

TEXTILE TRADE WITH CHINA—THE CHALLENGE OF TEXTILE SAFEGUARDS

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I. INTRODUCTION

In 1992 when the Uruguay Round concluded and the world agreed to phase-out textile quotas, the U.S. textile industry, which had not been in favor of the phase-out, could at least find solace in the fact that it had obtained a ten-year phase-out period. Further, because China was not a member of the World Trade Organization (WTO) and could not participate in the quota phase-out, the U.S. textile industry had reason to hope it would not have to face the world's most competitive textile producing country without quota protection.

Eight years later, China joined the WTO and positioned itself to participate in the anticipated increase in textile markets when quotas were phased out. I remember talking to a professional staffer at the American Textile Manufacturer's Institute when the WTO accession agreement with China was being finalized. Having failed in their effort to obtain a ten-year phase-out of textile quotas for China, the staffer expressed some relief that the agreement had a textile safeguard that would be much more beneficial to the industry than traditional safeguard mechanisms. The specific safeguard (the Textile Safeguard) was contained in section 11.242 of the Report of the Working Party on the Accession of China to the WTO.¹

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¹ 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) [hereinafter *Working Party Report*]. The provisions of paragraph 242 are as follows:

The representative of China agreed that the following provisions would apply to trade in textiles and clothing products until 31 December 2008 and be part of the terms and conditions for China's accession:

(a) In the event that a WTO Member believed that imports of Chinese origin of textiles and apparel products covered by the [Agreement on Textiles and

Five years after accession, we have discovered that the Textile Safeguard in the China agreement is more flexible and easier to impose than most existing safeguard mechanisms. However, the Textile Safeguard has been plagued by a rather incomplete regulatory structure, lawsuits, and threats of retaliation.

Another China-specific safeguard, namely, that safeguard contained in section 421(b) of the Trade Act of 1974,² has provided U.S. industries with virtually no effective import relief. Conversely, the Textile Safeguard has

Clothing] as of the date the WTO Agreement entered into force, were, due to market disruption, threatening to impede the orderly development of trade in these products, such Member could request consultations with China with a view to easing or avoiding such market disruption. The Member requesting consultations would provide China, at the time of the request, with a detailed factual statement of reasons and justifications for its request for consultations with current data which, in the view of the requesting Member, showed: (1) the existence or threat of market disruption; and (2) the role of products of Chinese origin in that disruption;

(b) Consultations would be held within 30 days of receipt of the request. Every effort would be made to reach agreement on a mutually satisfactory solution within 90 days of the receipt of such request, unless extended by mutual agreement;

(c) Upon receipt of the request for consultations, China agreed to hold its shipments to the requesting Member of textile or textile products in the category or categories subject to these consultations to a level no greater than 7.5 percent (6 per cent for wool product categories) above the amount entered during the first 12 months of the most recent 14 months preceding the month in which the request for consultations was made;

(d) If no mutually satisfactory solution were reached during the 90-day consultation period, consultations would continue and the Member requesting consultations could continue the limits under subparagraph (c) for textiles or textile products in the category or categories subject to these consultations;

(e) The term of any restraint limit established under subparagraph (d) would be effective for the period beginning on the date of the request for consultations and ending on 31 December of the year in which consultations were requested, or where three or fewer months remained in the year at the time of the request for consultations, for the period ending 12 months after the request for consultations;

(f) No action taken under this provision would remain in effect beyond one year, without reapplication, unless otherwise agreed between the Member concerned and China; and

(g) Measures could not be applied to the same product at the same time under this provision and the provisions of Section 16 of the Draft Protocol.

The Working Party took note of these commitments.

² 19 U.S.C.A. § 2451(b) (2004) [hereinafter Trade Act].

been invoked four times since China quotas began to be lifted and has provided a measure of relief for the U.S. textile industry.

In the fall of 2004, nine petitions were filed with the Committee for the Implementation of Textile Agreements (CITA) seeking relief under the Textile Safeguard once quotas were lifted in January 2005.³ The petitions alleged that imports from China threatened market disruption and threatened the orderly development of trade. The petitioners sought import relief from a surge of imports that was certain to occur once the textile quotas were lifted. CITA accepted all of those petitions for investigation. The petitions created an immediate controversy as importing interests argued that the Textile Safeguard provided no authority for import remedies based on a “threat” of market disruption. The investigations ground to a halt when the U.S. Court of International Trade granted a preliminary injunction preventing CITA from even investigating whether there was a threat of market disruption.⁴

II. DISCUSSION OF THE APPLICABLE LEGAL STANDARD

The petitioners in the nine cases argued that there was no question that the Textile Safeguards authorized a threat-based claim. The language of the Textile Safeguard authorized consideration of threat claims. CITA itself had made clear several months earlier when it took its first positive action under the safeguard authority that a threat-based finding was appropriate. While the guidelines issued by CITA to implement the Textile Safeguard do not explicitly establish a standard to evaluate a “threat” of market disruption,⁵ ample precedent in U.S. trade law exists for CITA to be able to evaluate such a claim.

³ See UNITED STATES DEPARTMENT OF COMMERCE, INTERNATIONAL TRADE ADMINISTRATION, OFFICE OF TEXTILES AND APPAREL, REQUESTS FOR CHINA TEXTILE SAFEGUARD ACTION FILED WITH THE COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS (CITA) SINCE OCTOBER 8, 2004, <http://otexa.ita.doc.gov/chinare1dec1.pdf>.

⁴ U.S. Ass’n of Imps. of Textiles & Apparel v. United States, 350 F. Supp. 2d 1342 (Ct. Int’l Trade Dec. 30, 2004), *rev’d*, 413 F.3d 1344 (Fed. Cir. June 28, 2005).

⁵ See Committee for the Implementation of Textile Agreements Procedures for Considering Requests from the Public for Textile and Apparel Safeguard Actions on Imports from China, 68 Fed. Reg. 27787 (May 21, 2003) [hereinafter Safeguard Procedures]. The procedures were clarified by notice issued August 18, 2003. Committee for the Implementation of Textile Agreements, Solicitation of Public Comments on Request for Textile and Apparel Safeguard Action on Imports from China, 68 Fed. Reg. 49440 (Aug. 18, 2003).

III. LANGUAGE OF THE TEXTILE SAFEGUARD

Sub-paragraph (a) of the Textile Safeguard provides:

In the event that a WTO Member believed that imports of Chinese origin of textiles and apparel products . . . were, due to market disruption, *threatening* to impede the orderly development of trade in these products, such Member could request consultations with China with a view to easing or *avoiding* such market disruption. The Member requesting consultations would provide China, at the time of the request, with a detailed factual statement of reasons and justifications for its request for consultations with current data which, in the view of the requesting Member, showed: (1) the existence *or threat* of market disruption; and (2) the role of products of Chinese origin in that disruption.⁶

The Textile Safeguard twice references a threat standard and also authorizes a member to request consultations to avoid market disruption. In its discussion of evidence to be presented to China in a Textile Safeguard consultation, section 11.242 of the Report of the Working Party states that the evidence provided to China should show the “existence or threat of market disruption,” indicating again that the “threat” of market disruption was a proper consideration for member countries.⁷

The Textile Safeguard further provides that a country can act to *ease or avoid* the market disruption believed by the country to exist. A country avoids market disruption (or disruption to the orderly development of trade) by taking action before such disruption is found to exist. One cannot avoid that which has already happened.

The language in section 11.242 differs from other, better-known trade remedies for several very specific reasons. The negotiators knew that trade in textiles and apparel was generally subject to import quotas that would tend to limit import growth in the time period immediately preceding the lifting of such quotas. Therefore, previous standards of injury that were largely dependent upon a finding that imports had already increased dramatically

⁶ *Working Party Report*, *supra* note 1, ¶ 242 § (a) (emphasis added).

⁷ *Id.*

would not adequately address the sudden lifting of restrictive import textile and apparel quotas.⁸

The drafters knew that the textile and apparel industries in most developed countries were already experiencing financial difficulties when the China Accession Agreement was finalized. They knew at that time that these industries could not withstand a dramatic surge in textile and apparel imports from China. They clearly believed it was important to ensure that these industries were provided the opportunity to adjust to this new, increased competition.

A. Determination by CITA

CITA itself had previously determined that the Textile Safeguard supported requests for consultations based upon a threat of market disruption and a threat to the orderly development of trade. In its December 2003 announcement that it was requesting consultations with China concerning imports of Chinese-origin knit fabric, CITA stated that a finding of a threat of market disruption supported a request for consultations with China:

The United States believes that imports of Chinese origin knit fabric are, due to market disruption, threatening to impede the orderly development of trade in knit fabric, and that imports of knit fabric from China play a significant role in the existence of market disruption. Further, the United States believes that imports of Chinese origin knit fabric are, due to the threat of market disruption, threatening to impede the orderly development of trade in knit fabric, and that imports of knit fabric from China play a significant role in the threat of market disruption. Either finding supports a request for consultations with the Government of the People's Republic of China under Paragraph 242 of the

⁸ Even existing trade remedy statutes, however, such as the Product-Specific Safeguard are directed to situations where a product is being imported in increased quantities or under such conditions as to threaten market disruption—clearly indicating that even under the Product-Specific Safeguard, the drafters intended to cover situations where the quantity of imports presently entering the member country might not be the only relevant consideration. The textile petitioners argued that there may be other “conditions” that also threaten market disruption where current import levels are dampened by the existence of quotas.

Report of the Working Party on the Accession of China to the World Trade Organization.⁹

In addition, the notice for comments issued by CITA with respect to the nine threat-based petitions indicated that CITA conclusively determined that section 11.242 of the Working Party Report enables member countries to request consultations based upon the threat of market disruption evidenced by an anticipated increase in imports:

In light of the considerations set forth in the Procedures, the Committee has determined that the Requestors have provided the information necessary for the Committee to consider the request. The Committee is soliciting public comments on the request, in particular with regard to whether there is a threat of disruption to the U.S. market for knit fabric and, if so, the role of Chinese-origin knit fabric in that disruption.¹⁰

CITA's actions under the Textile Safeguard made it clear that it believed it had authority to accept threat-based petitions. What was not at all clear was what standard it would use to evaluate these types of petitions.

B. Standard of Evaluation

The petitioners in the nine cases made two points. First, there was sufficient precedent in analogous U.S. trade law to provide guidance to CITA in evaluating whether there was sufficient evidence indicating a threat of market disruption. The petitioners also argued that the Textile Safeguard was different and established a lower threshold than did other U.S. import remedies.

Decisions by other U.S. agencies in cases involving a threat of market disruption provided an appropriate starting point for CITA's analysis. In anti-

⁹ Committee for the Implementation of Textile Agreements, Announcement of Request for Bilateral Textile Consultations with the Government of the People's Republic of China and the Establishment of an Import Limit for Knit Fabric, Category 222, Produced or Manufactured in the People's Republic of China, 68 Fed. Reg. 74944, 74945 (Dec. 29, 2003).

¹⁰ Committee for the Implementation of Textile Agreements, Solicitation of Public Comments on Request for Textile and Apparel Safeguard Action on Imports from China, 69 Fed. Reg. 75516 (Dec. 17, 2004).

dumping cases involving a threat of material injury,¹¹ the U.S. International Trade Commission has stated that, the Commission is to determine:

[W]hether the U.S. industry is threatened with material injury by reason of the subject imports by analyzing whether “further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued or a suspension agreement is accepted.” The Commission may not make such a determination “on the basis of mere conjecture or supposition,” and considers the threat factors “as a whole” in making its determination whether dumped or subsidized imports are imminent and whether material injury by reason of subject imports would occur unless an order is issued. In making our determination, we consider all statutory threat factors that are relevant to these investigations.¹²

The statutory threat factors often considered relevant in these types of investigations are also listed in section 771 of the Tariff Act of 1930.¹³

¹¹ Generally, the U.S. International Trade Commission considers that the concept of “market disruption” includes some finding of material injury, which is a lower standard than the requirement that one prove “serious injury.”

¹² Polyvinyl Alcohol From Germany and Japan, USITC Inv. Nos. 731-TA-1015-1016, 30 (U.S. International Trade Commission, June 2003) (determination), http://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/2002/polyvinyl_alcohol/final/PDF/pub3604.pdf [hereinafter Polyvinyl].

¹³ Tariff Act of 1930, 19 U.S.C.A. § 1677(7)(F) (1996) [hereinafter Tariff Act]. The statute reads:

(F) Threat of material injury.

(i) In general. In determining whether an industry in the United States is threatened with material injury by reason of imports (or sales for importation) of the subject merchandise, the Commission shall consider, among other relevant economic factors—

(I) if a countervailable subsidy is involved, such information as may be presented to it by the administering authority as to the nature of the subsidy (particularly as to whether the countervailable subsidy is a subsidy described in Article 3 or 6.1 of the Subsidies Agreement), and whether imports of the subject merchandise are likely to increase,

(II) any existing unused production capacity or imminent, substantial increase in production capacity in the exporting country indicating the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports,

CITA took note of these precedents in constructing a series of questions directed to commentators in its notice of investigation in the nine cases.

The general statement contained both in section 771 of the Tariff Act of 1930 and the decision of the International Trade Commission¹⁴ are also helpful to CITA and could be adapted to assist in evaluations under section 11.242 of the Working Party Report.

Evidence relied upon by CITA and presented to China in these cases should be more than "mere conjecture or supposition."¹⁵ CITA should evaluate

(III) a significant rate of increase of the volume or market penetration of imports of the subject merchandise indicating the likelihood of substantially increased imports,

(IV) whether imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices, and are likely to increase demand for further imports,

(V) inventories of the subject merchandise,

(VI) the potential for product-shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products,

(VII) in any investigation under this subtitle which involves imports of both a raw agricultural product (within the meaning of paragraph (4)(E)(iv)) and any product processed from such raw agricultural product, the likelihood that there will be increased imports, by reason of product shifting, if there is an affirmative determination by the Commission under section 1671d(b)(1) or 1673d(b)(1) of this title with respect to either the raw agricultural product or the processed agricultural product (but not both),

(VIII) the actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and

(IX) any other demonstrable adverse trends that indicate the probability that there is likely to be material injury by reason of imports (or sale for importation) of the subject merchandise (whether or not it is actually being imported at the time).

(ii) Basis for determination. The Commission shall consider the factors set forth in clause (i) as a whole in making a determination of whether further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued or a suspension agreement is accepted under this subtitle. The presence or absence of any factor which the Commission is required to consider under clause (i) shall not necessarily give decisive guidance with respect to the determination. Such a determination may not be made on the basis of mere conjecture or supposition.

Id.

¹⁴ Polyvinyl, *supra* note 12.

¹⁵ *Id.*

whether the evidence as a whole would ordinarily lead it to believe that increased imports of the subject products from China are imminent and whether the U.S. industry (or the orderly development of trade) is threatened with market disruption unless a safeguard limitation is imposed.¹⁶

C. Broad Discretion

The petitioners, however, argued that while these statutory guidelines were helpful, they were not necessarily dispositive of a threat determination under the Textile Safeguard. The petitioners argued that section 11.242 of the Working Party Report granted even broader discretion to the administering member country.

Much of the applicable U.S. law and precedent concerning a “threat” of market disruption or other injury from imports has evolved in conjunction with U.S. law or WTO provisions that required positive determinations by the administering member that either a “threat” was present or that market disruption had occurred.

The standard set out in the Working Party Report is notable in that it is quite different from other legal standards applicable to the institution of safeguards, either within the World Trade Organization or under U.S. law. The Textile Safeguard requires only a *belief* on the part of a WTO member that imports from China are, due to market disruption, threatening to impede the orderly development of trade in order for that member to request consultations with China, while other import remedies, on their face, require more positive *determinations*. This “belief” standard suggests that a member would have even more leeway in evaluating evidence it believed to constitute a threat to its market or the orderly development of trade than would be the case under more traditional safeguard language.

The Textile Safeguard provides even more evidence of discretion on the part of the administering member. It goes on to provide that if the member determines to initiate consultations based on a belief, the member must provide China a detailed factual statement justifying its consultation request and should supply current data which “in the view of the requesting Member” shows the

¹⁶ See Tariff Act, *supra* note 13, at (ii) (providing, in relevant part, “The Commission shall consider the factors set forth in clause (i) as a whole in making a determination of whether further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued or a suspension agreement is accepted under this subtitle”). *Id.*

existence or threat of market disruption and the role of products of Chinese origin in that disruption.¹⁷ This very subjective language strongly suggests that a decision by a WTO member to impose safeguards in accordance with section 11.242 should be given broad deference, as it is based on that member's belief concerning the impact of imports and based on facts evaluated from the point of view of "the requesting Member."¹⁸

This broad grant of discretion can be contrasted with other import remedies, such as countervailing duties, anti-dumping duties or even the China Product-Specific Safeguard.¹⁹ Under U.S. countervailing duty law, the administering authority must *determine* that there is a countervailable subsidy, that the product is imported, sold, or likely to be sold for importation into the U.S., and that there is a threat of material injury.²⁰

The China Product-Specific Safeguard, another China-specific safeguard, was also a part of the accession agreement and was enacted by the United States as section 421 of the Trade Act of 1974. Under section 421(a), the application of a safeguard limitation is conditioned on the President making *a determination* that a product of China is being "imported into the United States in such increased quantities *or* under such conditions as to cause or threaten to cause market disruption."²¹ Likewise, in section 421(b), the International Trade Commission is tasked with a similar analysis, namely:

the United States International Trade Commission . . . shall promptly make an investigation *to determine* whether products of the People's Republic of China are being imported into the United States in such increased quantities *or* under such condi-

¹⁷ *Working Party Report*, *supra* note 1, ¶ 242(a).

¹⁸ *Id.*

¹⁹ This reference is to the import safeguard procedure established in paragraph 16 of the Protocol of Accession of the People's Republic of China. Those procedures were enacted as section 421 of the Trade Act of 1974. Trade Act, *supra* note 2, § 2451.

²⁰ 19 U.S.C. § 1671(a) (providing, in relevant part:

If the administering authority determines that a countervailable subsidy is being provided with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States, and . . . the Commission determines that . . . an industry in the United States . . . is threatened with material injury . . . then there shall be imposed upon such merchandise a countervailing duty).

A similar provision applies to anti-dumping actions. See Tariff Act, *supra* note 13.

²¹ Trade Act, *supra* note 2, § 2451(a) (emphasis added).

tions as to cause or threaten to cause market disruption to the domestic producers of like or directly competitive products.²²

The positive determinations required in traditional safeguard actions and in other trade remedy provisions are the subject of significant case law and WTO Agreements designed to ensure that members do not inappropriately apply these import remedies.²³ Conversely, section 11.242 of the Working Party Report's simply requires a *belief* by the importing member and relies on that member's view of the supporting evidence. Section 11.242 is not tied to existing WTO requirements concerning safeguards, countervailing duties, or anti-dumping duties,²⁴ nor does there appear to be any other U.S. trade remedy statute that contains a similar, broad grant of discretion to the administering authority.

It seems clear that the language of section 11.242 provides the administering member very broad, almost unprecedented, discretion in evaluating whether to request consultations with China under its provisions. I would hope the breadth of this language would be acknowledged by U.S. courts once a final decision is rendered in the lawsuit in the Court of International Trade, and I would expect any WTO dispute settlement panel would also be constrained by the subjective nature of the provision.

²² *Id.* § 2451(b) (emphasis added).

²³ These WTO Agreements include the Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994), and the Agreement on Safeguards, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1, Legal Instrument—Results of the Uruguay Round, 33 I.L.M. 1125 (1994).

²⁴ Section thirteen of the Report of the Working Party provides a set of detailed procedures that must be followed by a member when applying the Product-Specific Safeguard procedures to imports from China. *Working Party Report*, *supra* note 1. Those procedures, however, clearly apply only to the Product-Specific Safeguard and do not apply to the Textile Safeguard authorized in section 11.242. This is demonstrated by the specific references to paragraph 16 of the Protocol of Accession contained in section 13 of the Report of the Working Party, as well as the provision in section 11.242 stating that a country cannot impose concurrent safeguards under section 11.242 and under the Product-Specific Safeguard.

IV. CONCLUSION

That CITA acted in the fall of 2004 to investigate allegations of threat of market disruption should not have come as a surprise to anyone familiar with import remedies, or to anyone familiar with CITA's previous decisions. It did apparently come as a surprise to U.S. importers who filed suit in the U.S. Court of International Trade alleging that the action by CITA was without authority. The importers asked for and received a preliminary injunction barring CITA from even investigating the petitions. That preliminary injunction has survived requests from the government for stays.²⁵ The delay gained by the legal action allowed 2005 to begin without the threat of the immediate imposition of safeguard import limits on China imports. The result was, as predicted by petitioners in the safeguard petitions, a dramatic surge in imports from China.

The Report of the Working Party, and its provision for special safeguards, signaled to those interested in trade deals, that countries could use specially crafted trade remedies, beyond the traditional remedies subject to WTO oversight, to assist agreement on trade deals and to enable participating countries to accept controversial agreements. The difficulty the United States is having carrying out some aspects of the Textile Safeguard undermines the credibility of U.S. negotiators in future trade deals.

The vote on the Central American Free Trade Agreement will apparently be far closer than it was ever expected to be.²⁶ If the U.S. is to continue to be a leader in trade negotiations, it may have to find ways to reassure affected U.S. industries that it can, in fact, effectively implement the trade deals it claims to have made.

²⁵ In June 2005, the Circuit Court of Appeals overturned the preliminary injunction that was granted by the Court of International Trade. *U.S. Ass'n of Imps. of Textiles & Apparel v. United States*, 413 F.3d 1344 (Fed. Cir. June 28, 2005).

²⁶ 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. 462 (codified as amended at 19 U.S.C. §§ 4001-4111 (2005)).