

# China Faces Uphill battle In WTO Challenge On Tires Safeguard

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China will be hard-pressed to mitigate the effects on its exporters of the U.S. safeguard on tire imports from China even if it decides to go forward with a legal challenge under the World Trade Organization, legal sources said. China filed a request for formal WTO consultations, which is the first step for a legal challenge, earlier this week.

At issue is the fact that the entirety of WTO proceedings -- including a panel decision, a decision by the Appellate Body if either party were to opt for an appeal, and then a reasonable period of time to implement the findings of the case if the U.S. safeguard were faulted under WTO rules -- would likely take only slightly less time than the three years for which the U.S. has instituted the tires safeguard, sources said.

If the U.S. were ultimately faulted in the challenge but then repealed the safeguard within the reasonable period of time for doing so, China would have no further recourse against the U.S. because WTO legal decisions are prospective in nature. Observers said that some countries, including Australia, object to the length of WTO legal proceedings in part because it allows for such "hit and run" safeguard applications.

However, one observer argued that a successful challenge against the U.S. tires safeguard could help prevent further uses of the China-specific safeguard. The China-specific safeguard provisions are set to expire in 2013.

Sources also agreed that, in theory, a safeguard instituted under the China-specific safeguard provisions in China's accession protocol -- such as the U.S. tires safeguard -- should be easier to defend than a general safeguard instituted under the WTO's Agreement on Safeguards. The WTO has never upheld a general safeguard, while a China-specific safeguard has never been challenged.

China-specific safeguard provisions should be easier to defend because they are an additional safeguard option afforded to WTO members other than China that comes in addition to their rights under the Agreement on Safeguards. In addition, the China-specific provisions in the accession protocol contain lower standards that should make a China-specific safeguard easier to defend, sources said.

For instance, the U.S. faces a lower standard under China's accession protocol for proving that its domestic industry has been adversely affected such that a safeguard is necessary, sources said.

Under the accession protocol, the U.S. may impose a safeguard if Chinese products are being imported "in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of like or directly competitive products."

This “market disruption” standard is weaker than the standard contained in the Agreement on Safeguards, which states that a safeguard may be invoked if products are being imported in such increased quantities as to cause or threaten to cause “serious injury” to the domestic producers of like or directly competitive products.

The “market disruption” standard would likely be equivalent to the “material injury” standard that applies to the WTO’s Antidumping Agreement, one legal source argued.

This is because, according to the accession protocol, market disruption shall exist wherever imports are increasing rapidly “as to be a significant cause of material injury, or threat of material injury to the domestic industry.” Thus, it is difficult to see how a WTO panel could make an affirmative finding on market disruption without also making an affirmative finding on “material injury,” this legal source argued.

In addition, sources argued that for a legal challenge on a China-specific safeguard, the U.S. should not be obligated to show that the safeguard was imposed in the face of increased imports and that such an increase was the result of “unforeseen developments,” which is a necessary hurdle in defending general safeguards.

However, one legal source cautioned that it is still unclear whether this additional test applies to China-specific safeguards and said the WTO may well find that it does.

At issue is the fact that the Appellate Body has found that under the Agreement on Safeguards, a member invoking a general safeguard must be able to show that the safeguard was imposed in the face of increased imports and that such an increase was the result of “unforeseen developments.”

In particular, the Appellate Body has found that the “unforeseen developments” obligation -- which is only expressly found in Article XIX of the General Agreement on Tariffs and Trade (GATT) -- nonetheless applies to the Agreement on Safeguards because of an “inseparable relationship” between provisions in those two areas.

However, this “unforeseen developments” requirement -- which the U.S. failed to meet when its general steel safeguard was faulted by the Appellate Body in 2003 -- should not apply to the safeguard provisions in China’s accession protocol, legal sources said.

This is because that protocol is a completely different legal instrument applying only to China-specific safeguards, whereas the Agreement on Safeguards and GATT Article 19 deal both deal with general safeguards and the Agreement on Safeguards “elaborates” on provisions in GATT Article 19, these sources said.

However, one source said that a WTO panel could nonetheless find that because the China-specific safeguard provisions of the accession protocol and the Agreement on Safeguards contains similar language and strive to achieve similar purposes, this additional test could apply to the accession protocol as well, which could complicate U.S. efforts to prove it has complied with WTO rules.

A final potential pitfall in any WTO challenge would be the Chinese allegation, contained in its Sept. 14 request for formal consultations, that the U.S. statute authorizing a China-specific safeguard “is inconsistent on its face” with Article 16 of the accession protocol.

If successful on this point in a legal challenge, the U.S. could be obligated to repeal the tires safeguard even if it prevails on all other legal points in the potential case, and would certainly be required to change the statute before applying any new China-specific safeguards, one legal source said.

At issue is the fact that the U.S. statute defines “significant cause” -- which is relevant because the accession protocol calls for a finding that increased imports are a “significant cause of material injury” -- in a way that is narrower than required by the ordinary meaning of that phrase as used in the accession protocol, according to the Chinese request for formal consultations.

This likely refers to the fact that while the accession protocol does not define a “significant cause,” the relevant U.S. statute specifies that “the term ‘significant cause’ refers to a cause which contributes significantly to the material injury of the domestic industry, but need not be equal to or greater than any other cause,” one source noted.

While this kind of specificity is often helpful in implementing WTO agreements, which are at times left fairly vague, China could argue that increased imports must play a greater role than all other factors in causing or threatening to cause material injury in order to be justified as a “significant cause” under the accession protocol, this source said.

In its formal submission, China charges that the U.S. did not properly justify use of the tires safeguard as a China-specific import restriction under China’s protocol of accession to the WTO. For that reason, the imposition of higher tariffs on tire imports from China violates the most-favored nation rules outlined in Article 1 of the General Agreement on Tariffs and Trade (GATT), according to the Chinese submission.

China also argues that the U.S. safeguard is inconsistent with China’s protocol of accession because Chinese tire imports were not “increasing rapidly” and were not a “significant cause” of material injury or threat of material injury.

Third, China argues that U.S. domestic tire producers were not experiencing “market disruption” or “material injury,” pointing out that some U.S. producers publicly opposed the safeguard. For these reasons, China argues that the safeguard does not meet the requirements as outlined in paragraphs 16.1 and 16.4 of the accession protocol.

China also argues that the safeguard fails to meet the test of paragraph 16.3 of the accession protocol because the restrictions are being imposed beyond the “extent necessary to prevent or remedy” the alleged market disruption. Similarly, it maintains that the three-year safeguard fails to meet the requirements of Article 16.6 because it is being imposed for a longer time than is “necessary to prevent or remedy” the alleged disruption. -- Jamie Strawbridge