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TIRES AND TEXTILES & APPAREL

by Marguerite Trossevin, Jochum Shore & Trossevin

Textile and apparel importers should care about tires. This is not an alert from AAA. Tires are forcing the Obama Administration to stake out its position on trade. In late April, the United Steel Workers union ("USW") filed a petition under section 421 of the Trade Act of 1974 asking for protection from imports of passenger vehicle and light truck tires from China, which it claims are causing a "market disruption" that is injuring the U.S. tire industry. Because of the unique nature of section 421 and the unusual facts of the tires case, a decision by the President to impose import restrictions on Chinese tires may be of greater consequence to importers of textiles and apparel than it ever will be to the U.S. tire industry. If the President sides with the union, new duties and quotas on Chinese textiles and apparel may soon follow; forcing importers to seek new sources of supply.

Marguerite Trossevin

You may be thinking, we already have to contend with risk of antidumping (AD) and countervailing duty (CVD) cases, so what's so special about section 421? Two things: first, U.S. producers or unions can pursue a section 421 action without demonstrating that the imports are "dumped" (*i.e.*, sold at prices below normal value) or subsidized. Second, a 421 investigation is much faster – approximately 5 months as opposed to 12-18 months for an AD/CVD investigation. That in turn means that section 421 cases are less expensive to bring. Those benefits can make section 421 particularly attractive, even though the duration of a section 421 measure is much shorter. Faster, cheaper cases could mean that importers will increasingly have to deal with the supply disruptions caused by trade actions.

So exactly what is section 421? As noted in the legislative history, it is an "extraordinary" measure; a special form of what is commonly referred to as a "safeguard" provision. Safeguards, as the name implies, are designed to afford temporary protection from import competition. Safeguards do not remedy unfair trade, such as "dumped" or subsidized imports. Nor are they an "enforcement" mechanism in the sense that they are not used to address "illegal" activity or a violation of an international agreement. To the contrary, a safeguard measure is more accurately described as a temporary suspension by the importing country of an international obligation. Safeguards are temporary duties or quotas that would otherwise be prohibited under the rule of the World Trade Organization ("WTO"), but may be imposed if there is a surge in import competition that injures a domestic industry. Because safeguard measures can be taken unilaterally against fairly traded goods, they have the potential to generate significant friction with trading partners. Their use is therefore strictly circumscribed under the WTO rules and is limited to cases of "serious injury". Also, safeguards normally must be applied on a nondiscriminatory basis, *i.e.*, to all imports of the subject merchandise regardless of the source – *unless*, the target is imports from China.

As a condition of accession to the WTO, China agreed that, until the end of 2013, WTO members may apply a special safeguard mechanism to imports of its products that cause a "market disruption" in the importing country. The United States codified that special safeguard in section 421, which provides for the imposition of duties or quotas on imports from China if the ITC finds that the Chinese imports are "rapidly increasing" and are a "significant cause" of "material injury" to the domestic industry. 19 U.S.C. § 2451(c).

Unlike AD/CVD orders, however, safeguard measures are not mandatory. If the ITC finds market disruption, it makes a recommendation to the President on what safeguard measures (duties or

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quotas) to impose. The President then has the discretion to modify the ITC's recommendation, or decide that it is not in the national economic interest of the United States to impose any safeguard measures. The precedents set by the ITC and the President in the tires case could determine whether section 421 actions will truly be "extraordinary" or become all too ordinary.

Why is that? First, as the U.S. Court of Appeals has noted, "the industry knows best its own economic interests."[1] While unions have standing to file a petition, the tires case is unusual in that the U.S. tire producers themselves did not make any allegations of market disruption and did not petition for any relief. The sole petitioner was the USW. In fact, after the ITC recommended a 55% duty on Chinese tires two U.S. producers opposed the remedy, with one calling it "irrational".[2] In a proceeding designed to assist an industry injured by a surge in import competition, such facts are very significant. Nevertheless, they did not carry the day. That is undoubtedly a welcomed sign for U.S. *textile* producers who would like to see restrictions on Chinese *apparel* imports. Although the textile producers would not have standing to file the case, the tires decision could encourage a union-supported apparel petition, without the need for any support from U.S. apparel producers.

The USW petition was opposed by a coalition of independent U.S. tire distributors and retailers that import Chinese tires. The Coalition argued that, like much of the retail industry, the market for tires is segmented with little if any competition between high-end premium brands and the low cost "entry level" tires typically purchased by less affluent consumers and those with older vehicles. The Coalition alleged that U.S. tire producers, which have production facilities in China other importing countries, were absent because they have no interest in restricting Chinese imports. They made strategic decisions to shift their U.S. production, where costs are higher, away from "entry level" tires to focus their U.S. production on their more profitable premium brand tires. The gap they left in the low-end of the market was then filled by Chinese imports. The ITC was not persuaded, however. Four of six Commissions found that the absent U.S. producers were in fact being injured and that Chinese imports, which account for less than 17% of the U.S. market, are a "significant cause" of that injury. U.S. textile producers have undoubtedly taken that as an encouraging sign.

The tires case also highlights special challenges section 421 can pose for importers of retail products. Retail markets are often segmented with little or no direct competition between high-end premium branded products (whether it be tires or trousers) and economy line or "private label" products made for less affluent consumers. Back in 2003, in the *Brake Drums & Rotors* case, the ITC recognized that competition between U.S.-produced premium brand product lines and imported economy product lines was so attenuated that there could be no causal nexus between the imports and the performance of U.S. industry.[3] In tires, however, the ITC rejected that argument, leaving unsettled (and without the benefit of judicial review) an issue that is almost certain to arise in future cases involving apparel and other consumer goods.

In end, U.S. policy on the use of section 421 rests with the President. The tires case is politically a charged; the union supported the President Obama and they expect him to support them in return. But, the U.S. producers are not complaining about Chinese imports, and some are in fact complaining about the ITC's recommendation. Moreover, a Rutgers economist issued a report finding that for every one job saved in the production sector of the tire industry, up to 25 jobs could be lost in the retail and distribution sectors of the tire industry. He also estimates that the cost to consumers would be approximately $300,000 per production job. Do those facts warrant extraordinary protection against import competition? How President Obama answers that question will set the section 421 bar either high or low. If he sets it low others will soon try to jump over it and textile and apparel unions may be first in line. ★

[1] *Suramerica de Aleaciones Laminadas* v. *the United States*, 44 F.3d 978 (Fed. Cir. 1994).

[2] See Comments of Cooper Tire & Rubber Company and Toyo Tire Holdings of America at www.regulations.gov, Docket No. USTR-2009-0017.

[3] See *Certain Brake Drums and Rotors from China*, Inv. No. TA-421-3, USITC Pub. 3622 (August 2003).

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