U.S.–CHINA TRADE: TEXTILES

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Despite the elimination of textile quotas on January 1, 2005, the problem of quotas remains the most prevalent topic of conversation among people in the textile and apparel business today. The reason, of course, is China.

Back in 1997, when China was not yet in the World Trade Organization (WTO), and its bilateral textile agreement with the United States was up for renewal, the U.S. textile industry pressed hard for assurances that China would have to go through a full ten-year phase-out of quotas, just as other WTO members were. As a practical matter, that was never an option. The Agreement on Textiles and Clothing (ATC) and its overseeing board, the Textiles Monitoring Body (TMB), would terminate on January 1, 2005, and there was no way to continue that agreement and bureaucracy just for China.[1]

In fact, the United States never even suggested that idea to China. Instead, the United States asked China to accept continuation of the so-called "consultation mechanism" under the bilateral agreement for four years after the ATC ended.[2] Ultimately, China acquiesced, but only after adding language that it believed ensured that the provision would be a "use-it-once-and-lose- it" proposition. Not surprisingly, the U.S. textile industry was not too thrilled with this provision. According to some, the chief textile negotiator at the time actually took her time even revealing it to the industry.

The provision was hardly a model of drafting clarity, and clearly all of its ramifications were not fully considered. In 2000 and 2001, as it came time to incorporate this provision into the terms of China's WTO accession, it was apparent that the United States, and perhaps others, realized that they had made a mistake. The provision, as drafted, did not start until January 1, 2005, but some products became quota-free before that date, because there was a staged liberalization process that began in earnest in 1998, with additional products

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[1] *See Textiles Monitoring Body (TMB). The Agreement on Textiles and Clothing*, http://www.wto.org/english/tratop_e/texti_e/texintro_e.htm (last visited Sept. 27, 2005).

[2] *Id.*

liberalized in 2002, and finally all in 2005.[3] As originally drafted, no importing country would have had the right to invoke the safeguard provision until all quotas were eliminated. Presumably, in 1997, the U.S. negotiator did not anticipate China being a WTO member before 2005, but by 2000, that was no longer the case. The United States, which negotiated the multilateralization of the provision with China, revised it to take effect upon China's accession. The sole purpose of that revision was to capture goods liberalized before 2005, not to allow measures to be considered even before goods were liberalized.

That safeguard provision is now the topic of conversation in the United States, Europe, Greater China, and no doubt, around the world. The Bush administration initially demonstrated restraint, resisting early initiatives by the U.S. industry to invoke the safeguard and taking time to actually draft a process by which the industry could present requests in writing, and by which the public, including importers, could provide input before any action was taken. Times have changed, however, and it is the nature of the U.S. textile program to resist change.

First, the Committee for the Implementation of Textile Agreements (CITA) failed to understand that by establishing a process for considering safeguards against Chinese products, it had no basis to disregard the basic rules of administrative procedure. Second, in its haste to use textiles once again for political purposes, CITA forgot that it now had rules, its own rules, by which it had to abide before it could act. And that, of course, brings us to why the importers sued CITA to stop it from violating its own rules and harming their businesses.[4]

At issue in that lawsuit is whether CITA could begin considering safeguard measures against products before quotas were even lifted.[5] Interestingly, it is both a legal issue of domestic law and a legal issue of international law.

Domestically, the U.S. rules do not allow or authorize or give notice of actions based upon a threat of market disruption, a threat that imports will increase after quotas are lifted. Internationally, we may yet face the question of whether the actual safeguard provision permits preemptive actions based on threat. And even if it did, there is a legal issue, in terms of international law, as to whether there can be a threat before there is any data demonstrating that

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[3] Press Brief, World Trade Organization, Textiles, http://www.wto.org/english/thewto_e/minist_e/min96_e/textiles.htm (last visited Sept. 27, 2005).

[4] U.S. Ass'n of Imps. of Textiles & Apparel v. United States, 250 F. Supp. 2d 1342 (Ct. Int'l Trade Dec. 30, 2004), *rev'd*, 413 F.3d 1344 (Fed Cir. June 28, 2005).

[5] *Id.*

imports are increasing. This was certainly the fact pattern last year. Obviously, the international law issues will have to be addressed by China. U.S. importers can only act to address violations of U.S. domestic law.

It remains to be seen whether the Chinese will challenge any U.S., or perhaps, European actions under the safeguard. Both governments seem to be giving the Chinese plenty of reasons to bring a challenge before the WTO.

For example, the U.S. actions taken have asserted that assembly operations in the Caribbean Basin and Mexico are effectively part of the disrupted U.S. industry. That is an expansion of "domestic market" and "industry" that goes beyond any precedent in WTO law. Also, the EU has suggested that an action might be justified to ensure the market share of vulnerable developing country exporters. Clearly, that is a novel justification and whether the safeguard provision permits it or can be interpreted to encompass that would be an issue for WTO dispute settlement.

One also would have thought that the Chinese would have a good case against the U.S. imposition of a double quota on cotton socks, which is what happened last October, when a safeguard was imposed on socks already restricted under the ATC. But so far, the Chinese have been quite restrained. All indications are that they want to work this out without resort to dispute settlement.

Perhaps it is in part that they do not want to stir up the political quagmire that bringing and perhaps even winning a WTO case against the United States might cause. That arguably could create a crisis for the WTO at least with the U.S. Congress. They also want to work with, not against, fellow developing countries.

Thus, instead of WTO cases, we have seen export taxes to encourage higher-value goods, and an export licensing scheme to get a better handle on likely exports. Nevertheless, the situation in the United States gets more vitriolic by the day, at least in Washington. With a significant trade agenda, the Bush administration has given the U.S. industry hope that they can leverage their demand for continued protection against votes for CAFTA.[6] Coming at the same time as a host of other China issues, currency, for example, it is clearly a highly combustible situation. Do not be surprised if Chinese restraint disappears along with U.S. cotton sales to China.

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[6] Editors Note: In August 2005, after the date of these remarks, the Dominican Republic-Central America-United States Free Trade Agreement was implemented by the United States. Pub. L. No. 109-53, 119 Stat. 461 (codified as amended at 19 U.S.C. §§ 2001-4111 (2005)).