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UNITED STATES DEPARTMENT OF COMMERCE
Office of the General Counsel
OFFICE OF THE CHIEF COUNSEL FOR INTERNATIONAL COMMERCE
Washington, D.C. 20230

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FEB 2 6 1999

MEMORANDUM FOR: Troy H. Cribb
Deputy Assistant Secretary
for Textiles, Apparel and
Consumer Goods Industries

THROUGH: Eleanor Roberts Lewis
Chief Counsel
for International Commerce

FROM: John Cobau
Attorney-Adviser

SUBJECT: CITA Authority to Impose Quantitative Restrictions on Textile and Apparel Imports from the CNMI

Issue

You have asked whether the Committee for the Implementation of Textile Agreements (CITA) has the authority to impose quantitative restrictions on textile and apparel imports from the Commonwealth of the Northern Mariana Islands (CNMI). [1/]

Discussion

A. Legal Relationship Between the United States and the CNMI

The CNMI is part of the Trust Territory of the Pacific Islands, which the United States administered as a United Nations Trusteeship from 1947-1986. United States v. Guerrero, 4 F.3d 749, 751 (9th Cir. 1993). In 1972, the United States agreed to conduct negotiations with the Northern Mariana Islands separate from the rest of the Trust Territory, and three years later the two parties signed the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (Covenant). Id. In 1976, Congress enacted the Covenant into law. Joint Resolution of March 24, 1976, Pub. L. No. 94-241, 90 Stat. 263, reprinted in 48 U.S.C. s 1681 note.

The Covenant provides that the CNMI will become a "self-governing commonwealth . . . in political union with and under the sovereignty of the United States." Section 101. Relations

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1/ This issue was addressed in a previous memorandum from this office dated March 2, 1989. Since that time, several relevant court cases have been decided and this memorandum supercedes the previous one.

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between the CNMI and the United States are governed by the Covenant, which, "together with those provisions of the Constitution, treaties and laws of the United States applicable to" the CNMI, are the "supreme law" of the CNMI. Section 102. According to the Covenant, the people of the CNMI have the right to local self-government and govern themselves "with respect to internal affairs" with a Constitution of their own adoption. Section 103. The CNMI has an independent government, comparable to that of a state. Section-By-Section Analysis of the Covenant, prepared by the Marianas Political Status Commission, Section 103. On the other hand, the United States has "complete responsibility" with respect to CNMI foreign affairs and defense. Section 104. The relationship has been described as "territorial in nature with full sovereignty vested in the United States." H. R. Rep. No. 94-433, p. 15 (1975).

CNMI is outside the customs territory of the United States. Covenant, Section 603(a), (b). The United States can and does impose duties on products from the CNMI, though such products receive preferential treatment. Harmonized Tariff Schedule of the United States, U.S. Note 3(a). The Covenant refers to such products as "imports." Covenant, Section 603(c).

B. Section 204

Section 204 of the Agriculture Act of 1956 authorizes the President "to negotiate with representatives of foreign governments" to obtain agreements limiting exports of textile products "from such countries" and to issue regulations governing the entry of such products to carry out any such agreement. Section 204 also authorizes the President to "issue, in order to carry out [the Agreement on Textiles and Clothing (ATC)],[2] regulations governing the entry" of textile products "which are the products of countries not parties to the agreement."[3] As Section 204 addresses negotiations with "foreign governments" and regulations governing entry of imports from "countries" not parties to the agreement, a primary question is whether Section 204 permits the President to enter into agreement with, and issue regulations regarding imports from, the CNMI; more specifically, whether the CNMI is a "foreign country" and a "foreign government" for purposes of Section 204.

Generally, in reviewing an agency's construction of a statute which it administers, courts

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[2] The ATC is one of the trade agreements resulting from the Uruguay Round of multilateral negotiations, and was approved by Congress in Section 101 of the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994).

[3] Executive Order 11651 delegates to the Chairman of CITA the authority to "take such actions as may be necessary to implement" textile agreements.

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examine whether the intent of Congress is clear; if it is not, courts consider whether the agency's interpretation is a reasonable one in the context of the particular program. Chevron v. Natural Resources Defense Council, 467 U.S. 837, 845 (1984). The agency's interpretation does not have to be the only permissible one, or even the reading the court would have reached if the question had initially arisen in a judicial proceeding. Id. at 843, n. 11. In reviewing an exercise of authority under Section 204, the Court of International Trade [4/] has stated that, in the absence of a contrary legislative intent, statutory terms are interpreted according to their "common meaning." Mast Industries v. Regan, 596 F. Supp. 1567, 1575 (CIT 1984).

In reviewing action by CITA under Section 204, courts appear to grant broader discretion than that granted under Chevron. The Federal Circuit has held that all that is required under Section 204 is that actions taken by the President "be relevant to the enforcement of some existing textile agreement." American Association of Exporters and Importers – Textile and Apparel Group v. United States, 751 F.2d 1239, 1247 (Fed. Cir. 1985). Courts have found that Section 204 grants the President broad authority, authority augmented by the President's constitutional power in the international arena. Target Sportswear v. United States, 70 F.3rd 604, 607 (Fed. Cir. 1995).

CNMI as a Foreign Country. With these standards in mind, it is possible to consider whether CNMI can be treated as a "foreign country" under Section 204. [5/] No court has reviewed the meaning of this term in Section 204, and the legislative history does not address this issue. In interpreting the Foreign Tort Claims Act, the Supreme Court has stated that the "commonsense meaning of the term" foreign country is "a region or tract of land." Smith v. United States, 507 U.S. 197, 199 (1993) (citations omitted). The CNMI would clearly fit within this definition. In interpreting that same statute, that Court stated in an earlier case that "[w]e know of no more

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4/ The Court of International Trade has exclusive jurisdiction over any matter arising out of any U.S. law providing for embargoes or other quantitative restrictions or the administration or enforcement of such matters. 28 U.S.C. s 1581(i) (1998).

5/ It appears that the same analysis would apply in determining whether the CNMI is either a "foreign government" or a "foreign country" for purposes of Section 204. The first sentence of Section 204 allows the President to negotiate agreements with "foreign governments" for purposes of obtaining limits on the exports from "such countries." The second sentence allows the President to regulate imports from "countries" that are not parties to a multilateral agreement. The statute thus logically distinguishes between "foreign governments," with which the President can negotiate agreements, and foreign "countries," which can be subject to limits, and the first sentence equates the two terms. For purposes of determining whether the CNMI may be negotiated with, or may be subject to limits, the terms appear interchangeable.

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accurate phrase in common English usage than 'foreign country' to denote territory subject to the sovereignty of another nation." United States v. Spelar, 338 U.S. 217, 219 (1949). As the CNMI is "under the sovereignty of the United States," it is arguably not within this definition of "foreign country." [6] In determining whether a territory is a "foreign country" for purposes of a particular statute, the Supreme Court has held that courts should examine the purpose of the statute at issue. "The term 'foreign country' is not a technical or artificial one, and the sense in which it is used in a statute must be determined by reference to the purpose of the legislation." Burnet v. Chicago Portrait Co., 285 U.S. 1, 5, (1932).

It seems that there is no "common meaning" of foreign country. However, as noted above, the common meaning should be interpreted in light of Congressional intent. "The congressional policy expressed in Section 204 is the limitation of imports of textiles and agricultural commodities into the United States." Mast Industries v. Reagan, 596 F.Supp. 1567, 1575 (CIT 1984). Products from the CNMI are considered imports into the United States. Based on the ambiguous meaning of "foreign country" and the Congressional intent to limit imports, it appears that it would be reasonable for CITA to consider CNMI a "foreign country" for purposes of Section 204.

Moreover, the imposition of limits here would be "relevant" to the enforcement of textile agreements. As noted above, the purpose of these agreements is to limit imports so as to protect the U.S. textile and apparel industry. The CNMI is outside the U.S. customs territory, and is not part of the "United States" for purposes of Section 204, [7] so limits on CNMI imports would protect the U.S. textile and apparel industry. In Target Sportswear v. United States, the Court of International Trade considered whether Section 204 grants the President the authority to issue rules of origin for textile and apparel products processed in a foreign country and subsequently substantially transformed in a U.S. insular possession. 875 F. Supp. 835 (CIT 1995), aff'd, 70 F.3d 604, 607 (Fed. Cir. 1995). The court held that the President must have this authority or "soon every insular possession would be used as a platform for importing textiles into the United States in order to evade quantitative restrictions . . . [blunting] the common purpose of Section

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[6] See also Mount Washington Tanker v. United States, 665 F.2d 340 (Ct. Cust. Pat. App. 1981) (examining Congressional intent to determine meaning of "foreign country" and concluding that the high seas were a "foreign country" for purposes of a provision requiring the payment of duty on vessel repairs performed in a "foreign country").

[7] The Office of the Solicitor of the Department of the Interior, The Application of Federal Laws in American Samoa, Guam, the Northern Mariana Islands, the U.S. Virgin Islands, Memorandum No. 7-4, p. 87 (1993).

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204, the [Multilateral Fibre Arrangement, the predecessor to the ATC] and the [bilateral textile agreements]. . . to limit imports of textiles into the United States so as to protect the domestic industry." 875 F. Supp. at 842 (citations omitted). This case provides strong support for the proposition that limits on imports from the CNMI would be "relevant" to the enforcement of textile agreements, as it would prevent the CNMI from being used as a "platform" for imports into the United States.

However, it could be argued that any action taken under Section 204 must both be relevant to a textile agreement and affect goods that have a "nexus" with a foreign country. In Target Sportswear v. United States, the Federal Circuit, after reaffirming the "relevancy" test, addressed appellant's argument that Section 204 grants authority to regulate exports from foreign countries, not exports from an insular possession. 70 F.3d 604, 607 (Fed. Cir. 1995) (affirming the previously discussed Court of International Trade decision). The court disagreed, noting that there was "no persuasive evidence . . . establishing that Congress intended to grant the President this broad authority, but at the same time to withhold from him the power to promulgate . . . a country of origin rule that differs from the customary test." The court also found that the regulation at issue did not "improperly impact insular possessions" as the goods "must have been advanced in value or similarly processed in a foreign country," and that "this nexus between the product and the foreign country brings the interim regulations squarely within the scope of the statute." Id. Thus, here it could be argued that any limit on imports from the CNMI would "improperly impact" the CNMI as there is no nexus between the product and a foreign country.

However, the nexus test was apparently a secondary rationale underlying the court's decision in Target, and the court's primary rationale was the "relevancy" test. Moreover, it has been alleged that the goods at issue here were manufactured using foreign fabric and temporary foreign labor, and in textile plants often owned by foreign nationals; in effect, the CNMI content is arguably small. This may be a sufficient "nexus" to meet the test put forward in Target, in the event it applies.

Conclusion. While the matter is not free from doubt, a strong argument could be made that Section 204 permits the imposition of limits on imports from the CNMI.

C. Section 603(c) of the Covenant

A second issue is whether the imposition of limits on imports from the CNMI violates the Covenant. The Covenant provides: "Imports from the Northern Mariana Islands into the customs territory of the United States will be subject to the same treatment as imports from Guam into the customs territory of the United States." Section 603(c). Based on this provision, it could be argued that the Covenant prohibits limits on imports from the CNMI unless the same limits are also imposed on imports from Guam.

The legislative history of the Covenant's implementation into U.S. law states that the Covenant was intended to become part of the law of the United States and that the Covenant was being enacted into the statutory law of the United States. S. Rep. No. 94-433, at 91 (1975); H.R. Rep. No. 94-364, at 17 (1974). It appears that if the Covenant precludes the imposition of limits on imports from the CNMI without imposing similar limits on Guam, the President would be without authority to impose limits only on imports from the CNMI, as the later-in-time Covenant would govern, rather than Section 204. [8]

One response is that imports from the CNMI and imports from Guam are being treated in the same manner. Here, there has been a dramatic increase in imports from the CNMI. If a similar increase in imports from Guam occurred, a limit would be placed on these imports as well. Thus, imports from both Guam and the CNMI are being treated in the same manner with respect to the process for the imposition of quotas. An analogy to the antidumping context makes this point clear; if the United States were to impose antidumping duties on certain merchandise from the CNMI in response to a finding that this kind of merchandise is being sold in the United States at less than fair value and that the U.S. industry is materially injured, the United States would not be obligated to impose the same duties on imports from Guam.

In support of this distinction, note that CITA has already treated Guam and the CNMI differently for purposes of quantitative restrictions. In 1985, CITA imposed a limit on sweaters exported to the United States that were products of foreign countries and were assembled in Guam of 160,000 dozen while at the same time imposing a limit of 70,000 dozen on such sweaters assembled in the CNMI. 50 Fed. Reg. 8649-50 (March 4, 1985). [9] Similarly, in 1990, the Department of Commerce issued an antidumping order on imports of sweaters from Hong Kong, Korea, and Taiwan; that order specifically excluded sweaters assembled in Guam produced from

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[8] The Covenant was enacted subsequent to the original enactment of Section 204 in 1956 and subsequent to the amendment to Section 204 permitting the President to limit the entry of textile products which are the product of countries not parties to a multilateral textile agreement in 1962. While Section 204 was amended in 1994 (Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809), those amendments did not affect the terms relevant here. Thus, the Covenant, as the later in time statute, would prevail in the event of an inconsistency.

[9] This action was upheld by the Court of International Trade. Yuri Fashions Co. v. United States, 632 F. Supp. 41 (CIT 1986); aff'd 804 F.2d 1246 (Fed. Cir. 1986); cert. denied, 481 U.S. 1004 (1987).

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knit-to-shape component parts knit in and imported from Taiwan but applied to such sweaters from the CNMI. 55 Fed. Reg. 39033 (September 24, 1990).

We have discussed this issue with a Department of Justice expert on insular possession law. He expressed concern about the consistency of Section 204 limits with Section 603(c), and suggested that a single limit be imposed on both Guam and the CNMI, or that a single limit be imposed on all insular possessions.

Conclusion. It could be argued that any limit on imports under Section 204 that was not also imposed on imports from Guam is inconsistent with the Covenant and is therefore not within the President's authority. On the other hand, a strong argument could be made that if the same criteria are used in applying Section 204 to both Guam and the CNMI, any such limit would be consistent with the Covenant.