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China Safeguard: What Can Latin America Do?

A safeguard can be an effective tool by Latin American countries to protect a domestic industry harmed by a surge in Chinese imports.

BY VICTOR MROCZKA

It is clear that China's imports into Latin America have increased dramatically in recent years. Chinese shipments have increased from $28 billion in 2004 to $71 billion in 2008. Normally, if a domestic industry believed it was being injured by imports from China, it filed antidumping and countervailing duty petitions with the trade investigating authorities. Since the establishment of the World Trade Organization (WTO), over 200 investigations against China were initiated by Latin American authorities, with Argentina, Peru, Brazil, Mexico, and Colombia being the primary countries involved. However, such investigations took time, usually years, and the remedy often came either not at all or too late to help the domestic industry involved. The United States was facing a similar situation with imports from China, so U.S. President Obama decided to try something new.

US TARIFFS

Late in the evening on September 11, 2009, President Obama decided to impose tariffs on imported tires from China through a China-specific safeguard. The tariffs amount to 35 percent *ad valorem* the first year, 30 percent the second year, and 25 percent the third (the initial amounts recommended by the U.S. International Trade Commission (ITC) were 55, 45, and 35 percent, respectively), and will take effect on September 26 - five months after the initial petition was filed. Some claim that these tariffs will harm the U.S. economy more than help it, but President Obama disagreed. Regardless of all the recent headlines about a trade war and protectionism, the bottom line is that this is an effective use of a trade enforcement tool that *any* country being impacted by Chinese imports - including one in Latin America - can utilize to help its local industries if the facts and circumstances warrant.

The transitional, product-specific safeguard mechanism used by the United States is actually contained in China's 2001 accession agreement to the WTO and is available for use by all WTO members until 2013. In other words, as part of the deal to join the WTO, China agreed that such a mechanism could be used against its imports if the facts warranted. Latin American countries should become familiar with this safeguard mechanism and investigate whether it would be to their benefit to follow in President Obama's footsteps.

MARKET DISRUPTION

The China safeguard can be employed "where products of Chinese origin are being imported [into a WTO member country] in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers" of similar products. "Market disruption" exists when imports from China increase rapidly over a period of time in such a way that they are a significant cause of material injury to a producing domestic industry. In determining whether market disruption exists, a country's investigating authority must consider objective factors such as the volume of imports, the effect of imports on prices, and the effect of those imports on the domestic industry. Again, this is straight out of China's agreement to join the WTO, so invoking such a safeguard is legally compliant with WTO law.

The problem that China now has with the tariffs is that, even though it agreed to such a mechanism, apparently it never thought it would actually be applied. China recently commenced a WTO action challenging the application of the safeguard to discourage other countries and U.S. industries from filing more petitions to do the same. China would like to keep shipping large volumes of products throughout the world to continue the production and growth of its industries. However, at the end of the day, the tariffs will be applied and shipments of Chinese tires to the United States will probably be reduced while the WTO challenge is ongoing and/or the tariffs are in effect. This is the whole point of the safeguard.

What China should be even more worried about is what else the U.S. action has triggered. Under the accession agreement, if a China safeguard action is taken and the tariffs cause or threaten to cause significant diversion of trade into another country's market, the impacted country may request consultations with China. If the consultations fail to lead to some form of resolution, within 60 days, that country can also limit imports from China without undergoing a full safeguard proceeding. In other words, if China begins diverting shipments to other countries as a result of safeguard tariffs, additional tariffs or quotas could quickly be put in place by other countries based only on a threat of significant diversion (i.e., a potential increase in imports of tires from China), a vague and low threshold.

LATIN AMERICAN USE

How could this be used by a Latin American country? As mentioned above, China is shipping a lot more merchandise to Latin America and the items being imported are largely manufactured goods in the form of electrical appliances and office machinery. So, using refrigerators as an example, if China's low-price exports to Brazil increased 20 percent from 2006 to 2008 and the Brazilian refrigerator industry was losing market share and sales to China, and as a result began to reduce its workforce, the evidence would be pretty strong to initiate a safeguard action. The Brazilian investigating authority could then examine the facts more thoroughly and develop a record to justify any future action, such as a tariff that could close or eliminate the pricing gap and allow its refrigerator industry to recover. And all of this could be completed in much less time than the average antidumping or countervailing duty investigation.

After the imposition of the safeguard tariff by Brazil, let's assume that Mexico saw an increase of refrigerator imports from China (even a small increase) and feared that large volumes of refrigerators that were originally destined for Brazil would now be coming to Mexico and threatening its refrigerator industry as well. Reacting to this threat, Mexico could bypass the safeguard investigation process and request immediate consultations with China. If, after 60 days, the consultations fail to obtain assurances from China that an increase in refrigerator imports is not coming, Mexico could then impose tariffs or a quota. The same process could be followed by Chile, Peru, Panama, whoever.

INCENTIVE

As the above demonstrates, the use of the safeguard and the imposition of tariffs on Chinese shipments should give an incentive to other countries concerned about surging Chinese imports to consider doing the same if the facts warrant. If a "safeguard" law already exists in a particular country, then a determination must be made whether that safeguard provision can be used or modified in such a way so that it can be put into immediate effect against imports from China. There must be objective legal standards for an investigative authority to follow, the process must be transparent, parties must be given a chance to submit data and legal arguments to present their position, and an outcome detailing the rationale behind a decision/remedy must be published. If such a process does not exist, then changes would need to be made in the law or regulation that implement the safeguard provisions of China's

WTO accession agreement. There is ample time for a governing authority to do so as, again, the safeguard provision does not expire until 2013. Once this is in place and followed during the investigation process, a country's governing authority can effectively defend its agency's action should a challenge arise to impose a safeguard remedy.

Therefore, a safeguard can be an effective tool to protect a domestic industry harmed by a surge in Chinese imports and it is perfectly legal (and likely quicker) to do so. The United States will not be the last to consider this option; this is only the beginning.

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