TRADE REMEDIES: THE IMPACT ON THE PROPOSED AUSTRALIA-CHINA FREE TRADE AGREEMENT

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I. INTRODUCTION

On October 24, 2003, in the presence of the then Australian Prime Minster John Howard and Chinese President Hu Jintao, the two governments signed an Australia-China Trade and Economic Framework, announcing an agenda for a closer bilateral relationship in the coming

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years.[1] In response, this was followed by a joint study to explore the feasibility of an Australia-China Free Trade Agreement ("ACFTA").[2] Prior to the accomplishment of the Joint Feasibility Study in March 2005, China asked for Australia's acknowledgment of its large contribution to an improved market economy as a precondition for the commencement of the ACFTA negotiation.[3] Notwithstanding numerous controversial submissions made by domestic manufacturers, the Australian government, attracted by China's huge market potential, granted China full market economy status in order to embark on the ACFTA negotiation.[4] As of the end of January 2009, when this Paper was being written, thirteen negotiating rounds have been concluded and a final agreement has not yet been reached.[5] Moreover, the successful conclusion of free trade agreements ("FTAs") between China and some of Australia's neighboring countries, such as New Zealand and Singapore, has rendered it possible that Australia will lose more bargaining power and gain less opportunities during the ACFTA negotiation. The progress achieved so far in the negotiation is disappointing due to a lack of consensus between the two parties over certain key aspects (for example, government procurement, agricultural products, intellectual property rights, services and investment).[6] However, notwithstanding any conflicts of diverse interests, the fundamental issue arising "behind the curtain" is how both parties can construct better strategies to keep a balance between creating more open access in the other party's market and protecting domestic industries in a weak position from the injurious "flood" of the other party's imports. Over the past decades, trade remedies adopted in FTAs have been defended as a "safety valve" and thus become the most effective and common means employed by negotiating parties to address this critical issue.

Current rules under the World Trade Organization ("WTO") contain regulatory regimes for three major trade remedy measures: anti-dumping

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1. *See generally Australia-China Trade and Economic Framework*, (Oct. 24, 2003), http://www.bilaterals.org/article.php3?id_article=6894&lang=en.

2. *See* THE DEPARTMENT OF FOREIGN AFFAIRS AND TRADE, AUSTRALIA AND THE MINISTRY OF COMMERCE, CHINA, AUSTALIA — CHINA FREE TRADE AGREEMENT: JOINT FEASIBILITY STUDY (2005), http://www.dfat.gov.au/geo/china/fta/feasibility_full.pdf [hereinafter FEASIBILITY STUDY].

3. *See* Mendaka Abeysekera, *Australia Grants Full Market Economy Status to China*, ASIAN TRIB., Apr. 20, 2005, http://www.asiantribune.com/news/2005/04/20/australia-grants-full-market-economy-status-china.

4. *Id.*

5. For all updated news and official documents of Australia-China Free Trade Agreement negotiations, please visit Australian Government: Department of Foreign Affairs and Trade, Australia-China Free Trade Agreement Negotiations, http://www.dfat.gov.au/geo/china/fta/ (last visited Feb. 23, 2010) [hereinafter Australia-China FTA].

6. Australian Government Dept. of Foreign Affairs and Trade, Subscriber Update: Thirteenth Round of Negotiations, Dec. 17, 2008, http://www.dfat.gov.au/geo/china/fta/081217_subscriber_update.html.

measures, countervailing measures, and safeguard actions taken. The primary purpose of these measures is to allow member states to temporarily suspend the General Agreement on Tariffs and Trade ("GATT") and WTO tariff binding obligations under certain circumstances by restricting imports through the trade remedy measures. In bilateral free trade agreements, trade remedies are widely employed. Two main factors account for this trend. One factor is that domestic industries will always be at greater risk because parties' obligations in bilateral free trade agreements often go well beyond those found in multilateral agreements. The second factor is that governments tend to take these measures as a last resort to quell domestic protectionist pressure, and FTAs frequently negotiated by administrative agencies are thus more readily passed and approved by the legislature when they are debated.

Both Australia and China have identified the negotiation of bilateral trade agreements as their trade policy priorities in recent years. Strikingly, as of February 2009, Australia already has bilateral agreements with Thailand, Chile, the United States, and Singapore; a closer economic relations pact with New Zealand; and a recent agreement signed with the Association of Southeast Asian Nations ("ASEAN") and New Zealand to establish a free trade area.[7] In addition, FTA negotiations with China, Japan, and some other countries are also underway.[8] In a similar vein, as of February 2009, China has formed numerous bilateral FTAs, including with Pakistan, Chile, ASEAN, New Zealand, and Singapore, and China is currently negotiating with South Korea and South Africa. Mainland China is also a member of two closer economic partnership arrangements with Hong Kong and Macao. It should be noted that there are specific provisions that tenuously cover trade remedies under all aforementioned agreements that Australia and China have already signed. These provisions in FTAs represent different approaches to trade remedies, yet share similarities, notwithstanding the diversity of trade and economic situations in those various countries and regions.

The primary purpose of this Paper is to provide a comprehensive analysis of trade remedy provisions in FTAs. It will focus on FTAs that Australia and China have already formed with other trading partners respectively. This focus is adopted because this Paper also aims at offering some practical suggestions on trade remedy measures for the proposed ACFTA. Part II will begin by discussing the legal basis of trade remedies in FTAs relating to regulations embedded in WTO agreements. This will be

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7. For official documents of Australia's bilateral agreements with these partners, see Australian Governmen: Department of Foreign Affairs and Trade, Free Trade Agreements, http://www.dfat.gov.au/trade/ftas.html (last visited Nov. 9, 2009).

8. There are several FTA negotiations undertaken by Australia, including China, Japan, Gulf Cooperation Council, Korea, and Malaysia. Australia is also participating in negotiating for a Trans-Pacific Partnership Agreement. *See generally id.*

followed by an examination of some relevant documents in the current ACFTA negotiation. Part III will discuss trade remedies in the proposed ACFTA by addressing trade remedy provisions that both Australia and China have already signed with other partners. On this basis, the remainder of Part III will provide some suggestions as to how Australia and China should design and develop trade remedies in the ACFTA. This Paper will conclude by highlighting the importance of laying down trade remedy provisions in the forthcoming ACFTA. The trade remedy provisions are paramount, as they will have been one of the impetuses for the successful conclusion of the negotiation, a better bilateral FTA, and an effective implementation of the future agreement; thereby, strengthening the closer trade and economic partnership between the two countries in the coming years.

II. THE RATIONAL BASIS FOR TRADE REMEDIES UNDER THE REGIONAL FREE TRADE AGREEMENT

A. Free Trade Agreements in the GATT/WTO Framework

A free trade agreement is a negotiated agreement between two or more countries or territories to form a free trade area through which more favorable conditions on trade are granted to participating counties or territories in the area.[9] It is said that FTAs depart from the most-favoured-treatment obligation of GATT/WTO members, which is the cornerstone of the post-war GATT/WTO world trading system. Notwithstanding this risk, there are, however, several clauses that tenuously address various FTAs in the GATT/WTO framework.

Paragraphs 4–10 of Article XXIV of the GATT, and its relevant official interpretation, the Understanding on the Interpretation of Article XXIV of the GATT 1994, regulate the formation and operation of a customs union and a free trade area in goods.[10] Moreover, they specifically identify the conditions of establishing and entering into regional trade agreements in the form of a customs union and a free trade area.[11]

Paragraph 2(c) of the Decision of November 28, 1979 on Differential and More Favorable Treatment Reciprocity and Fuller Participation of

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9. There are numerous books regarding the topic of free trade agreement or regional trade agreement. *See, e.g.,* REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM (Lorand Bartels & Federico Ortino eds., 2006).

10. General Agreement on Tariffs and Trade art. XXIV, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]; *see also* World Trade Organization, Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, http://www.wto.org/english/docs_e/legal_e/10-24.pdf (last visited Nov. 11, 2009).

11. *Id.*

Developing Countries, otherwise called the Enabling Clause,[12] empowers certain countries to engage in preferential trade arrangements in goods trade if all parties involved are developing countries.

In addition, a similar set of conditions to Article XXIV of the GATT, that have to be met by regional agreements for both developed and developing countries, is also addressed in Article V of General Agreement on Trade in Services ("GATS").[13]

B. Trade Remedies Under the GATT/WTO

Generally, trade remedy measures that are permitted in the GATT/WTO framework mainly cover three basic types: anti-dumping measures, countervailing measures, and safeguard measures. These specific measures enable WTO members to temporarily depart from the obligations that they committed to during tariff negotiations under the GATT/WTO in seeking short-term relief for domestic stakeholders. By undertaking these measures, the interests of numerous domestic stakeholders, when faced with the increasingly severe challenges relating to overseas competition arising out of FTAs, are thus taken into account and balanced.

Anti-dumping measures and countervailing measures have been designed and taken to combat purported "unfair trade" practices. If imports from a certain country or territory are sold at dumped prices in a domestic market and cause injurious dumping to domestic industries, anti-dumping measures can be invoked to control this distorted competition. Similarly, countervailing measures are undertaken to fight against unfair subsidies obtained from foreign governments for exports to lower prices and domestic industries are thus subject to the intolerable competition of their foreign rivals. In light of this, Article VI of the GATT [14]and the 1994 Anti-dumping Agreement ("1994 ADA")[15] are basic anti-dumping regulations in the GATT/WTO, while Article VI of the GATT, Article XVI of the GATT[16] and the 1994 Agreement on Subsidies and Countervailing Measures ("1994 SCM")[17] primarily address the issue of subsidies and countervailing.

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12. Report of the panel, *Differential and More Favorable Treatment Reciprocity and Fuller Participation of Developing Countries,* ¶2(c), L/4903 (Nov. 28, 1979), *available at* http://www.wto.org/english/docs_e/legal_e/enabling_e.pdf.

13. General Agreement on Trade in Services*,* art. V, Apr. 15, 1994, 1869 U.N.T.S. 183 33 I.L.M. 1167 (1994).

14. GATT, *supra* note 10, art. VI.

15. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 201 (1994) [hereinafter 1994 ADA].

16. GATT, *supra* note 10, art. XVI.

17. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 14 (1994) [hereinafter 1994 SCM].

In addition, WTO rules also provide a remedy which the "flood" of imports into the domestic market causes or threatens to cause serious injuries to the specific domestic industry. As a result, safeguard measures, through the means of quotas and other trade restriction measures, can be temporarily undertaken to deal with the issue. Under safeguard rules currently operating in the WTO, *i.e.* Article XIX of the GATT[18] and its annex via the Agreement on Safeguards,[19] safeguard measures should be applied to imports "irrespective of their source."[20]

C. Trade Remedies Under the Free Trade Agreement

According to the WTO, as of December 2008, 421 regional trade agreements ("RTAs") have been notified to the WTO.[21] Furthermore, there are indications that almost 400 RTAs are scheduled to be implemented by 2010.[22] Among them, FTAs and partial scope agreements account for over 90%, while customs unions make up less than 10%.[23] On the face of it, these statistics suggest the current wave of regionalism. However, one concern regarding this wave is whether the growth of regionalism results in the interests of certain domestic stakeholders being hurt. A further concern is what strategies can be developed to ensure minimal injuries to domestic industries when RTAs are implemented. Consequently, trade remedy measures, as an effective and efficient means to respond to these challenges, have been adopted in most RTAs, notably FTAs.

Generally, a number of methods can be adopted to regulate trade remedies under a free trade agreement. For example, in some FTAs, member states are obliged to grant exemptions from taking anti-dumping measures and countervailing measures against the products from other members engaged in the agreement. One such an attempt can be found in the Australia New Zealand Closer Economic Relations Trade Agreement ("ANZCERTA").[24] Another method is undertaking special anti-dumping or anti-subsidy investigations against member states via a set of unique substantive and procedural rules. Possible ways to do this may include establishing a special organization or body amongst member states to deal

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18. GATT, *supra* note 10, art. 19.

19. Agreement on Safeguards and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 154 (1994) [hereinafter Safeguards].

20. *Id.* art. 2, ¶ 2.2.

21. WTO, Regional Trade Agreements Gateway, www.wto.org/english/tratop_e/region_e/region_e.htm (last visited Nov. 4, 2009).

22. *Id.*

23. *Id.*

24. *See* Protocol to the Australia New Zealand Closer Economic Relations — Trade Agreement on Acceleration of Free Trade in Goods, Austl.-N.Z., art. 4, Aug. 18, 1988, 1988 Austl. T.S. No. 18 (requiring parties to abolish anti-dumping actions after July 1990 when free trade was achieved).

with the disputes arising out of anti-dumping or countervailing investigations. The North American Free Trade Agreement ("NAFTA") is the best example to illustrate this method.[25]

Compared with anti-dumping measures and countervailing measures, safeguard measures in FTAs are more complex. Three basic types of safeguard measures are usually addressed in most FTAs, including bilateral safeguards, special safeguards, and global safeguards.

Bilateral safeguards are often implemented during the transition period, a period that provides both parties of the agreement certain time to remove or reduce the tariffs as they committed to in the agreement. In most cases, bilateral safeguards allow the suspension of the tariff reduction or an increase in the tariff from the preferential rate to the previous Most-Favoured-Nation (MFN) level. These measures are legally permitted during the transition period and are thus often able to be implemented within two or three years. However, once the transition period finishes, bilateral safeguards have to be stifled.

Special safeguards have been designed and taken to protect sensitive sectors for parties engaged in FTAs. Sensitive sectors referred to, in this context, are industrial sectors that manufacture products which are crucial to countries or territories. By invoking special safeguards, parties in FTAs are thus able to avoid the protection pressure brought to bear by various domestic stakeholders.

According to the Agreement on Safeguards, WTO members should be treated equally when global safeguards are undertaken.[26] However, some FTAs agree to exclude imports of parties in FTAs from global safeguard actions. This approach does raise a query as to whether it violates the non-discrimination principle of the GATT/WTO.[27] Although WTO panels applied the rule of "parallelism" to deal with global safeguard disputes in FTAs, which prohibits an asymmetry between the safeguard investigation and the application of its resulting safeguard measure,[28] they avoided evaluating the aforementioned approach in the context of the GATT/WTO framework. Nonetheless, notwithstanding the absence of a definitive conclusion, WTO members continue to adopt this approach when taking global safeguard measures in their respective FTAs.

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25. *See* North American Free Trade Agreement, U.S.-Can.-Mex., ch. 19, Dec. 17, 1992, 32. I.L.M. 289 (1993).

26. Safeguards, *supra* note 19, art. 2, ¶ 2.2.

27. The non-discrimination principle is one of the cornerstones of the GATT/WTO system, and an obligation for all WTO members, which requires that all traders and all goods are treated in a fair and equal manner.

28. For details, see Robert Teh et el., *Trade Remedy Provisions in Regional Trade Agreement* 25–26 (WTO Econ. Research & Statistics Div., Staff Working Paper ERSD-2007-03, 2007).

D. Trade Remedies Under the Feasibility Study of the SINO-Australia Free Trade Agreement

1. Trade Remedies Under the Feasibility Study: Facts and Concerns

The joint feasibility study of ACFTA was accomplished in March 2005 after a summit meeting between Australia and China. According to the official documents distributed during the past years,[29] the two countries have set up working groups and discussed the trade remedy issue in several rounds of the negotiation that have been held so far.[30]

Given the dearth of information that has been released regarding the details of negotiation rounds, the joint feasibility study provides a rough roadmap to explore the issue of trade remedies in the ACFTA.

Section 6 of the joint feasibility study, which is titled "Implications for Bilateral Cooperation," outlines the possible areas for enhanced bilateral cooperation between the two countries through the FTA.[31] Sub-Section 6.10 specifically addresses trade remedies of both countries' policies and programs, including anti-dumping measures, countervailing measures and safeguard measures.[32]

In light of Sub-Section 6.10, Australia subjects injurious dumping practices to anti-dumping investigations in accordance with its obligations under Article VI of the GATT and the WTO 1994 ADA.[33] Ways to do this include examining the three criteria of an anti-dumping investigation which are embedded in the 1994 ADA, *i. e.*, alleged dumping, alleged injury, and their causal link; and setting the sunset clause for the termination of anti-dumping measures.[34] Prior to 2004, Australia regarded China as an "economy in transition,"[35] which empowered the Australian anti-dumping authority to examine whether the Chinese government is involved in price-setting activities operated by Chinese exporters. This also rendered it possible for Australia to adopt a surrogate approach to determine the dumping margin in anti-dumping investigations if establishing the fact that the government influenced the price of the product. Between 1995 and 2004, according to the feasibility study, a total of eighteen anti-dumping investigations into Chinese products were initiated by Australia.[36] Among them, six cases were finally brought to impose anti-dumping duties.[37] This

29. *See generally* Australia–China FTA, *supra* note 5.
30. *Id.*
31. FEASIBILITY STUDY, *supra* note 2, at 86–116.
32. *Id.* at 111–15.
33. *Id.* at 111.
34. *Id.*
35. *Id.* at 112.
36. *Id.*
37. FEASIBILITY STUDY, *supra* note 2, at 112.

apparently contrasts with anti-dumping initiations and imposition by China against Australian products in the same period, which accounted for zero of a total of thirty-three anti-dumping investigations it reported since 1997.[38] The basic anti-dumping regime in China is addressed in China's Foreign Trade Law[39] and the Anti-dumping Regulation.[40] The Ministry of Commerce ("MOFCOM"), China's official anti-dumping administering authority, also promulgated some detailed regulations to administer anti-dumping affairs.

Domestic regulations regarding countervailing measures in both Australia and China are currently subject to Article VI of the GATT, Article XVI of the GATT, and the 1994 SCM. Australia's key legislation for undertaking countervailing measures includes its Customs Act 1901[41] and The Customs Tariff (Anti-Dumping) Act 1975,[42] while China's main framework is embedded in Article 43 of its Foreign Trade Law[43] and the Anti-Subsidy Regulation.[44] The Australian Customs Service and China's MOFCOM are designated authorities in the two countries that are respectively responsible for anti-subsidy investigations. Unlike anti-dumping measures, in light of the feasibility study which was accomplished in 2005 and other subsequent documents, Australia had never initiated any anti-subsidy investigations targeted at Chinese products until March 2008.[45] This approach is also adopted by China as it has abstained from undertaking countervailing measures against Australian exporters. However, the latest developments in Australia are indicating that this approach has been changed. On March 26, 2008, Australia initiated an investigation into alleged anti-dumping and subsidization from China in respect of certain toilet paper.[46] This became the first anti-subsidy investigation initiated by

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38. *Id.* at 113 (stating that according to the joint "feasibility study," China has not initiated any anti-dumping investigation on products originating in Australia).

39. *See* Seabay, Foreign Trade Law of The People's Republic of China (1994), http://www.seabay.cn/freightknowledge/20050615/1968347.html.

40. *See generally* Regulations on Anti-Dumping (effective June 1, 2004) (P.R.C.) http://www.cacs.gov.cn/cacs/falv/falvshow.aspx?str1%20=3&articleId=38667.

41. Customs Tariff (Anti-Dumping) Act 1975, 1975, ¶ 6 (stating that the Customs Act of 1901 has been incorporated into the 1975 Act).

42. *Id.*

43. *See* Seabay, *supra* note 39, art. 43.

44. *See generally* Regulations on Countervailing Measures (effective June 1, 2004) (P.R.C.) http://chinatradedata.com/resources/trade-laws-and-regualations/117-regulations-of-the-peoples-republic-of-china-on-countervailing-measures.

45. The feasibility study said there had been no anti-subsidy investigation targeted at Chinese products until the date that the study was being written. *See* FEASIBILITY STUDY, *supra* note 2, at 111–15. Since the study was released, it had been no anti-subsidy investigations initiated by Australia against Chinese products that were officially reported until March 26, 2008. *Id.*

46. *Certain Toilet Paper Exported from The People's Republic of China and The Republic of Indonesia: Initiation of An Investigation into Alleged Dumping and Subsidization*

Australia against Chinese exports. Although the two petitioners withdrew the countervailing duty notice in this case, Australia, in late December 2008, began another investigation into anti-dumping and subsidization from China in respect of certain hollow structural sections.[47] This decision was heavily criticized by China who contended that it is inconsistent with WTO rules.[48]

Although both Australia and China commit themselves to taking safeguard measures under Article XIX of the GATT and the WTO Agreement on Safeguards, Australia does lack specific domestic legislation to regulate the imposition of safeguard measures. Compared with anti-dumping measures and countervailing measures, the administering authority in Australia for safeguard investigations has been transferred to the Treasurer and the Productivity Commission if the Australian government agrees that the investigation is necessary.[49] At the domestic level, Australia has initiated one safeguard inquiry since the establishment of the WTO in 1995.[50] However, this investigation did not result in a final safeguard measure being taken. At the FTA level, under ANZCERTA and the Singapore-Australia Free Trade Agreement ("SAFTA"),[51] imports from New Zealand and Singapore cannot be subject to safeguard measures undertaken by Australia against foreign exports.[52]

In contrast, Article 44 of the Foreign Trade Law[53] and the Safeguard Measures Regulation[54] form the foundation of China's safeguard actions, which also empower MOFCOM to undertake safeguard investigations in China. Since the enactment of China's safeguards legislation, there has

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from China, and Alleged Dumping from Indonesia, Australia Customs Dumping Notice No. 2008/12 (Mar. 26, 2008) [hereinafter Dumping Notice 1].

47. *Certain Hollow Structural Sections Exported from The People's Republic of China and Malaysia: Initiation of An Investigation into Alleged Dumping and Subsidization,* Australian Customs Dumping Notice No. 2008/45, (Dec. 18, 2008) [hereinafter Dumping Notice 2].

48. Xinhua News Agency, *China Regrets, Opposes Australia's Anti-Dumping Investigation on Weld Carbon Steel Pipe*, PEOPLE'S DAILY ONLINE, Dec. 26, 2008, http://english.people.com.cn/90001/90776/90884/6562204.html.

49. FEASIBILITY STUDY, *supra* note 2, at 114.

50. *Id.*

51. Singapore-Australia Free Trade Agreement, Sing.-Austl., Feb. 17, 2003, 2003 Austl. T.S. No. 16 [hereinafter SAFTA].

52. See Australia New Zealand Closer Economic Relations — Trade Agreement, art. 17, Jan. 1, 1989, 1988 No. 20. Article 17 only regulated bilateral safeguards during the transition period. Because the transition period was accomplished in 1988 which has rendered the abovementioned provisions regarding bilateral safeguards invalid. Currently, no bilateral safeguards can thus be undertaken between Australia and New Zealand. For details on safeguards in SAFTA, see *supra* note 51, art. 9.

53. *See* Seabay, *supra* note 39, art. 44.

54. *See generally* Regulations on Safeguard Measures (effective June 1, 2004) (P.R.C) www.cacs.gov.cn/cacs/falv/falvshow.aspx?str1=3&articleId=38669.

been only one safeguard investigation into foreign imports.[55] The case was initiated in May 2002, and definitive safeguard measures were imposed.[56] However, in December 2003, one year after their imposition, China announced the termination of these safeguard measures.[57]

In light of the joint feasibility study, some products may fall within the important sectors category.[58] This renders it possible that discussions will be engaged in during the FTA negotiation between the two countries to determine whether bilateral safeguards can be applied to these sectors. These products identified in the joint feasibility study include cotton, dairy, horticulture, seafood, forest products, meat, barley, wool, wheat, sugar, rapeseed, textile and clothing, automotive industry, and chemicals and plastics.[59]

The joint feasibility study concluded by highlighting three main areas for consideration of further cooperation under the proposed FTA regarding trade remedies. The three main areas are informal consultations as well as dialogue concerning the issue of trade remedies in the Doha round; technical exchange, particularly officials' exchanges between administering authorities of trade remedies in the two countries; and promoting dialogue and cooperation between domestic industries in the two countries to resolve potential trade remedy cases.[60]

2. *Trade Remedies Under the Feasibility Study: Some Observations*

The statistics of trade remedies provided by the feasibility study, as indicated above, may superficially suggest an asymmetry between Australia and China in regard to undertaking trade remedy measures. Strikingly, the statistics provided by the feasibility study appear curious, as there has been a dramatic difference between the two countries when taking anti-dumping measures.

To explain the issue, some background about the two countries in regard to anti-dumping measures is warranted. During the past decades, the United States, the European Union ("EU"), Canada, and Australia have been the

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55. *See* Li Heng, *China Applies Safeguard Measures to Five Imported Steel Products*, PEOPLE'S DAILY ONLINE, Nov. 22, 2002, http://english.peopledaily.com.cn/200211/21/eng20021121_107218.shtml.

56. *Id.*

57. Trade and Industry Department, Commercial Information Circular No. 4/2004, *Termination of Final Safeguard Measures on Imports of Certain Steel Products*, Jan. 8, 2004, http://www.tid.gov.hk/textonly/english/aboutus/tradecircular/cic/asia/2004/ci042004.html.

58. FEASIBILITY STUDY, *supra* note 2, at 28–38.

59. *Id.*

60. *Id.* at 115.

major countries frequently taking anti-dumping measures worldwide.[61] Despite being a frequent user of anti-dumping measures, Australia is clearly not as anxious as the others in this group, notably the United States and the EU. As a result, unlike other members of the group, Australia tends to be relatively restrictive in its application of anti-dumping measures. This policy adopted by Australia is more likely to correspond with its status in world trade. According to statistics provided by the WTO, Australia was ranked twenty-third in the list of major exporters and twenty-first major importer of merchandise in world trade in 2008, which accounted for 1.17% of total world exports and 1.22% of total imports respectively.[62] Such a fact suggests that although Australia attaches great importance to trade, the market presence it retains is not sufficiently large to render it a leading player in international trade. Consequently, a balanced strategy with primary concern on free trade and relatively limited employment of protection means will better serve its national interests. Although anti-dumping investigations are started by individuals' choices, this government's policy choice may contribute to the development of Australia's anti-dumping law and policy in practice to a certain extent, which further prevents frequent initiations of anti-dumping investigations because domestic industries are more likely to seek anti-dumping remedies if overseas imports are easy to prosecute. Apart from this policy tendency, many other factors may also come into play in this process to reduce trade remedy disputes. For example, more skillful lawyers have been employed by Chinese enterprises when they are subject to anti-dumping investigations. Their increasing role in successfully representing and assisting clients in many anti-dumping cases has been widely recognized.[63] As a result, it should be noted that, compared with numerous anti-dumping investigations initiated by the United States and the EU, anti-dumping investigations undertaken by Australia only form a small part of the whole picture regarding investigations worldwide into Chinese exports during the

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61. ANTIDUMPING LAW AND PRACTICE V (John H. Jackson & Edwin A. Vermulst eds., 1989).

62. World Trade Organization, Trade Profile of Australia, Oct. 2009, http://stat.wto.org/CountryProfiles/AU_e.htm [hereinafter Australia Profile]. For other related information, see also Xu M. & Huang R., *Multilateral Trade Liberalization or Bilateral Trade Liberalization?: An Analysis of Australian Trade Liberalization Strategy*, 3 ASIA-PACIFIC ECON. REV. 44–47 (2007).

63. In recent years, Chinese enterprises have won many anti-dumping cases in Australia. One of the crucial factors is that more skilful lawyers are sought and hired to represent these enterprises. For example, the carpet gripper case which happened in 2001. *See Ao da Li Ya Di Tan Ding Fan Qing Xiao An Zhong Guo Qi Ye Shen Su* [*Australia Carpet Gripper Anti-dumping Case: Chinese Enterprises Win*], NEW EXPRESS, Mar. 16, 2002, http://finance.sina.com.cn/b/20020316/181075.html; *see also* Australian Customs Dumping Notice, 2001/48 (July 23, 2001), *available at* http://www.customs.gov.au/site/content2252.asp; *see also* Australian Customs Dumping Notice, 2002/09 (Feb. 19, 2002), *available at* http://www.customs.gov.au/site/content2336.asp.

past decades,[64] even though Australia did not acknowledge China's full market economy status until April 2005.[65]

On the contrary, according to the WTO Secretariat, every year China is the country subject to the most anti-dumping investigations since its accession to the WTO.[66] Meanwhile, the number of anti-dumping investigations initiated by China that targeted foreign imports has also been steadily increasing in recent years.[67] This implies that equipped with robust national anti-dumping legislation, China is attempting to shift from being a passive victim to an astute user of anti-dumping measures.

Notwithstanding the above historical account, statistics of the feasibility study have highlighted that prior to 2005, Australia had undertaken several anti-dumping investigations against Chinese products.[68] Moreover, between March 2005 and 2008, during the period of the ACFTA negotiation, a number of anti-dumping investigations were continuously initiated by Australia in regard to Chinese exports.[69] However, as indicated above, it is surprising that, in contrast to Australia, so far no anti-dumping investigations have been initiated by China in regard to Australian products (not only prior to 2005 according to the feasibility study, but also between 2005 and the present).[70] This raises the question of why such a difference exists.

To analyse this, a couple of factors should be taken into account. One is the asymmetry in economic status between the two countries. According to WTO statistics in 2009, China was placed second as the main destination and the main origin for Australia's merchandise trade in 2008, accounting for 14.6% of the total value of Australia's exports and 15.6% of the total value of Australia's imports.[71] Nonetheless, however, Australia was apparently not on the list of China's main destinations and main countries of origin.[72] Despite this, Australian entities are capable of supplying products that are in high demand by China for its economic reform and development. For example, WTO statistics also show that in 2008, fuels and mining

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64. Relevant conclusion can be drawn from the WTO anti-dumping statistics provided by WTO members. *See* Press Release, WTO, WTO Secretariat Reports Increase in New Anti-Dumping Investigations (May 7, 2009), http://www.wto.org/english/news_e/pres09_e/pr556_e.htm [hereinafter Press Release].

65. Abeysekera, *supra* note 3 (stating that Australia did not regard China as a full market economy until April 2005).

66. Press Release, *supra* note 64.

67. *Id.*

68. FEASIBILITY STUDY, *supra* note 2.

69. *See, e.g.*, Dumping Notice 1, *supra* note 46; Dumping Notice 2, *supra* note 47.

70. FEASIBILITY STUDY, *supra* note 2 (when this Paper was being written in January 2009, there are also no reported anti-dumping cases initiated by China against Australia products between 2005 to the present).

71. *See* Australia Profile, *supra* note 62.

72. *See* World Trade Organization, Trade Profile of China (Oct. 2009), http://stat.wto.org/CountryProfiles/CN_e.htm [hereinafter China Profile].

products accounted for 27.1% of China's total imports,[73] while Australian fuels and mining products accounted for 59.7% for its total exports.[74] Apparently, Australian entities have obtained a competitive advantage in regard to these products and they exclusively retain certain market presence worldwide. More importantly, this is particularly true in the cases of mining products and natural gas, which are essential to China's development in the coming years.[75] Currently, in respect to these products, China's domestic industries and other foreign producers are still incapable of effectively and efficiently competing with Australian industries. Australia, in this regard, is playing a paramount role in supplying the raw material for China's economic development. Strikingly, this contrasts with other trade patterns that most developed countries employ in China or in other developing countries, as they are essentially not suppliers, but recipients, of the resource.[76]

Conversely, products such as textiles, chemicals, food, and fruit are the main Chinese exports to Australia.[77] Most of these products are manufactured goods, and thus readily draw attention from competitive domestic producers. Consequently, Chinese products in the Australian market are relatively easier to prosecute and are subject to anti-dumping measures, compared with Australian products in the Chinese market, with raw materials and services being the most popular exports that meet the needs for China's economic development.[78] On the other hand, Australian domestic industries do not have comparative advantages to compete with foreign exports in regard to many commodities in which Chinese exports play a predominant role in the global market.[79] This fact may explain the question as to why Australia, among the group of frequent trade remedy users (notably the EU and the United States), still has fewer anti-dumping investigations against Chinese products in certain areas. The abovementioned analysis relating to anti-dumping measures employed by the two countries also strongly supports the argument that these two economies are mutually complementary.[80] Moreover, this further implies that the potential to fully implement the existing comparative advantage of each country in the other's market may contribute to both countries' engagement in this free trade negotiation.

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73. Id.

74. Australia Profile, *supra* note 62.

75. China Profile, *supra* note 72.

76. Zong-Xian Feng & Lu-Yao Yu, Fei Dui Chen De Zhong Guo Ao Da Li Ya Fan Qing Xiao Ge Ju He Zhong Guo Shi Chang Jing Ji Tan Pan Di Wei [The Asymmetric Sino-Australia Anti-Dumping Pattern and Negotiation of Market Economic Status of China], 34 J. SHANXI NORMAL U. [SOC. SCI. ED.] 4 (2007) (P.R.C.) [hereinafter Feng & Yu].

77. *Id.*

78. *Id.*

79. *See* China Profile, *supra* note 72; Australia Profile, *supra* note 62.

80. Feng & Yu, *supra* note 76.

A second factor to take into account is the relative levels of market development in both countries. The high level of Australian market development renders it impossible that the viability of most Chinese exports in Australia mainly depends on their technological capacity and the quality of their products, but not on competitive prices, which are readily caught by anti-dumping measures. On the other hand, Australian exports obtain a comparative advantage that is exclusively focused on mining products and natural resources.[81] Consequently, Australian exporters are not forced to compete in the Chinese market by means of reducing export prices as these products are essential for Chinese economic development and are not easy to obtain from other foreign exporters. One such example is BHP, Australia's domestic giant for iron ore, which has continuously raised rather than lowered its prices of products into the Chinese market over the past years.[82] In addition to the above, the feasibility study indicates that the service industry is another area for Australia that has played an important role in its economy and thus gained a comparative advantage, compared with China.[83] Despite this, generally, anti-dumping measures are unable to be applied to services, but only to goods.[84] Furthermore, it is mostly impossible for Australian service exporters to retain their services market presence in China by means of low-prices. This is because China has a large population and thus the labour cost in its services market is relatively low. On the other hand, if Australian service exporters attempt to match low-prices in China, they also take a risk in violating other rules even though service transactions are not subject to current anti-dumping laws.[85] Consequently, this fact may also partly contribute to the concern over the asymmetry in initiations of anti-dumping investigations mutually brought by the two countries.

In addition to anti-dumping measures, according to the feasibility study and other relevant statistics, no anti-subsidy investigations have been initiated by China against Australian exports.[86] Moreover, there has been only one safeguard case in China since its accession to the WTO.[87] As a

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81. Australia Profile, *supra* note 62.

82. *BHP Doubles Price of Ore for Bao Steel*, INT'L HERALD TRIB., Jul. 4, 2008, http://www.nytimes.com/2008/07/04/business/worldbusiness/04iht-04bhp.14235821.html?_r=1.

83. *See* FEASIBILITY STUDY, *supra* note 2, at 43 (stating that the feasibility study indicates that Australia's service sector is compromised 80% of GDP in 2003 and China was its eighth-largest service export market in 2003, while China's service sector only contributes 31.8% to GDP).

84. According to GATT 1947 Article VI and 1994 WTO ADA, which laid out fundamental rules for anti-dumping investigations; anti-dumping measures are only applied to "products." GATT, *supra* note 10, art. VI; 1994 ADA, *supra* note 15.

85. For example, anti-monopoly laws or anti-competition rules may apply under certain circumstances.

86. FEASIBILITY STUDY, *supra* note 2.

87. Heng, *supra* note 55.

new member in the WTO, the history of use with regard to trade remedies is of recent origin for China even though it has tended to employ more measures during recent years to balance its trade relationships with other partners. Compared with numerous anti-dumping measures, there are relatively fewer countervailing measures and safeguard measures employed by WTO members worldwide.[88] As a result, it is not surprising that China, as a new member of the WTO, has an incentive to prevent anti-subsidy and safeguard investigations from being initiated.

In contrast, as indicated above,[89] Australia's latest tendency to subject single Chinese products to both anti-dumping and anti-subsidy investigations should generate anxiety as to its uncertainty regarding possible future tactics to target Chinese exports by employing trade remedy measures. This may further suggest that countervailing measures and safeguard measures will be the new potential challenges posed by Australia to China's exports in the coming years.

In conclusion, compared with their trading partners who are dominant users of trade remedy measures, both Australia and China do curb the frequent application of such measures posed mutually. Obviously, this is the outcome of comparative advantages and economic status in both countries that are mutually complementary, which further lays the groundwork for the ongoing bilateral FTA negotiation.

III. TRADE REMEDIES UNDER THE FUTURE SINO-AUSTRALIA FREE TRADE AGREEMENT

A. Trade Remedies Under China's Existing Free Trade Agreements

As of February 2009, China has reached several bilateral free trade agreements with its various trading partners amongst WTO members, including Pakistan, Chile, New Zealand, Singapore, ASEAN, Hong Kong, and Macao. Provisions in regard to trade remedy measures have been incorporated into all these FTAs.

Generally, bilateral FTAs that China has established with these partners cover three basic types: FTAs that China signed with Hong Kong and Macao; FTAs with Pakistan, Chile, New Zealand, and Singapore; and the FTA with ASEAN.

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88. Relevant conclusion can be drawn from the WTO Statistics on Subsidies and Countervailing Measures. WTO, Subsidies and Countervailing Measures, Gateway, http://www.wto.org/english/tratop_e/scm_e/scm_e.htm (last visited Nov. 4, 2009); WTO, Trade Topics, Safeguards Gateway http://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm (last visited Nov. 4, 2009).

89. *See supra* notes 46 & 47.

FTAs that China reached with Hong Kong and Macao, which are both titled "Closer Economic Partnership Agreement" ("CEPA"),[90] are not free trade agreements negotiated between countries *per se*. Since 1997, Hong Kong and Macao have reverted to Mainland China. Over the past centuries, these two territories have been designed and developed as important free trade areas in Southeast Asia. Furthermore, the fact that Hong Kong and Macao are GATT/WTO members also contributes to the engagement of CEPAs.[91] Consequently, the engagement of these CEPAs, in the context of their extraordinary background of history and political reality, plays a paramount role not only in trade and economic partnerships, but more importantly, in the political arena. This approach, which highlights the "one country, two systems" policy,[92] implies that these CEPAs are more likely to be preferential arrangements granted between two areas in one single country: Mainland China and Hong Kong, Mainland China and Macao, respectively. Apparently, such arrangements engender much closer partnerships amongst negotiating parties than do FTAs engaged in between independent countries.

Provisions regarding anti-dumping measures and countervailing measures in the two CEPAs provide that the two sides undertake that neither will apply anti-dumping measures and countervailing measures to goods imported and originated from the other.[93] On the other hand, although the CEPAs do not clearly identify bilateral safeguards and global safeguards throughout the texts, relevant provisions in CEPAs do imply that the term "safeguards" in the context should be interpreted to mean bilateral safeguards.[94] In light of this, the two sides undertake that:

> [I]f the implementation of the 'CEPA' causes sharp increase in the import . . . [from the other side which has caused or threatened to cause serious injury to the affected side's domestic industry] . . . the affected side may, after giving written notice, temporarily suspend the concessions on the

90. Mainland and Hong Kong Closer Economic Partnership Arrangement, P.R.C.-H.K., June 29, 2003, *available at* http://www.tid.gov.hk/english/cepa/legaltext/cepa_legaltext.html [hereinafter Hong Kong CEPA]; Mainland and Macao Closer Economic Partnership Agreement, Oct. 17, 2003, *available at* http://www.economia.gov.mo/web/DSE/public?_nfpb=true&_pageLabel=Pg_EETR_CEPA_T&locale=zh_MO [hereinafter Macao CEPA].

91. Prior to Mainland China's accession to the WTO in December 2000, both Hong Kong, China, and Macao, China have been WTO members since January 1, 1995.

92. "One country, two systems" is an idea provided by the then Chinese Communist Party leader Deng Xiaoping in the 1980s, which proposed that within one China, areas such as Hong Kong and Macao can retain their capitalist economic and political systems, while Mainland China uses the socialist system.

93. Hong Kong CEPA, *supra* note 90, arts. 7–8; Macao CEPA, *supra* note 90, arts. 7–8.

94. Hong Kong CEPA, *supra* note 90, art. 9; Macao CEPA, *supra* note 90, art. 9.

> import . . . and shall, . . . [promptly commence consultation] . . . in order to reach an agreement.[95]

These provisions regarding bilateral safeguards in CEPAs, if compared with similar ones in most FTAs, are relatively simple as they lack any detailed procedural and substantive rules. For example, they do not identify the transition period and fail to specify how the findings concerning "sharp increase" and "serious injury" are reached. Nonetheless, upon superficial analysis, this simple method does indicate that the two sides are anxious to employ consultation rather than trade remedies when disputes arise. Despite this, it is unclear whether this was done in response to the successful implementation of the "one country, two systems" policy.

As indicated above, China's FTAs with Pakistan, Chile, New Zealand, and Singapore cover another type of trade remedy provisions. Some observations relating to these provisions should be noted. Firstly, all FTAs in this type maintain parties' rights to take anti-dumping and countervailing measures. There are some minor differences regarding these measures amongst agreements that China has engaged in. Provisions concerning anti-dumping and countervailing measures in FTAs between China and other developing countries, such as Pakistan and Chile, are identical, asserting that anti-dumping and countervailing measures taken shall be subject to relevant rules under the WTO.[96] In addition, they lack further regulations in texts. In contrast, anti-dumping and countervailing provisions in FTAs that China signed with developed countries, for example, New Zealand and Singapore are more precise and strict. According to those provisions, any action taken by parties should be carried out in a transparent manner rather than an arbitrary or protectionist manner; the party that has accepted an application from a domestic industry calling on anti-dumping investigations shall notify the other party as soon as possible; neither party shall introduce or maintain any form of export subsidy on any goods exported to the other party.[97] Moreover, detailed provisions are specifically incorporated into the text in order to express concern over the issue of cooperation and consultation when employing trade remedies.[98] Although New Zealand is

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95. Hong Kong CEPA, *supra* note 90, art. 9; Macao CEPA, *supra* note 90, art. 9.

96. *See* Free Trade Agreement Between the Government of the People's Republic of China and The Government of the Islamic Republic of Pakistan, P.R.C.-Pak., art. 25, Nov. 24, 2006, [hereinafter FTA P.R.C.-Pak.]; Free Trade Agreement Between The Government of The People's Republic of China and The Government of The Republic of Chile, P.R.C.-Chile, art. 52, Oct. 1, 2006 [hereinafter FTA P.R.C.-Chile].

97. Free Trade Agreement Between the Government of the People's Republic of China and the Government of New Zealand, P.R.C.-N.Z., arts. 61–63, Apr. 7, 2008, [hereinafter FTA P.R.C.-N.Z.]; Free Trade Agreement Between The Government of The People's Republic of China and The Government of Singapore, P.R.C.-Sing., arts. 38, 40–41, Oct. 23, 2008 [hereinafter FTA P.R.C.-Sing.].

98. FTA P.R.C.-N.Z., *supra* note 97, art. 65; FTA P.R.C.-Sing., *supra* note 97, art. 39.

China's one trading partner which has undertaken relatively fewer anti-dumping and countervailing measures against Chinese exports amongst all developed countries,[99] it continues to play a dominant role in taking such measures when compared with China's trading partners amongst developing countries, such as Pakistan and Chile.[100] Following this trend, in a very similar vein, these trade remedy provisions were also incorporated into the text of the China-Singapore FTA in September 2008,[101] which suggests a laudable model for China to address similar issues of trade remedies in respect of other developed countries.

In this type of FTAs, all provisions regarding global safeguards are identical, *i.e.*, parties maintain their rights and obligations under Article XIX of the GATT 1994 and the Agreement on Safeguards.[102] More detailed regulations are developed for bilateral safeguards, which form the most comprehensive section in FTAs' texts concerning trade remedies. The contents of these provisions are fairly similar, including the definition, the transition period, conditions and limitations, provisional measures, procedures and compensation.[103] They have been designed to protect domestic industries, during the transition period, from the increasingly severe challenges due to the engagement of the FTA. In addition to the above, in FTAs that China signed with Chile and New Zealand, several provisions have been incorporated that tenuously cover trade remedies with regard to agricultural goods.[104] Both Chile and New Zealand are major export-oriented countries in respect of agricultural goods in the Southern Hemisphere.[105] According to the China-Chile FTA, both parties are obliged not to introduce or maintain any export subsidy on any agricultural goods destined for the other party.[106] It also encourages the two parties to

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99. Relevant conclusion can be drawn from the WTO anti-dumping statistics provided by WTO members. *See* WTO, Anti-Dumping, Gateway, 2001–2008, http://www.wto.org/english/tratop_e/adp_e/adp_e.htm. Obviously, New Zealand had fewer anti-dumping and countervailing investigations against China during the past years, compared with other developed countries such as the European Union, the United States, Canada, and Australia, according to these statistics from the WTO. However, if compared with some developing countries, for example, Pakistan and Chile, the figures are still higher.

100. *Id.*

101. FTA P.R.C.-Sing., *supra* note 97, arts. 37–43.

102. *See* FTA P.R.C.-Pak., *supra* note 96, art 26; FTA P.R.C.-Chile, *supra* note 96, art. 51; FTA P.R.C.-N.Z., *supra* note 97, art. 64; FTA P.R.C.-Sing., *supra* note 97, art. 42.

103. *See* FTA P.R.C.-Pak., *supra* note 96, art. 27; FTA P.R.C.-Chile, *supra* note 96, arts. 45–50; FTA P.R.C.-N.Z., *supra* note 97, arts. 66–72; FTA P.R.C.-Sing., *supra* note 97, art. 43.

104. *See* FTA P.R.C.-N.Z., *supra* note 97, arts. 10, 13 (protecting agricultural industries through the regulation of agricultural export subsidies and special agricultural safeguard measures); *see also* FTA P.R.C.-Chile, *supra* note 96, art. 12 (regulating agricultural export subsidies).

105. Australia Profile, *supra* note 62; China Profile, *supra* note 72.

106. FTA P.RC.-N.Z., *supra* note 97, art. 10(3); FTA P.R.C.-Chile, *supra* note 96, art. 12(2).

cooperate on discussions in WTO forums regarding export subsidies for agricultural goods.[107] In the China-New Zealand FTA, in addition to the similar provision concerning the elimination of export subsidies for agricultural goods, a special article has been incorporated empowering China to undertake special safeguards against agricultural goods from New Zealand. [108] In fact, New Zealand government eliminated all subsidies for its farmers in 1984.[109] As a result, Chinese agricultural industry is the only *de facto* party affected by the provision relating to the elimination of export subsidies for agricultural goods due to the FTA. Thus, undertaking special safeguard measures, in this context, can be essentially a powerful weapon used by China to fight market competition introduced by agricultural goods from New Zealand. Simultaneously, it further reduces the degree of protectionist pressure from China's conservative domestic industries in agriculture when they are faced with increasing competition from overseas.

The third type of trade remedies is incorporated in the China-ASEAN FTA. Based upon the Framework Agreement on Comprehensive Economic Co-operation between ASEAN and China,[110] China signed the Agreement on Trade in Goods with ASEAN in November 2004.[111] The Agreement sets out several factors when mutually undertaking trade remedies. Firstly, no provisions regarding anti-dumping and countervailing measures are specified in the Agreement. Despite this, Article 7 of the Agreement titled "WTO Disciplines" outlines that "the Parties . . . [agree and reaffirm their commitments to abide by the provisions of the WTO disciplines on, among others,] . . . subsidies and countervailing measures, [anti-dumping measures] . . . ."[112] Secondly, ASEAN acknowledges China as a full market economy and shall not apply Sections 15 and 16 of the Protocol of Accession of the PRC to the WTO and Paragraph 242 of the Report of the Working Party on the Accession of China to the WTO when dealing with the trade relationship between China and ASEAN.[113] It should also be noted

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107. FTA P.R.C.-N.Z., *supra* note 97, art. 10(2); FTA P.R.C.-Chile, *supra* note 96, art. 12(1).

108. FTA P.R.C.-N.Z., *supra* note 97, art. 13.

109. Laura Sayre, *Farming Without Subsidies?,* NEW FARM, Mar. 20, 2003, http://newfarm.rodaleinstitute.org/features/0303/newzealand_subsidies.shtml.

110. Framework Agreement on Comprehensive Economic Cooperation Between ASEAN and the People's Republic of China, Nov. 5, 2002, http://www.aseansec.org/13196.htm.

111. Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Co-operation Between the Association of Southeast Asian Nations and the People's Republic of China, Nov. 29, 2004, http://www.aseansec.org/16646.htm [hereinafter Agreement on Trade in Goods].

112. *Id.* art. 7.

113. *Id.* art. 14. Article 15 of the Protocol of Accession of the PRC to the WTO, entitled "Price Comparability in Determining Subsidies and Dumping" states that WTO member can treat China as a non-market economy for fifteen years after its accession to the WTO for dumping purposes, and also provides that the SCM Agreement shall apply in proceedings involving imports of Chinese origin into a WTO Member and in countervailing

that there have been special regulations to address safeguards in the Agreement. Article 9 of the Agreement specifically defines safeguard measures.[114] Among them, Article 9(1) deals with global safeguards, while Article 9(2)–(11) regulate bilateral safeguards. These provisions regarding bilateral safeguards are fairly similar to regulations in respect of bilateral safeguards that have been incorporated into the FTAs China negotiated with other trading partners, including conditions, the transition period, compensation and procedures. One particular provision Article 9(7) appears curious as it empowers the importing party not to apply safeguard measures to a party if the latter's market share of imports of the product concerned does not exceed 3% of the total imports from exporting parties. Such a regulation is more likely to be designed for ASEAN members who are small players in international trade, assuring that small players are also eligible to enjoy adequate interests in a multilateral free trade agreement. It may be impossible to incorporate this regulation, in this sense, into the text of a single bilateral free trade agreement. As a result, the China-ASEAN FTA is essentially a plurilateral FTA rather than a merely bilateral one.

B. Trade Remedies Under Australia's Existing Free Trade Agreements

As of the end of February 2009, Australia has entered into five FTAs with its trading partners, New Zealand, Singapore, Thailand, the United States, Chile, and ASEAN. Trade remedies provisions in these enacted agreements vary.

ANZCERTA entered into force on January 1, 1983.[115] According to Article 15 of the Agreement, both Australia and New Zealand may maintain

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duty actions against goods from China, benchmarks taken from outside China may under appropriate circumstances be used to identify and measure subsidy benefits. Ministerial Conference, *Protocol on the Accession of the People's Republic of China*, Annex 2, art. 15, WT/L/432 (Nov. 23, 2001), *available at* http://unpan1.un.org/intradoc/groups /public/documents/APCITY/UNPAN002123.pdf. Article 16 of the Protocol of Accession of the PRC to the WTO, entitled "Transitional Product – Specific Safeguard Mechanism" describes that specific safeguard mechanism can be undertaken by WTO member countries to impose trade restrictions on imported Chinese products that cause or threaten to cause market disruption to domestic producers of similar or directly competitive products. Ministerial Conference, *Protocol on the Accession of the People's Republic of China*, Annex 2, art. 16, WT/L/432 (Nov. 23, 2001), *available at* http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN002123.pdf.
Paragraph 242 of the Report of the Working Party on the Accession of China to the WTO allows WTO members to apply textile-specific safeguard measures to Chinese textiles and clothing products until December 31, 2008 after its accession to the WTO. Working Party on the Accession of China, *Report of the Working Party on the Accession of China*, ¶ 242, WT/ACC/CHN/49 (Oct. 1, 2001).

114. Agreement on Trade in Goods, *supra* note 111, art. 9.

115. Australia New Zealand Closer Economic Relations Trade Agreement, Austl.-N.Z., art. 26, Mar. 28, 1983, 1983 Austl. T.S. No. 2 [hereinafter ANZCERTA].

anti-dumping actions against goods originating from the other party.[116] However, it was amended via the Protocol to the Australia New Zealand Closer Economic Relations-Trade Agreement on Acceleration of Free Trade in Goods ("the Protocol") which was enacted on August 18, 1988.[117] Article 4 of this Protocol required the two parties to abolish anti-dumping actions after July 1990 when free trade was achieved.[118] Consequently, only competition laws in the two countries could be employed against misuse of market power in trans-Tasman markets.[119] In light of ANZCERTA, the two parties reserve their rights and obligations under the GATT and the 1979 Subsidies Code in regard to countervailing measures undertaken.[120] Moreover, countervailing measures can merely be undertaken "when no mutually acceptable alternative course of action has been determined [by] . . ." the two parties.[121] Despite this, countervailing measures have never been undertaken between the two parties because both countries, through several official documents relating to the implementation of ANZCERTA[122] and in practice, reaffirm that they would not introduce or maintain any form of export subsidy, export incentive or other assistance measure having similar trade distorting effects to export incentives on any goods destined for the other party. Strikingly, there are no provisions regarding global safeguards in ANZCERTA. However, bilateral safeguards that are eligible to be imposed only in the transition period have been regulated.[123] This was done in the text by providing conditions and procedures for the implementation of bilateral safeguards as well as the definition of the transition period.[124] However, the transition period was accomplished in 1988 (when the Protocol was signed), which has rendered the abovementioned provisions regarding bilateral safeguards invalid. Currently, no bilateral safeguards can thus be undertaken between the two countries.

The Singapore-Australia FTA ("SAFTA") has been Australia's first free trade agreement since the start of its closer economic relationship with New Zealand in 1983. Unlike ANZCERTA, SAFTA empowers the two parties to reserve their rights to undertake anti-dumping measures against the other

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116. *Id.* art. 15.

117. *See* Protocol to the Australia New Zealand Closer Economic Relations, *supra* note 24.

118. *Id.* art. 4.

119. *Id.* art. 4.

120. ANZCERTA, *supra* note 115, art. 16(1)(a). As ANZCERTA was signed in 1982, the international convention for countervailing measures was the 1979 Subsidies Code, not its current form 1994 SCM.

121. *Id.* art. 16(1)(c).

122. There are many other official documents, such as exchange letters between the two countries after the Agreement was signed. *See* Australia Department of Foreign Affairs and Trade, Closer Economic Relations, http://www.dfat.gov.au/geo/new_zealand/anz_cer/anz_cer_trade.html (last visited Nov. 9, 2009).

123. ANZCERTA, *supra* note 115, art. 17.

124. *Id.*

party's exports under Article VI of the GATT and the WTO 1994 ADA.[125] Nevertheless, some challenging criteria have been incorporated into the agreement, which are apparently stricter than rules under the ADA. This includes setting time frames for determining the volume of dumped imports in an investigation or review, a lesser duty rule and procedures for compulsory notification.[126] The elimination of export subsidies is extended to all goods (even to agricultural products).[127] Countervailing measures are committed to being subject to the WTO 1994 SCM if they are undertaken.[128] One particular provision that should be noted is that the two parties agreed to abolish safeguard measures mutually initiated or undertaken.[129]

The Thailand-Australia FTA ("TAFTA") entered into force on January 1, 2005. Australia regards TAFTA as a "major market opening agreement," which will grant all Australian exports no tariffs as of January 2010 when entering into Thailand's market.[130] Like SAFTA, both parties maintain their commitments regarding anti-dumping measures under Article VI of the GATT and the WTO ADA.[131] Similarly, they also commit to some criteria which are stricter than rules under the existing WTO ADA. For example, providing more detailed procedures for price undertakings and setting time frames for determining the volume of dumped imports in an investigation or review.[132] Countervailing measures undertaken will also be subject to the WTO 1994 SCM and no export subsidy will be introduced or maintained on any agricultural good destined for the other party.[133] In addition to this, more cooperation, consultation, and communication are required in regard to agricultural and food industries when relevant policies and measures imposed are being changed.[134]

The most significant section of TAFTA in regard to trade remedies is its safeguard measures, which contains a fairly comprehensive and detailed structure, covering all types of transitional safeguards (bilateral safeguards), global safeguards and special safeguards. Both parties will maintain their commitments regarding global safeguards under Article XIX of the GATT and the WTO Agreement on Safeguards.[135] However, each party is

125. SAFTA, *supra* note 51, art. 8.1.
126. *Id.* art. 8.2.
127. *Id.* art. 7.1.
128. *Id.* art. 7.2.
129. *Id.* art. 9.
130. *See* Australian Department of Foreign Affairs and Trade, Thailand-Australia Free Trade Agreement (TAFTA): Guide to the Provisions of the Thailand-Australia Free Trade Agreement, http://www.dfat.gov.au/trade/negotiations/aust-thai/ (last visited Nov. 9, 2009).
131. Agreement on Bilateral Cooperation Between the Government of Australia and the Government of the Kingdom of Thailand, Thail.-Austl., art. 206(1), July 5, 2004, 2004 Austl. T.S. No. 18 [hereinafter TAFTA].
132. *Id.* art. 206(2).
133. *Id.* arts. 207, 208(2).
134. *Id.* art. 208(3).
135. *Id.* art. 508(1).

empowered to exclude the other party's exports from its proposed safeguard action if such imports do not cause serious injury, or threat thereof, or serious damage, or actual threat thereof, or any other factors that are consistent with relevant rules under the WTO.[136] In this method, consultation is also required when the aforementioned action is undertaken.[137]

In light of TAFTA, transitional safeguards may apply when the other party's increased imports resulting from the reduction or elimination of a customs duty pursuant to TAFTA cause or threaten serious damage to domestic industries which produce like or directly competitive product.[138] Consequently, parties, under certain strictly defined conditions, may lift the tariff to the MFN rate which applied either at entry into force of TAFTA, or at the time the measure is imposed (whichever is lower).[139] Transitional safeguards may be imposed initially for two years, and can be extended to a maximum of six years.[140] In addition to the above, more detailed procedures in regard to undertaking such measures are also identified, including investigation, provisional measures, notification, consultation, and compensation.[141]

Special safeguards, in the context of TAFTA, are only designed for agricultural products that both parties consider sensitive. Annex 5 of TAFTA contains a list of such products, adding a period that special safeguards can be applied to each product. As a result, if the volume of imports regarding that sensitive product entering the party during any given calendar year exceeds the specified volume trigger level for that year identified in Annex 5, the other party may increase the rate of customs duty applicable to the product for the remainder of that calendar year through the application of the customs duty for such product at the current MFN rate or the base rate (whichever is lower).[142] Relevant procedural rules also include consultation, cooperation and review of the operation system.[143]

The Australia-Chile FTA is the latest free trade agreement Australia has implemented. It was concluded in May 2008, signed on July 30, 2008 and entered into force on January 1, 2009.[144] Chapter 8 of the Agreement addresses the issue of trade remedies. Both parties agreed to maintain their commitments under Article VI of the GATT 1994, the WTO Agreement

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136. *Id.*
137. TAFTA, *supra* note 131, art. 508(2).
138. *Id.* art. 502.
139. *Id.*
140. *Id.* art. 503(1).
141. *Id.* arts. 504–06.
142. *Id.* arts. 509(4), 509(5).
143. TAFTA, *supra* note 131, arts. 509(7), 509(8), 509(10).
144. Australia–Chile Free Trade Agreement, Austl.-Chile, July 30, 2008, 2009 Austl. T.S. No. 6.

ADA and their successors.[145] No export subsidy will be introduced or maintained in regard to any agricultural products destined for the other party.[146] Global safeguards will be subject to Article XIX of the GATT 1994, the Agreement on Safeguards, other relevant provisions in the WTO Agreement, and their successors.[147] It is surprising that neither transitional safeguards nor special safeguards have been identified in this FTA.

The Australia-United States Free Trade Agreement ("AUSFTA") is "one of the most important bilateral economic and commercial agreements ever negotiated by" Australia,[148] and was approved in 2004. As with most provisions regarding anti-dumping and countervailing measures in FTAs, AUSFTA announced that both parties will retain their WTO rights to anti-dumping and countervailing actions and neither party will make any change to their current relevant domestic legislation.[149] Chapter 9 of AUSFTA employs transitional bilateral safeguards and global safeguards as mechanisms for protecting domestic industries from any injurious effect brought about by the reduction or elimination of the prevailing tariffs.[150] Detailed provisions in regard to transitional bilateral safeguards have been incorporated in the Agreement, including the imposition of a safeguard measure, conditions and limitations, provisional safeguard measures and compensation.[151] If AUSFTA leads to increased quantities of imports and causes substantial cases of serious injury or threat to domestic industries, the affected party can suspend the further reduction of any rate of custom duty; or increase the rate of custom duty to a level not to exceed the lesser of: (a) the MFN applied rate of duty on the import in effect at the time the action is taken; and (b) the MFN applied rate of duty in effect on the day immediately preceding the date of entry into force of the FTA.[152] Moreover, export subsidies on agricultural goods destined for each other's markets are prohibited.[153] However, there is a slight difference for both parties in regard to undertaking agricultural safeguard measures. The United States was permitted to apply safeguard measures on a limited range of agricultural goods under the Agreement.[154]

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145. *Id.* art. 8.2(1).
146. *Id.* art. 3.13(2).
147. *Id.* art. 8.2(1).
148. Australia Chamber of Commerce and Industry, ACCI Review No. 102, *Australia United States Free Trade Agreement,* Aug. 2003, at 7, http://acci.asn.au/text_files/review/r102.pdf.
149. Australia–United States Free Trade Agreement, Austl.-U.S., art. 2.9(2), May 18, 2004, 118 Stat. 919 [hereinafter Austl.-U.S. FTA].
150. *Id.* arts. 9.1, 9.5.
151. *Id.* arts. 9.2–9.4.
152. *Id.* art. 9.1.
153. *Id.* art. 3.3(1).
154. *Id.* art. 3.4.

According to AUSFTA, global safeguards are taken under the WTO.[155] Notwithstanding no amended commitments to the WTO Agreement on Safeguards, a new term "substantial cause" has been employed in the text as follows: "a [p]arty taking a global safeguard measure may exclude imports of an originating good from the other [p]arty if such imports are not a *substantial cause* of serious injury or threat thereof."[156] In addition, special safeguards on textiles are also addressed in the Agreement.[157]

The Agreement Establishing The ASEAN–Australia–New Zealand Free Trade Area ("AANZFTA") is the latest free trade agreement that Australia has signed. It was signed on February 29, 2009 and will enter into force no later than January 1, 2010.[158] The Agreement does not explicitly employ any clause to regulate anti-dumping and countervailing measures, which is different from other FTAs Australia has implemented. Within the entire text of the Agreement, on only one occasion it implies that anti-dumping and countervailing measures can be applied under the WTO.[159] In addition, each party agrees to "eliminate and not reintroduce all forms of export subsidies for agricultural goods."[160] The Agreement merely regulates global safeguards and transitional safeguards. Each Party retains its rights and obligations to undertake global safeguards against other parties.[161] However, the Agreement does not empower the party to exclude other parties' exports from its proposed global safeguard action as some FTAs regulate.[162] It only requires the party to "initiate consultations with that [p]arty or [p]arties as far in advance of taking such measure as

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155. Austl.-U.S. FTA, *supra* note 149, art. 9.5.

156. *Id.* (emphasis added).

157. *Id.* art. 4.1(8).

158. Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area, ch. 18, art. 7, Feb. 27, 2009, *available at* http://www.aseansec.org/22260.pdf. [hereinafter AANZFTA]. Although Article 7, Chapter 18 of the Agreement stated that the "[a]greement shall enter into force on 1 July 2009 for any Party that has made such notifications provided that Australia, New Zealand and at least four ASEAN Member States have made such notifications by that date" or "[i]f this Agreement does not enter into force on 1 July 2009 it shall enter into force, for any Party that has made the notification referred to in Paragraph 1, 60 days after the date by which Australia, New Zealand and at least four ASEAN Member States have made the notifications," it has not entered into force yet on July 8, 2009. *Id.* However, according to the overview of this Agreement which is provided by Australian government, the Agreement will enter into force no later than January 1, 2010. *Id.*

159. *Id.* ch. 1, art. 3. Article 3 "General Definitions" mentions the definition "customs duties" in this Agreement, which are supposed to reduced in light of the negotiation should exclude "anti-dumping or countervailing duty applied consistently with the provisions of Article VI of GATT 1994, the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, as may be amended and the *Agreement on Subsidies and Countervailing Measures* in Annex 1A to the WTO Agreement, as may be amended." *Id.*

160. *Id.* ch. 2, art. 3.

161. *Id.*

162. *Id.*

practicable."[163] The transitional period for transitional safeguards is "the period from entry into force of the Agreement until three years after the customs duty on that good is eliminated or reduced to its final commitment, in accordance with a [p]arty's schedule of tariff commitments."[164] The duration of a transitional safeguard measure that a party may maintain is two years and can be extended for another year.[165] Repeat application of a safeguard measure is also prohibited within the specific years.[166] Strikingly, the Agreement regulates the minimum thresholds, which was settled as "its share of imports of the good concerned in the importing [p]arty does not exceed three per cent of the total imports from the other Parties, provided that those [p]arties with less than three per cent import share collectively account for not more than nine per cent of total imports of the good concerned from the other Parties,"[167] for the application of safeguard measures to imports from ASEAN parties. Expect all above mentioned, like all other FTAs, the Agreement specifically details the procedures and conditions regarding the application of transitional safeguards, including imposition of a safeguard measure, notification, provisional measures, investigation, and compensation.[168] These provisions are fairly similar to other FTAs that Australia signed previously regarding transitional safeguards.

C. Trade Remedies Under the Future SINO-Australia Free Trade Agreement

Nearly four years have elapsed since Australia and China initiated the FTA negotiation in 2005. Notwithstanding the joint feasibility study and thirteen negotiating rounds which have been concluded, current talks have hit deadlock.[169] The painfully slow progress of the negotiation has demonstrated the great diversity between the two parties in regard to some key issues, such as government procurement, agricultural products and intellectual property rights, which renders it difficult for one party to accommodate the other's requests, and thus reach an agreement. Despite discussions regarding trade remedies in several rounds of the negotiation, so

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163. AANZFTA, *supra* note 116, ch. 7, art. 9(3).

164. *Id.* ch. 7, art. 2(g).

165. *Id.* ch. 7, art. 6.1(b).

166. *See id.* ch. 7, art. 6(6). "No safeguard measure shall be applied again to the import of a particular originating good which has been subject to such a safeguard measure, for a period of time equal to the duration of the previous safeguard measure, or two years, whichever is longer." *Id.*

167. *Id.* ch. 7, art. 6(2).

168. *See id.* ch. 7, arts. 3–5, 7–8.

169. *See also* Yang Jiang, *Australia-China FTA: China's Domestic Politics and the Roots of Different National Approaches to FTAs*, 62 AUSTL. J. INT'L AFF. 179 (2008) (explaining why the Free Trade Agreement negotiation between Australia and China has been extremely difficult).

far there have been no more relevant documents released to indicate whether any final resolution of this particular issue has been reached.

In the proposed Sino-Australia agreement, the approach embedded in the China-New Zealand FTA in respect of trade remedies can be adopted to address the issue of trade remedy measures between China and Australia. Equipped with all well-known types of measures (including anti-dumping measures, countervailing measures, bilateral safeguards, global safeguards, and special safeguards) domestic industries will have a robust system to provide adequate protection that might be undermined due to the FTA, and thereby minimize injuries brought to the national welfare. This China-New Zealand approach can be employed not only because economies of New Zealand and Australia share some similarities, but more because Sino-Australia relations, especially economic relations, are fairly similar to Sino-New Zealand relations. Amongst China's trading partners, New Zealand and Australia are the only two developed countries that have acknowledged China's full market economy status. Moreover, compared with other frequent users of trade remedies against Chinese exports (notably the United States and the EU), these countries' attitude is not over-vigilant. This comparatively relaxed attitude has been fully illustrated by the fact that relatively few investigations have been initiated in regard to Chinese exports in both countries. Despite this, however, it should also be noted that Australia's economic size is much larger than New Zealand's and its major domestic industries are often highly developed. As a result, once a Sino-Australia FTA is concluded, it is more likely that the FTA will have a greater impact on Australian domestic industries than it has on New Zealand's. This further highlights the significance of the enactment of a better balanced system in the Sino-Australia FTA for trade remedies. Suggestions on how such a system can be developed for the future ACFTA will be canvassed in the following section of this paper.

Firstly, it is apparently not possible for both parties to follow the approach adopted by ANZCERTA, *i.e.*, employing domestic competition laws to substitute anti-dumping and countervailing provisions in the FTA, to address the issue of anti-dumping and countervailing. Due to China's increasing capacity in manufacturing and export and thereby the pressure brought to bear by Australian domestic industries, anti-dumping measures will continue to be one of the most powerful weapons against Chinese exports. Meanwhile, another concern should also generate anxiety as to whether Australian domestic industries will initiate more anti-subsidy investigations in regard to Chinese products after Australia's official acknowledgement of China's full market economy status. A further concern is Australian domestic industries' latest tendency, following the practices of the United States and Canada, to subject one single Chinese

product to both anti-dumping and anti-subsidy investigations.[170] Article VI (5) of the GATT 1947 reads: "no product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization."[171] However, the GATT/WTO framework does not provide a detailed interpretation concerning this provision as to whether both anti-dumping and anti-subsidy investigations can be initiated simultaneously against one single product, which leaves diverse understandings amongst WTO members in practice. Due to a lack of consensus on this issue, it is always easy to garner severe criticisms from others when one member's domestic industries attempt to initiate such investigations. Consequently, as this latest development in Australia was heavily criticized by the Chinese government,[172] it also raises the question for the FTA as to whether and how a joint committee should be set up to resolve disputes arising out of trade remedies. In addition to this, the proposed FTA should prohibit any form of export subsidy on any goods from one party destined for the other party.

Secondly, special safeguards should be incorporated into the FTA regarding sensitive sectors for both parties. Each country may identify some industrial sectors as sensitive. This will leave the two governments engaging in the negotiation sufficient leeway when facing domestic protectionists, which will also facilitate the later rounds of the negotiation. For example, to put some agricultural products and certain textile products on the list of sensitive sectors will not only relieve the pressure from domestic industries of both parties respectively, it will also, to some degree, work to heal the divisions that held back the progress of the negotiation.

Thirdly, both parties should agree to adopt bilateral safeguards during the transition period. The transition period can be extended for certain sensitive industries and products. This will give both parties' domestic industries sufficient opportunities to adjust their industrial structures, and it will also reduce the potential risk that certain exports will challenge to domestic industries in their infant stage of development.

Finally, global safeguards should be subject to the WTO Agreement on Safeguards. However, certain preferential arrangements may be granted; for example, excluding the other party from the proposed safeguard

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170. Recently, the United States has been quite anxious to subject one single Chinese product to both anti-dumping and anti-subsidy investigations. Zhang Ning, *China: US Abusing Anti-Dumping Rules*, CCTV NEWS, July 1, 2009, http://www.cctv.com/program/cctvnews/20090701/101765.shtml. For example, between the end of June 2009 and early July 2009, within only ten days, the United States has initiated three investigations against Chinese products. *Id.* *See supra* notes 46 & 47 (providing the Australian practices).

171. *See* GATT, *supra* note 10, art. VI(5).

172. Xinhua News Agency, *supra* note 48.

measure, if suspected products originating in the territory of the other party do not cause serious injuries to domestic industries.

IV. CONCLUSION

Trade remedy measures, as a safety valve for free trade, have played an increasingly important role in FTAs. An efficient and effective system of trade remedy measures can assist domestic industries as a powerful weapon in fighting the sharp pain that FTAs temporarily bring, and thereby protect the importing market to a certain degree. Moreover, a sound system can also become an escape valve when the government faces with the impairment of national welfare that protectionists claim. Therefore, the enactment of trade remedy measures in FTAs may relieve political pressures that are imposed on negotiating parties to some degree during negotiations and thus facilitate agreements. In this regard, the successful regulation and implementation of trade remedy measures in the forthcoming ACFTA is paramount. This will not only bring more fruitful outcomes to the ongoing negotiation, a better agreement of the ACFTA, as well as a successful free trade area; it will also have a far-reaching impact on the future trade relationship between Australia and China.