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WTO Appellate Body Upholds U.S. Safeguard Measures on Imported Tires from China: Legal Implications and Ramifications to Subsequent Trade Disputes and to Other Trade Industries

James Clifford Anderson

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Comments

WTO Appellate Body Upholds U.S. Safeguard Measures on Imported Tires from China: Legal Implications and Ramifications to Subsequent Trade Disputes and to Other Trade Industries

*James Clifford Anderson**

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I. INTRODUCTION

China and the United States are engaged in international trade disputes within the World Trade Organization (“WTO”) dispute settlement system which are currently at a boiling point.¹ On June 4, 2012, the U.S. Commerce Department announced that it will likely impose a thirty-one percent tariff on all solar panel imports from China.² Two other recent disputes, filed in September and October 2011, include allegations by the United States that China improperly levied tariffs on Chinese chicken imports and that China failed to disclose details of 200 Chinese subsidies as required by the WTO.³ Imposing tariffs on international imports between the United States and China is reciprocal.⁴ China announced on December 16, 2011 that it will impose anti-dumping tariffs on imported U.S. vehicles with engines of 2.5-litres or above, effective from December 15, 2011, and lasting two years.⁵ These recent examples illustrate the current volatile nature of global trade between two of the largest importing and exporting countries in the world.⁶

Over the past decade, despite numerous safeguard complaints filed by the United States against China alleging trade violations, not one has been completely upheld by the WTO Appellate Body (“AB”).⁷ This trend ended on

* J.D., University of the Pacific, McGeorge School of Law, to be conferred May 2013; B.A., Psychology, Arizona State University, 2003. I would like to thank Professor Michael P. Malloy for his insights and support throughout the publication process. Additionally, I would like to thank my wife and five children for their continued encouragement and affection.

1. Kara Loridas, *United States-China Trade War: Signs of Protectionism in a Globalized Economy?*, 34 SUFFOLK TRANSNAT'L L. REV. 403, 403 (2011); see generally Keith Bradsher, *200 Chinese Subsidies Violate Rules*, U.S. SAYS, N.Y. TIMES (Oct. 6, 2011), http://www.nytimes.com/2011/10/07/business/us-says-some-chinese-subsidies-violate-trade-rules.html?_r=1&scp=1&sq=200%20Chinese%20Subsidies%20Violate%20Rules&st=cse.

2. Dan Springer, *Obama Administration's Proposed Tariff on Chinese Solar Panels Raises Fear of Trade War*, FOX NEWS (June 4, 2012), <http://www.foxnews.com/politics/2012/06/04/us-solar-panel-trade-war-with-china/>.

3. *U.S. Files Complaint Against Chinese Chicken Tariffs*, FOX NEWS (Sept. 20, 2011), <http://www.foxnews.com/world/2011/09/20/us-files-complaint-against-chinese-chicken-tariffs/>; Bradsher, *supra* note 1; see generally Garrett E. Lynam, *Using WTO Countervailing Duty Law to Combat Illegally Subsidized Chinese Enterprises Operating in a Nonmarket-Economy: Deciphering the Writing on the Wall*, 42 CASE W. RES. J. INT'L L. 739 (2010) (describing implications of illegal Chinese subsidies in relation to WTO obligations and their effects on international trade).

4. See generally Lynam, *supra* note 3.

5. *China's Duties on US Imports Will Not Have Major Impact*, AUTOS INSIGHT (Dec. 16, 2011), <http://www.autosinsight.com/file/107508/chinas-duties-on-us-imports-will-not-have-major-impact.html>.

6. *China Trade Profile*, WTO (Oct. 2011), <http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country=CN>; *United States Trade Profile*, WTO (Oct. 2011), <http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country=US>.

7. Wenhua Ji & Cui Huang, *China's Experience in Dealing with WTO Dispute Settlement: A Chinese Perspective*, 45 J. WORLD TRADE 1, 11 (2011). From 2001 to the current tire dispute, the United States has filed six petitions under safeguard measures. The U.S. International Trade Commission (“USITC”) rejected two petitions after determining that market disruption had not been established. In the other four instances, President Bush used his discretionary authority and denied granting relief. *Id.* Prior to the tire dispute, the last safeguard

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September 5, 2011, when the AB issued its report regarding Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres⁸ from China (“AB Tire Report”) in favor of the United States.⁹ It was the first time the WTO completely upheld any kind of safeguard measure.¹⁰

But what are the ramifications of the AB Tire Report? What will happen when the U.S.-China Protocol expires in December 2013? What legal implications does the AB Tire Report have on other trade industries such as the solar industry? In the tire dispute, unlike previous failed disputes, the United States adequately showed that imports from China were “increasing rapidly” and that these imports “caused significant harm to the domestic industry.”¹¹ Other trade industries may be levied with tariffs by the United States because, from a statistical standpoint, their percentage of imports is similar to percentages found in the tire dispute.¹² For example, because solar industry imports are at a similar level to tire imports, the WTO may uphold tariffs imposed on China by the U.S. solar industry.¹³ Thus, it is likely that the United States will experience success in subsequent trade disputes with China.

Part II of this Comment introduces the background and procedure of China’s accession into the WTO and discusses the U.S.-China Protocol and its implications. Part III analyzes the initial 2009 tire dispute followed by an explanation of the AB Tire Report. Part IV examines the legal implications the AB Tire Report would have had on the previous U.S.-China Steel Dispute from 2003. In addition, Part IV will compare the AB Tire Report and what effects, if any, it may have on other current international trade disputes, such as the solar industry. It also discusses the possible effects and options once the U.S.-China Protocol expires in December 2013.

In Part V, the Comment concludes that because the AB Tire Report expanded definitions of critical terms within the U.S.-China Protocol and because other industries, such as the solar industry are importing at similar levels to the tire industry, the United States will likely experience success in subsequent trade disputes with China.

measure to be upheld was under the GATT system in 1951. *Dispute Settlement: WTO Adopts Reports on China/US Tyres Case*, WTO (Oct. 5, 2011), http://www.wto.org/english/news_e/news11_e/dsb_05oct11_e.htm.

8. The European spelling is “tyres.” However, I will use the American spelling “tires” throughout this Comment.

9. Appellate Body Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/AB/R (Sept. 5, 2011).

10. *Dispute Settlement: WTO Adopts Reports on China/US Tyres Case*, *supra* note 7 (noting that the last such occurrence under the GATT system was in 1951).

11. *See infra* Part III.

12. *See infra* Part IV.B.

13. *See infra* Part IV.B.

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II. BACKGROUND

China's emergence as a global power and its consistent growth since the 1980s into the third-largest economy is astonishing.¹⁴ Despite China's exceptionally rapid growth of trade with other nations in the 1980s and 1990s,¹⁵ on December 11, 2001, after nearly fifteen years of contentious and tortuous negotiations, China finally joined the WTO.¹⁶ At the time of China's accession to the WTO, China was the largest developing country in the world.¹⁷ There are obvious reasons why China would view WTO membership as beneficial.¹⁸ Arguably, the two biggest benefits China enjoys by joining the WTO are lowered tariffs on its exports and the removal of non-tariff barriers.¹⁹

Established on January 1, 1995, the WTO is the organization responsible for regulating international trade,²⁰ as it replaced the General Agreement on Tariffs and Trade ("GATT") as the international trading system.²¹ The goal of the WTO is to level the playing field within the international trading system by eliminating discrimination and promoting global free trade by way of multilateral negotiations among member countries.²² The WTO wants to ensure that "trade flows as smoothly, predictably, and freely as possible."²³ This is accomplished through the Most Favored Nation ("MFN") concept.²⁴ MFN requires that any advantage or privilege given to one member country must be given to all member countries.²⁵ MFN is based on a concept of non-discrimination and full

14. Pasha L. Hsieh, *China's Development of International Economic Law and WTO Legal Capacity Building*, 13 J. INT'L ECON. L. 997, 997 (2010).

15. Xiaohui Wu, *Agora: Ten Years of China's Participation in the WTO: No Longer Outside, Not Yet Equal: Rethinking China's Membership in the World Trade Organization*, 10 CHINESE J. INT'L L. 227, 229 (2011).

16. Jing Ma, *Product-Specific Safeguard in China's WTO Accession Agreement: An Analysis of its Terms and its Initial Application in Section 421 Investigations*, 22 B.U. INT'L L.J. 189, 189 (2004); Henry Gao, *China's Participation in the WTO: A Lawyer's Perspective*, 11 SING. Y.B. INT'L L. 41, 41 (2007); see Wu, *supra* note 15, at 228.

17. Wu, *supra* note 15, at 228.

18. Karen Halverson, *China's WTO Accession: Economic, Legal, and Political Implications*, 27 B.C. INT'L & COMP. L. REV. 319, 332 (2004). Two obvious benefits to joining the WTO include the "benefit from the recognition and prestige that WTO membership brings" and "deepen[ing] China's integration into the world economy and signal[ing] its status as a world economic power." *Id.*

19. Gao, *supra* note 16, at 48. As a WTO member, China benefits from MFN tariff rates, which are lower than previous rates applicable to China before the accession. *Id.*

20. MICHAEL P. MALLOY ET AL., INTERNATIONAL TRADE AND INVESTMENT 241 (forthcoming).

21. Loridas, *supra* note 1, at 405.

22. *Id.*

23. Lynam, *supra* note 3, at 743.

24. See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT] (adopting the MFN concept).

25. *Id.* (requiring that "any advantage, favour, privilege or immunity" be consistently granted to all members); see also Loridas, *supra* note 1, at 406-07; see also Thomas P. Holt, *CNOOC-UNOCAL and the WTO: Discriminatory Rules in the China Protocol Are a Latent Threat to the Rule of Law in the Dispute Settlement Understanding*, 15 PAC. RIM L. & POL'Y J. 457, 474 (2006).

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transparency.²⁶ Therefore, if any privilege or advantage is extended to one WTO member state, it must also be granted to all member states.²⁷

China was granted permanent MFN status by the United States during China's accession to the WTO.²⁸ Prior to being granted MFN status, China was required to submit to "highly controversial and politicized annual reviews" by the U.S. Congress pursuant to the Jackson-Vanik Amendment to the 1974 Trade Act.²⁹ With the annual reviews abolished, China's accession to the WTO was looked upon as a major step towards developing a more transparent and globally competitive economy within the world trading system.³⁰ However, the question remained whether China would be governed by the normal WTO Safeguard Agreement ("WTO Product-Specific Safeguard") like other member nations before the Dispute Settlement Body ("DSB").³¹

A. *WTO Product-Specific Safeguard*

One of the highly contested issues in the negotiation process was the WTO Product-Specific Safeguard clause and how it would be applied to China.³² One consequence or advantage³³ of China's accession to the WTO is access to the WTO DSB.³⁴ Annex 2 of the WTO Charter creates the Dispute Settlement Understanding ("DSU") which all member states are subject to.³⁵ The DSU subsequently creates the DSB³⁶ and authorizes the DSB to establish a standing

26. Loridas, *supra* note 1, at 406-07; *see also* Holt, *supra* note 25, at 474.

27. Loridas, *supra* note 1, at 406-07; *see also* Holt, *supra* note 25, at 474.

28. Wu, *supra* note 15, at 237.

29. *Id.* at 237-38. Under the Jackson-Vanik Amendment, Congress was required to annually review China and its trading practices and decide whether or not to extend MFN status to China for that year. The economic risks caused by the annual review of U.S. Congress were enormous and thus, China was eager to get rid of it. *Id.*; *see also* Charles Tiefer, *SINO 301: How Congress Can Effectively Review Relations with China After WTO Accession*, 34 CORNELL INT'L L. J. 55, 60-62 (2001); *see* Gao, *supra* note 16, at 45.

30. Wu, *supra* note 15, at 237.

31. *See* Agreement on Safeguards, WTO Agreement art. XIX, *available at* http://www.wto.org/english/docs_e/legal_e/25-safeg.pdf [hereinafter Agreement on Safeguards]; Fabio Spadi, *Discriminatory Safeguards in the Light of the Admission of the People's Republic of China to the World Trade Organization*, 5 J. INT'L ECON. L. 421, 421 (2002).

32. Spadi, *supra* note 31, at 421.

33. *See* Christopher Duncan, *Out of Conformity: China's Capacity to Implement World Trade Organization Dispute Settlement Body Decisions After Accession*, 18 AM. U. INT'L L. REV. 399, 485 (2002) (discussing consequences of the DSB in relation to China's capacity to comply); *but see* Wu, *supra* note 15, at 238 (stating one advantage is China's access to the DSB allows China the opportunity to bring other members to the DSB for WTO-inconsistent measures and seek redress).

34. Wu, *supra* note 15, at 238.

35. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]; *see also* MALLOY ET AL., *supra* note 20, at 239.

36. DSU, *supra* note 35, at art. 2.

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AB³⁷ capable of resolving disputes between member states.³⁸ Settlement of disputes between WTO members is the sole responsibility of the DSB.³⁹ Because all member states are subject to the DSU and DSB, the DSB enjoys mandatory, compulsory jurisdiction.⁴⁰ Therefore, regardless of whether or not China would be governed by the WTO Product-Specific Safeguard, China would be entitled to resolve all disputes before the DSB.⁴¹

Pursuant to GATT Article XIX,⁴² known as the “escape clause,” the WTO Product-Specific Safeguard permits members to depart from its GATT obligations “to the extent necessary to address serious injury to a domestic industry caused by imports”⁴³ (i.e. safeguard measures). Members may apply safeguard measures to a product only if “such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.”⁴⁴

The traditional view of this measure is that it should apply in a non-discriminatory manner to all WTO member nations.⁴⁵ Unfortunately for China, this safeguard measure does not apply to China or any products imported from China.⁴⁶ This is because within the procedure of WTO accession, China was required to enter bilateral negotiations with other member nations and agreed-upon accession terms as drafted and outlined in a protocol of accession document.⁴⁷ In other words, prior to WTO membership, the protocol of accession document represented the rudimentary terms of entry for China into the WTO.⁴⁸

B. China as a Non-Market Economy and the U.S.-China Protocol

In November 1999, the United States and China finally signed a bilateral agreement on China’s accession to the WTO (“U.S.-China Protocol”).⁴⁹ However, it did not take effect until China was officially voted into the WTO at

37. *Id.* at art. 17.

38. MALLOY ET AL., *supra* note 20, at 240.

39. *Id.* at 717.

40. Gao, *supra* note 16, at 71; *see also* Wu, *supra* note 15, at 238.

41. Gao, *supra* note 16, at 71.

42. GATT, *supra* note 24, at art. XIX.

43. Agreement on Safeguards, *supra* note 31; *see also* MALLOY ET AL., *supra* note 20, at 242.

44. Agreement on Safeguards, *supra* note 31.

45. Spadi, *supra* note 31, at 422.

46. Ma, *supra* note 16, at 195.

47. Halverson, *supra* note 18, at 324.

48. Duncan, *supra* note 33, at 459; *see* Halverson, *supra* note 18, at 323-24 (explaining that accession requires bilateral negotiations finalized in “three documents: the working party report, the protocol of accession, and the attached schedules contain[ing] the new member’s specific liberalization commitments.”).

49. Halverson, *supra* note 18, at 324.

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the Doha Ministerial Meeting in November 2001.⁵⁰ Because the expiration of the U.S.-China Protocol is set for twelve years after accession, it is to expire in December 2013.⁵¹

1. Implications of China Categorized as a Non-Market Economy

Despite China's requests to be categorized as a comprehensive "developing country" when ascending to the WTO,⁵² and after arduous negotiations, China reluctantly acquiesced to be treated as a "non-market economy" ("NME").⁵³ Therefore, China, as an NME, is subject to specific conditions by other WTO members, including the United States.⁵⁴ China agreed to be treated as an NME for a period of fifteen years from the date of its accession to the WTO; thus, it will expire in December 2016.⁵⁵

Had China been categorized as a "developing country" during its accession to the WTO, the U.S-China Protocol would be non-existent and, therefore, China would not be susceptible to a lower threshold of product-specific safeguards as found within the U.S.-China Protocol.⁵⁶ Furthermore, had China been categorized as a "developing country," member nations would need to show that imports are causing "serious injury," rather than "a significant cause of material injury."⁵⁷ However, since China consented into the WTO as an NME, this lower threshold of injuries found in the U.S.-China Protocol only applies to China and products imported from China.⁵⁸ Because many members worried that the application of normal safeguard measures under the WTO Product-Specific Safeguard Agreement might not be enough to counter the China threat,⁵⁹ China had to agree to a special safeguard mechanism in its accession package: the U.S.-China Protocol.⁶⁰

50. *Id.* at 324-25.

51. Gao, *supra* note 16, at 55-56; *see also* Halverson, *supra* note 18, at 330-31.

52. Wu, *supra* note 15, at 235.

53. *Id.* at 239; *see* Lynam, *supra* note 3, at 748 (stating that the United States labels China as a "NME despite the fact that there are pockets of market-oriented economies in China").

54. Wu, *supra* note 15, at 239; *see* Lynam, *supra* note 3, at 748.

55. Carlos Esplugues Mota, *Chapter 1: China's Accession to WTO*, in *CHINESE BUSINESS LAW* 1, 9 (2010).

56. Wu, *supra* note 15, at 239.

57. *See supra* Part II (explaining the differing injury thresholds between the WTO Product-Specific Safeguard and the U.S.-China Protocol).

58. Wu, *supra* note 15, at 239.

59. Gao, *supra* note 16, at 55-56; *see* Halverson, *supra* note 18, at 325 (explaining that WTO members viewed China as a major source of cheap labor imports and thus a threat to domestic industry); *see* Spadi, *supra* note 31, at 430 (stating concerns including China's lack of transparency, the high number of state enterprises, and the constant role of central and local authorities).

60. Gao, *supra* note 16, at 55.

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2. U.S.-China Protocol

Compared with the WTO Product-Specific Safeguard mechanisms applicable to other member states, the special “transitional product-specific safeguard” mechanism (“TPSS”) found within the U.S.-China Protocol includes many unique features.⁶¹ First, the TPSS may be “triggered by ‘market disruption,’ which is deemed to exist so long as imports are ‘a significant cause of material injury,’ rather than causing ‘serious injury,’ as would have been required under the [WTO Product-Specific] Safeguards Agreement.”⁶² Second, the TPSS only applies to China and products imported from China.⁶³ Third, pursuant to the WTO Product-Specific Safeguard, if “a safeguard measure” is imposed on “an increase of imports, the affected export members are allowed to retaliate immediately.”⁶⁴ However, the TPSS provides that China has “the right to retaliate only if such [safeguard] measures remain in effect for more than two years.”⁶⁵ These and other unique variances between the WTO Product-Specific Safeguard and U.S.-China Protocol provide for substantial differences in application and outcome of disputes within the DSB.⁶⁶

The U.S.-China Protocol remains in effect for twelve years after succession and is set to expire in December 2013.⁶⁷ The first unique feature is found in Article 16 of the U.S.-China Protocol. Article 1, paragraph 16.1 of the “Transitional Product-Specific Safeguard Mechanism” section of the U.S.-China Protocol provides:

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 Safeguards⁶⁸

Compared with the normal WTO Product-Specific Safeguard Agreement which applies to all other MFN members, the TPSS is “triggered by ‘market

61. *Id.* at 55-56.

62. *Id.* at 55.

63. *Id.* at 55-56.

64. *Id.* at 55.

65. *Id.*

66. *Id.*; see *supra* Part II.

67. Gao, *supra* note 16, at 55-56; see Halverson, *supra* note 18, at 330-31.

68. WTO Ministerial Conference, *Protocol on the Accession of the People's Republic of China*, WT/L/432, at art.16.1 (Nov. 23, 2001), available at <http://docsonline.wto.org/DDFDocuments/t/WT/L/432.doc>.

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disruption' which . . . exist[s] so long as imports are 'a significant cause of material injury,' rather than causing 'serious injury'" as applied to other MFN member countries within the WTO.⁶⁹ In determining whether market disruption exists, Paragraph 16.4 of the same section provides:

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.⁷⁰

Thus, "[t]he TPSS allows other WTO members to impose" quantitative restrictions and "tariffs on Chinese goods upon a minimal showing of injury, and it restricts China's ability to retaliate."⁷¹ In other words, "the threshold" for imposing safeguard measures against China "is at its lowest point."⁷² As stated, the U.S.-China Protocol not only "singles out China," but imposes a number "of highly specific" and "unique" obligations "not required of any other WTO member."⁷³

Despite the lessened threshold of "material injury" needed to obtain relief, the WTO AB has never completely upheld a safeguard measure dispute against China.⁷⁴ However, on September 5, 2011, the WTO released the AB Tire Report which was in favor of the United States.⁷⁵ Prior to the WTO AB Tire Report, the last time safeguard measures were upheld in favor of the United States was in 1951, but it was under the then existing and governing GATT system.⁷⁶

69. Gao, *supra* note 16, at 55.

70. WTO Ministerial Conference, *supra* note 68, § III, art. 1, ¶ 16.4.

71. Halverson, *supra* note 18, at 331; see Thomas Peele III, *U.S. Trade Law Affecting China After China's Accession to the WTO*, 817 PRACTICING L. INST. 115, 140 (2001) (providing that such measures may take various forms including increased tariffs, quotas or tariff-rate quotas).

72. Spadi, *supra* note 31, at 441.

73. Holt, *supra* note 25, at 479; see also *supra* Part II.B (outlining the specific and unique obligations of the U.S.-China Protocol).

74. Ji & Huang, *supra* note 7, at 11; Gao, *supra* note 16, at 55.

75. Appellate Body Report, *supra* note 9.

76. Ji & Huang, *supra* note 7, at 11; see also *Dispute Settlement: WTO Adopts Reports on China/US Tyres Case*, *supra* note 7 (noting that the last such occurrence under the GATT system was in 1951).

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III. THERE IS A FIRST TIME FOR EVERYTHING: WTO APPELLATE BODY COMPLETELY UPHOLDS SAFEGUARD MEASURES IN TIRE DISPUTE

On September 5, 2011, the WTO issued its AB Tire Report regarding certain imported tires from China in favor of the United States.⁷⁷ The AB “affirmed an earlier ruling by a WTO dispute settlement panel” (“Panel Report”), which held “that the United States did not act inconsistently with its WTO obligations when it imposed a tariff . . . on imports of certain passenger vehicle and light truck tires from China.”⁷⁸

A. Initial Tire Dispute—Findings in Panel Report

The initial dispute arose in 2007 when a petition was filed with the U.S. International Trade Commission (“USITC”) on behalf of the United Steel Workers (“USW”) “accusing Chinese manufacturers of exporting” certain subsidized tires “to the U.S. market to the detriment of the domestic industry.”⁷⁹ Subsequently, U.S. President Barack Obama, by invoking the TPPS clause in the U.S.-China Protocol, “imposed a safeguard measure on imports of subject t[i]res in the form of additional import duties for a three-year period: 35% *ad valorem* in the first year; 30% *ad valorem* in the second year; and 25% *ad valorem* in the third year.”⁸⁰ The measure took effect on September 26, 2009.⁸¹

The WTO Panel Body reviewed import data from 2004 through 2008, the period of investigation, and noted annual percentage increases in imports between 2005 and 2008.⁸² Based on this data, the Panel held that imports from China were “increasing rapidly” for the following reasons:

In absolute terms, imports of 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

77. Appellate Body Report, *supra* note 9.

78. *WTO Appellate Body Upholds Special Safeguard Measures Imposed by the United States on Certain Chinese Tires*, MAYER BROWN (Sept. 12, 2011), <http://www.mayerbrown.com/publications/article.asp?id=11548&nid=6>.

79. Alexis Early, *Where the Rubber Meets the Road: What Chinese Tires Mean for Obama’s Trade Policy*, 6 BUS. L. BRIEF 63, 63 (2010).

80. Appellate Body Report, *supra* note 9; *see also Tyre Production Continues to Rise in August*, AUTOMOTIVEWORLD (Sept. 20, 2011), <http://www.automotiveworld.com/news/suppliers/89375-china-tyre-production-continues-to-rise-in-august>; *see also US Trade Officials, Unions Hail WTO Ruling on China Tyres*, MORRIS ANDERSON (Sept. 6, 2011), <http://www.morrisanderson.com/resource-center/entry/US-trade-officials-unions-hail-WTO-ruling-on-China-tyres/>.

81. Panel Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, para. 2.2, WT/DS399/R (Dec. 13, 2010) [hereinafter Panel Report]; *see* JEFFREY L. KESSLER & SPENCER WEBER WALLER, INTERNATIONAL TRADE AND U.S. ANTITRUST LAW § 12:7 (2d ed. 2011).

82. Panel Report, *supra* note 81, at para. 7.83; Appellate Body Report, *supra* note 9, para. 150.

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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 2008.⁸³

However, China pointed out that because there was a decline in the rate of increase in subject imports in 2008 to 10.8 percent, this undermined the U.S. argument of “increasing rapidly” within the meaning of Paragraph 16.4 of the U.S.-China Protocol.⁸⁴ Unfortunately for China, the Panel did not agree and explained that:

[T]he fact that the 10.8 [percent] increase in 2008 was lower than the increase in the preceding year does not mean that imports were not “increasing rapidly” in 2008. An increase of 10.8 [percent] in 2008 by no means precludes a finding that imports are “increasing rapidly”, especially when that increase is assessed in context. Nor is it a “modest” increase. In this regard, we recall that the 10.8 [percent] increase in absolute volumes between 2007 and 2008 was *in addition* to an increase of 53.7 [percent] between 2006 and 2007, which was *in addition* to an increase of 29.9 [percent] between 2005 and 2006, which was *in addition* to an increase of 42.7 [percent] between 2004 and 2005. In our view, the 10.8 [percent] increase in absolute volumes from 2007 to 2008 reinforces the USITC’s conclusion that imports were “increasing rapidly” during the period, and continued to be “increasing rapidly” at the end of the period.⁸⁵

The Panel went on to state that, over the period of investigation, the market share of subject imports increased by twelve percent, whereas the ratio of subject imports relative to domestic production increased by twenty-two percent over the entire period.⁸⁶ Based on this, the Panel concluded that “regardless of a focus on imports relative to market share or relative to domestic production there were increases from year to year and significant increases over the period of investigation.”⁸⁷

83. Panel Report, *supra* note 81, paras. 7.85-7.86.

84. Appellate Body Report, *supra* note 9, at paras. 155, 161 (quoting Notification of an Appeal by China, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, paras. 159-63, WT/DS399/6 (May 27, 2011) [hereinafter China’s Appellant’s Submission]).

85. Panel Report, *supra* note 81, at para. 7.93.

86. *Id.* at para. 7.96.

87. *Id.* at para. 7.98.

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Because of these statistics and the evidence shown by the United States, the Panel Report was issued in favor of the United States on December 13, 2010.⁸⁸ China appealed the decision on May 24, 2011.⁸⁹

B. Appellate Body Tire Report

In its appeal, China argued that the Panel erred in its application of the “increasing rapidly” standard because the investigating authorities, the USITC, should not have assessed import increases over the entire five-year period between 2004 and 2008.⁹⁰ Moreover, China argued that the term “rapidly” in “increasing rapidly” requires that investigating authorities focus on the *rates* of increase in subject imports.⁹¹ In addition, China argued that the Panel erred when it established that rapidly increasing imports from China was “a significant cause” of material injury to the U.S. industry because, as China alleged, the word “significant” requires a heightened causation standard, which the United States had failed to prove.⁹²

1. Clarification of the Term “Increasing Rapidly” within the U.S.-China Protocol

China argued that investigating authorities and the USITC should not have assessed import increases over the entire five-year period.⁹³ Rather, China argued that the definition of “increasing” means the *most recent* period: thus in this case, the Panel should have only looked at import data during 2008.⁹⁴

The United States responded by arguing that because there is no explicitly prescribed period of investigation in Paragraph 16.4 of the U.S.-China Protocol, that authorities have discretion to select any period, provided that it allows for an assessment of import increases during a “recent period.”⁹⁵

The AB was not persuaded by China’s arguments.⁹⁶ The AB held that “nothing in the use of the present continuous tense ‘are increasing’ in Paragraph 16.4 and ‘are being imported’ in Paragraph 16.1 implies that the analysis must be limited to import data relating to the very end of the period of investigation.”⁹⁷

88. *Id.* at para. 2.2.

89. *Id.* at annex I.

90. Appellate Body Report, *supra* note 9, at para. 143.

91. *Id.* at para. 154.

92. *Id.* at para. 173.

93. *Id.* at para. 143.

94. *Id.* at paras. 142-43.

95. Panel Report, *supra* note 81, at para. 7.88.

96. *See infra* notes 95-98 and accompanying text; *see generally* Appellate Body Report, *supra* note 9.

97. Appellate Body Report, *supra* note 9, at para. 147.

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Thus, to use only import data relating to 2008 would be incorrect.⁹⁸ The AB subsequently held that the term “increasing rapidly” required investigating authorities to evaluate import trends over a “sufficiently recent period,” and to determine whether imports are significantly increasing within a short period of time.⁹⁹ Moreover, the period between 2004 and 2008, as analyzed by the USITC, was a sufficiently recent period and was therefore correct as the United States had alleged.¹⁰⁰

China additionally argued that the term “rapidly” in “increasing rapidly” requires that investigating authorities focus on the *rates* of increase in subject imports.¹⁰¹ Without focusing on the rates of increase, China argued, “there is no way to determine whether an increase is occurring at a ‘great speed’”¹⁰² China emphasized “that ‘rapidly’ is a relative concept, which conveys the idea that something is increasing more quickly than something else, and therefore it is ‘useful’ to assess the rates of increase in subject imports.”¹⁰³

The United States countered China’s definition of “rapidly” and claimed that “rapidly” does not require that imports be increasing not only “swiftly” or “quickly,” but also “at an accelerating rate of increase.”¹⁰⁴ The AB, reaffirming the Panel Report and concurring with the United States, held that the text of Paragraph 16.4 “requires that *imports*—and not the *rates* of increase in imports—be increasing ‘rapidly.’”¹⁰⁵ The AB went on to explain that although it may be useful for investigating authorities to review rates of increase in imports, a decline in the yearly rate of increase does not “necessarily preclude a finding that imports are ‘increasing rapidly.’”¹⁰⁶ After elaborating the definition of “increasing rapidly,” the AB continued its analysis by further defining the term “a significant cause.”¹⁰⁷

2. *Clarification of the Term “Significant Cause” within the U.S.-China Protocol*

China argued for several reasons that the USITC erred when it established that rapidly increasing imports from China was “a significant cause” of material injury to the domestic industry under Paragraph 16.4 of the U.S.-China

98. *Id.*

99. *Id.* at para. 167.

100. *Id.* at para. 147.

101. *Id.* at para. 154.

102. *Id.*

103. *Id.*

104. *Id.* at para. 156.

105. *Id.* at para. 158.

106. *Id.* (quoting Panel Report, *supra* note 81, at para. 7.92).

107. *Id.*

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Protocol.¹⁰⁸ First, China argued that the term “significant” imposes a more rigorous causation standard requiring a “particularly strong, substantial, and important causal connection” between rapidly increasing imports and material injury to the domestic industry.¹⁰⁹

The AB, in its effort to define the term “significant cause,” looked at the ordinary meaning of the term and held that Paragraph 16.4 suggested that “rapidly increasing imports must be an ‘important’ or ‘notable’ factor in ‘bringing about, producing, or inducing’ material injury to the domestic industry.”¹¹⁰ Thus, the AB held that a more rigorous causation standard, as argued by China, is not necessary.¹¹¹

The WTO AB concluded that the surge of Chinese tire imports within the United States constituted “a significant cause of material injury to the domestic industry,” and thus, the tariffs were consistent with international trade agreements.¹¹² The United States argued before the DSB that the volume of Chinese tire imports had more than tripled in the previous four years, to reach \$1.8 billion in value, while the U.S. production had shrunk by more than twenty-five percent in the same period, with fourteen percent of U.S. workers in the industry losing their jobs.¹¹³

Despite China’s argument that a decrease in the rate of increase during 2008 signifies a lack of “increasing rapidly,” the AB found no error in the Panels’ reasoning and concluded that a decline in the *rates* of increase in imports towards the end of the period of investigation was nevertheless sufficient to constitute “increasing rapidly” in both relative and absolute terms.¹¹⁴

Since this is the first safeguard dispute to be completely upheld by the WTO, what are its likely effects? Will it undermine or provide guidance to current pending and subsequent disputes not only within the tire industry but other international trade industries? What will happen after the U.S.-China Protocol expires in December 2013?

108. Appellate Body Report, *supra* note 9, at para. 171.

109. *Id.* at para. 173 (quoting China’s Appellant’s Submission, *supra* note 84, at para. 193).

110. Appellate Body Report, *supra* note 9, at para. 176.

111. *Id.* at para. 181.

112. *WTO Rules Against China in US Tyre Imports Case*, DOMAIN-B (Sept. 6, 2011), http://www.domain-b.com/organisation/wto/20110906_us_tyre.html.

113. Prakash Narayanan & Andrew Thompson, *World Trade Organization 2010 Marks an Important Shift for China*, BLAKES (Feb. 18, 2011), http://www.blakes.com/english/view_bulletin.asp?ID=4581.

114. Appellate Body Report, *supra* note 9, at para. 161-62.

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IV. REEVALUATING THE U.S.-CHINA STEEL DISPUTE, LEGAL IMPLICATIONS OF
THE AB TIRE REPORT ON THE SOLAR INDUSTRY AND THE EXPIRATION OF THE
U.S.-CHINA PROTOCOL

Because the AB Tire Report was the first time a safeguard measure was completely upheld under the current WTO,¹¹⁵ it is regarded as having great legal significance. It has been stated that the U.S.-China Protocol is wrought with unworkable vague ambiguities, and therefore, if the United States hopes to be successful in international trade disputes against China, the United States needs to address these ambiguities.¹¹⁶ The release of the AB Tire Report helped clarify some of the unworkable vague ambiguities because the AB specifically defined key terms within the U.S.-China Protocol.¹¹⁷ Applying the recently defined key terms to current and potential future safeguard disputes, it is possible to gain insight on their likely outcomes.¹¹⁸ However, since the U.S.-China Protocol expires in December 2013,¹¹⁹ the future of current safeguard tariffs is uncertain and WTO members may be limited in bringing and sustaining safeguard measures against China.

A. Reevaluation of the 2003 U.S.-China Steel Dispute

The AB Tire Report provides essential definitions of key terms within the U.S.-China Protocol vital for subsequent international trade disputes.¹²⁰ Significant terms explained by the AB include: “increasing,” “rapidly,” “significant cause,” and “material injury.”¹²¹ Knowing how future WTO appellate bodies will apply these terms found in Paragraphs 16.4 and 16.1 of the U.S.-China Protocol will assist the United States and other countries in determining how and whether or not subsequent disputes should be filed.¹²² In fact, the European Union welcomed the findings of the Panel and AB reports.¹²³ U.S. Trade Representative Ron Kirk called the ruling a “tremendous victory” for American workers and U.S. manufacturers and continued by stating that the

115. Ji & Huang, *supra* note 7, at 11.

116. Lynam, *supra* note 3, at 743; Jennifer Rivett Schick, *Agreement on Safeguards: Realistic Tools for Protecting Domestic Industry or Protectionist Measures?*, 27 SUFFOLK TRANSNAT'L L. REV. 153, 186-88 (2003); *see also generally* TERENCE P. STEWART, CHINA IN THE WTO – YEAR 3 (2005), available at http://www.uscc.gov/researchpapers/2005/05_01_21_china_inthe_wto.htm.

117. *See supra* Part III.B.

118. *See infra* Part IV.

119. Ji & Huang, *supra* note 7, at 11.

120. *See supra* Part III.B.

121. *See supra* Part III.B.

122. Lynam, *supra* note 3, at 743; Schick, *supra* note 116, at 186-88; *see also generally* STEWART, *supra* note 116.

123. *Dispute Settlement: WTO Adopts Reports on China/US Tyres Case*, *supra* note 7.

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Obama administration will continue to fight for U.S. jobs and businesses.¹²⁴ Cognizant of the newly defined key terms in the AB Tire Report, it is now possible to reanalyze the unsuccessful causation requirement in the 2003 U.S.-China Steel Dispute.¹²⁵

1. United States' Failure to Establish Causation in the U.S.-China Steel Dispute

One reason why the United States was not successful in prior disputes before the DSB was the failure to establish a causal link between increased imports of a product and “serious injury or threat thereof.”¹²⁶ In other words, prior to the AB Tire Report, in order to satisfy the WTO causation requirement, a member country had to prove that the injury was caused by increased imports alone.¹²⁷

On March 5, 2002, the United States imposed a safeguard measure on \$8.5 billion worth of certain steel products.¹²⁸ Nine members, including China, were complainants who claimed the tariffs violated WTO provisions.¹²⁹ On July 11, 2003, the WTO Panel ruled on the U.S.-China Steel Dispute that the U.S. tariffs on imported steel were illegal.¹³⁰ Specifically, the Panel concluded that the United States violated the parallelism requirement (i.e. “a significant cause”) and did not provide a reasoned and adequate explanation for its support to use a tariff.¹³¹ Additionally, the relevant data during the five and a half-year period in which the AB reviewed, indicated that imports of subject steel products did not steadily increase, but increased for part of the period and decreased during the remaining months or years.¹³²

One flaw by the United States in the U.S.-China Steel Dispute was failing to account for and adequately explain away other potential factors attributable to the

124. *United States Prevails in WTO Dispute About Chinese Tire Imports*, OFF. U.S. TRADE REPRESENTATIVE (Sept. 2011), <http://www.ustr.gov/about-us/press-office/press-releases/2011/september/united-states-prevails-wto-dispute-about-chinese>.

125. Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R (Oct. 9, 2003), available at http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members4_e.htm [hereinafter Steel Appellate Body Report]; see *supra* Part III.B.

126. Morgan Frohman, *Is Section 201 of the Trade Act of 1974 Consistent with the World Trade Organization Agreement on Safeguards?*, 17 N.Y. INT'L L. REV. 127, 149 (2004).

127. *Id.*

128. *Id.* at 133.

129. Wei Zhuang, *An Empirical Study of China's Participation in the WTO Dispute Settlement Mechanism: 2001-2010*, 4 L. DEV. REV. 217, 236 (2011).

130. Steel Appellate Body Report, *supra* note 125; see also Frohman, *supra* note 126, at 135.

131. Frohman, *supra* note 126, at 141. Parallelism requires that imports included in the injury determination must correspond to the imports covered by the safeguard measure. *Id.* at 158-59. In other words, a country may only apply safeguard measures to a product if the increased imports are the cause of injury to the domestic injury. *Id.* at 159.

132. Steel Appellate Body Report, *supra* note 125, at para. 26; see also Raj Bhala & David A. Gantz, *WTO Case Review 2003*, 21 ARIZ. J. INT'L & COMP. L. 317, 405-06 (2004).

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alleged injury.¹³³ In other words, the United States failed to convince the WTO Panel Body that steel imports were “a significant cause” of the domestic injury.¹³⁴ Brazil argued against the United States in the dispute claiming that the decline of the U.S. steel industry was because the U.S. steel industry was “weak, fragmented, and saddled with inefficient and/or antiquated capacity well in excess of demand” and not as a result from increased imports from U.S. foreign trading partners.¹³⁵ Additionally, other foreign trading partners such as the European Union, New Zealand, and Switzerland argued that the “differences in inputs and production methods” along with the U.S. steel industries’ “transition to become modern and more efficient” was the cause of the domestic injury.¹³⁶ In the U.S.-China Steel Dispute, the United States failed to meet the causation requirement due to the vagueness and the ambiguity of the term “a significant cause.”¹³⁷ The AB Tire Report now helps clarify this otherwise ambiguous term within the U.S.-China Protocol.¹³⁸

2. *AB Tire Report Assists in Clarifying the Causation Requirement in the U.S.-China Protocol*

The recent AB Tire Report helps clarify the vagueness of the term “a significant cause” within the U.S.-China Protocol.¹³⁹ Because the AB held that “a significant cause” must be an “important” or “notable” factor in “bringing about, producing, or inducing material injury to the domestic industry,”¹⁴⁰ it suggests a less rigorous standard than what the Panel held nearly ten years ago in the U.S.-China Steel Dispute.¹⁴¹ Therefore, even if one of the causes of domestic injury was the steel industries’ need for reorganization, it is plausible that under the current AB’s definition of “a significant cause,” as long as the United States showed that foreign steel imports was an “important” or “notable” factor in bringing about the material injury, the United States may have been successful in establishing causation. Another relevant factor is that subject imports in both the 2003 U.S.-China Steel Dispute and the 2009 tire dispute actually decreased in one or more preceding years.¹⁴²

133. Frohman, *supra* note 126, at 149-50 (complainants argued that injury within the steel industry was caused by its need for reorganization and not as a result from increased imports from foreign member countries); *see* Steel: Volume I: Determinations and Views of Commissioners, Inv. No. 201-TA-73, USITC Pub. 3479 (Dec. 20, 2001) (Final).

134. Frohman, *supra* note 126, at 149-50.

135. *Id.* at 150.

136. *Id.* at 150-51.

137. *Id.* at 152.

138. *See supra* Part III

139. *See supra* Part III.B.

140. Appellate Body Report, *supra* note 9, at para. 176.

141. Steel Appellate Body Report, *supra* note 125.

142. *See supra* Parts III.A, IV.A.

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In the tire dispute, addressing the decrease in imports from the preceding year, the Panel Report stated that even though a percent increase was lower than the preceding year, it “by no means precludes a finding that imports are ‘increasing rapidly’”¹⁴³ The AB Tire Report concurred with the Panel Report holding that although it may be “useful” for investigating authorities to review rates of increase in imports, a decline in the yearly rate of increase does not “necessarily preclude a finding that imports are ‘increasing rapidly.’”¹⁴⁴

Similarly, in the U.S.-China Steel Dispute, the relevant data during the subject period indicated that imports of subject steel products did not steadily increase, but increased for part of the period and decreased during the remaining months or years.¹⁴⁵ Therefore, it is plausible under the AB Tire Report’s holding, that since a decrease in imports from the preceding year does not preclude the finding that imports are “increasing rapidly,” subject imports in the U.S.-China Steel Dispute nevertheless may have been held to be “increasing rapidly.”¹⁴⁶

One immediate ramification of the appellate finding is that China’s domestic tire sector may be consolidated.¹⁴⁷ Shen Danyang, from China’s Ministry of Commerce, stated that the action “was a protectionist measure aimed at indulging domestic political pressures in the [United States] and it distorted the order of bilateral trade.”¹⁴⁸ Shen went on to state that “[t]he move hurt the legitimate interests of Chinese enterprises, and brought no benefits to the U.S. side.”¹⁴⁹ Consolidation of the Chinese tire industry and other industries that may also be affected may have detrimental effects to both the industry and to trade relations between China and the United States and other member nations.¹⁵⁰

The constant barrage of international trade disputes between China and the United States may lead one to believe that safeguard measures are merely a form of global protectionism.¹⁵¹ Others believe safeguard measures are in the best

143. Appellate Body Report, *supra* note 9, at para. 7.93.

144. *Id.* at para. 158 (quoting Panel Report, *supra* note 81, at para. 7.92).

145. Steel Appellate Body Report, *supra* note 125, at para. 26.

146. *See supra* Part III.B.

147. *CRIA Expects Consolidation in Tyre Industry in Wake of WTO Tariff Ruling*, RUBBER MARKET NEWS (Sept. 26, 2011), <http://rubbermarketnews.net/2011/09/cria-expects-consolidation-in-tyre-industry-in-wake-of-wto-tariff-ruling/>.

148. *US Urged to Scrap Special Tariffs on Chinese Tires*, CHINA DAILY (Sept. 20, 2011, 5:28 PM), http://www.chinadaily.com.cn/bizchina/2011-09/20/content_13744005.htm.

149. *Id.*

150. *See id.*

151. *See generally* Jie Zhou, *The Role and Impact of the New Global Protectionism in Recent U.S.-China Trade Relations with Illustrations from China’s Toy and Tire Industries* (2011) (unpublished MBus dissertation, Auckland University of Technology), *available at* <http://aut.researchgateway.ac.nz/bitstream/handle/10292/1217/JieZ.pdf?sequence=3> (arguing trade disputes between the United States and China are forms of global protectionism); *see also* Nan Sato, *Red Dragon Gone Green: China’s Approach to Renewable Energy Technologies, Its Legal Implications, and Its Impact on U.S. Energy Policy*, 2011 U. ILL. J.L. TECH. & POL’Y 463, 476 (2011) (stating import duties are likely to be criticized as a form of trade protectionism).

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interest of the United States in order to revive the U.S. economy by creating more jobs and maintaining opportunities for American companies.¹⁵²

In connection with this, another ramification is that since the AB Tire Report was in favor of the United States, it may encourage future trading disputes against China. On January 24, 2012, U.S. President Obama stated in his recent state-of-the-union address that his administration has brought trade cases against China “at nearly twice the rate as the last administration,” and announced the creation of an Enforcement Task Force to investigate unfair trade violations by China.¹⁵³ This tougher stance on trade violations may have negative consequences to the already volatile China-U.S. trade relationship.¹⁵⁴ On the other hand, it may boost the lagging U.S. economy and create more jobs for the American people.¹⁵⁵ This is because China’s unfair trade practices have created a huge trade gap between the United States and China that have cost Americans millions of jobs.¹⁵⁶ Therefore, by preventing these unfair trade practices through sanctions and dispute resolution, the effect is believed to boost the U.S. economy by creating more domestic U.S. jobs.¹⁵⁷

Whether or not an increase in litigation involving trading practices is viewed as positive¹⁵⁸ or negative,¹⁵⁹ one unsolved issue is what effect does the AB Tire Report have on other trade industries like solar panels? More specifically, what effects will the clarified terms of “increasing rapidly” and “a significant cause” have on current solar industry disputes?

152. Zhu Qiwen, *Commentary: Time for Plain Talk on Trade*, CHINA DAILY (Feb. 3, 2004, 9:39AM), http://www.chinadaily.com.cn/en/doc/2004-02/03/content_302540.htm; see also Cary Huang, *Obama Forms New Trade Body to Muscle China*, CHINESE CIRCLE (Jan. 26, 2012), <http://www.chinesecircle.com/?p=2041>.

153. Jeremy Bogaisky, *Full Text: President Obama’s State of the Union Address*, FORBES (Jan. 24, 2012, 10:02 PM), <http://www.forbes.com/sites/jeremybogaisky/2012/01/24/full-text-president-obamas-state-of-the-union-address/>; see also Cary Huang, *President Obama is Likely to Focus on Securing Chinese Help for the Troubled US Economy: But He Can’t Expect Sweeping Gestures from Beijing*, S. CHINA MORNING POST, Feb. 12, 2012; see also Huang, *supra* note 152.

154. Huang, *supra* note 152. Professor Tao Wenzhao from the Institute of American Studies of the Chinese Academy of Social Sciences stated that he “can foresee more trade disputes and escalating rivalry in every realm in the year ahead, from trade and currency to regional security and global diplomacy.” *Id.*; see generally Stephen Rush & Sam Mirmirani, *Can Increased Trade Prevent Conflict With China?*, 8 INT’L BUS. & ECON. RESEARCH J. 2 (2009) (discussing the possible effects increased trade will have on U.S.-China relations and currency).

155. Bogaisky, *supra* note 153 (President Obama states that toughening trade policy on China will increase the U.S. economy and create more American jobs); see also Huang, *supra* note 153.

156. Martin Crutsinger, *Congress Wants Tough Stance with China Over Trade*, DENVER POST (Sept. 17, 2010, 1:00 AM), http://www.denverpost.com/business/ci_16096873.

157. See *id.*

158. See Stuart Malawer, *United States-China WTO Litigation (2001-2010): Active & Aggressive Litigants (UPDATED)*, 59 VA. LAW. 28, 32 (2010) (argues that increased litigation is good for the WTO and global trade relations because litigation creates a clarified rules-based trading system).

159. See Huang, *supra* note 152.

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B. Ramifications of the Appellate Body Tire Report on the Solar Trade Industry

Another industry where current disputes between the United States and China are “heating up” is the photovoltaics industry (solar panel industry).¹⁶⁰ In October 2011, Oregon-based PV producer SolarWorld and six unnamed solar companies filed an antidumping and countervailing duty petition with the U.S. Department of Commerce and the USITC against China.¹⁶¹ Pursuant to the Agreement on Implementation of Article VI of GATT¹⁶² (“AIGATT”), dumping occurs when a product meant for domestic consumption is exported from one country to another at a lower price than the destination country’s comparable product.¹⁶³ Additionally, WTO members are prohibited from subsidizing domestic manufacturers that produce products for exportation purposes; otherwise, countervailing duties may be accessed.¹⁶⁴ The purpose of this rule is for the mutual assurance that a member’s conduct of *legally* assisting its domestic industry will not *illegally* injure the domestic industry of another member country.¹⁶⁵ If a member country has reason to believe that a prohibited subsidy is being permitted, the injured country may invoke countervailing duties on subject exports.¹⁶⁶ Although antidumping and countervailing duty petitions have some elements distinguishable to safeguard measures,¹⁶⁷ they both share two factors relevant to this discussion: increasing rapidly and causation requirements.¹⁶⁸

According to USITC data, U.S. imports of solar panel components from China increased from less than \$100 million to \$1.2 billion between 2006 and 2010.¹⁶⁹ As of October 31, 2011, Chinese solar exports already reached \$1.5 billion.¹⁷⁰ Meanwhile, China’s share of global solar exports increased from twelve

160. *Verbal Battle Intensifies Between US, China Over Charges of Dumping Solar PV Equipment*, RENEWABLE ENERGY REP., Nov. 14, 2011.

161. *Id.*

162. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 154, available at http://www.wto.org/english/docs_e/legal_e/19-adp.pdf.

163. Sato, *supra* note 151, at 474.

164. *Id.* at 473.

165. *Id.*

166. *Id.* at 474.

167. Tiefer, *supra* note 29, at 76-78 (since dumping occurs when an exporter sells merchandise in the importing country at less than fair value or below the price of production, one main element of analysis is ascertaining the fair-market value or fair price of production within the exporter country); *see also* Peele III, *supra* note 71, at 140.

168. *See generally* Peele III, *supra* note 71, at 140; *see generally* Tiefer, *supra* note 29, at 76-78 (when dumping causes or threatens injury in an importing country, that country may impose antidumping or countervailing measures).

169. Keith Chu, *Trade Wars Over Chinese Renewables Exports Resume with Senate Report, Complaint Filing*, RENEWABLE ENERGY REP., Oct. 31, 2011.

170. *Id.*

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percent in 2006 to thirty-three percent in 2010, while the U.S. share shrunk from eight percent to four percent over the same time period.¹⁷¹

Similar to the tire industry, where the value of imports increased by 294.5 percent between 2004 and 2008,¹⁷² the value of imports within the solar industry increased 833.33 percent between 2006 and 2010.¹⁷³ Because the value of solar industry imports far surpasses the value of tire industry imports during a five-year period, the DSB may likely concur with United States' allegations of "increasing rapidly." Additionally, because the AB held that "increasing rapidly" required investigating authorities "to assess import trends over a sufficiently recent period,"¹⁷⁴ the 2006-2010 time period should suffice, just as the 2004-2008 time period was sufficient in the tire dispute.¹⁷⁵

In addition, the United States would be required to establish a causal link between the dumped imports and the alleged injury.¹⁷⁶ The AB Tire Report helps clarify this term. If the United States can show that the increase in solar imports is an "important" or "notable" factor in "bringing about, producing, or inducing" a material injury to the U.S. solar industry, the United States should satisfy the causation element of Section 16 of the U.S.-China Protocol.¹⁷⁷

Currently, many U.S. solar technology firms are struggling to survive and losing millions of dollars in the process.¹⁷⁸ One illustration is Solyndra, a solar start-up manufacturer, which filed bankruptcy in August 2011, taking with it over \$500 million in government loan guarantees.¹⁷⁹ In fact, recent U.S. solar manufacturing firm bankruptcies and closings represent an almost one-fifth reduction of the solar panel manufacturing capacity in the United States.¹⁸⁰ Therefore, if the current solar dispute reaches the WTO DSB, assuming the United States is able to prove that China's illegal subsidies and illegal dumping

171. *Id.*

172. Panel Report, *supra* note 81, at para. 7.85.

173. Chu, *supra* note 169.

174. Appellate Body Report, *supra* note 9, at para. 167.

175. *Id.* at para. 147.

176. Sato, *supra* note 151, at 474.

177. Appellate Body Report, *supra* note 9, at para. 176.

178. Bryan Walsh, *The Coming U.S.-China Solar War*, TIME (Jan. 31, 2012), <http://www.time.com/time/health/article/0,8599,2105734,00.html>.

179. *Id.*; Anne C. Mulkern, *Solyndra Bankruptcy Reveals Dark Clouds in Solar Power Industry*, N.Y. TIMES (Sept. 6, 2011), <http://www.nytimes.com/gwire/2011/09/06/06greenwire-solyndra-bankruptcy-reveals-dark-clouds-in-sol-45598.html?pagewanted=all>. Analysts argue that one potential cause of Solyndra's bankruptcy is that the price of panels has decreased more than 40% in a year because the Chinese government is investing in solar production (i.e. Chinese illegal subsidies), which has forced down product prices worldwide. *Id.* In contrast, other analysts argue the main reason for Solyndra's bankruptcy was because Solyndra specialized in a unique commercial product, which was not generally useful for large fields or all rooftops, thus limiting its uses. Therefore, Solyndra misunderstood the marketplace. *Id.*

180. Sato, *supra* note 151, at 464 (noting that the Solyndra bankruptcy and closing combined with two other major solar manufacturers' bankruptcies, Evergreen Solar and SpectraWatt, represent almost one-fifth of the solar manufacturing capacity in the United States).

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are an “important factor” in “bringing about” these U.S. material injuries, it is likely, under the precedent of the AB Tire Report, that the United States would be successful on both the “increasing rapidly” and causation requirements.¹⁸¹

C. Expiration of the U.S.-China Protocol

Since the U.S.-China Protocol, which authorizes safeguard measures, expires in December 2013,¹⁸² the ability for the United States to impose safeguard measures on other imports from China in the future is limited. Although Section 16.6 of the U.S.-China Protocol allows a safeguard to be imposed “only for such period of time as may be necessary to prevent or remedy the market disruption,” it does not limit the duration of the measure.¹⁸³ The exact effect of the expiration of the U.S.-China Protocol is unclear.¹⁸⁴ Does this mean new safeguard measures cannot be put in place after 2013? Can existing safeguards continue after this date?

Despite some uncertainty once the U.S.-China Protocol expires, President Obama will still need a comprehensive trade policy to address the challenges of lower-priced imports.¹⁸⁵ It is apparent that President Obama is aware of this as he recently announced in his state-of-the-union address that he is strengthening his policy on China.¹⁸⁶ Some economists argue, however, that returning to multilateral agreements is the preferred course of action to boost lagging economies around the world as opposed to an increase in trade dispute litigation.¹⁸⁷

One possibility is that China could negotiate with the United States to grant China a market-economy status.¹⁸⁸ However, it is unlikely that China will obtain market-economy status from the United States “due to a mixture of political and economic factors at play.”¹⁸⁹ Additionally, the United States maintains that China

181. *See id.*

182. Ji & Huang, *supra* note 7, at 11.

183. Panel Report, *supra* note 81, at annex B-1.

184. *WTO Appellate Body Upholds Special Safeguard Measures Imposed by the United States on Certain Chinese Tires*, *supra* note 78.

185. Early, *supra* note 79, at 69.

186. Huang, *supra* note 153.

187. Early, *supra* note 79, at 70. On the benefits of free trade, economist Adam Smith wrote: “It is the maxim of every prudent master of a family never to attempt to make at home what it will cost him more to make than to buy,” and “[i]f a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry employed in a way in which we have some advantage.” Tracy Elizabeth Dardick, *The US-China Safeguard Provision, The GATT, and Thinking Long Term*, 6 CHI. J. INT’L L. 467, 476 (2005).

188. Gao, *supra* note 16, at 68. As of 2007, thirty-seven economies have recognized the market economy status of China, excluding the United States. *Id.*

189. Wu, *supra* note 15, at 265. Political factors include the U.S. policy of using China’s interest in a market economy status as a “leverage” with U.S. interests on “labor, currency, subsidy and other issues.” *Id.* at 266. Economic factors include deepening trade deficits, Chinese currency revaluation, and labor standards. *Id.*

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has yet to bring its trading laws into full compliance with WTO provisions.¹⁹⁰ Due to this, China may have to wait for the NME status to expire in its natural course in 2016.¹⁹¹

It is apparent that the uncertainty of the U.S.-China Protocol expiration has deterred other U.S. industry groups from seeking safeguard measures.¹⁹² Since the Panel Report in favor of the United States was issued in 2009, no new safeguard petitions have been filed by U.S. industries.¹⁹³ Although it may be unlikely that any new U.S. safeguard petitions will be filed before the U.S.-China Protocol expires in 2013,¹⁹⁴ it does not preclude President Obama's new Enforcement Task Force from investigating and eventually obtaining some relief from unfair trading practices either through the DSB or through subsequent bilateral agreements with China.¹⁹⁵ However, the WTO may experience an abrupt influx in safeguard disputes filed against China by other countries such as Canada.¹⁹⁶

Once the U.S.-China Protocol expires, terms will most likely revert back to the WTO Product-Specific Safeguard Agreement, which is applicable to all members of the WTO.¹⁹⁷ This may deter the United States somewhat from bringing future safeguard petitions against China because of the heightened "serious injury" standard under the normal WTO Product-Specific Safeguard.¹⁹⁸ Regardless, even though China's nine-year membership within the WTO may be regarded as "still in its infancy,"¹⁹⁹ it is evident that China is willing to protect its interests in future trade disputes.²⁰⁰ China also complains of being the victim of protectionist measures by the United States.²⁰¹ Despite President Obama's recent

at 265-66.

190. Loridas, *supra* note 1, at 414.

191. *See* Wu, *supra* note 15, at 269.

192. *WTO Appellate Body Upholds Special Safeguard Measures Imposed by the United States on Certain Chinese Tires*, *supra* note 78.

193. Ji & Huang, *supra* note 7, at 12 (noting that since the tires case in 2009, no other safeguard measure petition has been filed by the United States nor any other member); *see also* *WTO Appellate Body Upholds Special Safeguard Measures Imposed by the United States on Certain Chinese Tires*, *supra* note 78.

194. Ji & Huang, *supra* note 7, at 11.

195. Early, *supra* note 79, at 70.

196. Cyndee Todgham Cherniak, *Canadian Manufacturers May Have an Opportunity to Gain Market Share From Chinese Importers*, TRADE LAW. BLOG (Jan. 11, 2011, 6:36 AM), http://tradelawyersblog.com/blog/archive/2011/january/article/canadian-manufacturers-may-have-an-opportunity-to-gain-market-share-from-chinese-importers/?tx_ttnews%5Bday%5D=11&cHash=7a7a817936 (stating that Canadian manufacturing companies have less than two years left to gain market shares by filing safeguard measures against China).

197. *See supra* Part II.A (explaining that the WTO Product-Specific Safeguard is applicable to all members of the WTO).

198. *See id.*

199. Esplugues Mota, *supra* note 55, at 3 (stating that a seven year membership within the WTO is regarded as "still in its infancy").

200. Ji & Huang, *supra* note 7, at 36. In 2009, China alone accounted for half of the fourteen new WTO disputes. Thus, "it's just a matter of time before China not only is required to defend cases but will feel inclined to initiate cases against other Members." *Id.*

201. Loridas, *supra* note 1, at 414.

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announcement of creating the “Trade Enforcement Unit,”²⁰² some economists argue that it would be more advantageous for him to use his executive power to bring China back to the negotiating table.²⁰³

V. CONCLUSION

After a long and arduous accession into the WTO, which incorporated a lower threshold of safeguard measures as found in the U.S.-China Protocol, China has quickly grown into one of the largest exporter/importer member states in the world.²⁰⁴ As of October 2010, China ranks number one in merchandise exports and number two in merchandise imports.²⁰⁵ Simultaneously, the United States ranks number two in merchandise exports and number one in merchandise imports.²⁰⁶ Because China and the United States are the two largest exporters and importers globally,²⁰⁷ trade disputes are likely to continue into the future.²⁰⁸

Vital takeaways from the AB Tire Report are critical term definitions such as “increasing,” “rapidly,” and “a significant cause.” Thus, it is possible to apply these newly defined terms to on-going and subsequent trade disputes before the USITC and the WTO.²⁰⁹ The solar industry is one such example where the percentage of increased imports from China is near or beyond percentages found in the tire industry dispute, in which the WTO found in favor of the United States.²¹⁰ Because the AB Tire Report is the first to completely uphold a safeguard measure, it provides vital and invaluable insight into predicting outcomes of disputes in the future.²¹¹

One advantage to China is that the more restrictive U.S.-China Protocol is set to expire in December 2013.²¹² Once it expires, both countries will likely be bound under the WTO Product-Specific Safeguard Agreement, thus eliminating the lower causation and harm thresholds found in the U.S.-China Protocol.²¹³ Thereafter, the United States would need to show “serious injury” which may

202. Bogaisky, *supra* note 153.

203. Early, *supra* note 79, at 70.

204. Wu, *supra* note 15, at 228; Spadi, *supra* note 31, at 441.

205. *China Trade Profile*, *supra* note 6.

206. *United States Trade Profile*, *supra* note 6.

207. *China Trade Profile*, *supra* note 6; *United States Trade Profile*, *supra* note 6.

208. Bogaisky, *supra* note 153 (creating the Enforcement Task Force for the specific purpose to investigate future unfair trading practices).

209. *See supra* Parts IV.B-C.

210. *See supra* Part IV.B.

211. *See supra* Part IV.

212. Gao, *supra* note 16, at 55-56; *see also* Halverson, *supra* note 18, at 330-31.

213. *See supra* Part II.A.

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deter future safeguard disputes with China.²¹⁴ This is already evident in the fact that the United States has not filed any safeguard measures since 2009.²¹⁵

Due to the short time before the U.S.-China Protocol will expire, it is unlikely that any U.S. safeguard petitions will be filed until then.²¹⁶ However, the AB Tire Report provides invaluable insight into how future international trade disputes between all WTO members will likely be analyzed and determined by the WTO AB.

214. *See id.*

215. Ji & Huang, *supra* note 7, at 12.

216. *Id.*