U.S. Trade Remedies, The Byrd Amendment And Imported Merchandise From China

By Rick Van Arnam

Do you view Chinese manufactured goods as the biggest competition for your company or for your clients, either now or in the future? Or do you view the emergence of China as a viable source of low cost merchandise as providing sourcing alternatives for companies willing to work through China's infrastructure, currency, political and cultural issues? If you raised your hand to either question you should not be surprised, as China has emerged as a manufacturing power, fueled in large part by its huge and cheap labor pool.

Whether China is viewed as a threat or an option, understanding the different trade remedies that could be imposed against Chinese imported merchandise will help U.S. producers of like merchandise or importers looking to procure Chinese origin merchandise understand the risks and rewards of such trade. Some of these remedies are not unique to China and could be used to counteract predatory trade practices from other countries. Such remedies include the U.S. antidumping law and the Section 201 safeguards. Other remedies are unique to China, specifically the China safeguards agreed to by China as a condition to its membership in the World Trade Organization ("WTO"). And then there is the Byrd Amendment, which codified the rights of certain interested domestic parties to shares in the antidumping duties collected by the U.S., including dumping duties assessed against Chinese imports.

The China Safeguard Measures

After decades of negotiations and domestic trade reform, China acceded to the WTO in 2001. As part of the terms of full WTO membership, China agreed to two specific transitional measures to afford WTO member nations ample time to adjust to the changes brought on by the complete integration of the Chinese market into the world trading regime. These transitional measures, known as safeguard mechanisms, are trade remedies available for use by all WTO members, including the U.S., against the influx of imports from China. One of the safeguards is limited to textile articles, while the other can be used as a remedy against any type of importation, including textile articles.

The principal interim measure is the transitional product specific safeguard mechanism, which will be operative for 12 years from the effective date of China's WTO Accession Agreement. Under this mechanism the U.S. or other WTO member country may impose a "safeguard measure" against a specific Chinese product if it determines that imports of that product cause or threaten market disruption to the domestic industry of like or competitive product. These safeguard measures can be applied as necessary to remedy or prevent market disruption, and can take the form of higher duty rates, quantitative restrictions such as quotas, or other measures that the U.S. believes will limit the negative impact of increased imports from China of a specific product.

The U.S. cannot unilaterally apply these measures to correct a perceived imbalance. Rather, it must first request consultations with China to discuss the market disruption and to work towards an agreement where China prevents or remedies the condition. If these consultations do not lead to an agreement, then the U.S. is authorized to withdraw concessions or to impose other limits on the specific imports in an effort to remedy the market disruption. The U.S. must provide public notice to interested parties of its intended action to permit those parties to comment on whether the measure is in the public interest. The decision on whether market disruption exists rests in the United States International Trade Commission ("ITC"), with the President making the final decision on whether to impose a remedy.

Textile and apparel products can be subject to a second safeguard mechanism. Under this special mechanism the U.S. may impose *quota* limits upon certain textile or apparel products believed to cause, or which are likely to cause, market disruption in the U.S. If the matter cannot be resolved by consultation between China and the U.S., then the U.S. may impose a quota for a period of up to but not exceeding one year. The special mechanism will remain in effect until December 31, 2008. A further consequence of this rule is that textile goods are subject to the special textile safeguard mechanism and the general product specific safeguard mechanism; however, the U.S. cannot apply both safeguard mechanisms at the same time. The Committee for the Implementation of Textile Agreements ("CITA") has jurisdiction over actions seeking the implementation of a textile safeguard.

Both these safeguards are specific to Chinese origin merchandise, and apply a market disruption test. This is a lesser standard than the "serious injury" or "material injury" tests used in a Section 201 safeguard or an antidumping duty action, respectively. As such, these China specific safeguards offer the U.S. industry a potent option to those other more traditional remedies. And those who read the petitions filed on behalf of the U.S. brassiere, knit fabric and dressing gown industries can attest to the fact that the domestic industry need only make very general claims of injury in order to trigger action by CITA. In those cases, allegations of injury resulted in CITA instituting safeguard actions and finding a need for import quotas. With the textile and apparel quota system ending on December 31, 2004, the number of China textile safeguard actions should rise dramatically.

Section 201 Safeguard

Named after a section of the U.S. international trade law, this remedy is used to address products that are being imported into the U.S. at an increasing quantity and that are a substantial cause of serious injury or threat of serious injury to a domestic U.S. industry. The best known example of a Section 201 action is the steel safeguards imposed and recently withdrawn by President Bush.

A Section 201 safeguard differs from antidumping duties in a number of ways. First, it looks at quantity and does not consider whether the merchandise is being dumped or traded at below fair value. Second, the casual link is more difficult to satisfy in a 201 action than in a dumping case, the former requiring that causation between the imports and the injury be substantial. Third, the level of injury necessary to support a claim is serious injury, not material injury as required in a antidumping case. The Section 201 safeguards differ from the China safeguards in that the latter can only be used against Chinese merchandise, while the former can be used against all merchandise, including Chinese.

Section 201 cases are commenced by filing a petition at the ITC on behalf of a specific U.S. industry, or by the President or Congress. The ITC determines whether substantial cause and serious injury exist, and if so, then issues an affirmative determination and proposed remedies. The President has 60 days to accept the determination and impose remedies, reject the determination, or adopt it in a modified manner. The President also has leeway in fashioning the remedy. For example, in the steel cases the President imposed higher tariffs on certain steel products, and tariff rate quotas on others. An absolute quota is another possible remedy.

Antidumping Laws

The traditional avenue of relief against foreign produced goods being sold in the U.S. market at less than fair value is the antidumping duty law. Using this law, U.S. producers or other adversely impacted parties can request that the Department of Commerce ("Commerce") and the ITC commence investigations into the alleged harmful activity. If dumping is found, the U.S. government will impose an antidumping duty, which is an additional customs duty designed to offset the level of dumping present in the market.

Commerce and the ITC make separate determinations, both of which are required to be affirmative in order to obtain relief. ITC determines whether there is material injury to the U.S. industry. Commerce evaluates whether the goods are being sold in the United States at less than fair value. A final affirmative determination by both Commerce and the ITC yields relief for the petitioner(s) in the form of antidumping duties, the effect of which is to increase the landed cost of the imported merchandise.

This effect is generally well received by U.S. producers because it attempts to level the playing field between imported and domestic goods. But now an affirmative determination in a dumping case signifies another benefit for U.S. entities that participated in the underlying antidumping action – direct payments to those entities of the antidumping duties collected pursuant to the dumping order.

The Byrd Amendment

The Continued Dumping and Subsidy Offset Act of 2000, commonly referred to as the "Byrd Amendment," provides U.S. producers with an incentive to participate in a dumping petition. Specifically, a petitioner or a supporter of the antidumping investigation that remained in business until after an affirmative determination is eligible to receive disbursements from the antidumping duties collected by U.S. Customs. A domestic entity seeking such disbursement must: 1) apply to Customs for the disbursement; 2) certify that it is eligible to receive it; and 3) demonstrate that it incurred a qualifying expenditure after the antidumping duty order was issued for which it is entitled to a disbursement. If a domestic producer is certified as eligible, it will receive disbursements on an annual basis from duties collected in the preceding fiscal year. Customs will calculate disbursements on a pro rata basis, based on the producer's current and future qualifying expenditures.

While the Byrd Amendment has been warmly received by many U.S. producers, it met strong opposition from many of the U.S.' trading partners, who filed a complaint with the WTO, claiming that the Byrd Amendment improperly subsidized domestic U.S. industries. In January, 2003, the WTO appellate panel upheld an earlier panel decision that the Byrd Amendment violated global trade rules. The U.S. has until the end of December, 2003 to repeal or modify the law. Failure to do so will result in retaliation by the petitioners against U.S. exports. That being said, the Byrd Amendment has strong congressional support and will likely remain the law, at least for the near future.

Conclusion

China's development into a global manufacturing powerhouse is still in a nascent stage. Currently embodied in textiles, toys and other low cost articles, this should evolve into high tech, high value goods as China improves its infrastructure, supporting services and access to capital markets. At that time, Chinese exports will hit the U.S. markets like a tidal wave against the shore, triggering the debate of protecting U.S. jobs versus providing consumers lower cost options. Clearly, this debate currently rages in the apparel sector with the elimination of quota looming. U.S. companies facing increased competition from China should consider whether relief can be achieved through the trade laws. Alternatively, companies embracing Chinese trade should be mindful of these laws and their impact on the availability and costs of goods originating in China.

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