

There has been much debate regarding restrictive measures which countries can take with regard to the surge of Chinese exports following its accession to the WTO. World Footwear asked Canadian international trade lawyers Greg Kanargelidis and Prakash Narayanan (at Blake, Cassels & Graydon, LLP) to provide a brief overview.

Safeguards under WTO

According to the World Trade Organisation (WTO), China overtook Japan to become the third largest exporter in the world in 2005. By 2010, it is expected to become the single largest with 10% of global trade. At the time of its accession to the WTO, many existing WTO members expressed concern over the damage Chinese imports could do to their industries. China therefore agreed to two specific safeguard mechanisms that are available to WTO members until the end of 2013.

A WTO member may use these mechanisms in order to restrict imports of a product temporarily and they are provided for under the WTO General Agreement on Tariffs and Trade (GATT) and under the WTO Agreement on Safeguards. A member may adopt a safeguard measure in the form of tariffs or quotas only if it can clearly demonstrate that its domestic industry is suffering or is threatened by serious injury caused or likely to be caused as a result of an unforeseen surge in imports.

Safeguard measures differ

Safeguard measures are also different from other trade-remedy actions such as anti-dumping and countervailing measures in that they are to be applied to all sources of the imported product, irrespective of origin, although the WTO agreements do specify how quotas can be allocated among supplying countries. Furthermore, exporting countries subjected to safeguard measures can, through consultation, seek compensation from the WTO member imposing them.

The Protocol of Accession between the WTO and China provides WTO members with the right to impose certain China-specific safeguard measures in cases of market disruption and trade diversion. These are in addition to those provided for under GATT and the Agreement on Safeguards.

Definitions

Market Disruption — China-specific market disruption safeguard measures are available where products of Chinese origin are being imported into the territory of a WTO member in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of like or directly-competitive products.

The Protocol of Accession clarifies that market disruption exists whenever imports of such an article are increasing rapidly either absolutely or relatively, and so as to be a 'significant cause' of material injury, or threat of same to the domestic industry. As the use of the words 'significant cause' indicates, the threshold for demonstrating the existence of market disruption caused by imports from China is lower than the serious injury standard under WTO agreements relating to safeguards.

Determining disruption

In determining if market disruption exists, the affected member is required to consider objective factors similar to those required under the Agreement on Safeguards, including the volume of imports, their effect on prices for like or directly-competitive articles and their effect on the relevant domestic industry. Where a WTO member is of the opinion that market disruption has occurred, the two parties may enter into consultations with a view to finding a mutually satisfactory solution which may result in China taking necessary action to prevent or remedy the situation.

If, on the other hand, consultations do not lead to an agreement, the affected member is free to impose safeguard measures to the extent necessary to prevent or remedy the market disruption. In critical cases, the Protocol of Accession also provides for the imposition of provisional safeguard measures pursuant to a preliminary determination of market

disruption that may stay in place for a period of 200 days.

Trade Diversion — the Protocol of Accession also provides for China-specific trade diversion measures that permit a WTO member to impose safeguard measures when a market disruption measure taken by another member causes or threatens to cause 'significant diversions of trade' into the market of the member concerned. In other words, if imports from China are being redirected to a country because of safeguard measures taken by another WTO member, the country being affected by the diversion can also adopt safeguard measures. As with market disruption measures, a WTO member intending to take safeguard measures based on trade diversion must request consultations with China and may impose measures only if these do not produce a satisfactory outcome.

A number of countries have amended their domestic law relating to the imposition of safeguard measures in order to permit their domestic industries to avail themselves of these China-specific safeguard measures. For instance, in 2002, Canada amended some of its legislation in order to specify the procedures involved in market disruption and trade diversion inquiries and, in particular, to ensure that such inquiries are conducted in a quick and effective manner.

Conclusion

As part of China's integration into the world trading system, WTO members have been afforded a limited period of adjustment to China's increasing strength as an exporter. Safeguard measures specifically directed at imports from China are available until 2013. They are available to domestic producers who are being injured by significant volumes of import from China under a quick and less onerous investigative process. Whether domestic producers are able to effectively utilise them, however, remains to be seen. 