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Trade Remedies and The U.S.-China Bilateral WTO Accession Agreement

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Summary

The November 1999 U.S.-China bilateral agreement on China's accession to the World Trade Organization (WTO) addresses a range of U.S. foreign trade and investment concerns related to China's entry into the WTO. In particular, U.S. import-sensitive industries are wary of the impact from increased imports that might result from China's WTO membership. The bilateral agreement allows the United States to continue to use, at least temporarily, special trade remedy procedures against surges of imports and against dumped and subsidized imports from China that it has used since the two countries reestablished trade relations in 1980. These procedures are more favorable to import-sensitive industries than those normally used in trade with other established WTO members. They are viewed by some observers as a policy tool to cushion the potentially adverse impact of increased China trade on U.S. industries. Codification of the safeguard provision was included in H.R. 4444, the legislation that granted China PNTR (P.L. 106-268), and that was signed into law on October 10, 2000. This report examines the trade remedy provisions of the U.S.-China bilateral agreement in relation to the relevant U.S. trade laws and to WTO agreements and principles. It will also examine the potential impact of these provisions on U.S.-China trade and their legislative implications. For more information see CRS Issue Brief IB91121, *U.S.-China Trade Issues*. This report will be updated as events warrant.

After long, drawn out negotiations, the United States and China in November 1999 reached an agreement on conditions for China's entry into the World Trade Organization (WTO).¹ The U.S.-China Bilateral Agreement on WTO Accession (hereafter referred to as the Bilateral Agreement) was part of the series of bilateral and multilateral negotiations

¹ This report greatly benefitted from the review and comments of (name/redacted), Legislative Attorney, American Law Division and (name/redacted), Specialist in International Trade and Finance, Foreign Affairs, Defense, and Trade Division.

that any country or customs territory must go through with WTO-member trading partners in applying to join the WTO.²

The Bilateral Agreement addresses U.S. concerns about China's treatment of U.S. exports of agricultural and manufactured goods and of U.S. services in China's domestic market and about U.S. investments in China.³ In addition, and perhaps most critically for import-sensitive industries, the agreement allows the United States to employ special measures to remedy the adverse price effects on U.S. industries of some imports from China.⁴ The House passed on May 24, 2000, and the Senate passed on September 19, 2000, H.R. 4444 that authorized the President to grant China permanent normal trade relations (PNTR) status. H.R. 4444 was signed into law on October 10, 2000 (P.L. 106-268). (See Legislation section.)

U.S. Trade Remedies and Nonmarket Economies

Trade remedies are government measures authorized in law and sanctioned by multilateral agreement, i.e., the WTO, to minimize the adverse impact of some imports on domestic industries.⁵ *Safeguard* measures allow domestic industries to adjust to the adverse impact of surges in import competition. *Antidumping* duties remedy the adverse price effects of imports determined to be sold at less than fair value. *Countervailing* duties remedy the adverse price effects of imports that are determined to have benefitted from government subsidies.

Safeguard Measures. U.S. safeguard measures are authorized under sections 201-204 of the Trade Act of 1974 (often simply called section 201, or escape clause relief). They must also conform to Article XIX of the General Agreement on Tariffs and Trade (GATT1994) and the WTO Safeguards Agreement. U.S. law provides that an industry can receive relief, in the form of temporary higher duties, quotas, or other import restrictions, if the U.S. International Trade Commission (ITC) makes two determinations: (1) that imports of a like product as produced by the industry seeking relief have surged at such a rate as to cause "serious injury" or threat thereof to the U.S. industry and (2) that their level of causation is "substantial." If both determinations are affirmative, then the ITC makes a recommendation for relief which the President may accept, amend, or reject. Section 201 is applied in cases where the exporting country is a market economy.

However, U.S. law also authorizes similar relief against imports from nonmarket economies. Section 406 of the Trade Act of 1974, as amended, was enacted at a time

² The text of the Bilateral Agreement is available on a special website maintained by the White House: [<http://www.chinapntr.gov>].

³ For more information on U.S.-China trade, see CRS Issue Brief IB91121, *U.S.-China Trade Issues*.

⁴ In accordance with the WTO's principle of most-favored nation (MFN) treatment, the concessions made by China in the Bilateral Agreement technically apply to trade with all WTO members. This report, however, will focus on its impact on U.S. trade with China and relevant U.S. trade laws.

⁵ U.S. law provides for other trade remedies as well. For more information see CRS Report RL30461, *Trade Remedy Law Reform in the 107th Congress*.

when the United States was opening up trade relations with Communist countries. It was enacted in response to industry concerns that imports from Communist countries would flood U.S. markets because their prices were not market-determined. Section 406 provides for relief in the form of higher tariffs or quantitative restrictions on imports from “a Communist country” that the ITC determines have caused “market disruption.” Under the statute, market disruption is said to have occurred when the ITC determines that (1) the imports into the United States have rapidly increased absolutely or relative to domestic production at such a rate as to have caused “material” injury to the U.S. industry and (2) their level of causation is “significant.” If both determinations are affirmative, then the ITC recommends relief to the President who may accept and implement the recommendation or oppose the recommendation and deny relief.

Although similar, section 201 and section 406 differ in several important respects. First, the injury threshold for relief under section 201, “serious injury,” is higher than that of section 406, “material injury.” “Serious injury” is defined, under section 201, as one that is a significant, overall impairment to the position of the domestic industry. “Material injury” is not defined under section 406, but the legislative history of the statute indicates that Congress intended it to be a lower threshold than “serious injury.”⁶

Second, the causation threshold under section 406, “significant,” is lower than that under section 201, “substantial.” Under section 406, “significant cause” is a cause which “contributes significantly to the material injury of the domestic injury but *need not be equal to or greater than any other cause*” (italics added). On the other hand, under section 201, a “substantial cause” is one that is important and *not less than any other cause*” (italics added).

Third, under the Safeguards Agreement of the WTO, (and in accordance with the WTO most-favored-nation (MFN) principle), section 201 safeguards relief must be imposed against all imports of the product in question from all foreign suppliers, that is a WTO member cannot target relief against a particular country. Section 406, on the other hand, discriminates against Communist countries and allows U.S. industries to seek relief against imports from a single country. Section 406 (unlike section 201) does not provide statutory procedures for congressional override of a presidential decision not to act or to take action different than that recommended by the ITC. In sum, the lower injury and causation thresholds of section 406 and its provision for specific-country targeting are intended to increase the chances that temporary import relief measures will be implemented than would be the case under section 201.

Antidumping and Countervailing Duty Remedies. U.S. antidumping remedies are authorized under sections 731-739 of the Tariff Act of 1930, as amended. They must also conform to Article VI of GATT (1994) and the WTO Antidumping Agreement. Under U.S. law antidumping relief is granted if (1) the Department of Commerce (DOC) determines that imports subject to an antidumping investigation have been sold in the United States at less than fair value and (2) the ITC determines that a U.S.

⁶ See U.S. Congress. Senate. *Trade Reform Act of 1974*. Report of the Committee on Finance of the United States Senate together with Additional Views on H.R. 10710. 93d Congress. 2d Session. S.Rept. 93-1298. p. 212.

industry, producing a like or competitive product as the dumped import, has been “materially injured” “by reason of” the dumped imports.

In determining what is the “fair value” of a good, the U.S. antidumping law requires that the DOC use, when possible, the price of the good or a like good in the exporter’s home market. But because the prices of a good in a nonmarket economy are administratively set and not determined by market forces, they may not represent the “fair value” of goods produced in a nonmarket economy. The statute provides that in the case of nonmarket economy, such as China, the DOC construct the “fair value” of the good by determining what the costs of production (including profit) are in a market economy of comparable development level to the nonmarket economy and use that as a proxy for the “fair value.”

U.S. countervailing duty relief is authorized under sections 701-709 of the Tariff Act of 1930, as amended, and must conform to Article VI of GATT 1994 and the WTO Agreement on Subsidies and Countervailing Measures (SCM). Under the SCM Agreement, countervailable subsidies must be “specific,” as defined in the agreement and cause “material injury” to the relevant domestic industry. Under U.S. law an industry may obtain relief after (1) the U.S. Department of Commerce has determined that the imported good under investigation has benefitted from a countervailable subsidy and, in most cases, (2) the ITC has determined that the imports are causing or threatening to cause “material injury” to a U.S. industry producing a like or competitive product as the imported product.⁷

The U.S.-China Bilateral Agreement

The U.S. trade remedies against imports from China are one of the most critical sets of provisions of the U.S.-China Bilateral Agreement on WTO Accession. By and large, the Bilateral Agreement allows the United States to apply, for a certain period of time, the same trade remedy measures in its trade with China that it applied since 1980, when the United States and China first re-established trade relations. The trade remedy provisions of the Bilateral Agreement were incorporated into China’s terms of accession to the WTO and apply, on an most-favored-nation basis, to China’s trade with not only the United States of with each WTO member.

Regarding *safeguard measures*, with some exceptions, the Bilateral Agreement allows the United States to continue to apply the more liberal section 406 criteria for relief against imports from China. However, unlike section 406, the Bilateral Agreement allows China to seek equivalent compensation from the United States for the actions against its imports, if the U.S. measures have been in effect for at least two years, in the case of imports that have increased *relative* to domestic production, or three years, in the case of imports that have increased *absolutely*. This provision reflects, in part, the WTO

⁷ In CVD cases the injury test and, therefore, ITC participation, is required only if the country against which the U.S. industry is bringing a petition is a member of the WTO (which includes most trading partners), is a nonmember country but has accepted equivalent obligations, or a country, with which the United States has an agreement which entitles that country to unconditional MFN treatment. Otherwise, only a final determination by the DOC of the existence of a subsidy is required for the assessment of the countervailing duty.

Safeguards Agreement requirement that WTO members have the opportunity to obtain compensation, if safeguard action is taken against their exports by another WTO member and if that action has been in place for at least three years (whether the imports increased relatively or absolutely). In addition, the Bilateral Agreement allows the United States to take safeguard action against increased imports from China that may have been *diverted* from a third country as a result of that country's safeguard action against China. The agreement also requires that the United States consult with China to try to resolve the issue before initiating safeguards action and to notify the WTO Committee on Safeguards of measures taken against China. The safeguards provision of the Bilateral Agreement *expires on December 11, 2013, 12 years* after China enters the WTO, at which time section 201 measures would be used.

Regarding *antidumping measures*, the Bilateral Agreement provides that the United States can continue to use the constructed fair value method unless the Chinese producer can clearly show that market conditions prevail in the production of the exported good. In such a case, the United States will use prices and costs prevailing in China. The WTO Committee on Antidumping actions must be notified of antidumping actions taken under the bilateral agreement.

Regarding *countervailing duty* measures, the Bilateral Agreement provides that subsidies to Chinese state-owned enterprises will be considered specific (and therefore countervailable) if state-owned enterprises are the predominant recipients of the subsidies or if they receive disproportionately large amounts of the subsidies. In determining the level of subsidies, the Bilateral Agreement requires that, where possible, the United States use methodologies that it applies against the imports of other, market-economy, WTO members. But the Bilateral Agreement recognizes that, given the structure of China's economy, it may not always be possible and allows the United States to use alternative methodologies that are based on third-country surrogate market-determined data, rather than Chinese data.

As with the safeguards provisions, the Bilateral Agreement's provisions on antidumping and countervailing duties would seem to favor the U.S. industry more than in the case of the methodologies applied to imports from other WTO members making it easier for the U.S. industries to obtain relief. The provisions will be applicable *for 15 years after China's entry into the WTO (until December 11, 2016)* or when China is deemed a market economy by the national laws of the importing country, whichever comes first, at which time the standard antidumping and countervailing duty criteria will apply.

In addition to the provisions on safeguard, antidumping, and countervailing duty measures, the Bilateral Agreement contains provisions pertaining to trade in textiles and wearing apparel. According to the Agreement, U.S. quotas on imports of these items from China will continue but will be gradually phased out until January 1, 2005, at which time they will expire. But the agreement also provides that the United States will be able to apply a special product-specific safeguards measure against imports of textiles and wearing apparel from China that are determined to have caused market disruption in the United States. This special safeguards provision differs from the more general safeguards provision in the Bilateral Agreement, discussed earlier, in that China would not have the right to retaliate or seek remedies for U.S. action. The provision would expire on

December 31, 2008. After that date and until December 11, 2013, the non-textile safeguards provision would apply.

Legislation

On October 10, 2000, President Clinton signed into law H.R. 4444 (P.L. 106-286), the China-U.S. Relations Act of 2000 (the Act). The law authorized the President to grant China PNTR upon the issuance of a proclamation and only after he has certified to Congress that the terms of China's accession to the WTO were at least equivalent to the provisions of the Bilateral Agreement. On November 10, 2001, President Bush so certified, and on December 27, 2001, he issued the proclamation granting China PNTR, effective January 1, 2002.

The Act also codified into U.S. law the special safeguards measure of the Bilateral Agreement as sections 421-423 of the Trade Act of 1974. These sections are modeled after section 406 but contain some important additions. For example, they include Presidential discretion in granting relief in the form of a "Standard for Presidential Action"—the President is to grant relief if the International Trade Commission so recommends unless he determines that doing so would not be in the U.S. national economic interest or "in extraordinary cases" would harm the national security of the United States. They also give the U.S. Trade Representative (USTR) responsibility to make recommendations to the President regarding relief if the ITC makes an affirmative determination and after the USTR solicits public comments.

Conclusions

The U.S.-China Bilateral Agreement on WTO Accession was designed to smooth the transition of China's entry into the WTO for the United States. The trade remedy provisions attempt to alleviate apprehensions that some U.S. import-sensitive industries might have regarding increased competition from imports from China. Yet, it is unlikely that U.S.-China trade patterns will change much after China's entry into the WTO, certainly in the near-term. Chinese imports have received most-favored-nation (MFN), now normal-trade-relations (NTR) status, since 1980 and, therefore, U.S. tariff rates on Chinese imports will not immediately change. Therefore, U.S. domestic industry use of trade remedies are unlikely to alter greatly in the near term.⁸

However, trade remedies not only serve the economic role of smoothing the transition to liberalized trade for import sensitive industries, they also serve a political role—as tools to make trade liberalization more politically palatable to those sectors adversely affected by it.

⁸ For current information and analysis of U.S.-China trade since China's accession to the WTO, see CRS Issue Brief IB91121, *U.S.-China Trade Issues*.

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