THE WTO CONTINGENT TRADE INSTRUMENTS AGAINST CHINA: WHAT DOES ACCESSION BRING?

MICHELLE Q ZANG*

Abstract As part of the conditions for WTO accession, China is committed to a number of additional obligations stipulated in the accession documents. This article will mainly focus on the contingent trade instruments in this context, which WTO Members are entitled to take against products of Chinese origin. In this regard, the WTO rules to be examined include the buffering mechanism under Sections 15 and 16 of the Accession Protocol and the textile-specific safeguard mechanism under paragraph 242 of the Working Party Report. The discriminatory and non-beneficial nature of the latter makes it the most unfair component in China's accession. In some cases, these China-only instruments also go against some fundamental WTO principles. For example, revivals of grey-area measures and the bilateral approach are fairly evident therein, which are no longer advocated *and* even prohibited under the WTO system.

I. INTRODUCTION

On December 11, 2001, China completed its accession process and became a WTO Member. Given its rapid economic expansion, China's entry into the WTO has significant implications for the rest of the world. In 2005, China ranked as the third largest exporter and importer in world trade. In particular, the value of its merchandise exports reached US$ 761,953 million, which constituted 7.28 per cent of world total exports; meanwhile, China also imported US$ 659,953 million worth of merchandise representing 6.09 per cent of the global value.[1]

The WTO accession documents of China consist of two major parts: the Protocol on the Accession of the People's Republic of China (hereinafter the Accession Protocol)[2] and the Report of the Working Party on the Accession of China (hereinafter the Working Party Report)[3]. With regard to the legal status of the accession documents, Section 1.2 of the Accession Protocol provides

* PhD candidate, Law School, Durham University, UK. Contact at gingzi.zang@durham.ac.uk. Summary of this paper was presented at the Inaugural Conference of the Society of International Economic Law, 2008, Geneva. I am grateful to Dr. Antonis Antoniadis for the discussion and comments on this paper.

[1] See http://stat.wto.org/

[2] Available at http://docsonline.wto.org/DDFDocuments/t/WT/L/432.doc

[3] Available at http://docsonline.wto.org/DDFDocuments/t/WT/min01/3.doc

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that 'this Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement'.

Section 1.3 further provides that 'except otherwise provided for in this Protocol, those obligations in the Multilateral Trade Agreements annexed to the WTO Agreement that are to be implemented over a period of time starting with entry into force of that Agreement shall be implemented by China as if it had accepted that Agreement on the date of its entry into force'. This is the primary conflict clause dealing with the relations between the Annex 1A Agreements and the accession documents. Two conclusions can be drawn from this Article. First, in the absence of conflicting rules, WTO trading rules in goods shall apply to China alongside the trading rules included in the accession documents. That is to say, as a general rule, the WTO agreements and the accession documents apply to China cumulatively. Second, whenever divergences arise, priority shall be accorded to the Accession Protocol; in other words, provisions included in the Accession Protocol shall prevail over the conflicting WTO rules. The precedence of accession documents over other WTO agreements also flows from Article XII of the Marrakesh Agreement Establishing the WTO (hereinafter the WTO Agreement), which provides that 'any state or separate custom territory . . . may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto'.

Thus, upon its accession, China not only assumed all the obligations in the WTO agreements, but also undertook a number of additional commitments agreed in its accession documents. According to Section 1.2 of the Accession Protocol, these additional commitments shall be granted the same legal status as other WTO obligations. Generally, they can be divided into two different categories: the WTO-plus obligations and the WTO-minus disciplines and rights. The former impose more stringent disciplines on China than required by the WTO agreements, while the latter are special rules of conduct that at once weaken the existing WTO disciplines and reduce the rights of China as a WTO Member.[4] This article will focus mainly on the second category, particularly with regard to the contingent trade instruments WTO Members are entitled to take against China. Special provisions in this regard refer to the buffering mechanism under Sections 15 and 16 of the Accession Protocol and the textile-specific safeguard mechanism under Para 242 of the Working Party Report.

It is one of the traditional practices of GATT 1947 that a buffering mechanism shall be negotiated and agreed during the accession process of the

[4] J Ya Qin, 'WTO-plus Obligation and Their Implication for the WTO Legal System' (2003) Journal of World Trade 37(3) 483–522. For example, in the Accession Protocol, Section 10.2 on specificity test, Section 12 on agriculture, Section 15 on price comparability in determining subsidies and dumping and Section 16 on transitional safeguard mechanism; in the Working Party Report, Para 167 on export subsidies, Para 242 on textile specific safeguard.

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so-called state-trading countries or the non-market economies.[5] This mechanism normally consists of the permission for special methodology in anti-dumping investigation and a selective safeguard mechanism.[6] However, this practice disappeared after the establishment of the WTO and all the newly-acceded WTO Members, including those of non-market economies, are no longer subject to this mechanism—except China. The only plausible reason for this exception for China lies in the size and influence of its economy in world trade. In dealing with the largest non-market economy, the old-fashioned, or out-dated, GATT practice is revived. In particular, Sections 15 and 16 of the Accession Protocol, in combination, constitute the buffering mechanism which used to be popular in the GATT era, namely price comparability in determining subsidies and dumping and a transitional product-specific safeguard mechanism.

This paper will focus on two of the most influential trade instruments against Chinese exports, namely anti-dumping and safeguard actions. Countervailing measures, which place less pressure on China, will not be examined in detail here. Furthermore, this analysis will include the important sector textiles and clothing sector: due to the competitive advantages of China and the sectoral sensitivity of the domestic industry in most importing WTO Members, a special safeguard mechanism for textiles is also established under Para 242 of the Working Party Report.

II. SECTION 15 OF THE ACCESSION PROTOCOL: PRICE COMPARABILITY IN DETERMINING SUBSIDIES AND DUMPING

Section 15 is usually regarded as the official WTO text permitting, or recognizing, the non-market status of China's economy. In particular, it provides for an approach to price calculation based on this status. The general tenor of this Section is, unless the Chinese producers can clearly show that market economy conditions prevail in the industry under investigation, the importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China. Once China has proved that it is a market economy according to the established criteria in the importing Member, as of the date of accession, the rule will be terminated and then Chinese prices and costs shall be relied upon in determining price comparability.[7]

[5] See the accession process of Poland, Romania and Hungary.

[6] ibid.

[7] It is provided that 'in determining price comparability under Article VI of GATT 1994 and the Anti-dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China'. See Section 15 of Accession Protocol.

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A. The Non-Market Economy and Market Economy Conditions

Section 15 finds its origin in Ad Article VI GATT, which provides that 'in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate'.[8] It is thus established that, in an anti-dumping investigation, the importing WTO Member is entitled to apply a different, or special, methodology to a centrally-planned economy country.

It has been argued that Ad Article VI GATT is no more than a statement of fact providing no specific indications as to what course of action investigating authorities should take in dealing with a centrally planned economy. The fundamental problem with the implementation of this provision as it stands results from the fact that in today's world there have remained practically no countries that would qualify under the prescribed criteria.[9]

Furthermore, it is also questionable whether this description could be considered as the WTO definition of the non-market economy (NME). Given the infrequency of the situation described in Ad Article VI, it seems more appropriate to regard the description as an extreme situation of a NME should be understood as a fluid formulation: a broader concept of an economy in transition, contemplating not only the narrow concept found in Ad Article VI but also incorporating the existence of both market and non-market characteristics.[10] In understanding the meaning of this term, a dichotomous approach should be avoided with regard to the relationship between the non-market and market economies. It is inappropriate to consider the former as entirely opposite to the latter; that is to say, if we define NME by reference to a market economy, the relationship may not be simply one of negation or opposition. The concept and features of a market economy merely provide a starting point for analysis of a NME as, for example, merely different from a market economy or more usually as lacking or displaying specific features.[11]

As mentioned above, all the previous GATT 1947 accessions by non-market economies, namely, Poland, Romania and Hungary—have witnessed similar provisions to those under Section 15; yet, none of them made explicit reference market or non-market economy conditions. Thus, though noted in

[8] Annex I to the GATT: Notes and Supplementary Provisions on Paragraph 1 Article VI.

[9] A Polouektov (n 7).

[10] C Sohn 'Treatment of Non-market Economy Countries under the World Trade Organization Anti-dumping Regime' (2005) Journal of World Trade 39(4) 763–786.

[11] F Snyder 'The origins of the non-market economy: ideas, pluralism and power in EC anti-dumping law about China' (2001) European Law Journal 7(4) 369–434.

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Ad Article VI GATT, Section 15 is the first WTO provision that explicitly employs these concepts.

However, it seems potentially problematic that, rather than stipulating further criteria or detailed definitions, Section 15 subjects this issue to the national law of the importing Member. In particular, Section 15(d) provides that once China has established, under the national law of the importing WTO Member, that it is a market economy, the application of Section 15 could be terminated earlier than originally scheduled.[12] Consequently, differentiated standards of the market economy could co-exist simultaneously within the WTO system. On the one hand, the lack of uniform WTO criteria and the tolerance of the varying standards on the same concept could lead to the erosion of the integrity of this multilateral trading system. Depending on the investigating authorities and the criteria applied, the same country at the same time may well be considered as both a market and a non-market economy.[13] On the other hand, the discretion of the importing Member in deciding whether China is a qualified market economy further promotes dependence, on a bilateral approach among WTO Members. Reliance on bilateral negotiations and the discretion granted to the national authorities make the negotiation process more like political bargaining than an objective economic assessment. It has already been argued that political motivations played an important role while the relevant decision was being taken,[14] especially following pressure from the affected domestic industries.

B. WTO Rules on Anti-Dumping and China

As a general principle, WTO obligations are cumulative and Members must comply with all of them at all times unless there is a formal 'conflict' between them.[15] The provisions of different WTO agreements apply cumulatively, with conflict an exception only.[16] Hence, Article VI GATT on anti-dumping and the provisions of the WTO Agreement on Anti-dumping (hereinafter the ADA) the event apply together with Section 15. In case the conflict arises, recourse is made to the heading paragraph of Section 15. In particular, it is provided that Article VI GATT and the ADA shall apply consistently with the provisions in this Section.[17] Thus, insofar as imports of Chinese origin are

[12] According to Section 15 (d), the special methodology could be maintained, at the maximum, 15 years after the date of accession.

[13] A Polouektov (n. 7).

[14] ibid.

[15] WTO *EC-Bananas—Report of the Panel* WT/DS27/R para 7.160. *Guatemala-Cement—Report of the Appellate Body* WT/DS60/AB/R para 65. WTO *Korea-Dairy—Report of the Appellate Body* WT/DS98/AB/R para 76–77. WTO *Argentina-Footwear—Report of the Appellate Body* WT/DS121/AB/R para 83–89. *Turkey-Textiles—Report of the Appellate Body* WT/DS34/AB/R para 9.92.

[16] E Montaguti and M Lugard 'The GATT 1994 and other Annex 1A agreements: four different relationships?' (2000) Journal of International Economic Law 473–484, 484.

[17] First paragraph, Section 15.

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concerned, priority shall be granted to the special rules under Section 15 in the case of conflict.

Following the principle of cumulative application, it has been argued that the bundle of rules will allow NME WTO Members to maintain existing NME regimes to determine dumping whilst immediately guaranteeing exporters the full range of procedural rights and the vast majority of the substantive rights contained in the ADA.[18] That is to say, WTO Members are bound by international law to regulate their NME regime in a manner consistent with the various due process and factual assessment standards contained in the ADA.[19] This argument receives further support from the Working Party Report. In particular, with the aim of guaranteeing the rights of interested parties, especially Chinese producers and exporters, Para 151 thereunder establishes a series of procedural requirements on the part of the importing WTO Member in implementing Section 15, most of which correspond to those included in Articles 6 and 8 of the ADA.[20]

In sum, while Section 15 of the Accession Protocol set up substantive rules on price comparability, Para 151 of the Working Party Report was drafted as an attempt to provide procedural guarantees for the affected Chinese exporters/producers. However, these provisions in the accession documents do not present the entire picture of the WTO anti-dumping rules towards China: as already mentioned, although the precedence of the rules in Section 15 has been confirmed,[21] this does not exclude the application of the ADA rules which are compatible with them.

C. *The Special Methodology for NMEs*

Both Ad Article VI and Section 15 of the Accession Protocol employ special treatment of the NME, a methodology that is not based on a strict comparison with domestic prices or costs of the exporting country. First of all, what a methodology does this stand for? The text only makes it clear that approaches other than those entirely based on the data from the NME concerned are permitted, but fails to clarify the extent of deviation allowed. In other words, it does not explain how different the new approach might be, compared with the routine calculation of the dumping margin in the case of market economy.

Different interpretations of the text may arise therefore depending on the literal emphasis on either the phrase 'domestic prices or costs' or 'strict comparison'. In the former case, Section 15 shall be interpreted as introducing the use of prices and costs from another country which is a market economy. These data shall be first used in the course of calculating the normal value

[18] A Mastromatteo 'Anti-dumping rules in China's Accession Protocol: timely benefits for traders of foreign and Chinese origin' (2002) Int TLR 8(3) 75–78.
[19] ibid.
[20] These two Articles of the ADA concern respectively evidence and price undertakings.
[21] First paragraph, Section 15.

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which will later be compared with the export price to calculate the dumping margin. Otherwise, if the emphasis lies in the 'strict comparison', the best understanding should be directed to the final stage of determining the dumping margin only. In the latter case, the utilisation of the data from the domestic market could be, warranted for the NME country, although a strict comparison between the domestic price of normal value and the export price may not always be appropriate.[22] That is to say, a methodology not based on a strict comparison may only refer to certain adjustments or due allowances during the process of calculation, but the data collection from an analogue country is excluded. As a result, the outcome of the calculation will be exclusively based on the data from the NME; however, the result might not arise directly from the difference between the normal value and the export price because other elements could also be taken into account.

It is argued here that these two Interpretations should be extended and adopted in combination. The special methodology should refer to a set of rules employed by the national authorities in the entire process of investigation, including the calculation of normal value, the analysis of export price as well as the comparison between them. Indeed, situations in practice are in support of this proposition: the most widespread methodology among WTO Members, which will be examined in the following part, is the so-called analogue country approach as regards the normal value supplemented by the principle of one country-one duty related to the export price.

1. The special methodology in practice

Under the analogue country approach, rather than relying on the data collected from the NME market and industry, the investigating authorities of the importing Member rely on the data from another reference market economy country in calculating the normal value. The normal value of such exports will not be taken as the price payable on the domestic market, but will be determined on the basis of the price or contracted value in an analogue market economy third country.[23] The rationale behind this approach lies in the cognition that the prices and costs in the NME could be easily and considerably influenced by factors other than the market force, ie governmental control, and as a result, could not be relied upon in the anti-dumping investigation.

Where the export price is concerned, as a general rule, no prices from the individual exporters will be taken into account; rather, one weighted average export price throughout the exporting market is computed and will be later

[22] C Sohn (n 11).

[23] S Farr 'Individual treatment for exporters in anti-dumping cases: the China syndrome' (1997) Int.TLR 3(3) 105–107.

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used in comparing with the normal value from the analogue country. This is the one country-one duty principle, which is based on the assumption that in the NME all the means of production and natural resources belong to one entity of the state, and thus make it impossible to distinguish between individual producers. For this reason, all imports from the NMEs are considered to emanate from a single producer, and the application of a single rate is necessary to avoid circumvention of the duty, channelling of exports through the exporter with the lower duty rate.[24]

As to the final stage of the calculation of dumping margin, a flexible approach towards allowance and adjustment is required by the flexible character of the methodology under Section 15. When determining the dumping margin, investigating authorities shall take into account any element that might be affecting the final outcome and appropriate adjustments should be made accordingly. In fact, the requirement for adjustments has already been put forward under the WTO: Article 2.4 of the ADA provides a fair comparison at the same level of trade and the due allowance between the export price and the normal value. Regardless of the interpretative approach adopted, application of the ADA makes the proper adjustments in calculation indispensible under the Section 15 methodology.[25]

2. *A methodology with varieties*

Second, the methodology consisting of the analogue approach and the one country-one duty principle represents an extreme, approach in the anti-dumping investigation. This methodology is by no means the only or the exclusive choice left to importing WTO Members. According to the situations in different industries or sectors, an approach based on a rigid dichotomy resorting to either wholly domestic prices or wholly surrogate prices cannot be appropriate; rather, there is element of continuum between the two polar approaches which should be adopted.[26] In such case, it is not necessary at all times for the investigating authorities to give up all the relevant data from China. For example, in certain Chinese industries, although not all market conditions are fully satisfied, market forces have already taken over most of the sector. In such case, a moderate methodology should be preferred. With regard to the calculation of the normal value, substitute methods may refer to those stipulated under Article 2.2 of the ADA: a comparable price of the like product when exported to an appropriate third country, or the cost of production in China plus a reasonable amount for administrative, selling and general costs and for profits. With regard to the export price, a weighted

[24] Y Liu 'Anti-dumping measures and China' (2005) Journal of Financial Crime 12(3) 272–289.
[25] Further discussions on this issue later.
[26] C Sohn (n 11).

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average value could be replaced by the individual price where the export activity could be proved to be independent from the state interference in a NME.[27]

3. A methodology with national discretion

The final point regarding the special methodology concerns the substantial discretion accorded to the importing WTO Member in the accession documents. Given that no further guidelines or requirements have been provided in Section 15, the importing Members thus enjoy significant discretion in developing and establishing their own approaches in anti-dumping investigations against exports from China. In practice, this discretion is mainly reflected in the introduction of the concept of NME and the standards of selecting analogue countries. Neither are mentioned in any WTO rules and thus entirely following the relevant national criteria. In other words, the importing Members are free to make their own decisions as to the definitions and the standards of the terms 'NME' and 'analogue country'.

The questions then arise as to whether the importing WTO Member enjoys absolute autonomy to adopt any approach it considers suitable. According to the Working Party Report, only one prerequisite is required: the establishment and advance publication of the methodology concerned. It is provided 'when determining price comparability in a particular case in a manner not based on strict comparison with domestic prices or costs in China, the importing WTO Member should ensure that it had established and published in advance'.[28]

However, attention should also be paid to another implicit, or indirect, condition: the requirement of proper and fair comparison. It has been argued that in this fall-back rule for issues not dealt with in the special rules, there is, then, a similar broad concept of whether the market situation prevents a proper comparison. Although there is some vagueness about when a comparison is proper, this appears to set a minimum objective standard.[29] Indeed, proper and fair comparison is recognised as a general principle in an anti-dumping investigation, which is explicitly required by Article 2 ADA.[30] According to the principle of cumulative application, the importing Member should also take it as compulsory under the special methodology towards non-market economies.

It is submitted that the requirement of fairness is mainly concerned with, but not limited to, the comparison between normal value and export price. However, under the analogue country approach, this requirement also refers to the necessary adjustments regarding the differences between the situation in

[27] The individual treatment under the EU anti-dumping law is one typical example.

[28] Para 151 (a) Working Party Report.

[29] M Lennard 'Interpreting China's Accession Protocol: a case study in anti-dumping' in D Cass, B Williams and G Barker *China and the world trading system: Entering The New Millennium* (Cambridge University Press, Cambridge, 2003).

[30] Similar conditions have been imposed in Articles 2.2, 2.3 and 2.4 of the ADA.

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the third analogue country and that in the NME. These adjustments are of considerable significance since, for a long time, the analogue country approach has been criticised for its blindness to the comparative advantages, especially the cost advantages, enjoyed by the NME.[31] Consequently, a fear exists that this approach leads to higher dumping margins caused by a higher normal value due to the different development level of the analogue country.[32]

With regard to China, it has been argued that there are many ramifications and potential unfairness inherent in the analogue country test, which apparently denies all of the most obvious advantages enjoyed by Chinese producers, such as access to natural resources and cheap labour.[33] In fact, due to the transition process towards a market economy, most industries in China possess characteristics of both a non-market and a market economy. Consequently, it appears impossible for an analogue country with full market economic conditions to accurately reflect the situation of its counterpart industry in China, which makes the adjustments indispensable.

It is thus concluded that there is an inherent limitation of any surrogate country in capturing all the characteristics of the market structure of the non-market economy concerned;[34] and thus, reasonable allowance and adjustments become necessary for a fair result in calculating the dumping margin. Put another way, if the normal value, based on the data from analogue country, is not capable of reflecting the situation in the actual exporting Member, namely, the NME supplier, the resulting price differential could by no mean be considered as proof of the dumping practice on the part of the NME concerned, since there cannot exist a price in the first place.[35]

In order to meet the requirement of fairness, as well as to establish concrete evidence of dumping, a normal value mirroring the actual situation is required. Adjustments become essential and indispensible to make the data from the analogue country, to the largest extent possible accurately represent the situation in the Chinese market. Without these appropriate adjustments, the analogue normal value will probably be based on the data from a country with appreciably higher costs than the NME under investigation, so that the latter country will naturally be found to have been dumping.

III. SECTION 16 OF THE ACCESSION PROTOCOL: THE TRANSITIONAL PRODUCT-SPECIFIC SAFEGUARD MECHANISM

Section 16 of the Accession Protocol establishes a transitional product-specific safeguard mechanism against industrial products of Chinese origin. Two types of actions are established in that Section, namely, the market disruption safeguard and the trade diversion safeguard. These two measures are

[31] T WAJ Delva 'What happens when the dragon storms the fortress? China's unique position in EU policy on trade defence instruments' (2007) Int TLR 13(2) 19–29.
[32] ibid. [33] Y Liu (n 25). [34] C Sohn (n 11). [35] ibid.

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aimed at protecting the interest of two different groups of importing Members: the market disruption safeguard guarantees the interest of the direct importing Members while the trade diversion safeguard provides extra-protection for the third-country importing Members rather than the original and direct destination countries of the consignments from China. Hence, the same Chinese products subject to market disruption restrictions may simultaneously be subject to trade diversion actions by multiple Members.[36]

A. Market Disruption Safeguards

Section 16 provides that, in the case of market disruption or threat thereof, the affected Member may request consultations with China to seek a mutually satisfactory solution. If it is agreed that action is necessary, China shall take such action to prevent or remedy the market disruption. If no agreement is reached within 60 days, the affected Member shall be free to either withdraw concessions or limit imports to the necessary extent. That is to say either China should restrain its exports voluntarily in the case of mutual agreement or, in the absence of this agreement, the importing country is entitled to impose a quota or increase tariffs unilaterally.[37] Section 16.4 and Section 16.5 respectively refer to the definition of the term 'market disruption' and the required procedures regarding the investigation. Furthermore, Section 16.6 stipulates the application duration of the measures concerned and the actionable retaliations on the part of China. Few discrepancies, if any, exist between the procedures required under Section 16.5 and those under Article 3 of the WTO Agreement on Safeguards (the SGA). Indeed, Section 16 safeguard mechanism, to a certain extent, reproduces the standard safeguard model under the WTO. Nonetheless a number of discrepancies between these two devices can nevertheless be identified.

1. Substantive thresholds of market disruption and the compulsory procedures in the implementation

First of all, different substantive thresholds are established. Under Section 16, market disruption, based on material injury, constitutes the primary condition. In contrast, the counterpart standard under the WTO requires serious injury.[38] Section 16.4 of the Accession Protocol provides the definition of this term: 'market disruption shall exist whenever imports of an article, like or directly

[36] S Andersen and C Lau 'Hedging Hopes with Fears in China's Accession to the WTO: the Transitional Special-Product Safeguard for Chinese Exports' Journal of World Intellectual Property 5(3) 405–476.

[37] H Liu and L Sun 'Beyond the phase-out of quotas in the textiles and clothing trade: WTO-plus rules and the case of US safeguards against Chinese exports in 2003' Asia-Pacific Development Journal 11(1) 49–71, 59.

[38] Comparison between material and serious injury is provided in the following part.

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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'.[39] Three elements could be identified under this definition: the concepts of 'like or directly competitive products', 'material injury' and the causal link of 'a significant cause'.

a) The concept of 'like or directly competitive product'.

This is one of most widely-used terms in the WTO and has been employed in various occasions in the WTO agreements, including Articles I and III of the GATT on Most-Favoured-Nation and national treatment, the ADA and the SGA. In the field of safeguards, unfortunately, neither the SGA nor Section 16 provides for a definition of this concept. However, WTO jurisprudence has established some guidelines on this issue.

With regard to 'like products', as pointed out by the Appellate Body, there can be no precise and absolute definition of what is 'like'.[40] In *Japan—Alcoholic Beverages*, which was concerned with internal taxation rather than safeguards, the Appellate Body, while ruling that the interpretation of the term 'like products' should be examined on a case-by-case basis, nevertheless identified some common criteria for this term, including the product's end-uses in a given market, consumers' tastes and habits, which change from country to country and the product's properties, nature and quality.[41] Furthermore, in *US-Lamb Meat* which was concerned with a definitive safeguard measure imposed by the US against lamb meat from Australia and New Zealand, the panel held that 'like products would mean the like end products'; and in that case, the panel considered that the feeders and growers of live lambs were thus not included in the domestic industry.[42]

With regard to the term 'directly competitive products', more elaboration is found in the *US-Cotton Yarn* dispute.[43] It has been established by the Appellate Body that 'two products are in a competitive relationship if they are commercially interchangeable or if they offer alternative ways of satisfying the same consumer demand in the marketplace'. The Appellate Body also pointed out that a static view is incorrect in that products which are competitive may not be actually competing with each other in the marketplace at a given moment. On this point, the Appellate Body considered the term 'directly competitive' to suggest a focus on the competitive relationship of products,

[39] The Accession Protocol, available at http://docsonline.wto.org/DDFDocuments/t/WT/L/432.doc
[40] WTO *Japan-Alcoholic—Report of the Appellate Body* WT/DS8/AB/R para 114.
[41] ibid.
[42] WTO *US-Lamb Meat—Report of the Panel* WT/DS177/R, WT/DS/178/R para 7.109.
[43] WTO *US-Cotton Yarn case—Report of the Appellate Body* WT/DS192/AB/R para 96.

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including not only actual but also 'potential competition'.[44] As to the degree of the competitive relationship between the products under comparison, according to the Appellate Body, it is significant that the word 'competitive' is qualified by the word 'directly'; and the 'like products' are, necessarily, in the highest degree of competitive relationship in the market place.[45]

In sum, on the one hand, the term 'like products' requires the similarity in physical characteristics and in the end usage of the products concerned. On the other hand, the concept of directly competitive product further allows the inclusion of certain products that do not bear any physical similarity to domestic products, provided that there is a degree of market competition between them, which is usually demonstrated by the close commercial relationship and a degree of substitutability.[46] This term is closely related to the investigation process before the imposition of the safeguard measure. As the first prerequisite, the importing WTO Member must have a domestic industry producing products which could qualify as the like or directly competitive products of the Chinese exports in question. Furthermore, this prerequisite also circumscribes the scope of the subsequent investigation on the material injury and the causal link, which are analysed below.

b) Material injury

According to Section 16.4, the existence of the market disruption can only be proved on the basis of material injury, or the threat thereof, caused to the domestic industry of the importing country. In other words, in determining the existence of market disruption, the investigating authority has to carry out the injury test to prove the material injury. However, no further elaboration concerning the term 'material injury' has been provided in Section 16.[47]

In fact, 'material injury' is usually employed in the determination of the so-called unfair trade practice, ie the dumping; and in that area, rather than setting up a detailed definition, the common practice is to establish a list including the objective elements which have to be taken into account during the investigations. For example, the ADA establishes a series of objective criteria for assessing the condition of the domestic industry, in particular, the existence of material injury.[48] A similar list of objective factors has also been included in Section 16; however, this list is rather basic and general in

[44] ibid para 96. [45] ibid para 97.

[46] Y-Shik Lee 'Safeguard measures in world trade: the legal analysis' (2003) Kluwer Law International, 2003 126.

[47] It has been argued that Section 16 fails to provide a clear guideline for the determination of an actionable market disruption in that these listed factors are few and less precise than the eight injury factors enumerated in Art 4.2 (a) of the WTO Agreement on Safeguards. Y-Shik Lee 'The Specific safeguard mechanism in the Protocol on China's accession to the WTO: A Serious Step Backward from the Achievement of the Uruguay Round' Journal of World Intellectual Property, Volume 5, Issue 2, 219–231, 226.

[48] Article 3.4 of the WTO Agreement on Anti-dumping.

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comparison with the one in the ADA merely referring to the volume of imports, the effect of imports on prices, and the effect on the domestic industry.[49] This list is considered compulsory but not exhaustive: on the one hand, all the factors included therein must be examined during the investigation; on the other hand, the competent investigating authorities is not be restricted by that list and other relevant factors should also be examined into in deciding the existence of market disruption.

The level of injury required for material injury is generally considered less than that of serious injury, which is the threshold level established under the standard WTO safeguard mechanism and defined as 'a significant overall impairment in the position of a domestic industry'.[50] Article 4.2 SGA further provides a list of factors for the determination of 'serious injury' in a safeguard investigation. As the Appellate Body ruled in *US-Lamb*, 'we are fortified in our view that the standard of serious injury in the Agreement on Safeguards is a very high one when we contrast this standard with the standard of material injury envisaged under the Anti-Dumping Agreement, the Agreement on Subsidies and Countervailing Measures and the GATT 1994'.[51] Although the benchmark of 'serious injury' might be helpful in deciding the existence of 'material injury', there are still ambiguities left in the explanation of the latter. Doubts have also been raised whether it is justifiable to apply a safeguard measure based on anything less than serious injury to domestic industry, since safeguard measures are only an emergency device of last resort to relieve the domestic economy of an acute economic and political shock from the rapid decline of the domestic industry caused by an increase in imports.[52]

In sum, so far, there is no elaborate or authoritative definition of 'material injury' under the WTO and the only gauge seems to be the definition of 'serious injury' which is supposed to be more intensive than the latter.

c) Causal link: a significant cause

With regard to the causal link between the import surge from China and the detrimental impact to the importing WTO Member, Section 16 provides that the increase in imports has to be a significant cause of the material injury, or the threat thereof.[53] Again, no further explanation has been provided in that Section and it is thus not clear what constitutes a significant cause in the context of Section 16. In spite of the fact that the standard of 'a significant

[49] Section 16 of the Accession Protocol.
[50] Article 4.1 WTO Agreement on Safeguards.
[51] 'Material injury' is the standard provided for in Article VI of the GATT 1994, Articles 5 (footnote 11) and 15 (footnote 45) of the SCM Agreement, and Article 3 (footnote 9) of the Anti-Dumping Agreement.
[52] Y-Shik Lee (n 47).
[53] Section 16 of the Accession Protocol.

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cause' could not be found in any other WTO rules, several conclusions could, nevertheless, be inferred from the WTO jurisprudence in this regard.

First, the requirement of a significant cause implies a close temporal connection between the arrival and increase in volume of Chinese imports and the injury to the domestic industry of the importing country. This is termed as the 'correlation approach' on the causation analysis, which indicates that an increase in imports should normally coincide with a decline in the relevant injury factors.[54] This approach was established in *Argentina-Footwear*, where the Appellate Body verified the Panel's interpretation of the causation requirements ruling that 'we will consider whether Argentina's causation analysis meets these requirements on the basis of (i) whether an upward trend in imports coincides with downward trends in the injury factors, and if not, whether a reasoned explanation is provided as to why nevertheless the data show causation'.[55]

Second, being *a* significant cause, rather than *the* significant cause, the Chinese imports in question do not have to be the only cause of material injury. There could be other significant causes of material injury to the domestic industry at the same time, such as non-Chinese imports and non-import factors.[56] In *US-Wheat Gluten,* the Appellate Body rejected the Panel's conclusion that the serious injury must be caused by the increased imports alone and that the increased imports had to be sufficient to cause 'serious injury'. It was concluded that 'the need to distinguish between the effects caused by increased imports and the effects caused by other factors does not necessarily imply, as the Panel said, that increased imports on their own must be capable of causing serious injury, nor that injury caused by other factors must be excluded from the determination of serious injury'.[57] This proposition was raised again by the Appellate Body in *US-Lamb*, where it stated that 'the Agreement on Safeguards does not require that increased imports be 'sufficient' to cause, or threaten to cause, serious injury. Nor does that Agreement require that increased imports alone be capable of causing, or threatening to cause, serious injury'.[58]

d) Compulsory procedural requirements

The procedures required to be followed by the investigating authorities are set forward in Section 16.5 of the Accession Protocol and further elaborated in Para 246 of the Working Party Report. During the negotiations, the representative of China expressed particular concern that WTO Members provide

[54] AO Sykes 'The Safeguard mess: a critique of WTO jurisprudence' (2003) World Trade Review 2(3) 261–295, 280.

[55] WTO *Argentina-Footwear—Report of the Appellate Body* WT/DS121/AB/R paras 141 and 144.

[56] S Andersen and C Lau (n 37).

[57] WTO *US-Wheat Gluten—Report of the Appellate Body* WT/DS166/AB/R para 70.

[58] *WTO US-Lamb—Report of the Appellate Body* WT/DS178/AB/R para 170.

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due process and use objective criteria in determining the existence of market disruption, because WTO Members did not have wide experience in implementing the provisions of Section 16 of the Accession Protocol.[59] Particularly in Para 246, detailed procedures are established for implementing the provisions on market disruption. Suffice it to say, few discrepancies, if any, could be identified between Para 246 and Article 3 SGA on investigation, except those concerning the protection of confidential information in the latter.[60]

2. Retaliation actions on the part of China

Safeguard measures under Section 16 are not free from retaliation on the part of China, depending on the cause and duration of the measure. According to Section 16.6, China has the right to suspend the application of a concession or other GATT obligation if the safeguard measure resulting from a relative increase in imports remains in effect for more than two years, or, when caused by an absolute import increase, if it remains in effect for more than three years. In contrast, under the SGA, only one time limit of three years is fixed against the absolute import increase and the exporting countries are entitled to immediate suspensions of equivalent concessions or other GATT obligations in the case of a relative import increase.[61]

3. The potential for voluntary export restraints

Section 16.2 offers the possibility of applying voluntary export restraints: in cases where agreement has been reached between the importing WTO Member and China during the course of consultation, China shall take such action as to prevent or remedy the market disruption. Theoretically, the agreed resolution on the part of China could include any type of measures and nothing in this Section prevents China from agreeing to the voluntary export restraint that were reputedly the reason for the SGA.[62] It is thus admitted that considerable flexibility has been granted to the Members concerned in negotiating and determining which type of measures, and their extent, would be the best choice in the circumstances concerned. However, one point explicit under Section 16.2 is that this mutually satisfactory resolution has to be enforced by China, which might very possibly to take the form of a voluntary export restraint.

4. The duration of safeguard measures

As Section 16.6 provides, a WTO Member shall apply a measure pursuant to this Section only for such period of time as may be necessary to prevent or

[59] See Section 13 of Transitional Safeguards, Working Party Report.
[60] Article 3.2 SGA.
[61] Article 8 SGA.
[62] S Andersen and C Lau (n 37).

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remedy the market disruption. With regard to the sufficiency of prevention or remedy for the market disruption, although certain objective conditions and procedure requirements apply, it is still a decision of the investigating authorities of the importing Member. In other words, the market disruption safeguard could be maintained in force until the importing Member is convinced that the market disruption has ceased and will not recur. More importantly, the extension of Section 16 measures is also explicitly permitted, provided that the competent national authorities have determined that action continues to be necessary.[63] On the one hand, Section 16.6 suggests that the measure shall be temporary in nature: insofar as market disruption or the threat of it, no longer exists, it has to be terminated. On the other hand, no maximum duration for the application period is established and the possibility of extension has been envisaged. Consequently, it has been argued that safeguard actions under Section 16 can be as long as the duration of the Accession Protocol itself.[64] In contrast, under the SGA, even with the possibility of re-application, no measures are allowed to apply over eight years, which is the fixed maximum ceiling of the WTO safeguard.[65]

5. Detriment to the Principle of the Most-Favoured Nation (MFN)

The reason why economists typically prefer safeguards to anti-dumping measures is due to the general requirement of MFN in the application of the former. This requirement avoids the potential efficiency losses from trade diversion that occur when protection-affording countries discriminate between foreign exporters of the same product and shift imports from low-cost products to less-efficient exporters.[66] However, Section 16, as a safeguard mechanism, is actually founded on the basis of discriminatory application and is targeted exclusively at imports from China. In other words, Section 16 is not entrusted with the MFN principle, which is nevertheless considered as the common character of contemporary safeguards.[67] Discrimination also arises in its application: in the presence of market injury which is material in nature but fails to reach the serious level, Section 16 will allow WTO Members to place restrictions on a particular Chinese imported product while simultaneously importing the same product from other WTO Members without restrictions.

[63] See Para 246(f) of the Working Party Report.

[64] Y-Shik Lee (n 47).

[65] Article 7.3 SGA.

[66] C P Bown, ‘Why are safeguards under the WTO so unpopular?’ (2002) World Trade Review 1(1) 47–62, 50.

[67] Although not be adopted, arguments for the selective safeguard actions widely existed around the Tokyo Round.

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B. Trade Diversion Safeguards

Section 16 also envisages extra protection for the so-called third country importing Members, besides those which are the original and direct export destinations. This refers to the trade diversion safeguard under Section 16.8 allowing third country Members to apply a safeguard action where there are actual or threatened significant trade diversions of a particular Chinese product from the market of the Member applying the market disruption safeguard under Section 16.2, 16.3 and 16.7. In addition, beyond a 60-day time period, the requesting WTO Member would be entitled to take action in the case of the failure of consultation. In fact, measures of this type are aimed to protect the interests of a group of WTO Members which are usually not concerned under other safeguard mechanisms. Thus, it is very likely that safeguard actions against China start in one country due to market disruption and quickly cascade to all other significant markets on the basis of trade diversion.[68]

1. Substantive thresholds

Trade diversion, as defined in Para 247 of the Working Party Report, refers to an increase in imports from China to a WTO Member as the result of an action by China or other WTO Members. Para 248 further enumerates the objective criteria which have to be considered in determining the diversion of trade.[69]

It is submitted that a set of less onerous conditions apply to safeguards of this type. From the substantive perspective, it is remarkable that no requirement of injury tests on the domestic industry is mentioned in the text and the triggering condition under Section 16.8 is an increase in imports, or the threat thereof, from China into a WTO Member. It is thus submitted that what ultimately activates the protection mechanism of trade diversion is only a substantive increase in imports, with no need to demonstrate, at least directly, any kind of injury to the domestic industry concerned.[70]

2. Procedural requirements

From a procedural perspective, no investigation procedures are mentioned; rather, the starting sentence of Section 16.8 uses a rather subjective word

[68] H Liu and L Sun (n 38).

[69] According to Para 248, factors to be examined include: the actual or imminent increase in market share of imports from China in the importing WTO Member; the nature or extent of the action taken or proposed by China or other WTO Members; the actual or imminent increase in the volume of imports from China due to the action taken or proposed; conditions of demand and supply in the importing WTO Member's market for the products at issue; and the extent of exports from China to the WTO Member(s) applying a measure pursuant to paragraphs 2, 3 or 7 of Section 16 of the Draft Protocol and to the importing WTO Member.

[70] F Spadi, 'Discriminatory Safeguards in the Light of the Admission of the China to the WTO' (2002) Journal of International Economic Law 421–443.

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'consider'.[71] It is thus argued that as soon as one WTO member implements a transitional product-specific safeguard measures against Chinese exports, all other members can enforce a similar measure at almost no procedural cost.[72] That is to say, a trade diversion safeguard action could be adopted without any investigation in advance. In theory, considerable discretion is left to the importing WTO Members. In practice, however, this textual shortcoming is not so problematic, since the most influential importing WTO Members, such as the US, Canada and the EU, chose to follow the same procedures as those against market disruption.[73] This practice is plausible in that, first, it guarantees procedural justice for the Chinese exporters and producers; second, it also prevents the abuse of this mechanism by the importing Members.

Furthermore, attention should be directed to another procedural issue, which, although not addressed in the accession documents, should nevertheless be considered an indispensible step in the decision-making process. This refers to the non-attribution test.

In most cases, market disruption is the joint effect of a series of factors, ranging from imports from different exporting countries to other non-import elements, such as inflation, supply problems and consumer demands. Hence, the requirement of non-attribution has been recognised as one of the fundamental conditions for the imposition of safeguard measures under the WTO system. In particular, this requirement is explicitly provided in Article 4.2 (b) of the SGA.[74] It is also approved in the WTO jurisprudence that the competent authorities assess appropriately the injurious effects of other factors, so that those effects may be disentangled from the injurious effects of the increased imports. In this way, the final determination rests, properly, on the genuine and substantial relationship of cause and effect between increased imports and serious injury.[75]

From the general perspective, the non-attribution test guarantees the basic fairness of the investigation outcome in that the investigating authorities cannot simply ascribe all the material injury suffered by the domestic industry

[71] Section 16.8 provides that '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'.

[72] PA Messerlin 'China in the WTO: Anti-dumping and safeguards' World Bank Economic Review 18(1) 105–130, 127.

[73] M Bronckers and M Goyette, 'The special safeguard clause in WTO trade relations with China: (How) Will it work?' Marco CEJ Bronckers and GN Horlick, *WTO Jurisprudence and Policy: Practitioners' Perspectives* (Cameron May, London, 2004) 427–438.

[74] Article 4.2(b) SGA provides that 'when 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'.

[75] WTO *US-Cotton Yarn—Report of the Appellate Body* WT/DS192/AB/R; *Argentina-Footwear (EC)—Report of the Panel* WT/DS121/R; *Argentina—Footwear (EC)—Report of the Appellate Body* WT/DS121/AB/R; *US-Wheat Gluten—Report of the Appellate Body* WT/DS166/AB/R; *US-Lamb—Report of the Appellate Body* WT/DS177/AB/R, WT/DS178/AB/R; *US-Lamb—Report of the Appellate Body* paras 179–180.

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to the exports from China if exports from other sources or other non-import factors also play a role in the market disruption. Furthermore, the application of the non-attribution test is also the result arising from the principle of cumulative application of WTO rules.[76] In particular, due to the prevalence of this test in the area of safeguards arising from Article 4(d) of the SGA, it must be taken into account even in the absence of an express provision under Para 242.

Furthermore, application of the non-attribution test is of particular importance under Section 16. This is because both market disruption and trade diversion safeguards thereunder are to be enforced only to the extent, and maintained only for such period of time, necessary to prevent or remedy the market disruption. In other words, the form, extent and duration of the safeguard measures under this Section depend mainly on the injurious effect of the market disruption attributed to exports from China. In order to enforce safeguard actions at a reasonable and fair level, the non-attribution test turns out to be an essential step.

3. Textual ambiguities

Finally, ambiguities in the provisions on the trade diversion safeguard entrusts the competent authorities in WTO Members with remarkable interpretative discretion. For example, it is required in both Section 16.8 of the Accession Protocol and Para 247 of the Working Party Report that any trade diversion has to be significant. Does the word 'significant' mean that only an absolute increase in imports could be taken into account or is a relative increase also pertinent? Although a series of objective criteria, which shall be applied in determining the diversion of trade, have been established in Para 248 of the Working Party Report, it is still far from clear what the word 'significant' means.[77] A similar problem also arises with regard to the issue of the causal link between the trade diversion and the market disruption safeguard action. It is simply explained in Para 247 that the former has to be the result of the latter: the action taken to address market disruption has caused or threatened to cause the diversion.[78] It is thus questionable whether the market disruption measure has to be the single reason for the diversion or just one factor among other causes. Obviously, further elaboration on this issue is needed in the course of implementation.

[76] It is required under this principle that Members must comply with all the WTO rules at all times unless there is a formal 'conflict' between them. Detailed analysis on this issue is included in the previous part.
[77] para 248 of the Working Party Report.
[78] ibid para 247.

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IV. PARA 242 OF THE WORKING PARTY REPORT: THE TEXTILE SPECIFIC SAFEGUARD MECHANISM

According to Para 242, when the importing WTO Member believes that the textile products from China are, due to market disruption, threatening to impede the orderly development of trade, such Member can request consultations with China. Upon the receipt of the request for consultation, China agrees to hold its shipments of the categories in question to the specified level.[79] If no solution were reached during the 90-day consultation period, the importing Member can continue the limits mentioned above while consultations would continue. No action remains in effect beyond one year without reapplication, unless otherwise mutually agreed between the Member concerned and China.

Para 242 is characterised by immediate safeguard action upon the consultation request. In particular, Para 242 (c) imposes an obligation of urgent action on the part of China to control its shipment of the textile products in question below a certain level as stipulated. In contrast, according to Article XIX:2 GATT, before the enforcement of any action, the WTO Members having a substantial interest as exporters of the product concerned has the opportunity to consult with it in respect of the proposed action.[80] In other words, under the WTO safeguard system, no action is allowed or required by either contracting party before the consultation is completed. Thus, Para 242 establishes a safeguard mechanism with more expeditious and comprehensive protection for domestic industries. It has to be pointed out, however, that this action is a typical grey-area measure in the form of voluntary export restraint, which is explicitly prohibited under Article 11 SGA.

A. Substantive and Procedural Thresholds Under Para 242

The substantive condition for applying a safeguard action under Para 242 summarised in one sentence with no further elaboration is provided. According to Para 242 (a), 'in the event that a WTO Member believed that imports of Chinese origin of textiles and apparel products covered by the ATC as of the date the WTO Agreement entered into force, *were, due to market disruption, threatening to impede the orderly development of trade in these products*, such Member could request consultations with China with a view to easing or avoiding such market disruption'.[81] In fact, most terms are obscure and this

[79] Para 242 (c): upon receipt of the request for consultations, China agrees to hold its shipments to the requesting Member of textile or textile products in the category or categories subject to these consultations to a level no greater than 7.5 per cent (6 per cent for wool product categories) above the amount entered during the first 12 months of the most recent 14 months preceding the month in which the request for consultations was made.

[80] Article XIX (2) of the GATT.

[81] The Working Party Report, available at http://docsonline.wto.org/DDFDocuments/t/WT/min01/3.doc

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briefly-framed text has been criticised for its linguistic ambiguities.[82] However, it could not be denied that the term 'market disruption' constitutes the primary standard as well as the deciding element thereunder. With regard to the interpretation of this term, recourse shall be made to Section 16.4 of the Accession Protocol.[83] In other words, Para 242 measures share the same substantive requirement with market disruption safeguards under Section 16; furthermore, as will be argued in the following part, these two mechanisms are also subject to the same investigation procedures.

From a procedural perspective, Para 242 has been criticised for its apparent lack of stipulations on due process. No provision under that Paragraph sheds light on the investigation rules that will be followed by the competent authorities in the importing WTO Member before determining the existence of market disruption and initiating the request for consultations.[84] However, the lack of investigation rules does not mean that legislation or regulations under Para 242 are without constraints. It has already been argued that investigation rules under Article 3 SGA must apply to Para 242 to satisfy the procedural requirements implied, although not articulated by the text of Para 242.[85]

It is argued, however, that the required procedures under Section 16, in particular, those stipulated in Section 16.5 of the Accession Protocol and elaborated in Para 246 of the Working Party Report, should be considered as the applicable as well as compulsory procedural rules for Para 242. Procedures under these two parts are negotiated and drafted for the implementation of the provisions on market disruption. Insofar as Para 242 and Section 16 share the same substantive threshold of market disruption, the required procedures associated to this term should also be followed in the same manner.

B. Comments on the Para 242 Mechanism

1. Deviating from the traditional safeguard mechanism

Attention will first be directed to the absence in Para 242 of the phrase 'unforeseen developments . . . any product is being imported . . . in such increased quantities' which is included in Article XIX:1 GATT. It is required under that Article that the targeted import surge into the protection-affording Member must be a result of unforeseen developments.[86] According to the Appellate Body, 'the developments which led to a product being imported in such increased quantities and under such conditions as to cause or threaten to cause

[82] D Huang, 'Legal Interpretation of Paragraph 242 of the Report of the Working Party on the Accession of China under the World Trade Organization Legal Framework' (2006) Journal of World Trade 40(1) 138.
[83] Detailed discussion on the definition of this term is included in the previous part.
[84] D Huang (n 82).
[85] ibid.
[86] Article XIX:1 GATT.

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serious injury to domestic producers must have been 'unexpected'.[87] While negotiating the tariff concessions among WTO Members, increase in imports is one of the corollaries of the reduced level of tariffs. Thus, import increase, or even surge, to a certain extent, was expected among the negotiators. The term 'unforeseen developments' signifies that, on the one hand, the regular, or expected, import increase, which is considered as the major benefit rewarded under the WTO system to the exporting Members, shall be tolerated and supported; on the other hand, safeguard measures shall only be taken into account when the trade trend expands to a point which is beyond the original expectations of the Members during the negotiation round.

It could thus be inferred that the omission or absence of this condition in Para 242 implies the presumption that no particular climbing space for textile imports from China is guaranteed as one of the economic gains from its WTO membership; rather, the imposition of a safeguard is entirely dependent on the conditions of the domestic market in the importing Members. The Situation here is different from the absence of the same term in the SGA, where the consideration of unforeseen developments is indispensible according to the Appellate Body in *Argentina-Footwear (EC)*.[88] In that case, both Article XIX GATT and Article 2 SGA highlight the import increase or the increased quantities in certain products. In contrast, Para 242 no longer focuses on the rise in imports; rather, it emphasises the generally unfavourable situation in the importing market which is not necessarily caused by the surge in imports. In particular, nowhere in the text of Para 242 is the increase of imports from China mentioned; and thus, safeguard measures could also be imposed under the situation where market disruption is entirely the consequence of economic depression in the importing Member but with the same level of Chinese imports.

The second deviation of Para 242 refers to the non-application of the MFN principle. This point is also shared with the Section 16 safeguard mechanism.[89] In practice, Para 242 will allow WTO Members to place restrictions on particular Chinese imported products while simultaneously importing the same product without imposing restrictions on any other WTO Members.[90]

[87] WTO *Argentina-Footwear—Report of the Appellate Body* WT/DS121/AB/R para 91. See also *Korea-Dairy—Report of the Appellate Body* WT/DS98/AB/R para 84.

[88] The Appellate Body rejected the conclusion of the Panel that 'safeguard investigations conducted and safeguard measures imposed after the entry into force of the WTO agreements which meet the requirements of the new Safeguards Agreement satisfy the requirements of Article XIX of GATT'. This is because, according to the Appellate Body, the foregoing conclusion is inconsistent with the principles of effective treaty interpretation and with the ordinary meaning of Articles 1 and 11.1(a) of the *Agreement on Safeguards*. WTO *Argentina—Footwear (EC)—Report of the Panel* WT/DS121/R para 8.69. *Argentina—Footwear (EC)—Report of the Appellate Body* WT/DS121/AB/R para 89.

[89] Detailed discussions are included in the previous part.

[90] S Andersen and C Lau (n 37).

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The last aspect of the deviations concerns the revival of the so-called gray-area measures. In fact, safeguards under both Section 16 and Para 242 stimulate the use of voluntary export restraints but to a different extent: the former merely provides the possibility of revival through mutually agreed action enforced by China, while the latter not only offers the same possibility in a bilateral context, but also mandates China to control its exports upon the request for consultation. In particular, according to Section 16.2, the mutually satisfactory resolution has to be enforced by China, which is very likely to take the form of voluntary export restraint; however, in addition to a similar provision, Para 242 further specifies another automatic gray-area measure in that it requires China, upon the request for consultation, to hold its shipment of textile products in question below certain levels.[91] Hence, reliance on voluntary export restraints turns out to be more straightforward under Para 242.

This issue is of considerable significance under the WTO system since the prohibition of trade restrictions of this type constitutes not only a major achievement of the Uruguay Round in the area of safeguards but also one of the fundamental principles of the GATT system.[92] It is widely accepted that grey-area measures could adversely affect the objective of free trade. They are condemned for having a distorting effect on world trade and for the lack of trade compensation for the exporting countries.[93] Arguably, in spite of the controversies over the efficiency of the SGA, the consensus is that the primary objective thereunder is the prohibition and lifting of these grey-area measures.[94] In other words, the SGA was part of a political bargain to eliminate the use of voluntary export restraints, and this was a major accomplishment of the Uruguay Round.[95] Furthermore, it has also been argued that it is even more unjustifiable when such a reversal of the policy was adopted to single out one Member for an easier restraint on imports from that particular Member while the policy against grey-area measures is still maintained with respect to the exports from the other Members. This selective revival of grey-area measures presents a serious challenge to the integrity of the WTO rules and policies.[96]

2. The Bilateral resolution in the multilateral trading system

The question then arises as to whether, given the current situations in international trade, Para 242 should be recognised as a positive resolution for the possible trade frictions in textiles and clothing.

[91] See Section 16.2 of the Accession Protocol and Para 242(a) (b) of the Working Party Report.

[92] See Article XI GATT.

[93] Y-Shik Lee (n 47).

[94] K Jones, 'The safeguard mess revisited: the fundamental problem' World Trade Review (2004), 3: 1, 83–91. Alan O. Sykes, 'The Safeguard mess: a critique of WTO jurisprudence' (2003) World Trade Review (2003), 2: 3, 261–295.

[95] ibid K Jones 90.

[96] Y-Shik Lee (n 47).

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The answer is probably negative due to the bilateral nature of this mechanism. Under Para 242, duty of notification to the WTO is not required, which can be contrasted to the explicit obligation under Section 16 as well as under the SGA. Consequently, Para 242 actions are not under any multilateral surveillance from the WTO and remarkable flexibility has therefore been left in the hands of the trading partners involved. That is to say, although concluded on a multilateral basis, its bilateral nature is evident. In practice, all consultations under Para 242 in 2005 resulted in a mutually satisfactory solution in the form of bilateral agreements, the main concern over which lies in the revival of voluntary export restraints.[97]

On this point, it has been argued that the value chain of international trade has now evolved to a stage where distortions and shocks can no longer be solved by bilateral agreements alone but only by multilateral regimes such as the WTO.[98] The value chain of China, which is the largest supplier in textile trade, is spread across the globe: the supply chain from a Chinese clothing factory to a supermarket in New York is characterized by participants from all over the world.[99] Thus, despite that the consequence that invoking Para 242 might be directly reflected in a decrease in volume of Chinese imports and increase in unit prices, many more participants in the value chain involved would also be affected indirectly. Therefore, all governments should make efforts to avoid playing the WTO rules for the advantage of particular domestic interest groups and to prevent the recurrence of the classical tragedy that short term or opportunistic politics leads to disappointing economics and reduced welfare.[100]

V. EVALUATING THE CONTINGENT TRADE INSTRUMENTS

A. The Unpopularity of Safeguards

At a first glance, safeguards, anti-dumping, countervailing measures, as well as the import-restrictive measures in other forms, are based on rather different conditions and the primary dividing line is focused on whether the targeted import surges involve unfair trade practices. However, what they have in common is, first, in each case a WTO member is authorised, where certain conditions are fulfilled, to impose measures that would otherwise be inconsistent with core obligations under the WTO agreements. Second, the GATT/WTO imposes on the importing Member the task of determining whether those conditions were satisfied; in other words, the imposition of those measures is, in the first instance, based on a decision by the importing Member

[97] In particular, the US and China concluded a memorandum of agreement on import-level restraints on 21 categories of textiles and clothing products from China in Nov 2007; and the EU and China signed a similar pact in June 2005.

[98] H Liu and L Sun (n 38).

[99] ibid 66.

[100] ibid 69. Further discussions of bilateralism will be included in the final part of this article.

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itself.[101] For this reason, the term 'contingent trade remedy' is useful shorthand for referring to anti-dumping, countervailing or anti-subsidy and safeguard measures altogether.[102] Moreover, the integration of these trade instruments into one group could also be understood from another aspect: they constitute the policy options for the importing Members wishing to manage trade, when certain market chaos, or disorder, takes place domestically due to the competition from imports.[103]

Given the common characteristics shared among these import-restrictive instruments, the unpopularity of one instrument might be analysed through the dependence, or reliance, on others. That is to say, it is not that national governments have managed to fend off the domestic protectionist pressures or that they no longer seek an escape from their GATT/WTO obligations, rather they are not doing so under the safeguard provisions; instead, they are choosing instruments, such as anti-dumping measures, to relieve this pressure.[104] According to statistics from the WTO, from 2005 to 2008, merely 29 requests for consultations have been made under the Section 16 mechanism.[105] In contrast, 55 anti-dumping measures were enforced against China in 2005 alone and by the end of June 2007, the total number reached 139.[106]

The unpopularity of safeguards could, to a certain extent, be explained by the following reasons. First of all, fundamentally, safeguards differ from anti-dumping actions in that they are meant temporarily to slow down the pace of adjustment to changes in the external economic environment, whereas the latter can be in place for as long as dumping continues.[107] The difference in nature between these two trade instruments is reflected in the substantive thresholds, the requirements for investigation, the application duration as well as the conditions for re-application. In short, less workload is required on the part of importing Members to maintain the anti-dumping measure concerned in force.

Second, the relevant provisions concerning the standard of review in the dispute settlement procedure make the choice of anti-dumping actions more attractive for the importing WTO Members.

In the case of disputes concerning safeguard measures, Article 11 DSU provides that a panel should make an objective assessment of the matter before it. As the Appellate Body ruled in *EC-Hormones*, 'in our view, Article 11 of the DSU bears directly on this matter and, in effect, articulates with great succinctness but with sufficient clarity the appropriate standard of review for panels in respect of both the ascertainment of facts and the legal

[101] J Kerier, 'Contingent trade remedies and WTO Dispute Settlement: some particularities', in *Key issues in WTO dispute settlement: the first ten years* (Cambridge University Press, Cambridge, 2005) 46–62. [102] CP Bown (n 66). [103] ibid. [104] ibid.

[105] Available at http://docsonline.wto.org/GEN_searchResult.asp

[106] Available at http://www.wto.org/english/tratop_e/adp_e/adp_e.htm

[107] H Horn and PC Mavroidis, (2003) 'US-Lamb: what should be required of a safeguard investigation?' World Trade Review 2(3) 395–430, 398.

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characterization of such facts under the relevant agreements'.[108] As witnessed in the WTO jurisprudence,[109] panels and the Appellate Body have applied a generally intrusive standard of review during the dispute resolution.[110] This intrusive approach adopted leads to the result that the conditions in Article XIX GATT and the SGA are exceptionally difficult to satisfy in front of the WTO panel/ Appellate Body.[111] However, the situation is different with regard to anti-dumping measures. In particular, Article 17.6 ADA explicitly requires a certain deference to the decision of the competent national authorities.[112] In other words, to a certain extent, the ADA circumscribes the ability of dispute settlement panels to address the complaints of exporters.[113]

Therefore, while a safeguard action will be examined thoroughly through the *de novo* approach, much more deference and respect will be accorded to the anti-dumping measure in question. Assuming the exporting Member brings these trade-restricted measures into the dispute settlement procedure, the standard of review in the latter case appears to be much lower and as a result, would be preferred by the importing Members.

Third, in the case of China, particular attention has to be paid to the NME status of China in the anti-dumping investigations. The primary effect of this disadvantageous status is that during the investigation, it is much easier for the investigative authorities to establish the existence of the dumping practice by Chinese exporters rather than other sources. It is also argued that the NME status of China is the decisive reason for the disproportionately high number of anti-dumping cases against it and its loss in these battles.[114] Although Section 16 has already relaxed the substantive condition to material injury—the same as required in the anti-dumping procedures—the NME status further brings down the threshold for action in the latter case.

[108] WTO *EC-Hormones—Report of the Appellate Body* WT/DS26/AB/R WT/DS48/AB/R para 116.

[109] See WTO *EC-Hormones—Report of the Appellate Body* Appellate Body Report in *US-Lamb*; *Argentina-Footwear—Report of the Appellate Body.*

[110] M Oesch, 'Standards of review in WTO panel proceedings', in *Key issues in WTO dispute settlement: the first ten years* (Cambridge University Press, Cambridge, 2005) 161–176.

[111] AO Sykes 53 'The persistent puzzles of safeguards: lessons from the steel dispute' Journal of International Economic Law 7(3) 523–564.

[112] Article 17.6 ADA provides: 'If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned'. It is further provided that 'where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.'

[113] K A Reinert 'Give us virtue, but not yet: safeguard actions under the Agreement on Textiles and Clothing' 41. The World Economy 23, 1: 25–55, 41.

[114] X Hou and R Ren 'Cooperate or antagonize: the EU's dilemma on antidumping and safeguard measures against China' (2006) China & World Economy 14(6) 79.

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Fourth, it has to be pointed out that the unpopularity of the Para 242 safeguard could be better explained through the wide availability of quantitative restrictions against Chinese textiles products. First of all, the prevalence of quantitative restrictions is caused by the delayed accession of China to the WTO Agreement on Textile and Clothing (the ATC) due to the fact that the ATC was not open for the non-WTO Member countries. Second, the unsatisfactory implementation of the ACT with regard to the quota liberalisation led to the result that most quantitative restrictions imposed on sensitive textile products remain untouched until the end of that agreement. Consequently, import quotas have been the most effective and most popular trade defence instrument against textile exports from China, even after its accession to the WTO; and it was thus not necessary for the importing WTO Members to resort to Para 242 until the termination of all the quantitative restrictions at the beginning of 2005.

B. *The Revival of Bilateralism*

The preference for the bilateral approach among the China-specific contingent trade instruments is evident. Under Section 15 of the Accession Protocol, bilateral negotiation is the only way for China to get market economy status, since the standards are entirely subject to the decision of the importing WTO Members. Furthermore, as implementation in practice illustrates, the most common result of resorting to Para 242 safeguards is the conclusion of bilateral agreements on mutually satisfactory terms.

However, this bilateral approach is no longer advocated under the multilateral system of WTO. Nowadays, most international transactions are based on widespread value chains rather than point-to-point trade relations between two trading partners only. The bilaterally agreed solution, in most cases, fails to take into account the benefits and losses of other participants involved in the value chain; and thus can not be considered as a comprehensive resolution of the trade friction in question.

Furthermore, this approach also leads to the erosion of the integrity of the WTO system. For example, according to Section 15 of the Accession Protocol, varying standards on the same concept of 'market economy' exist simultaneously; under the WTO and thus the same country at the same time may well be considered as both market and non-market economy depending on different WTO Members.

In addition to the potential unfairness for the third parties and the detriment to the integrity of WTO system, it is also submitted that bilateral dialogues usually involve more political bargaining than objective economic assessments. Under the guise of market economy status, it is argued that political motivation played an important role in the bilateral negotiations on this issue before the relevant decision was taken, especially following pressure from

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the affected domestic industries.[115] The intensive involvement of political elements is usually considered a sign of a power-oriented regime, rather than a rule-based trading system, which is the fundamental nature of the WTO.[116]

C. Para 242: The Voluntary Undertaking of China

Since 2005, a special trading regime no longer exists in textiles and clothing. Upon the expiry of the ATC, this sector, after a 10-year structural reform, is wholly integrated into the WTO system and exclusively governed by the GATT trading rules. Consequently, Para 242 becomes the only special treatment in this area towards products of Chinese origin. The question then arises as to the major reason or basis for this textile-specific safeguard mechanism. Given the fact that a parallel safeguard device due to the non-market economy status of China has already been established under Section 16, Para 242 safeguards could no longer be solely linked to the nature of Chinese economy. Rather, it is argued a better understanding lies in the weak competitiveness of domestic industries in most WTO Members.

It has been widely accepted that all additional protections in the textile sector should be terminated at the end of the ATC. It thus becomes highly questionable whether China should have undertaken the obligation as Para 242 as the condition for its WTO accession. The answer is probably in a negative. In essence, China should not be hold responsible for the general fragile sectoral competiveness in major importing Members and the continued disadvantageous conditions in textiles and clothing are mainly due to the unsatisfactory implementation of the ATC. In particular, many WTO Members failed to enforce the required reform process with good faith and thus did not make the achievements expected under the ATC.[117] Even after the ATC-reform, their textile industries are far from being ready to compete with imports from China and as a result, a textile-specific safeguard mechanism is required and was finally inserted into the Working Party Report. In other words, China, through circumscribing its own export potential, contributes to redress and restore the sectoral weakness causes by the WTO Members themselves; and the establishment of this mechanism could by no means be justified by either the defects of the Chinese economy or unfair trade practice by China. The only plausible explanation seems to be that China is voluntarily providing, or forced to provide, extra protection for the textile industries in importing

[115] A Polouektov (n 7).

[116] John H Jackson, *Sovereignty, the WTO and Changing Fundamentals of International Law*, (Cambridge University Press, 2006), section 5.12.

[117] Analysis on the ATC implementation, see James Scott, 'The use and misuse of trade negotiation simulations' (2008) Journal of World Trade 42(1): 87–103, J Mayer, 'Not Totally Naked: Textiles and Clothing Trade in a Quota-free Environment' (2005) Journal of World Trade (2005) 39(3) 398; HK Nordås 'The Global Textile and Clothing Industry post the Agreement on Textiles and Clothing', Discussion Paper No 5, World Trade Organization, Geneva, Switzerland, 14.

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Members and is offering another 4-year time period for their sectoral adjustments after the expiry of the ATC.[118] It is thus fair to argue that the Para 242 safeguard is discriminatory and uninterested in nature and among other contingent trade instruments, turns out to be the most unfair deal in China's accession documents.

VI. CONCLUSION

This final part will subsequently discuss future developments. To start with, Para 242 expired by the end of 2008 and the China-only contingent instruments will mainly consist of those under Sections 15 and 16 of the Accession Protocol. It is worth noting that, due to the principle of cumulative application, the ADA and the SGA are simultaneously applicable to the imports from China, subject to one restriction: in the case of conflict, Section 15 prevails over the inconsistent ADA rules.

Among different types of contingent instruments, anti-dumping actions will continue their prevalence over others.[119] From 1995 to 2007, total of 3210 anti-dumping measures were imposed under the WTO whereas merely 164 actions were taken in the area of safeguard.[120] This is particularly the case for measures against China, with respect to WTO members not admitting its market economy status. For example, the EU has imposed 82 definitive anti-dumping measures against China since 1995 but only one safeguard action during the same time period.[121]

With regard to Section 15, the probability is provisions on anti-dumping under this Section might come to an end earlier than the stipulated 15 years.[122] This is because, on the one hand, more and more WTO Members have granted the market economy treatment to imports of Chinese origin, including several major developed importers such as New Zealand and Australia. On the other hand, as the economic reform process in China further develops, the remaining WTO Members refusing to do so would face considerable pressure, not only from China and other trading partners, but also from domestic industries and retailers.

In the field of safeguards, is the co-application of Section 16 and the SGA might be maintained until the end of the transitional period of 12 years.[123] However, it is not easy to foresee the popularity between these two mechanisms at the current stage. That is to say, although Section 16 considerably

[118] According to Para 242, the textile-specific safeguard will terminate at the end of 2008.

[119] Analysis for the reasons are analysed in Part IV.

[120] Data available at http://www.wto.org/english/tratop_e/adp_e/adp_e.htm http://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm

[121] ibid.

[122] Section 15(d) provides that 'in any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession'.

[123] Section 16.9 provides that 'Application of this Section shall be terminated 12 years after the date of accession'.

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reduces the substantive threshold down to 'material injury', situations in practice so far have not revealed an obvious preference towards it. This is partially due to the scarce cases where the importing Members actually resorted to safeguard measures to control products from China.[124] Nonetheless, two conclusions arise on this point. First, this is a decision exclusively under the discretion of the importing Member on a case-by-case basis. Second, Section 16 turns out to be the only option if the affected WTO Member is suffering from trade diversion rather than the direct imports from China.

[124] In fact, when the EC decided to impose definitive safeguard measures against imports of citrus fruits from China in 2004, the standard WTO rules, rather than those under Section 16, have been followed. Commission Regulation 658/2004 of 7 April 2004 imposing definitive safeguard measures against imports of certain prepared or preserved citrus fruits, OJ L 104, 8.4.2004, 67–94.

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