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## China's Safeguard Measures Under the New WTO Framework

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# China's Safeguard Measures Under the New WTO Framework

Lihu Chen and Yun Gu

## **Abstract**

This Essay inquires into the nature of China's new safeguard regulation, its significance in China's new trade regime, and, in the authors' view, some of its shortcomings. Part I gives a brief overview of the purpose of safeguard measures and the place of safeguard regulations in China's new trade regime. Part II describes some of the challenges that China's producers will face in the wake of the newly liberalized domestic market, and observes that the use of safeguard measures will become both necessary and important in the coming years in order to facilitate adjustment to this new environment. Part III, for the benefit of interested readers who do not otherwise have access to Chinese law, provides a brief overview of the primary component of China's safeguard regulation.

## ESSAYS

# CHINA'S SAFEGUARD MEASURES UNDER THE NEW WTO FRAMEWORK

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### INTRODUCTION

On November 10, 2001, the Ministerial Conference of the World Trade Organization ("WTO") in Doha required only eight minutes to approve China as a full member of the largest international trade organization, with more than 140 members.<sup>1</sup> This satisfying ending concluded China's fifteen-year odyssey seeking admission to the WTO. Just sixteen days later, the State Council, China's chief executive branch, published the first regulation specific to safeguard measures, PRC Regulation on Safeguard Measures.<sup>2</sup> This swift implementation by the Chinese central government can be viewed as a sign of its acute awareness of the challenges ahead, as well as a solid first step towards the thorough transformation of the government's administrative and legislative processes in order to comply with WTO requirements. China's safeguard regulation came into force on January 1, 2002. Because of its newness, and the newness of China's trade policy reforms, many questions have arisen as to the regulation's nature and significance.

This Essay will inquire into the nature of China's new safeguard regulation, its significance in China's new trade regime, and, in our view, some of its shortcomings. Part I gives a brief overview of the purpose of safeguard measures, and the place of safeguard regulations in China's new trade regime. Part II describes some of the challenges that China's producers will face in

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1. Press Release, World Trade Organization, WTO Ministerial Conference Approves China's Accession (Nov. 10, 2001), available at [http://www.wto.org/english/news\\_e/pres01\\_e/pr252\\_e.htm](http://www.wto.org/english/news_e/pres01_e/pr252_e.htm).

2. *PRC Regulation on Safeguard Measures*, PEOPLE'S DAILY, Dec. 13, 2001, available at <http://www.people.com.cn/GB/paper464/4948/531473.html> (Chinese version).

the wake of the newly liberalized domestic market, and observes that the use of safeguard measures will become both necessary and important in the coming years in order to facilitate adjustment to this new environment. Part III, for the benefit of interested readers who do not otherwise have access to Chinese law, provides a brief overview of the primary components of China's safeguard regulation.

### I. INTRODUCTION OF SAFEGUARD MEASURES IN CHINA

When increased import of a product constitutes a substantial cause of serious injury to domestic industry, safeguard measures allow the importing country to "escape" from its obligations under international trade agreements in order to give affected industries temporary relief from competition. This "escape" enables them to adjust to heightened import levels. Safeguard measures are used by many countries as an effective means of protecting domestic industry.

Under the WTO framework, safeguard measures were originally allowed by Article 19 of the 1947 General Agreement on Tariffs and Trade ("GATT").<sup>3</sup> More recently, the WTO Agreement on Safeguards has clarified and elaborated the basic rules of GATT Article 19.<sup>4</sup> Safeguard measures are one in an array of "extraordinary" protective measures under WTO agreements that governments are permitted to impose on imported goods. The most significant other measures include antidumping duties, which are imposed on imports that are deemed by the importing government to be sold at less than normal value in the importing market in a way that damages domestic industry; and countervailing duties, which are imposed on imports that are deemed by the importing government to have been produced with unfair subsidies in the exporting State.

Like "antidumping" and "countervailing" measures, safeguard measures are imposed in order to protect domestic industry against import competition. Also, like these other kinds of protections, safeguards can only be imposed if the imports are

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3. See World Trade Organisation, *The Agreements: Anti-dumping, Subsidies, Safeguards: Contingencies, etc.*, available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm7\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm).

4. World Trade Organisation, *Agreement on Safeguards*, available at [http://www.wto.org/english/docs\\_e/legal\\_e/25-safeg.pdf](http://www.wto.org/english/docs_e/legal_e/25-safeg.pdf).

shown either to have injured or threaten to injure domestic industry.

An important difference, however, takes us right to the heart of safeguard measures: safeguard measures aim to deal with the import increase under conditions of *normal market competition*. That is, unlike countervailing or antidumping duties, safeguards do not offset an "abnormal" or "unfair" trade act by foreign producers or foreign governments.

There are other differences in the rules relating to safeguard measures that flow from this unique quality. In principle, safeguard measures cannot be targeted at imports from a particular country, and safeguard investigations should not be country specific. In addition, a higher level of injury—"serious injury," as opposed to "material injury" for antidumping and countervailing duties—must be shown in order to justify the imposition of safeguards. Thus, the criteria for safeguards are stricter than those for antidumping and countervailing measures.

These parameters around safeguard proceedings flow from the WTO framework. Thus, WTO obligations ensure a certain uniformity and consistency in the use of safeguards by member governments. In addition, the WTO Agreement on Safeguards establishes certain minimal procedural requirements, as well as a general obligation of transparency, to avoid the arbitrary use of safeguard investigations by Member States.<sup>5</sup>

China's efforts to build a domestic safeguard framework date from 1994, the year in which China adopted its Foreign Trade Law<sup>6</sup> as part of a series of preparatory reforms in anticipation of its entry into the WTO. Article 29 of Foreign Trade Law therefore provides that "where a product is imported in such increased quantities as to cause or threaten to cause serious injury to domestic producers of like or directly competitive products, the State may take necessary safeguard measures to remove or ease such injury or threat of injury."<sup>7</sup>

In this law, China recognized safeguard measures as one of its fundamental methods of regulating foreign trade. However, after the Foreign Trade Law was enacted, a chilly period of si-

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5. *Id.*

6. Foreign Trade Law (China), available at <http://www.rhwx.com/b1/b103-3.htm> (Chinese version).

7. *Id.* art. 29 (author's trans.).

lence followed in which the central government failed to adopt the necessary subsidiary laws and regulations to implement Article 32.<sup>8</sup> Without concrete guidelines for the implementing agency and an investigation procedure, the operation of the safeguard framework is impossible. Indeed, prior to the identification of the Chinese Ministry of Foreign Trade and Economic Cooperation (“MOFTEC”) in the PRC Safeguards Regulation, no implementing agency or procedures for safeguards against imports into China had been established.<sup>9</sup>

The WTO Agreement on Safeguards clearly stipulates that each member shall adopt appropriate domestic legislation before it imposes safeguard measures. Such legislation shall identify an agency that will carry out the investigation and will establish detailed guidelines for the procedures and forms of safeguards to be imposed. In line with the WTO transparency principle, the Chinese government should implement its rules and regulations concerned with trade in a uniform, impartial, and reasonable manner. It should also underscore the importance of establishing judicial, arbitration, and administrative procedures for the review and control of the agencies charged with trade and customs policy. Given this obligation, China’s enactment of the PRC Regulation on Safeguard Measures is a step forward by the central government to conform to its obligations under WTO rules.

## II. *REALITY BEHIND CHINA’S SAFEGUARD MEASURES*

In the two decades since China inaugurated its economic liberalization reforms, China has steadfastly adhered to the policy of opening up to the outside world, developed foreign trade, and actively attracted foreign investment. Despite this general

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8. The Law set forth the basic conditions for implementation. Article 32 provides: “the authority or agency designated by the State Council shall conduct investigations and make determinations in accordance with relevant laws and administrative regulations.” It is clear, then, that the agency delegated by the State Council has the full authority to investigate the increased import products and the damage on domestic industry they caused, and issue a decision accordingly. However, no concrete delegations have been made to any agency.

9. However, China’s export product has been the target of safeguard measures investigations by foreign governments. For example, both the Sino-South Korea Garlic Case in 2000 and the Sino-Japan Green Chinese Onion Case in 2001, were settled by MOFTEC through bilateral consultation and negotiation with its Japanese and Korean counterparts.

climate of liberalization, important aspects of economic reality in China's manufacturing and agricultural sectors will likely create the need for safeguard measures central to China's trade policy going forward. This section outlines some of the challenges facing domestic producers in China, their consequent vulnerabilities to import competition, and the resulting need for safeguard measures.

### A. *Manufacturing*

Labor-intensive production occupies a fairly high proportion of China's industrial economy, while the proportion of high technology-intensive projects is quite low. Although unremitting efforts have been made to restructure Chinese industry by increasing capital investment and restructuring industry technology (following the national industry policy of "Innovate new technology, Upgrade Hi-tech industry"), the government alone will not be able to resolve the significant problems ahead for the Chinese manufacturing industry. A particular problem for China is its large State-owned enterprises, which have hindered China's ability to maintain rapid economic growth. These enterprises are particularly distressed by problems of low labor productivity, slow completion of projects, and low profit margins, and are therefore most in need of the adjustment opportunities provided by safeguard measures.

Second, China has slowly ceded its traditional comparative advantage in labor-intensive industries to countries such as Poland and the Czech Republic in Eastern Europe, whose labor costs are low and where economic growth has been rapid of late. This consideration combined with the fact that developing countries such as India and Brazil have increased their competitiveness in labor-intensive industries, indicates the pressing competition and challenges China's industry will have to face.

Third, although the "socialist-market" economic system<sup>10</sup>

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10. The "socialist-market" economic system is the goal of China's economic reform. It was first put forward by the Fourteenth National Congress of the Communist Party of China ("CPC"), held in 1992, and established Deng Xiaoping's theory of building socialism with Chinese characteristics as the guiding policy in China. Then it was adopted into a constitutional amendment at the First Session of the Seventh National People's Congress on March 29, 1993.

Its principal contents may be summarized as follows: adopting a series of macro-adjustment and control measures to carry out the reform in depth and in all aspects,

has taken shape and the market is increasingly playing a fundamental role in the allocation of resources in China's domestic economy; the competition between enterprises is still somewhat disordered and without clear-cut direction. The government's macroeconomic policies have not completely solved difficulties such as overlapping investment and wasted resources. In general, most Chinese economists are discouraged by the competitiveness of Chinese manufacturing industry compared with its foreign counterparts.

Fourth, among the township enterprises,<sup>11</sup> which constitute half of China's national economy, the percentage occupied by

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public ownership will continue to be the main form of ownership as various types of ownership are jointly developed; the operation mechanism of State-owned enterprises will be further transformed to meet the requirements of the market economy; the property rights and responsibilities of enterprises will be clearly defined, the functions of the government separated from those of enterprises, and enterprises scientifically managed; an open and unified national market system will be established, closely integrating urban and rural markets, providing for reciprocal flows between domestic and international markets, and promoting the optimization of resource allocation; changing the government's functions in economic management and establishing an optimal macro-regulatory system chiefly employing indirect means; an income distribution system based on distribution according to work will be established in which efficiency is given precedence and fairness in distribution is taken into account; and a multi-tier social security system will be set up to accelerate the development of China's economy.

The Fifteenth National Congress of the CPC, held in 1997, put forward the viewpoint that the non-public ownership sector is an important component of China's socialist economy. Encouraging essential production factors, such as capital and technology, to participate in the distribution of gains enables the reform of China's economic system to take bigger steps. Now, China's socialist market economy system is being set up, the basic functions of the market in resource allocation have been obviously strengthened, and the initial framework of the macro-adjustment and control system has taken shape. By 2010, China will have established a comparatively sound socialist market economy, which will be comparatively mature by 2020.

11. The term "township enterprises," according to the PRC Township Enterprises Law, which was enacted on October 29, 1996, refers to enterprises to be run by townships or villages, and includes a wide range of cooperative and individual enterprises owned, financed, or run by farmers, defined as the rural population, or by the township or village government. As national statistics indicate, the term is also used to cover collectively and individually owned enterprises (as well as self-employed persons) if they have registered at the offices of industry and commerce and are run by farmers. Township enterprises cover manufacturing, construction, mining, transport and communications, commerce, services, and other businesses. The purpose is to undertake the task to promote economic growth, absorb the surplus rural labor force, and discourage excessive urban migration. Township enterprises have become the principal force for revitalizing the rural economy. They succeeded in absorbing 92 million rural workers, a substantial proportion of the surplus rural labor force from 1978-94. Income from township enterprises, including taxes retained by counties, townships, and villages, has become the major source of financial support for local governments.



traditional industry and products is too high while the percentage occupied by new industry and products is fairly unremarkable. Industry restructuring, industrial upgrading and optimization, and improvement of corporate efficiency lag far behind the demand of the changing structure and composition of market needs. This conflict is a prominent obstacle in China's economic development process.<sup>12</sup>

Fifth, there are few large-scale conglomeration-forming enterprises that can fight the tempest of international market competition. Taking the tobacco industry as an example, it is obvious that few Chinese tobacco enterprises can compete with foreign companies such as Philip Morris Companies Incorporated, although there are now 170 tobacco enterprises and more than 2,000 tobacco trademarks in China. Foreign companies will cause intense competition in the Chinese domestic market. The fear in China is that foreign companies view the Chinese market as a big cake to share amongst themselves, while driving their Chinese counterparts out of the market by making use of their disadvantages in competition.<sup>13</sup>

Before these five problems facing China's manufacturing industries can be resolved, China's entry into the WTO, and the accompanying reduction or elimination of tariffs and non-tariff barriers to trade, will likely result in the influx of large volumes of imported goods. These import surges will surely damage China's domestic industry. Safeguard measures can play a crucial role in providing fragile domestic industries in China with a period of protection in which they can grow strong enough to face foreign competition.

### B. *Agriculture*

The impact of trade on China's agricultural sector presents another important consideration. Agriculture is at the heart of China's domestic economy. Consequently, its success will ensure China's economic and political stability. The healthy and steady growth of the agricultural industry benefits not only farmers, but

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12. See Han Jian & Jiang Changyun, *The Problems Faced in the Reform Process of Our Country's Countryside and Township Economy Structure*, MATERIALS ON ECONOMY RESEARCH, No. 6, June 1999, at 19.

13. See Die Jianrong, *Strategy of China Tobacco Industry Facing WTO Challenge*, LIBERATION DAILY, Aug. 31, 2001.

also manufacturers who depend on agricultural products. The Chinese government has paid a lot of attention to agriculture, and has made heavy investments to modernize agricultural production. Admittedly, when compared with levels twenty years ago, large strides have been made in agricultural production. In some districts, agricultural productivity has even reached fully modern levels. However, Chinese agriculture continues to face daunting tasks and problems.

First, eighty percent of the national population works in agriculture, while fifty percent of the national workforce, around 350 million people, undertakes the whole of national agriculture production. This situation differs from that of most developed countries, where the proportion of agricultural workers is lower.<sup>14</sup> Excess labor supply for agriculture and low output efficiency, combined with the reality that there is not enough land for all agricultural workers, has created a serious problem of labor overabundance in the countryside.

Second, Chinese agricultural technology is not on the same level as that of their foreign counterparts, which results in high output costs and low international competitiveness.

Third, the household registration and land tenure system<sup>15</sup> in China has caused the scattering of planting,<sup>16</sup> and the degree of modernization in agriculture remains quite low. Compared with the high mechanization and large-farm operations of developed countries, the disadvantages of Chinese agricultural production methods is glaring.

Fourth, administrative agencies exercise far too much control over the production and distribution of agricultural com-

14. See Song Hong, *Industrial Advantage, Comparative Advantage and Competitive Advantage: Gains and Pains from China's Entry into WTO*, 4 INT'L ECON. REV. 7 (1999).

15. The "household registration and land tenure system" refers to the household contract responsibility system, linking remuneration to output, and beginning the dismantlement of the people's commune system, eliminating the links between organizations of State power and economic organizations. Contracting land out to peasants altered the distribution form of land and mobilized peasants' enthusiasm for production, which was first introduced in China in 1979. It recognized the land-use rights of individual households and allocated lands to individual households for a period of time. The land-users could keep the entire output after fulfilling their tax and other obligations. In 1993, the Constitution was amended to incorporate this system at the First Session of the Seventh National People's Congress on March 29, 1993.

16. This system separated the original integrated farm into many parts operated by different household farms. So, the scale of farm is smaller than before and the planting is scattered according to the desire of different households.

modities, with the result that prices are often distorted and adjustment mechanisms of the market are prevented from operating fully.

From the factors discussed above, we can see that the current state of Chinese agricultural production is stagnation rather than development. In the past few years, the government has implemented welcome increases in technology and capital production inputs. Nevertheless, the heavy historical burden and large scale of current industry means that these policies do not have an obvious short-term effect.<sup>17</sup> Accession into the WTO forces the opening up of the domestic agricultural commodity market and continues a nationwide campaign to eliminate obsolete laws and regulations contradictory to WTO rules. Also, Chinese tariff and non-tariff protection on agriculture has to be abolished. In the face of the tough competition of foreign agriculture commodities that are of better quality and lower prices, China's agriculture has to fight a battle that will decide its fate and future. So, if domestic agricultural products suffer serious injury or threat of injury by virtue of increased imports of agricultural commodities, the government will have no choice but to take possible measures as effective weapons to protect domestic industry. Safeguard measures are on the top layer of the cabinet of arms at the government's disposal.

### III. NEW SAFEGUARD MEASURES REGULATION IN CHINA

To carry out its promise to abide by the rules of the WTO, and to adapt to the legislative and development demands of its new economy, China has revised a number of laws and regulations and will continue to perfect the legislative system regarding overseas economic and trade affairs. Among those laws, the PRC Regulation on Safeguard Measures plays a special role in China's trade regime. To call it the "cornerstone" of the Chinese foreign trade system is not overestimating the significance of this new regulation. As an indication of its significance as an administrative regulation concerned with foreign transactions, the PRC Regulation on Safeguard Measures has a total of five chapters and thirty-five articles. In these articles, the Regulation sets forth basic principles and concepts. It stipulates the conditions, inves-

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17. These policies can have a positive long-term effect, such as strengthening China's agriculture industry.

tigation, forms, time limits, and review of safeguard measures in an explicit way. This section provides a brief overview of the major elements of this new legal framework.

Pursuant to the Regulation, there are three conditions to fulfill before safeguard measures may be initiated. The first condition is an increase in the quantity of imports that is both absolute and relative. The second condition is that the increase of imports causes or threatens to cause serious injury to a domestic industry that produces like or directly competitive products. The last condition is that a causal link exists between the increased imports and the serious injury or threat thereof.<sup>18</sup> If all conditions are met, safeguards can be imposed in a variety of forms, such as tariffs, quantitative restrictions, and so on.<sup>19</sup> MOFTEC is in charge of investigating and making a determination on the increase of imports.<sup>20</sup> A second ministry, the State Economic and Trade Commission, is responsible for the investigation and determination of injury.<sup>21</sup> MOFTEC is also in charge of consultation, notice, and dispute consultation with foreign parties.<sup>22</sup> The basic guideline to implement safeguard measures is to comply with the "fair, open and appropriate" tenet.<sup>23</sup>

Chapter One of the PRC Regulation on Safeguard Measures contains General Provisions that include only two articles. It provides that the goal of the Regulation is "to promote healthy development of foreign trade" and the Regulation is "formulated in accordance with the Foreign Trade Law of the People's Republic of China."<sup>24</sup>

Chapter Two lays down guidelines for the safeguard investigation. Running from Article 3 to Article 16, the guidelines set

18. *PRC Regulation on Safeguard Measures*, *supra* note 2, arts. 2, 11.

19. *See id.* art. 20.

20. *See id.* art. 21. The Regulation states that:

If the safeguard measures take the form of tariff increases, MOFTEC shall propose its suggestion and the Tariff Policy Commission of the State Council shall make a decision based on suggestion of MOFTEC. And MOFTEC shall publicly announce the ruling. If the safeguard measures take the form of quantitative restriction, MOFTEC shall make a decision and publicly announce the ruling. The Customs Bureau shall implement above decision from the date stipulated in the publication.

*Id.* (author's trans.).

21. *See id.* art. 6.

22. *See, e.g. id.* arts. 5, 14, 18, 25, 33.

23. *See id.* arts. 23, 12, 24.

24. *Id.* art. 1 (author's trans.).

out two means of initiating an investigative procedure. One guideline provides that a:

natural person, legal person or their related organizations concerned with domestic industry (hereinafter referred to as 'the applicant'), may submit a written application for a safeguard measures investigation to MOFTEC in accordance with the provisions of this regulation. MOFTEC should examine the application in time and should decide whether or not to file the case for investigation.<sup>25</sup>

The other mode of initiating an investigation is that "if, without an applicant's written application, [MOFTEC] has sufficient evidence to believe that the increased import caused injury to domestic industry, it may decide on its own to file a case for investigation."<sup>26</sup>

The notice obligation is stipulated clearly in this chapter. Under this obligation, MOFTEC must notify the WTO Committee on Safeguards of its decision to file a case for investigation. Article 8 establishes a standard to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry. The following factors should be considered:

the rate and amount of the increase in imports of the product concerned in absolute and relative terms; the share of the domestic market taken by increased imports; changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment; other factors causing injury to domestic industry.<sup>27</sup>

This Article also points out that the determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture, or remote possibility. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to the increased imports.<sup>28</sup>

Another important provision in this chapter sets out the rules on confidential information. It says:

Any information obtained in investigation which is thought

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25. *Id.* art. 3 (author's trans.).

26. *Id.* art. 4 (author's trans.).

27. *Id.* art. 8 (author's trans.).

28. *See id.* arts. 2, 11.

confidential by its provider, MOFTEC and State Economic and Trade Commission may treat it as such. If the application to keep information confidential is reasonable, the provided information should be treated as confidential and parties providing confidential information may be requested to furnish non-confidential summaries thereof. Such information shall not be disclosed without permission of the party submitting it.<sup>29</sup>

This Article is significant because it reflects the spirit of the WTO and incorporates the protection of confidential information into safeguard measures in China for the first time.

Chapter Three, running from Article 17 to Article 26, provides the form and procedure of safeguard measures applications. In addition, this chapter stipulates some quite important principles of the WTO Agreement on Safeguards. For example, safeguard measures shall be applied to an imported product irrespective of its source.<sup>30</sup> Before applying a safeguard measure, MOFTEC shall provide an adequate opportunity for prior consultations with those governments with a substantial interest as exporters of the product concerned.<sup>31</sup>

Chapter Four, running from Article 27 to Article 31, establishes measures for the time limit and review of safeguard measures. It provides that the period of application of a safeguard measure shall not exceed four years. However under the following conditions it may be extended: in conformity with the procedures set out in this Regulation, that the safeguard measure continues to be necessary to prevent or remedy serious injury; that there is evidence that the industry is adjusting; that the obligation on notification and consultation has been fulfilled; or that the safeguard measure after extension is not stricter than the safeguard measure before it. The total period of application of a safeguard measure and any extension thereof, shall not exceed eight years.<sup>32</sup>

Chapter Five (Article 32 to Article 35) contains a number of "supplementary provisions" that establish miscellaneous limitations and guidelines for safeguard investigations. For example, Chapter Five explicitly states that "the People's Republic of

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29. *Id.* art. 13 (author's trans.).

30. *See id.* art. 23.

31. *See id.* art. 25.

32. *See id.* art. 27 (author's trans.).

China may adopt corresponding measures against any country or region adopting discriminatory safeguard measures against its exports."<sup>33</sup> Chapter Five also provides that "MOFTEC is responsible for all consultation, notification and dispute settlement concerned with safeguard measures."<sup>34</sup> Finally, Chapter Five allows "MOFTEC and the State Economic and Trade Commission [to] formulate specific measures in accordance with these regulations."<sup>35</sup>

Generally speaking, the content of the Regulation is in compliance with China's obligations under international trade law, i.e., GATT Article 19 and the WTO Agreement on Safeguards. The Regulation embodies the principles of the WTO agreements and some provisions simply reproduce the text of the WTO Agreement on Safeguards. The Regulation is also in line with the basic requirements of China's Foreign Trade Law. The legislative model that the Regulation adopts is quite similar to the Anti-Dumping Regulation and Anti-Subsidy Regulation, published at the same time, that address other types of trade restrictions China may impose under the GATT/WTO.<sup>36</sup>

#### IV. DEFECTS IN THE PRC REGULATION ON SAFEGUARD MEASURES

We assert that the analysis should not end here. Further questions arise as to whether, despite this surface acceptability, the Regulation contains defects that will appear in its application. The following section identifies some defects, and offers suggestions for improvement of the Regulation.

The Regulation's first problem has to do with the competent authority for safeguard measures. The difference between safeguard measures, antidumping actions, and anti-subsidy measures reflects not only the substantive rules promulgated by some countries, but also the arrangement of competent authorities. The United States and Australia, for example, have established

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33. *See id.* art. 32 (author's trans.).

34. *See id.* art. 33 (author's trans.).

35. *See id.* art. 34 (author's trans.).

36. Anti-Dumping Regulation was published on October 31, 2001 and became effective on January 1, 2002, available at <http://www.cacs.gov.cn/new/wto/wto01.htm> (Chinese version). The Anti-Subsidy Regulation was published on October 31, 2001 and became effective on January 1, 2002, available at <http://www.cacs.gov.cn/new/wto/wto02.htm> (Chinese version). Both regulations were enacted by the State Council.

that safeguard investigations should be carried by one chief agency and that the determination whether to apply safeguard measures ultimately rests with the executive branch.<sup>37</sup> Allocating the investigative authority in one branch is reasonable since the quantitative analysis involved in safeguard measures is much simpler than that involved in anti-dumping and countervailing duty measures (in particular, the former proceeding does not require showing of “unfair” trade action whereas the latter two proceedings do). Furthermore, the decision whether to take safeguard measures requires the discretionary assessment of many political and trade policy factors. It is more appropriate, therefore, for the decision to be made at a relatively high level of government. In contrast to the U.S. or Australian procedure, the safeguard proceeding in China is conducted by MOFTEC and the Tariff Policy Commission of the State Council. MOFTEC has the authority to make decisions on whether to apply safeguard measures, and does not need permission from any higher government entity.<sup>38</sup>

We suggest that any future amendment to the Regulation should include a provision that the chief competent authority on investigation procedure is the State Economic and Trade Commission and MOFTEC should bear the responsibility of consultation, notice, and dispute settlement affairs concerning safeguard measures. Further, no matter what form safeguard measures take, the decision should be made by the State Council—the top executive branch of China. This arrangement would not only aid top Chinese leaders to balance the costs and benefits of international trade, but also help to control the extent and scope to which safeguard measures should be applied. Moreover, this provision would assign responsibilities between different agencies more clearly, which would avoid the administrative inefficiency and enforcement disorder caused by the fact that the investigating and deciding authorities overlap among different agencies.

Secondly, pursuant to the Regulation, safeguard measures shall be applied only to the extent necessary to facilitate adjustment of domestic industry. Also, mid-term reviews of safeguard

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37. In Australia, the decision is made by the Cabinet, while in the United States, the power is the President's.

38. See *PRC Regulation on Safeguard Measures*, *supra* note 2, art. 21.



measures shall take into account the ability of the domestic industry to adjust.<sup>39</sup> The legislators realized the importance of the relationship between safeguard measures and domestic industry adjustment and have taken the adjustment into consideration. In our opinion, safeguard measures have evolved from a strictly protectionist approach to a new focus on upgrading the competitiveness of domestic industry. Safeguards should enable domestic industry to improve itself through industry adjustment. As a new member of the WTO, this function is critical to China's ability to face international competition. Consequently, the Regulation should increase China's progress towards strengthening the emphasis on industry adjustment. We propose that language should be added to the Regulation that reflects this emphasis. The recognition of "the importance of structural adjustment and the need to enhance rather than limit competition" should be introduced into the Regulation as an explicit goal of safeguard legislation, in order to highlight that goal in view of domestic enterprises and industrial administration authorities.<sup>40</sup> A structural adjustment requirement should be added to the content of the written application for safeguard measures, which requires the petitioning enterprises to undertake adjustment in order to qualify for the protection of safeguard measures. Any such amendment should also provide for supervision of the effectiveness of structural adjustment measures. If the enterprise in question has failed to adjust itself positively to improve its competitiveness after the period of protection afforded by safeguard measures, those protections would be removed.

Thirdly, the Regulation's provisions for implementing conditions of safeguard measures should be elaborated and expanded so as to afford greater certainty. In determining whether increased imports have caused or are threatening to cause serious injury to a domestic industry, the Regulation provides that "a domestic industry" shall be understood to mean the producers as a whole of the like or directly competitive products operating within the territory of China, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those

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39. *See id.* arts. 24, 27, 29.

40. In the Preamble of the WTO Agreement on Safeguards, there is the same stipulation.

products.<sup>41</sup> This language is in harmony with the WTO Agreement on Safeguard Measures. Notwithstanding this, however, the application of this law is problematic in China. This is because the Regulation does not deal with the “district industry” protection coming with the development of the economy. The “district industry” concept has been recognized by some developed countries. It means that if in a certain geographic district, producers as a whole of the like or directly competitive products, or those whose collective output of the like or directly competitive products, constitutes a major proportion of the total domestic production of those products, and the output is mainly focused in this district while the import product is also concentrated in this district, the producers in this geographic area can be viewed as “a domestic industry.”<sup>42</sup>

The newly enacted Anti-Dumping Regulation and Anti-Subsidy Regulation both stipulate that “district industry” can be viewed as “domestic industry” in some special circumstances.<sup>43</sup> Thus, it is better to add such a provision on “district industry” into the Regulation. Although there is no article in the WTO Agreement on Safeguards mentioning “district industry,” it is not contradictory to the tenets and goals of the WTO and it is allowed under the framework of the WTO.

With reference to common international practice, the Regulation requires that the increased import cause or threaten to cause serious injury to the domestic industry.<sup>44</sup> However, there are two ways to determine the criteria to judge whether there is causality between increased import and injury. Which one should be adopted: The criterion of major factors or the standard of substantive cause? There is no instruction on this question in the Regulation. Generally speaking, the criterion of substantive cause is much easier to reach than the criterion of major factors. Given the fact that some industries and enterprises have been affected to various degrees by increased imports and suffer from certain negative impacts caused by increased imports since China entered into the WTO, it is more appropriate to use the criterion of substantive cause to determine the causality.

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41. See *PRC Regulation on Safeguard Measures*, *supra* note 2, art. 10.

42. See, e.g., 19 U.S.C.A. § 2252(c)(4) (1998).

43. See *Anti-Dumping Regulation*, *supra* note 36, art. 11; *Anti-Subsidy Regulation*, *supra* note 36, art. 11.

44. See *PRC Regulation on Safeguard Measures*, *supra* note 2, art. 11.

Besides these defects, the Regulation also faces criticism with respect to its provision on agricultural products. Compared with manufactured products, agricultural products have a longer production period and a shorter sale period because of their seasonal character. Thus, if imported agricultural products cause or threaten to cause serious injury to like or directly competitive domestic products, it is urgent to remedy the domestic agriculture quickly. Delay would cause damage to producers, which would be difficult to repair. As such, the Regulation should be fully aware of the special nature of agricultural products and make arrangements accordingly. But the Regulation only provides that "MOFTEC and the Ministry of Agriculture should jointly investigate the injury to domestic industry concerned with import of agricultural products."<sup>45</sup> However, common practice around the world is that the duration of the safeguard measures on agricultural products shall not exceed one year, during which period the competent authorities shall supervise the import of the agricultural product continuously and promptly notify domestic enterprises with their evaluation of the potential impact on domestic industry. The position of agriculture is very important in China, so safeguard measures on agriculture should be delineated in the Regulation.

Other questions need to be answered. Is it possible to offer aid for industry adjustment when the competent authorities make a decision on safeguard measures? Can the competent authorities increase tariffs and implement quantity restrictions at the same time? What is the exact percentage referred to as a "major portion" in Article 10.<sup>46</sup> All these problems will be encountered in practice and they may be addressed in the implementation rules of the Regulation.

### CONCLUSION

As binding international law, WTO agreements assert that Member States should undertake corresponding obligations while enjoying rights according to the principle of balance be-

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45. *See id.* art. 6.

46. *See id.* art. 10. "A domestic industry refers to the producers as a whole of the like or directly competitive products operating within the territory of PR China, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products." *Id.* (author's trans.).

tween obligations and rights. The ability to apply safeguard measures under critical economic circumstances is a right that WTO Member States enjoy under the WTO international legal framework. However, it is not a right without limits. Rather, the right to impose safeguard measures is subject to certain conditions required by the WTO agreement. In some ways, we should realize that these conditions are much stricter than the conditions of anti-dumping actions or anti-subsidy measures. Safeguard measures can protect the domestic industry, but a more important function is to increase the competitive capability of domestic industry. Of course, the latter function depends heavily on whether the concerned country has prioritized industry adjustment and has accordingly incorporated adjustment with the supervision regimes.

Joining the WTO will accelerate the industrial restructuring of China, allow the advantageous industries to get even stronger, and improve the quality and level of China's economic development. To implement the WTO Agreement on Safeguards and to protect domestic industry in conformity with WTO requirements, China has established and continues to improve the regime of safeguard measures.

Economic globalization is the objective trend of economic development in the world today. Globalization is marked by the free flow and optimized allocation of capital, technology, information, and service, making economic interdependence and interaction between various countries ever stronger, and bringing about new driving forces and opportunities for economic development in all countries. However, nobody can deny the fact that under circumstances where the international economic new order is not yet established and the difference in the economic development level of all countries is fairly large, the benefits enjoyed by different countries from the process of economic globalization are not balanced.

China, as the largest developing country in the world, has its own role to play in this new era. The legal system of China is in the process of modernization, and China's accession into the WTO surely has played and will play a special role in this phenomenon. The Chinese safeguard measures system depicted here provides just one example.