing” of concessions, may be invoked if no agreement is reached within 30 days of WTO consultations between or among the members concerned.<sup>24</sup> If an affected exporting member invokes this right, it must first inform the WTO Council on Trade in Goods of its proposed measure. The member may then suspend concessions no later than 90 days after the safeguard is applied, provided 30 days have lapsed since the Council received the notification of the suspension and the Council has not disapproved (i.e., blocked) the proposed action.

Notwithstanding the 90-day limitation described above, Article 8.3 of the Agreement prohibits members from exercising their “right of suspension” for the first three years that a safeguard measure is in effect, provided that the safeguard (1) is taken as a result of an *absolute* increase in imports and (2) is consistent with the Safeguards Agreement. Absent a mechanism in the Safeguards Agreement for establishing whether a safeguard conforms to the Agreement at this stage, affected WTO members have claimed that the three-year limitation did not apply based on unilateral determinations of WTO-consistency, but, more often, have waited or sought to wait until adverse panel and Appellate Body reports involving another member’s safeguard were adopted by the WTO Dispute Settlement Body.<sup>25</sup>

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<sup>22</sup> *Id.*

<sup>23</sup> GATT 1994 art. XIX:3(a); Agreement on Safeguards art. 8.2.

<sup>24</sup> *Id.* art 8.2.

<sup>25</sup> The issue of the immediate suspension of concessions under Article 8.2 of the Safeguards Agreement arose in response to the imposition by the United States of safeguard tariffs on steel products under Title II of the Trade Act of 1974, originally effective March 20, 2002, through March 20, 2005. Proclamation No. 7529, 67 Fed. Reg. (March 7, 2002). Affected exporting countries took three different approaches to the exercise of suspension rights under Article 8 of the Safeguards Agreement. The European Communities (EC), Japan, Norway, China, and Switzerland notified the WTO that they intended to suspend concessions, that is, impose tariff surcharges on U.S. goods, under Article 8.2. China, Norway, and Switzerland stated that they were reserving the right to suspend concessions, as listed in their notifications, until March 20, 2005—three years after the safeguard was imposed—or, if earlier, five days after a WTO decision that the U.S. measures were inconsistent with WTO agreements. The EC and Japan each maintained two lists of U.S. products on which they intended to suspend tariff concessions, stating that they reserved the right to suspend concessions regarding the first list not earlier than June 18, 2002, and regarding the second list, not earlier than March 20, 2005, or five days after an adverse WTO decision involving the U.S. steel safeguard. Neither the EC nor Japan suspended concessions during the earlier period. In addition, Australia, Brazil, Korea, and New Zealand notified the WTO with the United States in May 2002 that they had agreed that the 90-day period set out on Article 8.2 would be considered to expire March 20, 2005 or, for Korea, March 19, 2005. Taiwan and the United States made such a joint notification in June 2002. In addition, the EC, Japan, Brazil, China, Korea, New Zealand, Norway, and Switzerland challenged the U.S. steel tariffs in WTO dispute settlement proceedings (WT/DS248 et al.). See generally CRS Report RL31474, *Steel and the WTO: Summary and Timelines of Pending Proceedings Involving the United States*, by Jeanne J. Grimmer and Stephen Cooney (out of print but available from Jeanne J. Grimmer, American Law Division).

The President terminated the steel safeguard on December 4, 2003, Proclamation No. 7741, 68 Fed. Reg. 68483 (December 4, 2003), approximately 15 months before it was set to expire and one week before the WTO Dispute Settlement Body adopted adverse panel and Appellate Body reports issued in the WTO dispute settlement proceedings. See *infra* notes 25 and 26 and accompanying text. Withdrawal of the safeguard tariffs removed the basis for the (continued...)



Four U.S. safeguards have been successfully challenged in the WTO.<sup>26</sup> Among other findings, the WTO Appellate Body determined that the United States had acted inconsistently with Article XIX of the GATT or the Safeguards Agreement, as the case may be, due to inadequate or improper analysis of one or more of the following: the existence of unforeseen developments, increased imports, serious injury or threat, and causation—that is, whether increased imports had caused or were causing serious injury—including issues related to non-attribution of injury to factors other than increased imports.<sup>27</sup>

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(...continued)

suspension of concessions by WTO members under Article 8.3 and thus no member suspended concessions under the Article. As the dispute settlement proceeding progressed to its final stage, legal questions arose over relationship of the right of WTO members to suspend concessions under Articles 8.3 of the Safeguards Agreement to members' rights and obligations involving WTO dispute settlement. See generally Matthew R. Nicely & David T. Hardin, *Article 8 of the WTO Safeguards Agreement: Reforming the Right to Rebalance*, 23 ST. JOHN'S J. LEGAL COMMENT. 699 (2008)[hereinafter Nicely & Hardin]; *Trade Experts Clash Over Validity of EU Steel Section 201 Retaliation Threat*, INSIDE U.S. TRADE, October 3, 2003, at <http://www.insidetrade.com>. Note that under Article 23.2(a) of the WTO Dispute Settlement Understanding, if a WTO member initiates a WTO dispute settlement proceeding in which a WTO violation is alleged, the complaining member may not make a determination to the effect that a violation has occurred except in accordance with the Dispute Settlement Understanding and must make any such determination consistent with the ultimate WTO decision in the case.

In response to an earlier U.S. safeguard action, the EC in January 2001 took action under Article 8 after the WTO had adopted adverse Appellate Body and modified panel reports finding that the United States acted inconsistently with the Safeguards Agreement in imposing a safeguard quota on EC wheat gluten in 1998 (WT/DS166). See *infra* notes 25-26 and accompanying text. The EC had challenged the U.S. safeguard in the WTO and imposed a tariff-rate quota (TRQ) on U.S. corn gluten feed under Article 8.3 shortly after the panel and Appellate Body reports were adopted. The United States requested consultations on the EC measure, arguing that the EC had not followed notification and consultation requirements in the Safeguards Agreement and that the measure was thus inconsistent with the GATT Articles I, II, and XIX and Article 8 of the Agreement. Request for Consultations by the United States, *European Communities—Tariff-Rate Quota on Corn Gluten Feed from the United States*, WT/DS223 (January 30, 2001). The dispute was later resolved when United States removed its quota on EC wheat gluten and the EC permitted its TRQ to expire, each action occurring on June 1, 2001. *U.S. Drops Restrictions on Imports of Wheat Gluten, Offers Support for Industry*, 18 Int'l Trade Rep. (BNA) 890-91 (2001).

<sup>26</sup> See Appellate Body Report, *United States—Definitive Safeguard Measures on Wheat Gluten from the European Communities*, WT/DS166/AB/R (December 22, 2000) [hereinafter U.S. Wheat Gluten AB Report]; U.S. Lamb AB Report, *supra* note 12; Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R (February 22, 2002); Appellate Body Report, *United States—Definitive Safeguard Measures on Import of Certain Steel Products*, WT/DS248 et al./AB/R (November 10, 2003).

<sup>27</sup> Article 4.2(b) of the Safeguards Agreement states that “[w]hen factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.” To comply with this requirement, the WTO Appellate Body has made clear that domestic investigative agencies must: (1) distinguish injurious effects caused by increased imports from injurious effects caused by other factors and (2) “attribute to increased imports, on the one hand, and, by implication, to other relevant factors, on the other hand, injury caused by all of these different factors, including increased imports.” U.S. Wheat Gluten AB Report, *supra* note 26, para. 69. According to the Appellate Body, it is through this two-step process that investigative authorities comply with Article 4.2(b) “by ensuring that any injury to the domestic industry that was *actually* caused by factors other than increased imports is not ‘attributed’ to increased imports and is, therefore, not treated as if it were injury caused by increased imports, when it is not.” *Id.*

## Paragraph 16 of China's WTO Accession Protocol: China-Specific Safeguard Mechanism

When a country seeks to accede to the World Trade Organization (WTO), it negotiates its terms of accession both multilaterally with the WTO members as a whole, as well as bilaterally with individual WTO members.<sup>28</sup> Bilateral negotiations involve market access concessions and commitments in goods as well as specific commitments in services.<sup>29</sup> The terms of all bilateral agreements eventually become a part of the country's overall accession agreement with the WTO.<sup>30</sup>

In their bilateral negotiations, the United States and China agreed to a temporary China-specific safeguard that could be imposed in the event that import surges of Chinese products occurring after China became a WTO member resulted in material injury to domestic producers.<sup>31</sup> The provision was later included as paragraph 16 of Part I of China's Protocol on Accession to the WTO (Accession Protocol) under the caption "Transitional Product-Specific Safeguard Mechanism."<sup>32</sup> On November 10, 2001, WTO members agreed that China could accede to the WTO on the terms and conditions set out in its Accession Protocol. China became a WTO member 30 days later, on December 11, 2001. The China-specific safeguard provision will terminate 12 years after the date of China's accession, or December 10, 2013.<sup>33</sup>

The China-specific safeguard contains both substantive and procedural requirements.<sup>34</sup> It may be invoked by a WTO member "in cases where products of Chinese origin are being imported into the territory of ... [the] member in such increased quantities or under such condition as to cause or threaten to cause market disruption to the domestic producers of like or directly competitive products."<sup>35</sup>

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<sup>28</sup> Peter John Williams, *A HANDBOOK ON ACCESSION TO THE WTO* 38-39 (2008) [hereinafter Williams].

<sup>29</sup> World Trade Organization, *Note by the Secretariat, Revision: Technical Note on the Accession Process* 12, WT/ACC/10/Rev.3 (November 28, 2005).

<sup>30</sup> Williams, *supra* note 28, at 309.

<sup>31</sup> See Summary of the U.S.-China Bilateral WTO Agreement, Prepared by the White House National Economic Council, November 15, 1999, 16 Int'l Trade Rep. (BNA) 1888, 1890 (1999) [hereinafter NEC Summary].

<sup>32</sup> World Trade Organization, Accession of the People's Republic of China; Decision of 10 November 2001, para. 16, WT/L/432 (November 23, 2001) [hereinafter PRC Accession Protocol]. Note also paragraphs 245-50 of World Trade Organization, Report of the Working Party on the Accession of China, WT/ACC/CHN/49 (October 1, 2001) [hereinafter Working Party Report]. These paragraphs address the actions of WTO members under the China-specific provision. Unlike certain other paragraphs of the Working Party Report, which contain commitments by China, these are not incorporated into China's Accession Protocol. See PRC Accession Protocol, Part I, para. 1.2; Working Party Report, *supra*, para. 342.

<sup>33</sup> PRC Accession Protocol, para. 16.9.

<sup>34</sup> See the **Appendix** to this report for the full text of Part I, paragraph 16.

<sup>35</sup> PRC Accession Protocol, para. 16.1.

The Accession Protocol provision defines “market disruption” as occurring:

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.<sup>36</sup>

In determining whether market disruption exists, the importing member must look at “objective factors,” including import volume, the effect of imports on prices for like or directly competitive articles, and the effect of the imports on the domestic industry producing such articles.<sup>37</sup> As explained earlier, a “material injury” standard is considered less onerous than the “serious injury” standard contained in the Article XIX of the GATT and the Agreement on Safeguards.

Under paragraph 16.1 of the Accession Protocol, a WTO member that finds that the described market disruption exists may request consultations with China aimed at resolving the situation, including whether the member should instead pursue applying a measure under the Agreement on Safeguards. Any such request must be immediately notified to the WTO Committee on Safeguards.

Further, if in the course of the consultations, “it is agreed” that Chinese imports are causing or threatening to cause market disruption and that remedial action is “necessary,” China must take “such action as to prevent or remedy the market disruption.”<sup>38</sup> If consultations do not lead to such an agreement within 60 days after China receives the request for consultation, the importing member “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.”<sup>39</sup>

The safeguard may be applied only to goods of Chinese origin, a significant difference from the WTO Safeguards Agreement, which requires that a safeguard be imposed on the subject product regardless of its source. In addition, the China-specific safeguard does not contain the prohibition contained in Article 11.1(b) of the Safeguards Agreement against utilizing “voluntary export restraints, orderly marketing agreements or other similar measures on the export or the import side” as forms of safeguard measures, nor does it otherwise expressly limit the type of safeguard measure that may be applied.

Although paragraph 16.6 of the Accession Protocol allows a safeguard to be imposed “only for such period of time as may be necessary to prevent or remedy the market disruption,”<sup>40</sup> the Accession Protocol differs from the Safeguards Agreement in that it does not limit the duration of the measure. Paragraph 16.6 does state, however, that China “has the right” to suspend the application of “substantially equivalent” GATT concessions or obligations to the trade of the WTO member imposing the safeguard if the safeguard is still in effect after two years where the

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<sup>36</sup> *Id.* para. 16.4. An absolute increase in imports would occur if imports increased in one year from, for example, 50,000 to 100,000 units. A relative increase would occur when the import share of the domestic market increases notwithstanding a decrease in the total volume of imports. For example, if imports decline in one year from 20,000 to 10,000 units, and domestic production declines from 100,000 to 30,000 units over the same period, the import share would increase from 20% of the domestic market to 33% of the market. See John H. Jackson, William J. Davey & Allan O. Sykes, Jr., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 612 (3d ed. 1995).

<sup>37</sup> PRC Accession Protocol, para. 16.4.

<sup>38</sup> *Id.* para. 16.2.

<sup>39</sup> *Id.* para. 16.3.

<sup>40</sup> *Id.* para. 16.6.

safeguard was taken as a result of a relative increase in imports, or after three years where the increase was absolute.<sup>41</sup>

Similar to Article XIX of the GATT and the Safeguards Agreement, paragraph 16.7 of the China-specific safeguard permits the importing WTO member to apply a provisional safeguard measure, after it makes a preliminary determination that market disruption exists, where there are “critical circumstances,” that is, where “delay would cause damage which it would be difficult to repair.”<sup>42</sup> A member may impose a provisional safeguard for no more than 200 days and, once it takes the action, it must immediately notify the Committee on Safeguards and request bilateral consultations with China. In addition, paragraph 16.8 provides a remedy for WTO members who have suffered significant trade diversion from China, that is, increased imports of Chinese product into their own territory, due to another member’s transitional safeguard measure.<sup>43</sup>

At the time the U.S.-China bilateral WTO agreement was concluded, a White House summary addressed differences between the China-specific safeguard and the Agreement on Safeguards, stating that the former was “in addition to” the latter and that it “differs from traditional safeguards in that it permits China to address imports that are a significant cause of material injury through measures such as voluntary export restraints.”<sup>44</sup> The statement said that the United States would in addition “be able to apply restraints unilaterally based on standards that are lower than those in the WTO Safeguards Agreement.”<sup>45</sup> This nature of the standard and other features of the safeguard were described in congressional testimony of U.S. Trade Representative Barshefsky, who stated that the China-specific safeguard “applies to all industries, permits us to act based on lower showing of injury, and act specifically against imports from China.”<sup>46</sup>

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<sup>41</sup> *Id.* While paragraph 16.6 of the Protocol incorporates the three-year delay for the suspension of concessions by exporting countries in the event of absolute increases of imports contained in Article 8.3 of the Safeguards Agreement, it does not include an additional condition analogous to that contained in Article 8.3, namely, that the safeguard in question be consistent with the Agreement. More so than the requirement that the safeguard result from an absolute increase in imports, the WTO-consistency requirement speaks to the overall action of the importing country imposing the safeguard and thus seemingly operates as a discipline on that action, arguably justifying the delay. See Nicely & Hardin, *supra* note 25, at 719-20, 738. Unlike Article 8 of the Safeguards Agreement, paragraph 16 of the Protocol does not place an express obligation on the WTO member imposing a China-specific safeguard to maintain a substantially equivalent level of concessions, does not provide for bilateral negotiations on compensation, and perforce does not permit China to suspend concessions in the event that negotiations fail, provisions that would seemingly provide a basis for an earlier suspension of concessions on China’s part. For further discussion of Article 8.3 of the Safeguards Agreement, see *supra* note 25 and accompanying text.

<sup>42</sup> *Id.* para. 16.7.

<sup>43</sup> *Id.* para. 16.8.

<sup>44</sup> NEC Summary, *supra* note 31, at 1890.

<sup>45</sup> *Id.*

<sup>46</sup> *Accession of China to the WTO; Hearing Before the H. Comm. on Ways and Means*, 106<sup>th</sup> Cong. 49 (2000)(Statement of Hon. Charlene Barshefsky, United States Trade Representative).

## Section 421 of the Trade Act of 1974: Implementing the China-Specific Safeguard

Section 421 of the Trade Act of 1974, 19 U.S.C. §2451, which implements the China-specific safeguard in U.S. law, was enacted in P.L. 106-286 as part of a package of provisions addressing various issues arising from the accession of China to the WTO. The statute, which also permitted the President to grant most-favored-nation (MFN) tariff treatment to Chinese goods upon China's accession to the WTO, was enacted in October 2000, a little more than a year before China became a WTO member. Section 421 is described in legislative history as "a temporary, extraordinary trade remedy specifically designed to address concerns about potential increased import competition from China in the future."<sup>47</sup> Section 421, related provisions on trade diversion and regulatory action, as well as any regulations issued under these provisions, will expire 12 years after the date that China's WTO Accession Protocol enters into force, or December 10, 2013.<sup>48</sup>

Section 421 is modeled on section 406 of the Trade Act, 19 U.S.C. §2436, which authorizes import relief for U.S. market disruption caused by products of "Communist countries."<sup>49</sup> Section 406 in turn was adapted from section 201 of the Trade Act of 1974, 19 U.S.C. §2251, the general U.S. safeguard statute, which authorizes the President to impose import restrictions or take other action if the U.S. International Trade Commission (ITC) finds that a surge in imports of a product regardless of origin is a "substantial cause of serious injury, or threat" to a domestic industry producing a like or directly competitive product.<sup>50</sup> Among the differences between the two was an intent that the market disruption test in section 406, under which an import surge of a product must be "a significant cause of material injury or threat" to a domestic industry (a definition that is replicated in Section 421), would be met more "more easily" than the serious injury test contained in section 201.<sup>51</sup>

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<sup>47</sup> H.Rept. 106-632 at 19.

<sup>48</sup> Trade Act of 1974 (TA), § 423(c), 19 U.S.C. § 2451b(c).

<sup>49</sup> As was the case with most countries covered by section 406 of the Trade Act of 1974, trade with China had been subject to the requirements of Title IV of the act, which prohibited the extension of most-favored-nation tariff treatment to Chinese goods unless China met certain freedom-of-emigration requirements or the requirements were annually waived by the President, and China had entered into a bilateral trade agreement with the United States. Along with enacting the China-specific safeguard, P.L. 106-286 authorized the President to remove China from the Title IV regime and thus enabled the United States to extend to China the most-favored-nation (MFN) tariff treatment that WTO members must extend "immediately and unconditionally" to products of other members under Article I:1 of the GATT 1994. MFN treatment, under which a country accords any tariff or other trade benefit that it grants to the products of one country to the products of all other countries, is referred to in U.S. law as "normal trade relations" (NTR). See 19 U.S.C. § 2432(a).

<sup>50</sup> See generally S.Rept. 93-1298, at 210-13.

<sup>51</sup> As stated in the Senate report on the Trade Act of 1974: "While section 201(b) would require that increased imports of the article be a 'substantial cause' of the requisite injury, or the threat thereof, to a domestic industry, section 406 would require that the article is being, or is likely to be, imported in such increased quantities as to be a 'significant cause' of material injury, or the threat thereof. The term 'significant cause' is intended to be an easier standard to satisfy than that of 'substantial cause'. On the other hand, 'significant cause' is meant to require a more direct causal relationship than between increased imports and injury than the standard used in the case of worker, firm and community adjustment assistance [also authorized in the bill], i.e., 'contribute importantly.' In addition, the term 'material injury' in section 406 is intended to represent a lesser degree of injury than the term 'serious injury' standard employed in section 201." *Id.* at 212.

Section 421 provides domestic legal authority for the President to respond to injurious import surges as follows:

If a product of the People's Republic of China is 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 a like or directly competitive product, the President shall, in accordance with the provisions of this section, proclaim increased duties or other import restrictions with respect to such product, to the extent and for such period as the President considers necessary to prevent or remedy the market disruption.<sup>52</sup>

The statute incorporates the definition of “market disruption” contained in paragraph 16 of China's WTO Accession Protocol, but adds that the term “significant cause,” a term that is not defined in paragraph 16, means a cause “which contributes significantly to the material injury of the domestic injury, but need not be equal to or greater than any other cause.”<sup>53</sup>

The Section 421 process involves (1) initiation of the process by private petition or governmental action; (2) an investigation by the ITC of the import concerned; (3) an ITC vote on its market disruption determination and, if affirmative, recommendations to the President on a remedy; (4) submission of a report by the ITC to the President and to the United States Trade Representative (USTR); (5) if the determination is affirmative, negotiations between the USTR and China seeking agreement by China to take action to prevent or remedy the market disruption; (6) a public hearing on remedies and a USTR recommendation to the President regarding what responsive action, if any, should be taken; (7) assuming a bilateral agreement has not been reached, a presidential determination as to whether to take action and, if so, what the action will be; and (8) if a remedy will be applied, a presidential proclamation increasing tariffs or imposing the chosen import restriction.<sup>54</sup> The entire process from petition or other invocation of the section to any proclamation of relief should be completed within 150 days.<sup>55</sup>

### *Initiating the Section 421 Process*

Section 421 investigation may be instituted in one of four ways: (1) by petition; (2) upon the President's request; (3) upon resolution of either the House Ways and Means or Senate Finance Committee; or (4) on the ITC's own motion.<sup>56</sup> A petition may be filed by “an entity, including a trade association, firm, certified or recognized union, or group of workers, which is representative of an industry.”<sup>57</sup> Unlike antidumping and countervailing duty investigations, there is no industry support requirement for investigations initiated by petition.

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<sup>52</sup> TA, § 421(a), 19 U.S.C. § 2451(a).

<sup>53</sup> TA, § 421(c), 19 U.S.C. § 2451(c).

<sup>54</sup> Special procedures and deadlines exist for petitions alleging “critical circumstances,” see generally TA, § 421(i), 19 U.S.C. § 2451(i), and for petitions alleging that a China-specific safeguard imposed by another WTO member has caused a significant diversion of trade into the United States. TA, § 422, 19 U.S.C. § 2451a. These provisions are not discussed in this report.

<sup>55</sup> See H.Rept. 106-432, at 18.

<sup>56</sup> TA, § 421(b)(1), 19 U.S.C. § 2451(a).

<sup>57</sup> TA, § 421(b)(1), 19 U.S.C. § 2451(a); TA, § 201(a)(1), 19 U.S.C. § 2251(a)(1).

### ***U.S. International Trade Commission: Investigation, Determination, Recommendations***

Once an investigation is requested or otherwise initiated, the ITC must “promptly make an investigation” to determine whether the Chinese products at issue are causing the requisite market disruption.<sup>58</sup> To determine whether “market disruption” exists, the ITC must look at “objective factors, including (1) the volume of imports of the products which is the subject of the investigation; (2) the effect of imports of such products on prices in the United States for like or directly competitive article; and (3) the effect of imports of such product on the domestic industry producing like or directly competitive articles.”<sup>59</sup> The presence or absence of any of these factors “is not necessarily dispositive of whether market disruption exists.”<sup>60</sup>

The ITC must make its determination and transmit it to the President generally no later than 60 days after the date the petition is filed, the request or resolution is received, or the ITC motion is adopted.<sup>61</sup> If the commissioners are evenly divided on their determination, then the determination agreed upon by either group may be considered by the President and the USTR as the ITC determination.<sup>62</sup>

In the event of an affirmative determination, the ITC must propose “the amount of increase in, or imposition of, any duty or other import restrictions necessary to prevent or remedy the market disruption.”<sup>63</sup> Only those commissions that agreed to the affirmative determination may vote on the proposed action to prevent or remedy market disruption.<sup>64</sup> Members who did not agree to an affirmative determination may, however, submit separate reviews regarding what action, if any, should be taken to prevent or remedy the market disruption that was found.<sup>65</sup>

Within 20 days after its determination, the ITC must submit a report on the investigation to the President and the U.S. Trade Representative (USTR).<sup>66</sup> The report must include (1) the commission’s determination and an explanation of its basis; (2) in the event of an affirmative determination, ITC recommendations for proposed remedies and the reasons for them; (3) any separate and dissenting views; (4) a description of the short-term and long-term effects that implementation of the recommended action is likely to have on the petitioning domestic industry, on other domestic industries, and on consumers; and (5) a description of the short-term and long-term effects of not taking the recommended action on the petitioning domestic industry, its workers, and the communities where production facilities of the industry are located, and on other domestic industries.<sup>67</sup>

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<sup>58</sup> TA, § 421(b)(1), 19 U.S.C. § 2451(a).

<sup>59</sup> TA, § 421(d), 19 U.S.C. § 2451(d).

<sup>60</sup> *Id.*

<sup>61</sup> TA, § 421(e), 19 U.S.C. § 2451(e).

<sup>62</sup> *Id.*

<sup>63</sup> TA, § 421(f), 19 U.S.C. § 2451(f).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> TA, § 421(g)(1), 19 U.S.C. § 2451(g)(1).

<sup>67</sup> TA, § 421(g)(2), 19 U.S.C. § 2451(g)(2).

### ***Role of the United States Trade Representative***

Within 20 days after receiving the ITC report, the USTR must publish a notice in the *Federal Register* of any safeguard measure that the USTR proposes should be taken under the Section 421(a) and of an opportunity for the submission of public views and evidence on “the appropriateness of the proposed measure and whether it would be in the public interest.”<sup>68</sup> Within 55 days after receiving the ITC report, the USTR, taking into account the views and evidence submitted, must make a recommendation to the President “concerning what action, if any to take to prevent or remedy market disruption.”<sup>69</sup> The statute does not require that the USTR’s recommendation or a summary of the recommendation be made public.

In addition, the USTR is authorized “to enter into agreements for the People’s Republic of China to take such action as necessary to prevent or remedy market disruption” and “should seek to conclude” such agreements before the end of the 60-day consultation period provided for in paragraph 16 of China’s WTO Accession Protocol.<sup>70</sup> Any such negotiations are to begin no later than five days after the USTR receives an affirmative ITC determination. In order to carry out any agreement that is concluded, the President is authorized to prescribe regulations governing the entry or withdrawal from warehouse of goods covered by the agreement.<sup>71</sup>

If no agreement is reached with China, or if the President determines that a concluded agreement “is not preventing or remedying the market disruption at issue,” the President is to provide import relief “in accordance with” Section 421(a).<sup>72</sup>

### ***Presidential Decision Regarding Import Relief***

Within 15 days after receiving a recommendation by the USTR regarding what action, if any, the President should take, the President is to provide import relief for the industry concerned “unless the President determines that the provision of such relief is not in the national economic interest of the United States or, in extraordinary cases, that the taking of action ... would cause serious harm to the national security of the United States.”<sup>73</sup> The President may make a negative economic interest determination “only if the President finds that the taking of such action would have an adverse impact on the United States economy clearly greater than the benefits of such action.”<sup>74</sup> As noted earlier, Section 421(a) authorizes the President “to proclaim increased duties or other import restrictions” on the product concerned. The President’s decision, including his reasons for his decision and the scope and duration of any action taken, must be published in the

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<sup>68</sup> TA, § 421(h)(1), 19 U.S.C. § 2451(h)(1).

<sup>69</sup> TA, § 421(h)(2), 19 U.S.C. § 2451(h)(2).

<sup>70</sup> TA, § 421(j)(1), 19 U.S.C. § 2451(j)(1).

<sup>71</sup> TA, § 423(b), 19 U.S.C. § 2451b(b).

<sup>72</sup> TA, § 421(j)(2), 19 U.S.C. § 2451(j)(2).

<sup>73</sup> TA, § 421(k), 19 U.S.C. § 2451(k). Legislative history states that Section 421 “establishes clear standards for the application of Presidential discretion in providing relief to injured industries and workers” and that “[i]f the ITC makes an affirmative determination on market disruption, there would be a presumption in favor of providing relief.” H.Rept. 106-632, at 18.

<sup>74</sup> *Id.*



*Federal Register*.<sup>75</sup> Import relief must take effect no later than 15 days after the President's determination to provide such relief.<sup>76</sup>

If import relief is provided, the President must, by regulation, provide for "the efficient and fair administration" of any restriction that he proclaims under the statute and for "effective monitoring of imports under [421(a)]."<sup>77</sup>

Once a safeguard is in effect for six months, the President may request that the ITC provide a report on the probable effect on the relevant industry were the safeguard to be modified, reduced, or terminated.<sup>78</sup> The ITC must transmit the report to the President within 60 days after the report is requested. The President may then "take such action to modify, reduce, or terminate relief that the President determines is necessary to continue to prevent or remedy the market disruption at issue."<sup>79</sup>

The statute also authorizes the President to extend the safeguard if certain conditions are met. Upon a presidential request or a "petition of the industry concerned" filed with the ITC between six to nine months before the safeguard is set to expire, the ITC must investigate whether a safeguard continues to be necessary to prevent or remedy the market disruption involved.<sup>80</sup> The ITC must provide for a public hearing and transmit a report on its investigation and its determination within 60 days before the safeguard expires.<sup>81</sup> If the ITC's determination is affirmative, the President may extend the safeguard if he also determines that the action "continues to be necessary to prevent or remedy the market disruption."<sup>82</sup>

### ***Prior Section 421 Investigations***

Six ITC investigations were conducted under Section 421 prior to the 2009 investigation of Chinese tire imports. These covered the following products: pedestal actuators, wire hangers, brake drums and rotors, ductile water works fittings, uncovered innerspring mattress units, and circular welded non-alloy steel pipe.<sup>83</sup> The ITC made affirmative market disruption determinations with regard to imports of pedestal actuators, wire hangers, ductile water works fittings, and circular welded non-alloy steel pipe. Negative determinations were made with regard to imports of brake drums and rotors and innerspring mattress units. President George W. Bush declined to provide relief in each of the cases in which an affirmative determination was rendered on the ground that providing import relief was not in the U.S. economic interest.<sup>84</sup>

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<sup>75</sup> TA, § 421(l)(1), 19 U.S.C. § 2451(l)(1).

<sup>76</sup> TA, § 421(m), 19 U.S.C. § 2451(m).

<sup>77</sup> TA, § 423(a), 19 U.S.C. § 2451b(a).

<sup>78</sup> TA, § 421(n)(1), 19 U.S.C. § 2451(n)(1).

<sup>79</sup> TA, § 421(n)(2), 19 U.S.C. § 2451(n)(2).

<sup>80</sup> TA, § 421(o)(1), 19 U.S.C. § 2451(o)(1).

<sup>81</sup> TA, § 421(o)(2)-(3), 19 U.S.C. § 2451(o)(2)-(3).

<sup>82</sup> TA, § 421(o)(4), 19 U.S.C. § 2451(o)(4).

<sup>83</sup> The ITC report on pedestal actuators (Pub. 3557) may be accessed at <http://www.usitc.gov/publications/safeguards/PUB3557.pdf>. ITC reports issued in the other referenced investigations may be accessed at [http://www.usitc.gov/trade\\_remedy/731\\_ad\\_701\\_cvd/investigations/completed/index.htm](http://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/completed/index.htm).

<sup>84</sup> Presidential Determination on Circular Welded Non-Alloy Steel Pipe from the People's Republic of China, 71 Fed. Reg. 871 (January 5, 2006); Presidential Determination on Certain Ductile Iron Waterworks Fittings from the People's Republic of China, 69 Fed. Reg. 10597 (March 8, 2004); Presidential Determination on Wire Hanger Imports from the (continued...)

## Judicial Responses

The President's decision not to provide relief under Section 421 has been held to be a discretionary act and thus not reviewable by a court. In *Motion Systems Corp. v. Bush*, an *en banc* decision of the U.S. Court of Appeals for the Federal Circuit (CAFC) affirming a decision of the U.S. Court of International Trade,<sup>85</sup> the industry plaintiff argued that the President had acted outside the scope of his statutory authority following a recommendation by the ITC that import quotas were required to remedy the market disruption that had been found to adversely affect the domestic pedestal actuator industry, the first industry to have filed a petition under Section 421. The plaintiff also argued that the United States Trade Representative, *inter alia*, committed procedural violations involving the public hearing that must be held following the ITC's determination and recommendation, which was focused on the ITC's recommendations regarding import relief.<sup>86</sup>

Noting that there exists "no explicit statutory cause of relief granting a petitioner who is denied import relief under Section 421 the right to sue the President and the Trade Representative in the Court of International Trade," the CAFC stated that there were only two options left to the plaintiff to seek relief: (1) judicial review provisions of the Administrative Procedure Act (APA), 5 U.S.C. §701-706, or (2) "some form of nonstatutory review."<sup>87</sup> The plaintiff had conceded that it could not proceed under the APA given the Supreme Court's 2002 decision in *Franklin v. Massachusetts*, 505 U.S. 788 (1992), that the President is not an "agency" for purposes of APA provisions providing a right of judicial review for those adversely affected by "agency action."<sup>88</sup> The court described the plaintiff's remaining source of relief (i.e., nonstatutory review) as reducing itself to a question whether plaintiff could "challenge the President's discretionary actions under 19 U.S.C. §2451 as outside the scope of authority of delegated to him by Congress."<sup>89</sup>

The court relied on the Supreme Court's decision in *Dalton v. Specter*, 511 U.S. 462 (1994), which it viewed as acknowledging that a suit against the President could proceed where the presidential action alleged to exceed the scope of delegated statutory authority was claimed to constitute a constitutional violation (e.g., a violation of the separation-of-powers doctrine), but holding that, where there is no constitutional issue and assuming that a statutory basis for suit exists, judicial review of presidential action is not available where a statute commits a decision to the President's discretion.<sup>90</sup> The court concluded that Section 421, in giving the President "broad discretion" to determine that providing relief is "not in the national economic interest" and that taking action would cause "serious harm" to U.S. national security, "accords the President the same discretion found to remove Presidential action from judicial review" in *Dalton* as well as in other Supreme Court cases.<sup>91</sup> The court further held that the acts of the USTR under Section 421

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(...continued)

People's Republic of China, 68 Fed. Reg. 23019 (April 29, 2003); Presidential Determination on Pedestal Actuator Imports from the People's Republic of China, 68 Fed. Reg. 3157 (January 22, 2003).

<sup>85</sup> *Motion Systems Corp. v. Bush*, 437 F.3d 1356 (2006), *cert. denied*, 127 S.Ct. 69 (2006).

<sup>86</sup> See *Motion Systems Corp. v. Bush*, 342 F.Supp.2d 1247, 1263-66 (Ct. Int'l Trade 2004).

<sup>87</sup> *Motion Systems*, 437 F.3d at 1359.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 1359-60.

<sup>91</sup> *Id.* at 1360-62.

were not final actions for purposes of the APA, but only recommendations to the President, and thus not subject to judicial review.<sup>92</sup>

## **Section 421 Investigation: *Chinese Passenger Vehicle and Light Truck Tires from China* (2009)**

On April 20, 2009, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union filed a petition with the U.S. International Trade Commission requesting that it institute a Section 421 investigation involving certain passenger vehicle and light truck tires from China.<sup>93</sup> As Section 421 permits an investigation to be requested by a union or group of workers, the absence of an industry petitioner does not foreclose the initiation of an investigation under the statute. The ITC instituted the investigation (TA-421-7) on April 24, 2009.

As a result of its investigation, the ITC in June 2009 voted 4-2 that imports of the subject tires were causing market disruption to domestic producers and recommended that the President impose an addition duty on the imported tires for three years, beginning with an additional 55% *ad valorem* duty in the first year, 45% *ad valorem* in the second year, and 35% *ad valorem* in the third year. The ITC also recommended expedited consideration of trade adjustment assistance if applications for such assistance were filed by affected firms or workers. The agency submitted its report to the President and the U.S. Trade Representative on July 9, 2009.<sup>94</sup>

The President subsequently decided to provide import relief regarding the subject tires and on September 11, 2009, proclaimed increased tariffs for three years, albeit at lower rates than those recommended by the ITC, effective September 26, 2009.<sup>95</sup> The President also directed the Secretaries of Labor and Commerce to expedite applications for trade adjustment assistance and to provide other available economic assistance to affected workers, firms, and communities.

### ***Products Covered***

The products subject to the ITC investigation and the domestic like product were determined to be rubber tires used on passenger vehicles (with the exception of racing cars) and on-the-highway light trucks, vans, and sport utility vehicles.<sup>96</sup> The ITC also found that various sizes and types of domestic passenger vehicle and light truck tires, including tires produced for the replacement and original equipment manufacturer [OEM] markets are “part of a continuum of products, with no clear dividing line between them.”<sup>97</sup>

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<sup>92</sup> *Id.* at 1362.

<sup>93</sup> Certain Passenger Vehicle and Light Truck Tires from China, 74 Fed. Reg. 19593 (April 29, 2009).

<sup>94</sup> U.S. Int’l Trade Comm’n, Certain Passenger Vehicle and Light Truck Tires 13 (July 2009)(Pub. 4085) [hereinafter ITC China Tires Report], at <http://www.usitc.gov/publications/safeguards/pub4085.pdf>.

<sup>95</sup> Proclamation No. 8414, 74 Fed. Reg. 47861 (September 17, 2009).

<sup>96</sup> ITC China Tires Report, *supra* note 94, at I-3, 9 (footnote omitted).

<sup>97</sup> *Id.* at 7, 9.

### ***Rapidly Increasing Imports***

The ITC determined that the period of investigation for the Section 421 proceeding was 2004-2008. It found that the imports of the subject tires were increasing rapidly in both relative and absolute terms during this period, summarizing its conclusions as follows:

In absolute terms, imports of the subject tires from China increased throughout the period of investigation and were the highest, in terms of both quantity and value, in 2008, at the end of the period. The quantity of subject imports rose by 215.5 percent between 2004 and 2008, by 53.7 percent between 2006 and 2007, and by 10.8 percent between 2007 and 2008. The value of subject imports rose even more rapidly, increasing by 294.5 percent between 2004 and 2008, by 60.2 percent between 2006 and 2007, and by 19.8 percent between 2007 and 2008.

Both the ratio of subject imports to U.S. production and the ratio of subject imports to U.S. apparent consumption rose throughout the period examined, and both ratios were at their highest levels of the period in 2008. The ratio of subject imports to U.S. production increased by 22.0 percentage points between 2004 and 2008, with the two largest year-to-year increases occurring at the end of the period in 2007 and 2008. The ratio of subject imports to U.S. apparent consumption increased by 12.0 percentage points during the period examined, with the two largest year-to-year increases also occurring at the end of the period in 2007 and 2008.

We do not agree with respondents that the increases in subject imports from China during the period examined were “gradual” or “small,” or that the subject imports had “abated” by the end of the period. Rather, we find that the subject imports increased, both absolutely and relatively, throughout the period by significant amounts in each year and, as stated above, were at their highest levels at the end of the period in 2008. Whether viewed in absolute or relative terms, and whether viewed in terms of the increase from 2007 to 2008 alone or the increase in the last two full years (or even the last three years), the increase were large, rapid, and continuing at the end of the period—and from an increasingly large base.<sup>98</sup>

### ***Material Injury to a Domestic Industry***

The domestic injury producing passenger vehicle and light truck tires was found by the ITC to consist of ten U.S. producers “ranging from large multinational companies with global production and sales and varying levels of vertical integration to smaller producers with only domestic operations.”<sup>99</sup> It found that in 2008, “U.S. producers manufactured such tires in 28 plants, with most of these plants producing the tires with dedicated equipment, machinery, and workers.”<sup>100</sup> It further found that during the same period “approximately 82 percent of the domestic shipment of U.S. producers went to the replacement market, and the remaining shipments went to original equipment (new cars and like truck) manufacturers (OEMs).”<sup>101</sup> These domestic producers were found to “collectively manufacture a full range of styles and sizes of passenger vehicle and light truck tires, which are sold in various price ranges.”<sup>102</sup>

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<sup>98</sup> *Id.* at 11-12 (footnotes omitted).

<sup>99</sup> *Id.* at 15.

<sup>100</sup> *Id.* (footnote omitted).

<sup>101</sup> *Id.* (footnote omitted).

<sup>102</sup> *Id.*

The ITC determined that the domestic industry was materially injured, having found that “[v]irtually all industry indicators declined during the period examined”:

U.S. producers’ capacity, production, shipments, number of U.S. PRWs [production and related workers] and hours worked, productivity, and financial performance were all at their lowest levels of the period in 2008. U.S. producers’ capacity utilization, which was at its lowest in 2006, nearly equaled that level in 2008. Four plants were closed during the period examined, and in light of the current conditions, U.S. producers have announced plans to close three more plants in 2009. Only two indicators, R&D expenses and capital expenditures, appear to have increased toward the end of the period. Virtually all the industry indicators declined during the period.<sup>103</sup>

### ***Significant Cause of Material Injury or Threat***

In determining whether the rapidly increasing tire imports were a significant cause of material injury, the ITC looked to the three statutory factors relating to a causation analysis: (1) the volume of subject imports, (2) the effect of the subject imports on prices, and (3) the effect of subject imports on the domestic industry. The ITC referenced its earlier finding of a large and rapid increase in tire imports, an increase that it found “is also reflected in those imports’ large and growing share of the U.S. market.”<sup>104</sup> Regarding the effect of the imports on prices of U.S. tires, the ITC stated that the “close substitutability of the domestic product and the subject imports combined with pervasive underselling by significant and growing margins enhanced the ability of subject imports to displace domestically produced tires in the U.S. market.”<sup>105</sup>

The ITC then found that “there is a direct and significant connection between the rapidly increasing imports of subject tires from China and the domestic tire industry’s deteriorating financial performance and declining capacity, production, shipments, and employment,” with the “large and rapidly increasing volumes of subject tires from China having greatly displaced U.S. producers” in the lower-priced end of the U.S. market, the area in which Chinese producers were found to primarily compete.<sup>106</sup> The ITC also found that “significant and continuous” underselling by “large and rapidly increasing volume” of Chinese tires during the period of investigation “eroded the domestic industry’s market share, leading to a substantial reduction since 2004 in domestic capacity, production, shipments, and employment during the period examined.”<sup>107</sup> The ITC further found that “[a]s imports of low-priced Chinese tires increased, U.S. producers were forced to reduce capacity so as to focus on the parts of their business in which they could expect to remain profitable despite the impact of subject imports from China.”<sup>108</sup> As a result, the ITC found that the “substantial reduction in domestic capacity and the closures of U.S. plants during the period examined were largely in reaction to the significant and increasing volume of subject imports from China, and were not, as respondents argue, part of a strategy by domestic tire producers to voluntarily abandon the low-priced ‘value’ segment of the U.S. market.”<sup>109</sup>

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<sup>103</sup> *Id.* at 18.

<sup>104</sup> *Id.* at 22.

<sup>105</sup> *Id.* at 23.

<sup>106</sup> *Id.* at 24.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* While the ITC had considered other possible causes of material injury cited by the respondents in the investigation (e.g., the current recession, the contraction in the OEM tire market), it noted that Section 421 did not (continued...)

### *Proposed Remedy*

Petitioners had recommended that the ITC propose a three-year quota on Chinese tires in the amount of 21 million in the first year, with increases of 5% in each subsequent year due to its concern that “Chinese government policies might undermine the effect of a duty.”<sup>110</sup> Respondents argued that no remedy was appropriate for several reasons including that “any restriction would contravene the domestic industry’s strategy of moving away from the economy segment of the market” and that “a remedy would only result in the U.S. market being supplied by third countries.”<sup>111</sup>

Instead, the ITC proposed a three-year duty increase, declining from 55% *ad valorem* in the first year, to 45% *ad valorem* in the second year, and 35% *ad valorem* in the final year. The ITC explained its recommendation as follows:

This increase in the tariff would significantly improve the competitive position of the domestic industry, increasing domestic production, shipments, and employment and restoring the domestic industry to at least a modest level of profitability. The increase should accomplish this by reducing the quantity of subject imports and raising their price in the U.S. market. In proposing this remedy, we are mindful of record evidence that domestic producers have already significantly reduced their capacity to produce for the lower-priced end market of the market in which imports from China compete most extensively. Nevertheless, there is substantial competition between U.S.-produced tires and imports from China in all segments of the market, and the imposition of higher duties will increase prices and permit U.S. producers to utilize their available capacity to increase production, sales, and employment. Additional revenue from increased process and sales will improve the profitability.

We have recommended that the increased duties be phased down in annual 10 percentage-point increments over the three-year remedy period. This recommendation recognizes that the remedy is only temporary in nature and is designed to give the domestic industry and its workers breathing space in which to adjust to import competition, which will be encouraged by the phasing down of the duties. In addition, reducing the size of the duty each year is likely to limit the extent to which non-subject suppliers may increase their exports to the United States in response to the relief on imports from China. We also expect the level of tariff protection that is necessary to offset market disruption to decrease as new investments and other adjustments are implemented. The action we are recommending is not intended to address the effects of the current recession or to restore the domestic industry to a level of shipments and profitability that might prevail in a healthier national economy, but only to address the market disruption caused by the subject tires. We expect this remedy to have little or no effect on the U.S. automobile and light truck industry because tires account for a very small part of the cost of manufacturing a car or light truck.

We recommend that the remedy remain in place for a three-year period because we believe that a remedy of such duration is needed to give firms and workers in the industry the time to identify and implement needed adjustments in their questionnaire responses. Other information in the record indicates that domestic producers have put plant and equipment upgrades on hold pending more favorable market opportunities. Moreover, we anticipate that

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(...continued)

require it to weigh causes but only to find that rapidly increasing subject imports “in and of themselves” constitute a significant cause of serious injury or threat to the domestic industry. *Id.* at 29.

<sup>110</sup> *Id.* at 34.

<sup>111</sup> *Id.* at 35 (footnote omitted).

the relief may encourage certain domestic producers to reconsidered planned plant closures.<sup>112</sup>

The two dissenting commissioners suggested that a “trade-restricting remedy” would not provide relief to the domestic industry, stating that “[i]n an industry where domestic producers have already taken positive steps to adjust to global competition, we find that not only will trade restrictions not provide effective relief to the tire industry workers but will risk disrupting the U.S. market by creating an adverse impact on U.S. producers.”<sup>113</sup> Noting the worker displacement that occurred during the period of investigation and the adverse effect on workers of announced plant closings, the commissioners “respectfully urge[d] the President to focus on providing economic adjustment assistance to displaced tire workers through continued use of Trade Adjustment Assistance or other programs that might be available to suppliers of the battered U.S. automobile industry.”<sup>114</sup> If a trade measure were to be chosen, they suggested that it be a tariff-rate quota with a quota of 41.5 million tires and an over quota rate of 55% in the first year, 45% in the second year, and 35% in the third year. The commissioners stated that this approach “avoids a large increase in the base cost of the tires purchased by the poorest customers, and provides greater stability in pricing in the U.S. market.”<sup>115</sup>

### *President's Decision*

As noted earlier, the President decided to utilize the overall remedy proposed by the ITC, that is, increased tariffs for three years to decline annually, but decided to apply lower annual tariff rates than those recommended by the agency. The President proclaimed the increased tariffs on September 9, 2009, directing that they enter into effect on September 26, 2009.<sup>116</sup> Under the President’s proclamation, Chinese passenger and light truck tires are subject to additional tariffs of 35% *ad valorem* above the current most-favored-nation rate for the first year, 30% *ad valorem* above this rate for the second year, and 25% *ad valorem* above this rate for the third year.<sup>117</sup> The President also followed recommendations made by commissioners for the provision of economic assistance by directing the Secretary of Commerce and the Secretary of Labor to expedite the consideration of any applications for trade adjustment assistance “from domestic passenger vehicle and light truck producers, their workers, or communities and to provide such other requested assistance or relief as they deem appropriate, consistent with their statutory mandates.”<sup>118</sup> After the tariffs were in effect for six months (i.e., after March 25, 2010), the President was authorized to request the ITC to report on “the probable effect” of modifying, reducing, or terminating them,<sup>119</sup> and, after receiving the report, to take any of these three actions.<sup>120</sup> The President did not exercise these authorities.

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<sup>112</sup> *Id.* at 35-36 (footnotes omitted).

<sup>113</sup> *Id.* at 46.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> Proclamation No. 8414, 74 Fed. Reg. 47861 (September 17, 2009).

<sup>117</sup> *Id.* para. 5. The imported tires covered by the safeguard are classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheadings 4011.10.10, 4011.10.50, 4011.20.10, and 4011.20.50. *Id.* para. 4.

<sup>118</sup> Imports of Certain Passenger Vehicle and Light Truck Tires from the People’s Republic of China, Presidential Determination No. 2009-28, Memorandum for the Secretary of Commerce, the Secretary of Labor, the United States Trade Representative, 74 Fed. Reg. 47433 (September 16, 2009).

<sup>119</sup> TA, § 421(n), 19 U.S.C. § 2451(n).

<sup>120</sup> *Id.*

## China's WTO Complaint: *United States—Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China* (WT/DS399)

On September 14, 2009, China requested consultations with the United States under the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding or DSU) over the additional tariffs imposed on Chinese tire imports by the President under Section 421 “and any other measures the US may announce to implement” the President’s decision.<sup>121</sup>

Consultations not having resolved the issue, China requested a dispute settlement panel on December 21, 2009.<sup>122</sup> The WTO Dispute Settlement Body (DSB) established a panel on January 19, 2010.<sup>123</sup> Absent an agreement on panelists by the disputing parties, China requested the WTO Director-General to appoint the panelists in the case. Panelists were appointed on March 12, 2010.<sup>124</sup> Although other WTO members had invoked the China-specific safeguard,<sup>125</sup> China did

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<sup>121</sup> Request for Consultations by China, *United States—Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, at 1, WT/DS399/1 (September 16, 2009). The United States Trade Representative filed a *Federal Register* notice on October 2, 2009, soliciting public comment on China’s complaint. Comments were due by October 30, 2009. WTO Dispute Settlement Proceeding Regarding United States—Certain Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tires from China, 74 Fed. Reg. 50997 (October 2, 2009).

After the U.S. safeguard was announced, China also reportedly instituted antidumping and anti-subsidy investigations involving U.S. poultry imports and an antidumping investigation involving U.S. auto products. *China Responds to Tires Safeguard with New AD Investigations*, INSIDE U.S. TRADE, September 18, 2009, at 19; *MOFCOM Seen Fostering Trade Cases as Reaction to Obama Tire Safeguards*, INSIDE U.S. TRADE, September 25, 2009, at 22; *China Launches Antidumping, Anti-Subsidy Investigation into Imports of U.S. Poultry*, 16 Int’l Trade Rep. (BNA) 1323 (October 1, 2009).

<sup>122</sup> WTO News Item, DSB establishes panel to examine China’s export restrictions on raw materials (December 21, 2009), at [http://www.wto.org/english/news\\_e/news09\\_e/dsb\\_21dec09\\_e.htm](http://www.wto.org/english/news_e/news09_e/dsb_21dec09_e.htm).

<sup>123</sup> WTO News Item, DSB sets up panel on US—tyres (China) and Philippines—taxes on spirits, adopts reports on China—publications and AV products (January 19, 2010), at [http://www.wto.org/english/news\\_e/news10\\_e/dsb\\_19jan10\\_e.htm](http://www.wto.org/english/news_e/news10_e/dsb_19jan10_e.htm).

<sup>124</sup> Note by the Secretariat, Constitution of the Panel Established at the Request of China, *United States—Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/3 (March 16, 2010); *WTO Chief Appoints Three Panelists to Rule on China Complaint Against U.S. Tire Duties*, Daily Rep. for Executives (BNA), March 18, 2010, at A-2.

<sup>125</sup> See, e.g., WTO documents G/SG/N/16/IND/4/Suppl. 3 (July 8, 2009)(notification by India of two-year definitive safeguard measures on aluminum flat rolled products and aluminum foil effective June 19, 2009); G/SG/N/16/PER/1/Suppl.1/Rev.1 (May 2, 2005)(notification by Peru that it would not impose definitive safeguard measure on imports of textiles and clothing following expiration of provisional safeguard measure on these products).

The U.S. notification of its consultation request involving the definitive safeguard on Chinese tires is contained in WTO document G/SG/N/16/USA/5 (June 26, 2009), as corrected, G/SG/N/16/USA/5/Corr.1. Note also that India notified the WTO in early June 2009 under paragraph 16 that it had initiated a safeguard investigation on passenger car tires on May 18, 2009; the investigation was later terminated, however, at the request of the applicants. Notification of Application of Transitional Product-Specific Safeguard Measure Pursuant to Section 16.7 of Part I of the Protocol on the Accession of the People’s Republic of China, G/SG/N/16/IND/7 (June 4, 2009), and Supplement, G/SG/N/16/IND/7/Suppl.1 (December 7, 2009).

Paragraph 16 notifications may be accessed at WTO Documents Online, at [http://docsonline.wto.org/gen\\_search.asp?searchmode=simple](http://docsonline.wto.org/gen_search.asp?searchmode=simple), by entering the prefix “G/SG/N/16” into the box for “Document symbol.”



not challenge these other actions and, thus, this was the first panel to review a special safeguard action taken against Chinese goods.<sup>126</sup>

### *China's Complaint*

China claimed in its panel request that the higher tariffs, “not having been justified as emergency action under relevant WTO rules, are inconsistent with Article I:1 of the GATT 1994 because the US does not accord the same treatment it grants to passenger and light truck tires originating in other countries to the like products originating in China, and Article II of the GATT 1994, since these higher tariffs consist of unjustified modifications of US concessions thereunder.”<sup>127</sup> Article I:1, the general most-favored-nation obligation of the GATT, provides, in pertinent part, that, where customs duties are concerned, any advantage that a WTO member grants to any product originating in one country must be accorded “immediately and unconditionally” to the like product originating in all other WTO members. As discussed above, the China-specific safeguard permits a safeguard to be applied only to Chinese products. Article II of the GATT 1994 prohibits WTO members from imposing tariffs on products imported from other WTO members in excess of negotiated rates.

China further maintained that the United States “has not even attempted to justify these restrictions as a safeguard action pursuant to GATT Article XIX and the *Agreement on Safeguards*,” justifying them only under the China-specific safeguard contained in paragraph 16 of China’s Accession Protocol.<sup>128</sup> In such case, China challenged both the statutory basis of the

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<sup>126</sup> China has also challenged various U.S. antidumping and countervailing duty investigations and orders involving Chinese products as inconsistent with Part I, paragraph 15 of its Accession Protocol, as well as provisions of the GATT, the WTO Agreement on Antidumping, and the Agreement on Subsidies and Countervailing Measures (SCM). Request for the Establishment of a Panel by China, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/2 (December 12, 2008). Paragraph 15 of the Protocol addresses determinations of price comparability by WTO members in antidumping and countervailing duty investigations involving imports of Chinese goods. China alleged that the United States acted inconsistently with paragraph 15 with regard to aspects of its use of a benchmark outside of China for the purpose of determining the existence and amount of a subsidy benefit to Chinese firms in its countervailing duty investigations. *Id.* at 5. China also alleged, among other things, that the United States violated obligations under the SCM Agreement in determining that certain Chinese state-owned enterprises were “public bodies” and thus capable of conferring subsidies for purposes of the Agreement, *id.* at 4, and that the United States violated the SCM Agreement, the Antidumping Agreement, and the GATT most-favored-nation article in simultaneously imposing antidumping and countervailing duties on the same Chinese goods, that is, that the United States had improperly availed itself of a “double remedy” where the same subsidization was taken into account in calculating each set of duties. *Id.* at 5-6. In a report issued on October 22, 2010, the panel rejected the bulk of China’s claims. Panel Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/2 (October 22, 2010). On appeal by China, the Appellate Body, *inter alia*, reversed the panel’s findings that certain state-owned firms qualified as “public bodies” for purposes of the SCM Agreement and that China had failed to establish that the United States violated its WTO obligations in applying a “double remedy.” Regarding the latter, the Appellate Body found instead that offsetting the same subsidization by simultaneously applying antidumping and countervailing duties to the same imports was inconsistent with Article 19.3 of the SCM Agreement, which requires that, if countervailing duties are to be imposed, they be imposed in an “appropriate” amount. Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R (March 11, 2011). The United States has stated that it will comply with the WTO decision and the two parties have agreed on a compliance period expiring on February 25, 2012. Agreement under Article 21.3(b) of the DSU, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/11 (July 8, 2011).

<sup>127</sup> Request for the Establishment of a Panel by China, *United States—Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, at 2, WT/DS399/2 (December 11, 2009)[hereinafter China Tires Panel Request].

<sup>128</sup> *Id.* (italics in original).

safeguard as well as its specific application in the case of Chinese tires as inconsistent with the Protocol provision.

First, China argued that the statutory basis of the safeguard is inconsistent “on its face” with the Protocol in that the Section 421 “impermissibly weakens the standard of ‘significant cause’ by imposing a definition of the term that contradicts Article 16.4 of the Protocol of Accession.”<sup>129</sup>

Second, China claimed that imposition of the tire tariffs is inconsistent with the following elements of the China-specific safeguard: (1) “Articles 16.1 and 16.4, because imports from China in this case were not occurring ‘in such increased quantities’ and were not ‘increasing rapidly,’ and instead had begun to decline in response to changing US demand conditions”; (2) “Articles 16.1 and 16.4, because imports from China 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”; (3) “Articles 16.3, because the restrictions 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”; and (4) “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.”<sup>130</sup>

By beginning its legal argument with a reference to Article I:1 of the GATT, China highlighted an element of the China-specific safeguard provision that distinguishes it from safeguards permitted under GATT Article XIX and the WTO Agreement on Safeguards, namely, the absence of a requirement that the safeguard be applied to all imports of the product involved regardless of their source. The reference to GATT Article II seemingly emphasizes that WTO members may impose safeguard tariffs on injurious imports and thereby temporarily escape their Article II obligations to maintain tariff concessions owed other members only if requirements in GATT Article XIX and the Safeguards Agreement are met. The China-specific provision was agreed to, however, by China and all other WTO members and thus the fact that it does not require global application does not in itself appear to provide a legal basis for complaint. Further, while China’s request sought to raise questions regarding the relationship between the China-specific safeguard and GATT Article XIX and the Safeguards Agreement, the major focus of the request appeared to be the consistency of the U.S. statute and its application to Chinese tires with paragraph 16 of China’s Accession Protocol.

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<sup>129</sup> *Id.* A facial or “as such” challenge in a WTO dispute proceeding seeks to prevent the defending member from acting under the cited law or regulation in the future. The WTO Appellate Body has described “as such” claims as follows: “By definition, an ‘as such’ claim challenges laws, regulations, or other instruments of a member that have general and prospective application, asserting that a member’s conduct—not only in a particular instance that has occurred, but in future situation as well—will necessarily be inconsistent with that member’s WTO obligations. In essence, complaining parties bringing ‘as such’ challenges seek to prevent members *ex ante* from engaging in certain conduct. The implications of such challenges are obviously more far-reaching than ‘as applied’ claims.” Appellate Body Report, *United States—Sunset Review of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, para. 172, WT/DS268/AB/R (November 29, 2004).

<sup>130</sup> China Tires Panel Request, *supra* note 127, at 2.

## WTO Panel Report

In a report issued December 13, 2010, the WTO panel rejected all of China's claims.<sup>131</sup> Before proceeding with its analysis, the panel set out context for the case, including that the case raised questions that had not yet been dealt with in a WTO dispute settlement proceeding, such as the relationship of the China-specific safeguard to the WTO global safeguard mechanisms; that the U.S. International Trade Commission causation determination was not unanimous, warranting "very careful consideration" by the panel of this aspect of the determination; that the unanimous ITC material injury finding was not before the panel, thus making causation a crucial issue, though complicated by the fact that the ITC's period of investigation had "involved in part a period of massive global economic downturn or recession"; that the section 421 petition had been filed by a labor union concerned with job losses and not by the domestic tire industry, which had reduced investment in the United States and increased investment in China, arguably precipitating the increase in Chinese tire imports that resulted in the safeguard; and that the domestic industry indicated that it would not make adjustments even though a safeguard was put in place.<sup>132</sup>

Notwithstanding this context, the panel emphasized that its task was to interpret the China-specific safeguard and "not to seek to recalibrate what the WTO members had agreed to in the negotiations that led to the accession of China to the WTO in the light of what the Panel might perceive as changing economic circumstances that perhaps had not been considered when the Protocol was negotiated."<sup>133</sup>

In considering the proper standard of review under Paragraph 16, the panel agreed with the disputing parties that in trade remedy cases the panel "should neither conduct a de novo review, nor grant total deference to an investigation authority" and added that "it is also well established that the Panel's standard of review 'must be understood in the light of the obligations of the particular covered agreement at issue.'"<sup>134</sup> In this case, the panel stated that it would consider whether the ITC had "evaluated 'objective factors', as required by Paragraph 16.4,"<sup>135</sup> whether the ITC had "provided a reasoned and adequate explanation of its determination, in line with its obligation under Paragraph 16.5,"<sup>136</sup> and, regarding the latter, whether the ITC's reasoning "seems adequate in light of plausible explanations of the record evidence or data advanced by China in this proceeding."<sup>137</sup> Further, in interpreting the phrases "increasing rapidly" and "significant cause," the panel stated that it would take into account the provisions of GATT Article XIX and the Safeguards Agreement to the extent they were "relevant."<sup>138</sup>

Regarding the ITC's determination that imports were "increasing rapidly" as required under Paragraph 16.4, the panel rejected China's contention that the phrase requires that the investigating authority focus on imports in the most recent past and that there also be "a quick

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<sup>131</sup> Panel Report, *United States—Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/R (December 13, 2010). U.S. submissions to the WTO panel are available at <http://www.ustr.gov/trade-topics/enforcement/dispute-settlement-proceedings/wto-dispute-settlement/pending-wto-disputes>.

<sup>132</sup> Id. paras. 7.2-7.9.

<sup>133</sup> Id. para. 7.10.

<sup>134</sup> Id. para. 7.15 (footnotes omitted).

<sup>135</sup> Id. para. 7.15.

<sup>136</sup> Id.

<sup>137</sup> Id. para. 7.18.

<sup>138</sup> Id. para. 7.37.

progression in the rate of increase of the volume of imports.”<sup>139</sup> Citing panel and appellate decisions under the WTO Safeguards Agreement, the panel found that while some retrospective analysis is required, focus on the “movements of imports during the *most* recent past, or during the period immediately preceding the authority’s decision” is not.<sup>140</sup> The panel further found that the Protocol does not require a rapid increase in the rate of increase of imports and instead demands only the rapid increase in imports be on an absolute or relative basis.<sup>141</sup> Among other panel findings involving the rapidity of increase, the panel dismissed China’s argument that a “low base” existed at the beginning of the ITC’s period of investigation and that the agency did not put this figure into context. The panel found instead that “[h]aving five percent of the market at a value of 450 million dollars, and being the fourth largest import source are far from humble beginnings” and that “gaining 12 percentage points in market share at a value of 1.7 billion dollars, and becoming the largest import source over the period of investigation means subject imports were a large and significant presence in the market at the end of the period.”<sup>142</sup>

Regarding the causation standard in the U.S. statute, the panel found that the “contributes significantly” standard in Section 421(c)(2), which, as explained by the United States, demands the existence of a “direct and significant causal link” between the rapidly increasing imports and the market disruption, does not require the United States to establish causation inconsistently with Paragraph 16.<sup>143</sup>

The panel also considered arguments on the nature of the causation analysis required under Paragraph 16 itself, specifically (1) whether the investigating authority must consider conditions of competition and correlation, that is, a coincidence of trends between increasing imports and declines in the relevant injury factors and (2) how the investigating authority should evaluate injury factors other than the subject imports.

First, the panel found that Paragraph 16.4 does not obligate the importing member to apply any particular methodology for establishing market disruption, including causation, requiring only that it consider “objective factors.”<sup>144</sup> The panel stated, however, that “an analysis of the conditions of competition and correlation will often be relevant, and may on the facts of a given case prove essential, to a consideration of ‘significant cause’” and, as the ITC had considered both of these factors in this case, the panel would consider these analyses as part of its task to objectively assess the ITC’s overall determination of significant cause.<sup>145</sup>

Second, the panel found that Paragraph 16 does not require the strict “non-attribution” analysis demanded under the WTO Safeguards Agreement—that is, that the injurious effects of all of the different causal factors at play be distinguished and separated from the injurious effects caused by increased imports—but that “this does not mean that the obligation to demonstrate that rapidly increasing imports are a significant cause of material injury should not entail some form of analysis of the injurious effects of other factors.”<sup>146</sup> The panel thus found that “the causal link

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<sup>139</sup> Id. para. 7.87-

<sup>140</sup> Id. para. 7.90 (emphasis in original).

<sup>141</sup> Id. para. 7.92.

<sup>142</sup> Id. para. 7.105.

<sup>143</sup> Id. para. 7.111-7.160.

<sup>144</sup> Id. para. 7.170.

<sup>145</sup> Id.

<sup>146</sup> Id. para. 7.176.

between rapidly increasing imports and material injury must be assessed ‘within the context of other possible causal factors’” and that, in particular, “a finding of causation for purposes of Paragraph 16.4 should only be made if it is properly established that rapidly increasing imports have injurious effects that cannot be explained by the existence of other causal factors.”<sup>147</sup>

The panel upheld the ITC’s analysis of the conditions of competition between Chinese and domestic tires,<sup>148</sup> as well as the ITC’s approach to correlation. Responding to China’s argument that the ITC had failed to properly establish correlation between rapidly increasing imports and material injury, the panel noted that Paragraph 16 did not require a showing of correlation between the two, that correlation is instead an investigative tool that may be used to demonstrate causation, and that it was not necessary that causation be based on correlation “only if the varying degrees of increase in imports over the period of investigation are reflected in the varying degrees, or rates of decline, in injury indicators.”<sup>149</sup> The panel stated:

While a more precise degree of correlation between the upward movements in imports and the downward movements in injury factors might result in a more robust finding of causation, and might indeed suffice on its own to demonstrate causation, a finding of “significant cause” is not excluded simply because an investigative authority relies on an overall coincidence between the upward movement in imports and the downward movement in injury factors, especially if that finding of overall coincidence is combined—as it was in the present case—with other analyses indicative of causation.<sup>150</sup>

China had also argued that material injury was attributable to a number of factors other than increased imports, including the domestic industry’s relocation strategy, and that the ITC did not fully assess these factors or establish that any injury that they caused was not instead attributed to the subject imports.<sup>151</sup> The panel noted that the majority and dissenting ITC Commissioners drew opposite conclusions regarding industry strategy from the same evidence, the majority finding that the strategy to reduce U.S. production and relocate in China was a response to increased imports and thus not an alternative cause that prevented increasing imports from China from constituting a significant cause of injury and the dissenting commissioners finding that the relocation strategy was an independent business strategy that began before imports were increasing. The panel stated that it would be inappropriate for it to choose between these views and instead found that its own assessment “indicates that it is difficult to separate out the business strategy from the increasing imports.”<sup>152</sup> The panel continued:

It may well be, as the dissenting commissioners say, that the strategy of relocating to China began before 2004 and before the substantial increases in subject imports. It is also true that plant closures occurred after the increase in imports and may well have been linked to the competition from imports. Indeed, the decision to locate production in China might have been the result of an independent business strategy, but the decision to close plants might well have been a response to imports.<sup>153</sup>

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<sup>147</sup> Id. para. 7.177 (footnote omitted).

<sup>148</sup> Id. paras. 7.179-7.216.

<sup>149</sup> Id. para. 7.229.

<sup>150</sup> Id.

<sup>151</sup> Id. para. 7.262.

<sup>152</sup> Id. para. 7.321.

<sup>153</sup> Id. para. 7.321.

In light of these considerations, the panel could not find that the ITC's analysis of the alternative business strategy was in error, a *prima facie* case of which China had failed to make.<sup>154</sup> The panel also rejected China's non-attribution arguments relating to other factors, such as changes in demand and imports of tires from countries other than China.<sup>155</sup>

The panel also dismissed China's claims regarding the scope and duration of the U.S. remedy. China had argued (1) that the U.S. safeguard addressed all market disruption including that caused by factors other than rapidly increasing imports and thus was imposed beyond the "extent necessary" as required under Paragraph 16.3 and (2) that the three-year duration of the safeguard exceeded the period of time necessary to prevent or remedy the market disruption.

Regarding the scope of the remedy, the panel found that since the Protocol did not require a "full-blown" non-attribution analysis, it did not contain a benchmark by which to measure the scope of the remedy, but that, even so, China had failed to show that the measure was excessive.<sup>156</sup> The panel found that a measure was not necessarily excessive simply because it seeks to improve the condition of the domestic industry, the deterioration of which is to some extent due to increased imports.<sup>157</sup> It further determined that because the ITC had found that "the domestic industry suffered market disruption as a result of rapidly increasing subject imports that were underselling domestic production, a measure that is aimed at 'reducing the quantity of subject imports and raising their price in the U.S. market' can be justified."<sup>158</sup> The panel noted, however, that such a remedy "does allow for the possibility of the expansion of non-subject imports rather than the improvement of the condition of the domestic industry" and that "that is a consequence of a country-specific safeguard and not a defect of the remedy in this case."<sup>159</sup> The panel similarly found that China had failed to make a *prima facie* case that a three-year safeguard was excessive, noting that the United States was under no obligation to explain why a measure of this length was needed nor to quantify the injury caused by increasing imports or separate and distinguish that injury from injury caused by other factors.<sup>160</sup>

Finally, the panel quickly disposed of China's claims under GATT Articles I and II. The panel found that China's GATT claims were "entirely dependent" on Paragraph 16 of the Protocol and because it had rejected the Paragraph 16 claims, it similarly did not accept the claims under the GATT.<sup>161</sup>

### *China's Appeal*

China appealed the panel report on May 24, 2011, claiming that the panel had misinterpreted and misapplied the phrases "increasing rapidly" and "significant cause" as they related to the U.S.

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<sup>154</sup> Id. para. 7.322.

<sup>155</sup> Id. paras. 7.323-7.378.

<sup>156</sup> Id. paras. 7.394-7.395.

<sup>157</sup> Id. para. 7.397.

<sup>158</sup> Id. para. 7.398.

<sup>159</sup> Id.

<sup>160</sup> Id. para. 7.414.

<sup>161</sup> Id. para. 7.418. Citing China's first written submission to the panel, the panel noted that "the dependent nature of China's GATT 1994 claims is shown by China's argument that there is 'also' a GATT 1994 violation because of the additional duties 'not having been justified as emergency action under relevant WTO rules.'" Id. n. 557.

International Trade Commission determination.<sup>162</sup> Among other arguments, China maintains that the panel did not consider the most recent rate of increase in tire imports in the context of earlier increases and thus failed to distinguish a rapid increase in imported tires from a mere increase in such goods, and that the panel did not properly define the term “significant” and thus failed to distinguish a “cause” of serious injury from a “significant cause” thereof. China did not pursue its GATT–related arguments in its appeal.

According to WTO rules, the WTO Appellate Body is expected to issue its report within 60 to 90 days and thus, in this case, by late August 2011. Once issued, the report must be unconditionally accepted by the disputing parties. The Appellate Body report and the panel report, subject to any modifications by the Appellate Body, will then be scheduled for adoption by the WTO Dispute Settlement Body. As the reverse consensus rule will apply, the reports will be adopted unless all WTO members present at the DSB meeting vote not to do so.<sup>163</sup> If the Appellate Body finds fault with the panel report so that the United States is found to be out of compliance with its WTO obligations, the United States will be expected to comply with the WTO decision within a reasonable period of time. If the Appellate Body upholds the panel’s findings, the United States will have prevailed in the dispute and China will have no further recourse under WTO dispute settlement rules on the matters involved.

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<sup>162</sup> Notification of an Appeal by China, *United States—Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/6 (May 27, 2011).

While the WTO Dispute Settlement Understanding gives the disputing parties 60 days to appeal a panel report, the parties asked the WTO Dispute Settlement Body to extend the appeal period to May 24, 2011, reportedly to accommodate the demanding workload of the Appellate Body at the time.<sup>162</sup> Joint Request by China and the United States for a Decision by the DSB, *United States—Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/5 (January 28, 2011); see *U.S. China Agree to Suspend Appeals Proceedings in WTO Tire Safeguard Dispute*, 28 Int’l Trade Rep. (BNA) 190 (February 3, 2011); *Heavy DSB Workload Forces U.S. China to Delay Action on Tire Panel*, INSIDE U.S. TRADE, February 11, 2011, at 8.

<sup>163</sup> For further discussion of the WTO dispute settlement process, see CRS Report RS20088, *Dispute Settlement in the World Trade Organization (WTO): An Overview*, by Jeanne J. Grimmett, and the WTO website at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/displ\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm).

## **Appendix. WTO China-Specific Safeguard**

### **Protocol on the Accession of the People's Republic of China (Part I, General Provisions)**

#### **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.

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