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NOTE

U.S. ASS’N OF IMPORTERS OF TEXTILES & APPAREL V. UNITED STATES: THE IMPACT OF INCONSISTENT DOMESTIC AGENCY PROCEDURES GOVERNING TEXTILE-SPECIFIC SAFEGUARD MEASURES ON THE BUSINESS OPERATIONS OF U.S. IMPORTERS

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Since the early 1960s, U.S. textile importers have conducted their business operations under quantitative quotas. Despite the fact that employment in the domestic textile industry during the life of the quota

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1. See Craig R. Giesse & Martin J. Lewin, The Multifiber Arrangement: “Temporary” Protection Run Amuck, 19 LAW & POL’Y INT’L BUS. 51, 52-53 (1987); see also Arrangement Regarding International Trade in Textiles, art. 2, Dec. 20, 1973, 25 U.S.T. 1001 [hereinafter MFA] (setting forth a textile trade agreement, which was negotiated to allow textile trading nations to impose quantitative restrictions on imports of textile and apparel products under certain circumstances). For the last forty years, the textile and apparel industry has been subjected to some form of quantitative restraint. Giesse & Lewin, supra, at 52-53. Although the principles upon which the General Agreement on Tariffs and Trade (GATT) was based consisted of nondiscriminatory treatment for all of its members and the eventual elimination of quantitative trade barriers, an exception has always existed for the textile and apparel industry. Id. at 51-53; see also JOHN H. JACKSON, WILLIAM J. DAVEY & ALAN O. SYKES, JR., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 401 (4th ed. 2002) (noting that the Short-Term Arrangement Regarding International Trade in Textiles, enacted in October 1961, and initially scheduled to expire in September 1962, was extended in October 1962 by the Long-Term Arrangement Regarding International Trade in Cotton Textiles, and was eventually succeeded by the MFA in 1974). Such “temporary protection” has served to insulate the United States from textile imports from the “Lesser Developed Countries” since the enactment of section 204 of the Agricultural Act. Giesse & Lewin, supra, at 53 (internal quotation marks omitted). The comprehensive regulatory scheme that evolved as a result “has protected the U.S. textile and apparel sector more extensively and for a longer period than the protection afforded to any other U.S. manufacturing industry.” Id. at 53-54.
system fell from approximately one million to 400,000 jobs,² U.S. importers have continuously been forced to sacrifice optimal business success in the name of unsuccessful efforts to protect the domestic textile industry.¹ The importers’ predicament has been exacerbated by the absence of clearly defined, consistent procedures for applying these quantitative restrictions on textile imports.⁴ The textile-specific safeguard mechanism, established in 2000 as a condition to China’s accession to the World Trade Organization (WTO), imposed another unclearly defined restriction on U.S. textile importers.⁵ Although the

². Paul Blustein, Deal on Textiles May Only Delay China’s Dominance, WASH. POST, Nov. 9, 2005, at A24 (“The U.S. [domestic textile] industry lost jobs at a terrible clip when the global quota system was in effect . . . .”).

³. See Giesse & Lewin, supra note 1, at 81-82 (concluding, based on the condition of the U.S. textile and apparel industry at that time, that the “unparalleled level of protection” it received was unwarranted); infra notes 193-95 and accompanying text. Moreover, this level of protection has not been based on economics, but “[r]ather, politics [have] dictate[d] policy choices in the realm of U.S. textile and apparel trade . . . . to satisfy the demands of a powerful, special interest group.” Id.

⁴. See Giesse & Lewin, supra note 1, at 125 (discussing the “storm of objections” raised when the Reagan administration issued guidelines that reduced the criteria for implementing restraints on textile imports from a showing of “actual ‘market disruption’ or the threat thereof” to creating a “‘presumption of market disruption’”). This criterion seemed to conflict with the terms of the MFA, which requires a measurable determination of market disruption, and not one “determined to exist on the basis of allegation, conjecture or mere possibility.” Id. (quoting MFA, supra note 1, Annex A, para. 1). It seemed that U.S. textile importers and the domestic textile industry had reached a compromise in 1994 when the United States and other GATT members established the World Trade Organization (WTO) in order to promote free trade, eliminate non-tariff trade barriers, and reduce tariffs. See Agreement Establishing the World Trade Organization, pmbl., Apr. 15, 1994, 33 I.L.M. 1144 [hereinafter WTO Agreement]. However, recognizing that sensitive industries, such as the textile and clothing industry, required a progressive integration process to facilitate adjustment to GATT rules, GATT members enacted the Agreement on Textiles and Clothing (ATC). Agreement on Textiles and Clothing, art. 6, para. 1, Apr. 15, 1994, available at http://www.wto.org/english/docs_e/legal_e/16-tex.pdf [hereinafter ATC]. This agreement, though it permitted quantitative restrictions on textiles that would temporarily hinder the businesses of U.S. importers of textiles, sought to do so “consistently” and “as sparingly as possible.” Id. paras. 1-2. Further, the ATC was designed to gradually phase out these restrictions, leading to their eventual extinction at the end of ten years, a period of time determined sufficient for the U.S. domestic textile industry, as well as that of other GATT members, to adjust and “contribut[e] to the objective of further liberalization of trade.” See id. pmbl., art. 9.

Committee for the Implementation of Textile Agreements (CITA)\(^6\) has published procedures for handling requests for restrictions on textile imports,\(^7\) U.S. importers have challenged the level of clarity of these procedures, CITA’s adherence to them, and CITA’s very authority to carry them out.\(^8\)

precondition to its accession to the WTO: a product-specific safeguard and a textile safeguard. See Working Report, supra, paras. 242(a), 245. The Chinese textile safeguard provides for a transitional textile safeguard remedy that WTO Members may invoke against importations of Chinese textiles for a limited duration. \textit{Id.} para. 242(a). Specifically, the pertinent provision provides:

[I]n the event that a WTO Member believed that imports of Chinese origin of textiles and apparel products covered by the ATC as of the date the WTO Agreement entered into force, were, due to market disruption, threatening to impede the orderly development of trade in these products, such Member could request consultations with China with a view to easing or avoiding such market disruption.

\textit{Id.} (emphasis added).

6. See Exec. Order No. 11,651, 3 C.F.R. 676 (1971-1975) (establishing CITA). CITA, the inter-departmental agency that claims the authority to supervise the implementation of these safeguards, consists of representatives from the Departments of State, Treasury, Commerce, and Labor, and the Office of the United States Trade Representative. \textit{Id.} The President issued this order pursuant to his delegated authority under section 204 of the Agricultural Act of 1956, 7 U.S.C. § 1854 (2000), which provides that the President is authorized to negotiate agreements concerning textiles. \textit{Id.} Congress expressly amended this Act to include the ATC within the meaning of “textile agreements.” \textit{Id.; see also} Fieldston Clothes, Inc. v. United States, 19 Ct. Int’l Trade 1181, 1182-83 (1995) (describing CITA’s role).

7. See Procedures for Considering Requests from the Public for Textile and Apparel Safeguard Actions on Imports from China, 68 Fed. Reg. 27,787, 27,787 (May 19, 2003) \[hereinafter China Textile Safeguard Procedures\]. On May 19, 2003, CITA published, by Federal Register notice, procedures for the consideration of requests from the public for invocation of the textile safeguard provided in the Working Report. \textit{Id.} The notice establishes that CITA will publish procedures and petitions requesting safeguard measures via the Federal Register and allow thirty days for public comments. \textit{Id.} at 27,789. The notice further states that the Committee will make determinations in a manner “\[c\]onsistent with longstanding Committee practice in considering textile safeguard actions,” and the newly established May 19, 2003 procedures. \textit{Id.} at 27,788 (emphasis added). A request would only be considered if it included the following: product description; import data; production data; market share data; and additional information such as price. \textit{Id.} at 27,788-89.

In October 2004, prompted by concerns that the termination of the current system governing textile and apparel quotas under the WTO would result in an unprecedented surge of textile imports from China, CITA took preemptive action. CITA permitted additional requests for safeguards against textile imports based on a mere threat of market disruption, as opposed to a showing of actual disruption. In response, several U.S. importers alleged that allowing safeguards to be based only on the threat of market harm represented an unpublished and impermissible change to prior procedures and practices. This reinterpretation left U.S. textile importers in a state of uncertainty as to

Moreover, with respect to all other safeguard measures, clear statutory definitions are provided, which closely mirror language contained in the WTO Agreement on Safeguards, and which have been interpreted numerous times by the WTO Dispute Settlement Body. Compare 19 U.S.C. §§ 2251(a), 2252(a), (c), 2451(a), (c), (d), with Agreement on Safeguards, pmbl., arts. 2, 4, Apr. 15, 1994, http://www.wto.org/english/docs_e/legal_e/25-safeg.pdf; see also Appellate Body Report, United States — Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan, paras. 71, 74, 86 & n.56, WT/DS192/AB/R (Oct. 8, 2001) [hereinafter Cotton Yarn]; Appellate Body Report, United States — Restrictions on Imports of Cotton and Man-made Fibre Underwear, at 19 n. 29, WT/DS24/AB/R (Feb. 10, 1997) [hereinafter Cotton & Fibre Underwear]. Under 19 U.S.C. § 2451(d), for example, the imported product causing alleged injury must be "like or directly competitive" to a product produced by the domestic industry suffering injury. 19 U.S.C. § 2451(d)(2). This requirement, which is also stated in CITA's China Textile Safeguard Procedures, has been defined by statute, legislative history, and by the ITC in its investigations. See 19 U.S.C. § 2252(c)(4); S. REP. NO. 93-1298, at 121-22 (1974); H.R. REP. NO. 93-571, at 45 (1973); U.S. INT'L TRADE COMM'N, PUBL'N NO. 3622, CERTAIN BRAKE DRUMS AND ROTORS FROM CHINA 7-8 (2003); U.S. INT'L TRADE COMM'N, PUBL'N NO. 3575, CERTAIN STEEL WIRE GARMENT HANGERS FROM CHINA 5-6 (2003); U.S. INT'L TRADE COMM'N, PUBL'N NO. 3557, PEDESTAL ACTUATORS FROM CHINA 5-6 (2002) [hereinafter PEDESTAL ACTUATORS FROM CHINA] (“[T]he ITC follows a two-step practice of first determining what constitutes the product like or directly competitive with the imports subject to the investigation, and then identifying who produces it (the domestic industry).”). In step one, when assessing what constitutes the “[l]ike or directly competitive domestic article,” the ITC applies the definition found in the legislative history of section 202 of the Trade Act of 1974 and “consider[s] such factors as (1) the physical properties of the article, (2) its customs treatment, (3) its manufacturing process... (4) its uses, and (5) the marketing channels through which the product is sold.” PEDESTAL ACTUATORS FROM CHINA, supra, at 5-6. “[D]omestic product[s] need not be identical to the imported product[s] . . . [b]ut must be] ‘substantially identical.’” Id. at 6. “[T]he [ITC] has found a domestic product to be a separate and distinct product . . . when it had different physical properties, was produced by a different process, or had different applications. Id. Upstreaming, the affected industry's practice of including component parts within the definition, has been held improper based on this theory. Cf. id. at 5-9.

9. See ATC, supra note 4.
11. Id.
12. Id.
how to continue to successfully conduct business operations. In addition, although the United States and China recently signed a bilateral agreement establishing specific quota rates through 2008 for thirty-four categories of textile products, the agreement has left U.S. textile importers even more unclear as to how CITA will handle pending and future petitions for safeguards against the several categories of textile products that were not included in the agreement.

In response to CITA's preemptive action, the Association of Importers of Textiles and Apparel (U.S.-ITA) sought a preliminary injunction from the Court of International Trade (CIT) in U.S. Ass'n of Importers of Textiles & Apparel v. United States (U.S. Ass'n of Importers I), to prevent CITA from considering petitions for safeguard measures on Chinese textile imports that were only "based on the threat of market disruption." The CIT granted U.S.-ITA's motion for a preliminary injunction, concluding that: (1) denying relief would risk irreparable injury to U.S.-ITA; (2) the balance of hardships favored U.S.-ITA; (3) U.S.-ITA would likely succeed on the merits; and (4) relief would serve the public interest.

13. See id. ("As a result of CITA's insupportable actions, plaintiff alleges that its members' operations have been and will continue to be disrupted, and its members are being forced to make sub-optimal business decisions that cannot be undone or reimbursed if plaintiff ultimately succeeds on the merits of the case.").


15. See id. paras. 2, 3 (stating that categories 338/339, 638/639, 647/648 are expressly excluded from, and ten categories for which safeguards were requested are not included among, those products subject to quota levels under the U.S.-China Textile Agreement); see also Memorandum from Laura E. Jones, U.S. Ass'n of Imps. of Textiles & Apparel, to Members, U.S. Ass'n of Imps. of Textiles & Apparel 1, 3 (Nov. 14, 2005) (on file with author) [hereinafter Jones Memorandum]. With respect to these categories, the United States agreed to "exercise 'restraint'" in imposing safeguards pursuant to paragraph 242 of the Working Report. MOU, supra note 14, para. 7; see also Jones Memorandum, supra, at 3 (stating that a decision by CITA to impose safeguards against the ten categories for which petitions are pending would upset the "'balance'" sought by the agreement and contradict the United States' commitment to exercising restraint).


17. Id. at 1344. In September 2004, CITA and DOC officials announced that safeguards based on the mere threat of a potential increase in importers were permitted under China Textile Safeguard Regulations. Id. at 1346. This announcement was inconsistent with statements made between July and August of 2004 that those regulations "were intended for cases of actual market disruption rather than the threat of such disruption." Id. (quoting China Textile Safeguards to Focus on Market Disruption Cases, Official Says, Daily Rep. for Executives (BNA), July 23, 2004, at A-28 [hereinafter China Textile Safeguards to Focus on Market Disruption]).

18. See id. at 1347-51.
The United States Court of Appeals for the Federal Circuit reversed the CIT's decision, holding that the CIT abused its discretion in granting a preliminary injunction. The Federal Circuit held that the controversy was not ripe for review, and that the U.S.-ITA failed to establish "a fair chance of success on the merits." This Note examines the development of federal case law requirements concerning consistency in CITA's procedures and the availability and scope of judicial review of CITA's actions. First, this Note traces the evolution of a presumption of reviewability in Supreme Court decisions to an era marked with restrictions on when, and to what extent, an agency action is subject to review. Secondly, this Note discusses the Federal Circuit and CIT's maintenance of a broad availability of judicial review, contrasted with a restrictive scope of judicial review, as applied to agency actions that concern international trade. Third, this Note evaluates the Federal Circuit's opinion in U.S. Ass'n of Importers of Textile & Apparel v. United States (U.S. Ass'n of Importers I), demonstrating that the Federal Circuit strayed from both the Supreme Court's and its own precedent governing the availability of judicial review of agency actions, and, consequently, left the question concerning the scope of CITA's authority unanswered. Finally, this Note addresses the validity of the Federal Circuit's decision and its future impact, highlighting the need for consistency and transparency in agency procedures.

I. A TREND TOWARD RESTRICTED AVAILABILITY AND SCOPE OF JUDICIAL REVIEW OF AGENCY ACTIONS UNDER THE ADMINISTRATIVE PROCEDURE ACT

Through the Administrative Procedure Act (APA) of 1946, Congress set forth standards by which a federal agency's actions may be subject to judicial review, as well as standards that the judiciary would apply in reviewing an agency action. Additionally, the APA established


20. Id. at 1348-49, 1353-54.


22. See 5 U.S.C. § 702 (2000) (affording the right of review of an agency action to "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute"); id. § 704 (requiring that there be a "final agency action"); id. § 551 (providing that an agency action includes any "rule," defined by the APA as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe [general] law or policy").

23. See id. § 706 (providing that the reviewing court, where necessary, "shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action," and set aside...
procedures that an agency must follow, including both formal adjudication processes and informal notice-and-comment procedures. Three pertinent provisions govern agency action: (1) availability of review; (2) scope of review; and (3) procedural requirements. The APA also established exceptions as to when an agency need not follow formal and informal procedures. Over time, the courts shifted from interpreting the APA as an Act that both affords a liberal availability of review and mandates strict adherence to procedural requirements, to interpreting the APA as an Act that significantly limits which agency actions are subject to review and whose exceptions to its procedures often apply.

A. The Supreme Court Reinforces a Presumption of Judicial Review and Emphasizes Consistency Under the APA

1. Presumption of Judicial Review

Prior to the adoption of the APA, the Supreme Court liberally granted judicial review of agency actions, absent persuasive evidence that

24. Id. §§ 552-553. Section 552 states in pertinent part:
   Each agency shall make available to the public information as follows:
   (1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public . . .
   (B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;
   (C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;
   (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
   (E) each amendment, revision, or repeal of the foregoing.

Id. § 552. Section 553 provides:
   (a) This section applies, according to the provisions thereof, except to the extent that there is involved—
   (1) a military or foreign affairs function of the United States; or
   (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.
   (b) General notice of proposed rule making shall be published in the Federal Register . . . .

Id. § 553.

25. Id. §§ 551-553, 702, 704, 706; see supra notes 21-24.

26. 5 U.S.C. § 553(a) (also affording an exception for an agency action that is part of the "foreign affairs function of the United States").

granting judicial review would be contrary to congressional intent.\textsuperscript{28} Upon the enactment of the APA, which "embodie[d] the basic presumption of judicial review,"\textsuperscript{29} the Supreme Court continued to afford unrestricted access to judicial review absent a clear and convincing display of contrary legislative intent.\textsuperscript{30} The Court also applied a liberal standard as to whether a final agency action existed to invoke standing for judicial review.\textsuperscript{31} Two cases, \textit{United States v. Storer Broadcasting Co.}\textsuperscript{32} and \textit{Abbott Laboratories v. Gardner},\textsuperscript{33} represent the broad spectrum of agency actions the Court has found to be covered under the APA.

In \textit{Storer Broadcasting Co.}, the Supreme Court recognized the importance of liberal agency review.\textsuperscript{34} The case involved a notice of proposed rulemaking issued by the Federal Communications Commission (FCC), which precluded an applicant from acquiring licenses for broadcasting stations if the applicant already possessed an interest in a certain number of stations.\textsuperscript{35} The respondent, a licensee owning more than seven broadcasting stations, argued that it would suffer irreparable financial loss if it were forced to forfeit existing licenses.\textsuperscript{36} The Court held that the FCC's issuance of rules that placed limits on the number of licenses for broadcasting stations by any one party constituted a reviewable final agency action under the APA.\textsuperscript{37}

\begin{thebibliography}{99}
\bibitem{28} \textit{Abbott Labs.}, 387 U.S. at 140. A survey of Supreme Court cases supports a liberal granting of judicial view. \textit{Id.} (citing Rusk v. Cort, 369 U.S. 367 (1962); Leedom v. Kyne, 358 U.S. 184 (1958); Harmon v. Brucker, 355 U.S. 579 (1958); Brownell v. We Shung, 352 U.S. 180 (1956); Heikkila v. Barber, 345 U.S. 229 (1953); Bd. of Governors v. Agnew, 329 U.S. 441 (1947)).

\bibitem{29} \textit{Id.} The APA affords judicial review to one "suffering [a] legal wrong because of agency action . . . within the meaning of a relevant statute." 5 U.S.C. § 702; see also Louis L. Jaffe, \textit{The Right to Judicial Review}, 71 HARV. L. REV. 401, 432 (1958) ("[J]udicial review is the rule . . . a basic right; it is a traditional power and the intention to exclude it must be made specifically manifest."); Martin Shapiro, \textit{Administrative Discretion: The Next Stage}, 92 YALE L. J. 1487, 1489 n.1 (1983) (noting that since the passage of the APA, the sustained effort of administrative law has been to "continuously narrow[w] the category of actions considered to be so discretionary as to be exempted from review").

\bibitem{30} \textit{Abbott Labs.}, 387 U.S. at 141. \textit{But see} Block v. Cmty. Nutrition Inst., 467 U.S. 340, 350-51 (1984) (stating that although the Court has "never applied the 'clear and convincing evidence' standard in the strict evidentiary sense . . . . [the standard operates as] a useful reminder to courts that, where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling.").

\bibitem{31} \textit{Abbott Labs.}, 387 U.S. at 140.

\bibitem{32} 351 U.S. 192 (1956).

\bibitem{33} 387 U.S. 136 (1967).

\bibitem{34} \textit{Storer Broad. Co.}, 351 U.S. at 197 (acknowledging the availability of review of any agency action where a party has been aggrieved by that action).

\bibitem{35} \textit{Id.} at 193.

\bibitem{36} \textit{Id.} at 196-97.

\bibitem{37} \textit{Id.} at 198.
The FCC's rules were subject to review because they “presently affected existing contractual relationships . . . [and were] ‘not any the less reviewable because their promulgation did not operate of their own force to deny or cancel a license.’” The Court explained that the pertinent provision of the APA provides that “review . . . is granted any party aggrieved or suffering legal wrong by [an agency] action.” Further, the Court concluded that a “legal wrong” need be “something more than a mere adverse personal effect . . . the adverse effect must be an illegal effect.” The Court found the respondent had been aggrieved because it was precluded from acquiring FM stations and could not effectively plan present and future business operations.

The Court reinforced the broad spectrum of agency actions subject to judicial review in Abbott Laboratories. In this case, thirty-seven drug manufacturers and the Pharmaceutical Manufacturers Association brought an action against the Commissioner of Food and Drugs to challenge the promulgation of regulations that required manufacturers to prominently print the established name of a drug on all drug labels, advertisements, and printed materials that display the drug's trade name. The plaintiffs alleged they were sufficiently aggrieved by these regulations because they were forced to choose between incurring substantial costs to comply with the regulations or risk prosecution for distributing “misbranded” drugs. The Court agreed, holding that the suit brought by the drug companies and their association was ripe for judicial review.

38. Id. at 199 (quoting Columbia Broad. Sys. v. United States, 316 U.S. 407, 417-18 (1942)). In Columbia Broadcasting System, the Court held that “[i]t [wa]s enough that, by setting the controlling standards for the Commission's action, the regulations purport[ed] to operate to alter and affect adversely appellant's contractual rights and business relations with station owners.” Columbia Broad. Sys., 316 U.S. at 422.


41. Storer Broad. Co., 351 U.S. at 199-200 (noting that the proposed amendments are not any less reviewable “merely because it [was] not certain whether the Commission w[ould] institute proceedings to enforce the penalty incurred”). The Court further emphasized that Storer's grievance was that it could not “cogently plan its present or future operations.” Id. at 200; see also Columbia Broad. Sys., 316 U.S. at 422 (finding sufficient as a final agency action, FCC regulations that would adversely affect the appellant's business relations with broadcast station owners whose future license applications may be rejected, and whose current licenses may be subject to revocation).


43. Id. at 138-39.

44. Id. at 152-53 (noting that compliance would require the modification of all promotional materials, the destruction of printed stocks, and the replacement of supplies).

45. Id. at 148-49.
decision and the hardship to the parties of withholding court consideration." In determining the fitness factor, the Court emphasized first that the disputed issue was "a purely legal one: whether the statute was properly construed by the Commissioner to require the established name of the drug to be used every time the proprietary name is employed," and second, that the regulations were considered a "final agency action" under the APA. With respect to finding the regulation at issue to be final, the Court relied on its "flexible view of finality" in previous cases. Finally, the Court considered the second factor of hardship to the plaintiffs. The Court determined that there was sufficient standing because the regulation "require[d] [the plaintiffs] to make significant changes in their everyday business practices."

2. Broader Scope of Review, Less Deference to Agency Action

Not only has the Supreme Court upheld the general availability of judicial review of most agency actions, it has also held agencies to a stricter standard when conducting review of their actions to avoid arbitrary determinations. Under the APA, the Supreme Court has recognized and sought to protect against three types of agency actions deemed unlawful: (1) arbitrary and capricious abuses of discretion; (2) unconstitutional actions; and (3) actions beyond an agency's statutory authority. With respect to actions challenged as beyond an agency's

46. Id. at 149.

47. Id. (internal quotation marks omitted) (noting that prior cases have interpreted the finality element pragmatically). In an earlier case, an FCC rule asserting its intention not to license certain stations was held to be a final agency action under the APA, even though it was "a statement only of its intentions" and no license had yet been denied under the rule. Id. at 149-50; see supra note 22 (providing the APA's definition of "rule").

48. Abbott Labs., 387 U.S. at 150 (recognizing that the announcement of a policy not to issue additional television licenses to applicants with seven licenses and the notice of a statutory interpretation of the meaning of "agricultural commodities" had previously been considered final agency actions) (citing United States v. Storer Broad. Co., 351 U.S. 192, 198 (1956); Frozen Food Express v. United States, 351 U.S. 40, 45 (1956)).

49. Id. at 154.


51. 5 U.S.C. § 706 (2000). Prior to the enactment of the APA, the Supreme Court afforded respect to agency decisions, but weighed a variety of factors in determining the degree of respect. Skidmore v. Swift & Co., 323 U.S. 134, 136, 140 (1944) (holding that rulings by the Department of Labor's Wage and Hour Administrator, as to when "waiting time" constituted "working time," though not controlling, served as proper guidance for the courts). Moreover, the Court noted that the absence of an adversarial trial in formulating these rulings did not bar the rulings from some degree of respect. Id. at 140 (referring to Treasury decisions and regulations as examples of nonadversarial rulings entitled to respect). The weight that courts would give to non-controlling rulings depended upon factors including: "the thoroughness evident in its consideration, the
delegated authority, courts initially cautioned against upholding such actions.\textsuperscript{52}

In \textit{Morton v. Ruiz},\textsuperscript{53} for example, the Supreme Court demonstrated its unwillingness to uphold agency actions that the Court deemed arbitrary.\textsuperscript{54} The respondents, who were members of an Indian tribe and lived near, but not on a reservation, sought general assistance benefits under the Snyder Act.\textsuperscript{55} When the Bureau of Indian Affairs (BIA) denied assistance, the respondents challenged the action as arbitrary under section 706 of the APA.\textsuperscript{56} The Court agreed, reasoning that this action was inconsistent with the BIA’s usual practice of awarding assistance to members of an Indian tribe who lived “near” a reservation, as well as “on” a reservation.\textsuperscript{57}

Not only did the \textit{Morton} Court grant judicial review, but in rejecting the BIA’s limitation on providing general assistance benefits, the Court placed emphasis on the agency’s inconsistency.\textsuperscript{58} Because the agency’s prior interpretation of “on a reservation” had included “near” a reservation, the Court gave greater weight to this interpretation than to the express language in the Snyder Act.\textsuperscript{59} The Court added that it was not necessarily ultra vires for the agency to limit assistance in this manner, but that in doing so, “the agency must, at a minimum, let the standard be generally known so as to assure that it is being applied consistently and so as to avoid both the reality and the appearance of arbitrary denial of benefits to potential beneficiaries.”\textsuperscript{60} Ultimately, the

\begin{footnotes}


54. \textit{Id.} at 237.

55. \textit{Id.} at 204.

56. \textit{Id.} at 205, 233; \textit{see also} 5 U.S.C. § 706.

57. \textit{Morton}, 415 U.S. at 229.

58. \textit{Id.} at 237. An agency has a responsibility to act consistently, as well as to implement procedures mandated by law. \textit{Id.} at 232 (citing Fed. Mar. Comm’n v. Seatrain Lines, Inc., 411 U.S. 726, 745-46 (1973); NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764 (1969) (plurality opinion); Dixon v. United States, 381 U.S. 68, 74 (1965); Brannan v. Stark, 342 U.S. 451 (1952)). The Supreme Court has recognized that the deference afforded to an agency’s interpretation is contingent on “its consistency with earlier and later pronouncements.” Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); \textit{see also} N. Ind. Pub. Serv. Co. v. Porter County Chapter of the Izaak Walton League of Am., Inc., 423 U.S. 12, 14 (1975) (per curiam) (finding that Atomic Energy Commission’s interpretation of its own regulations was controlling where the interpretation was “supported by the wording of the regulations and . . . consistent with prior agency decisions”).


60. \textit{Id.} at 231.
\end{footnotes}
Court concluded that the BIA’s ad hoc, unpublished determination represented the type of arbitrary rulemaking the APA sought to avoid.61

In furtherance of its goal to deter arbitrary agency action, the Supreme Court committed itself to ensuring agency adherence to the Act’s rulemaking provisions.62 *NLRB v. Wyman-Gordon Co.* demonstrated this commitment.63

In *Wyman-Gordon Co.*, the Supreme Court invalidated a rule requiring an employer to provide lists of eligible employee voters to unions.64 The rule was promulgated by the National Labor Relations Board (NLRB) through an internal adjudication process in lieu of APA notice-and-comment rulemaking requirements.65 The Court noted that the APA required, at a minimum, publication of both the proposed and adopted versions of the rule in the *Federal Register*, and an opportunity for interested parties to be heard prior to adoption.66 Ultimately, the Court concluded that the NLRB’s self-created adjudicatory proceedings “fell short of the substance of the requirements of the Administrative Procedure Act.”67

**B. The Supreme Court Abandons a Presumption of Review and Embraces Agency Deference**

Both the presumption of availability of judicial review and the broad scope applied in that review have been largely abandoned.68 Beginning as early as the 1970s, the Supreme Court restricted a petitioner’s standing

61. *Id.* at 233-34 (citing H.R. REP. NO. 79-1980, at 21-23 (1946); S. REP. NO. 79-752, at 12-13 (1945)). Further, section 552(a)(1) of the APA states in pertinent part: “Each agency shall separately state and currently publish in the Federal Register for the guidance of the public . . . substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency.” 5 U.S.C. § 552(a)(1) (2000). Additionally, the APA provides that absent “actual and timely notice,” a person may not “be adversely affected by . . . a matter required to be published in the Federal Register and not so published.” *Id.*


63. *Id.*

64. *Id.* at 763-64.

65. *Id.*

66. *Id.* at 764 (noting that an agency may not devise its own rulemaking procedures).

67. *Id.* at 764-65 (citing as evidence the fact that the rule was not published in the Federal Register, and that not all interested parties were given notice of the proceedings held, thus averting the purpose of the rulemaking procedures to allow all interested parties to participate in the rulemaking process).

to challenge an agency action, afforded unprecedented deference to agencies, and expanded the application of exceptions under the APA.\textsuperscript{69}

1. Limited Availability of Judicial Review

The modern trend in Supreme Court decisions has been to apply the Abbott Laboratories test,\textsuperscript{70} but ultimately conclude that the absence of a final agency action precludes judicial review.\textsuperscript{71} The Court has accomplished this by applying a stricter definition of "finality" in finding an agency action ripe for review.\textsuperscript{72}

In \textit{FTC v. Standard Oil Co.},\textsuperscript{73} for example, the Supreme Court held that the issuance of a complaint by the Federal Trade Commission (FTC) regarding a violation of the Federal Trade Commission Act (FTCA) was not subject to judicial review prior to completion of a pending administrative adjudication.\textsuperscript{74} The Court reasoned that the FTC's action was not a "final agency action" under section 10(c) of the APA.\textsuperscript{75} The Court applied the twofold test promulgated in Abbott Laboratories, comparing the FTC's issuance in this case with the Abbott Laboratories Court's interpretation that required manufacturers to place labels on drug products.\textsuperscript{76} The Court held that the FTC's issuance "ha[d] no legal

\begin{itemize}
\item \textsuperscript{70} See supra Part I.A.1.
\item \textsuperscript{71} See Ohio Forestry Ass'n, 523 U.S. at 735-36; Standard Oil Co., 449 U.S. at 238-39 (1980). \textit{But see} Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 670-71 (1986) (addressing whether judicial review is precluded by statute, discussing whether a final agency action exists, and emphasizing that statutes "rarely... withhold judicial review").
\item \textsuperscript{72} Standard Oil Co., 449 U.S. at 239-41 (concluding that the action at issue did not constitute a "definitive statement of position").
\item \textsuperscript{73} 449 U.S. 232 (1980).
\item \textsuperscript{74} Id. at 234, 238. Major oil companies challenged the complaint on the basis that it allegedly lacked the requisite "reason to believe" that a violation of the FTCA had occurred. Id. at 234.
\item \textsuperscript{75} Id. at 238.
\item \textsuperscript{76} Id. at 242. The Court distinguished this case from Abbott Laboratories, explaining:
\end{itemize}

In Abbott Laboratories, for example, the publication of certain regulations by the Commissioner of Food and Drugs was held to be final agency action subject to judicial review in an action for declaratory judgment brought prior to any Government action for enforcement. The regulations required manufacturers of prescription drugs to print certain information on drug labels and advertisements. The regulations were "definitive" statements of the Commission's position, and had a "direct and immediate... effect on the day-to-day business" of the complaining parties. They had "the status of law" and "immediate compliance with their terms was expected." In addition, the question presented by the challenge to the regulations was a "legal issue... fit for judicial resolution." Finally, because the parties seeking the declaratory judgment represented almost all the parties affected by the regulations, "a pre-
force comparable to that of the regulation at issue in *Abbott Laboratories*, nor any comparable effect upon . . . daily business. 77

In a more recent case, *Ohio Forestry Ass'n v. Sierra Club*, 78 the Supreme Court held that an environmental group’s challenge of the United States Forest Service’s land resource management plan that allegedly permitted excessive logging was not ripe for judicial review. 79 The Court reasoned that although the plan made logging and clear-cutting more likely, federal statutes and Forest Service regulations required several steps before review of an action was authorized. 80 Applying the *Abbott Laboratories* test, 81 the Court found that the environmental groups could not point to any hardship of a strictly legal kind, or one that had a practical effect on the trees that environmental groups aimed to protect. 82 Therefore, the Court held that the issue was not ripe for review. 83

2. Narrowing the Scope of Review

In addition to limiting the availability of judicial review of agency actions, the Supreme Court also began to afford those actions greater deference. In a landmark decision, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 84 the Court afforded an unprecedented

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77. *Id.* at 239-40 (citations omitted) (alterations in original).

78. *Id.* at 242. Specifically, the Court emphasized that the only effect of the FTC’s complaint was the initiation of adjudication proceedings. *Id.* The only burden imposed on the oil companies was that they had to respond to the complaint. *Id.* In addition, the Court noted that FTC regulations, in conjunction with the APA, required proceedings in which the respondent had the opportunity to rebut the FTC’s complaint by presenting evidence before an administrative law judge and then appealing any adverse ruling to the FTC. *Id.* at 241.


80. *Id.* at 728.

81. *Id.* at 729-30. The National Forest Management Act required the Forest Service to choose a site and logging method, ensure a project’s consistency with its plan, afford interested parties notice and opportunity for comment, perform an environmental assessment, and implement a final determination to allow logging, which would be appealable in administrative and court proceedings. *Id.*

82. *Ohio Forestry Ass'n*, 523 U.S. at 733-34 (noting that the Forest Service’s plan did not “give anyone a legal right to cut trees . . . [or] abolish anyone’s legal authority to object to trees being cut”). Further, the environmental group failed to present an argument in the lower courts demonstrating any manner in which the plan forced it “to modify its behavior . . . to avoid future adverse consequences.” *Id.*

83. *Id.* at 739.

level of deference to an Environmental Protection Agency (EPA) decision to treat all pollution-emitting devices within the same industrial site as within a single bubble. The Court applied a two-part test: (1) if Congress' express intent was clear as to the construction of the enabling statute, the Court must carry out Congress' express intent; (2) if Congress' intent was ambiguous, the Court must give deference to an agency's interpretation of the statute, provided it is a "reasonable" interpretation. Providing some clarification as to what constitutes a reasonable interpretation, the Court emphasized that if "Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." Further, "[s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.") Finding that Congress expressly intended to be silent on the issue, the Court applied the second part of its test. The Court held that the EPA's interpretation, that the statutory term "stationary source" covered an entire industry plant, was permissible.

Chevron, Thomas Jefferson University v. Shalala, and Norfolk Southern Railway Co. v. Shanklin also demonstrated the Court's pattern of affording substantial deference to an agency's interpretation. Although the Court declined to accept an agency's interpretation in Norfolk Southern Railway Co., the key distinguishing factor in overcoming this deference was that the Court itself had previously interpreted the statute in a manner inconsistent with the agency's interpretation.

In Thomas Jefferson University, the petitioner challenged the Secretary of Health and Human Services' interpretation that a Medicare reimbursement provision excluded certain educational expenditures. The Court upheld the Secretary's interpretation, stating that an "agency's interpretation must be given 'controlling weight unless it is plainly erroneous or inconsistent.'" The Court did acknowledge that

85. Id. at 840, 866.
86. Id. at 842-44. An agency's interpretation of a statute does not have to be the only permissible construction or the same interpretation that the Court would have reached. Id. at 843 n.11.
87. Id. at 843-44.
88. Id. at 844.
89. Id. at 845-46, 866.
91. 529 U.S. 344 (2000).
92. Id. at 356; infra note 100.
94. Id. at 512 (quoting Bowles v. Seminole Rock Co., 325 U.S. 410, 414 (1945)).
conflicting interpretations are "entitled to considerably less deference," but found the petitioner's claim in this regard to be unsubstantiated.\footnote{95} \n
\textit{Norfolk Southern Railway Co.} demonstrated how an agency's inconsistency may cause its acts to be set aside as arbitrary and capricious.\footnote{97} Unlike in \textit{Chevron} and \textit{Thomas Jefferson University}, the \textit{Norfolk Southern Railway Co.} Court rejected the Federal Highway Administration's interpretation of a regulation concerning warning devices for railroad crossings.\footnote{98} The Court acknowledged that although "an agency's construction of its own regulations is [ordinarily] entitled to substantial deference,"\footnote{99} such deference does not apply if the agency's interpretation is inconsistent with the express text of the statute, and with a prior interpretation of the statute adopted by the Court.\footnote{100}

\footnote{95} Id. at 515 (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 446, n.30 (1987)).

\footnote{96} See id. at 515-16 (rejecting the petitioner's reference to a 1978 letter discussing various categories of educational expenses but failing to address redistribution). It is noteworthy that this alleged inconsistent letter is distinguishable from the inconsistent actions of the Bureau of Indian Affairs in \textit{Morton v. Ruiz}. See \textit{Morton v. Ruiz}, 415 U.S. 199, 233 (1974). In \textit{Thomas Jefferson University}, the Secretary of Health and Human Services' prior letter could not be inconsistent with the agency's interpretation concerning redistribution because the letter did not address the matter of redistribution at all. \textit{Thomas Jefferson Univ.}, 512 U.S. at 505, 515. To the contrary, the Bureau of Indian Affairs' past actions of affording monetary assistance to native Indians living "near" a reservation were inconsistent with the Bureau's interpretation. \textit{Morton}, 415 U.S. at 233.

\footnote{97} Norfolk S. Ry. Co., 529 U.S. at 352-59.

\footnote{98} Id. at 355-56. The Administration's view was that the regulation "comprise[d] two distinct programs—the 'minimum protection' program and the 'priority' or 'hazard' program." Id. at 355.

\footnote{99} Id. at 356 (citing Lyng v. Payne, 476 U.S. 926, 939 (1986)).

\footnote{100} Id. (emphasizing that the doctrine of stare decisis requires adherence to a prior determination by the Court of "a statute's clear meaning [and that any] later interpretation of the statute" is evaluated based on that prior determination). In addition to granting greater deference to agency actions, the Supreme Court was reluctant to interpret legislation granting agency authority as requiring formal rulemaking, and eventually, notice-and-comment procedures. See \textit{Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.}, 435 U.S. 519, 546 (1978) (adopting the position that courts may not impose additional procedural requirements on agencies); United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 240-42 (1973) (holding that a statutory requirement for a "hearing" did not require formal adjudicative proceedings under the APA, but would be satisfied by the APA's notice-and-comment procedures and informal rulemaking proceedings); United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 756-57 (1972) (refusing to interpret a statutory requirement for a "hearing" as invoking formal rulemaking procedures under the APA). In one prior case, the Supreme Court held that the Secretary of Health and Human Services was not "required to abide by the familiar notice-and-comment rule making provisions" of the APA prior to reallocating its resources because such a decision was exempt as a "general statement[] of policy." \textit{Lincoln v. Vigil}, 508 U.S. 182, 195-97 (1993) (quoting 5 U.S.C. § 553(b) (1988)). The Court concluded that the APA's exemption for general statements of policy most certainly included an "announcement . . . discontinu[ing] a discretionary allocation of unrestricted funds from a lump-sum appropriation." Id. at 197. The Court relied on its decision in
C. The “Sphere of International Trade”: Broad Availability of Review Offset by a Limited Scope of Review

Although willing to afford judicial review to a broad spectrum of agency actions, the Federal Circuit and the CIT have assumed a markedly deferential posture when reviewing agency actions with respect to international trade, specifically those undertaken by CITA. The courts generally construe agency actions concerning international trade to be within the ambit of the President’s foreign affairs authority; thus, they are subject to an assumption of broad delegated authority exempt from APA rulemaking procedures. Courts usually self-impose limitations when reviewing these matters on the issue of whether the President or his designated agencies have acted beyond their delegated power, i.e., whether their actions are ultra vires. Three cases, *Mast Industries, Inc. v. Regan*, *American Ass’n of Exporters & Importers—Textile & Apparel Group v. United States* (Am. Ass’n of Exporters I), and *Fieldston Clothes, Inc. v. United States*, demonstrate this combination of broad availability of review and restrictive scope of

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*Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), in which the Secretary of Transportation’s decision to “allow the expenditure of federal funds to build [a highway] through [a public park] was plainly not an exercise of a rulemaking function.” Id. at 414. The Supreme Court previously defined “general statements of policy” as “statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.” *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979); *see also Lincoln*, 508 U.S. at 199 (distinguishing the requirement in *Morton v. Ruiz* that a provision restricting eligibility for Indian assistance be published in the Federal Register because the Bureau’s own regulations in *Morton* required such publication). Moreover, the Supreme Court has held that although *Chevron* deference is inapplicable to statements of policy that are not bound by notice-and-comment procedures, such actions may be eligible for *Skidmore* respect, depending on their persuasiveness. *See United States v. Mead Corp.*, 533 U.S. 218, 228 (2001); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *supra* notes 51, 58.

101. *Florsheim Shoe Co. v. United States*, 744 F.2d 787, 793 (Fed. Cir. 1984). With respect to international trade, “congressional authorizations of presidential power should be given a broad construction and not hemmed in or cabined, cribbed, confined by anxious judicial blinders.” Id. (quoting *S. P.R. Sugar Co. Trading Corp. v. United States*, 334 F.2d 622, 632 (Cl. Ct. 1964) (internal quotation marks omitted)).


103. *See Am. Ass’n of Exps. and Imps.—Textile & Apparel Group v. United States (Am. Ass’n of Exporters I)*, 7 Ct. Int’l Trade 79, 86-87 (1984) (explaining that “[t]he only question . . . remain[ing] is whether the President’s actions (through the CITA) were permissible pursuant to section 204 . . . [because] Section 204 grants extraordinary discretion to the President . . . [h]e may negotiate ‘whenever he determines such action appropriate’” (quoting 7 U.S.C. § 1854 (1982))), *aff’d*, 751 F.2d 1239 (Fed. Cir. 1985).


105. 751 F.2d 1239 (Fed. Cir. 1985).

review. Generally, in international trade cases, courts will review an agency action, but are unlikely to conclude that the action is unlawful.¹⁰⁷

1. Flexible Ripeness for Review Standard

In Mast Industries, the CIT found that importers and retailers of textile products had standing to bring an action against the United States Customs Service (Customs) challenging interim regulations that amended country of origin requirements for textiles imported subject to quotas under the Multi-Fiber Agreement (MFA).¹⁰⁸ Without specifically referencing the Abbott Laboratories test for determining whether requisite agency action was final, the CIT relied on the adverse practical effect of restricting textile imports to determine that the importers were sufficiently aggrieved.¹⁰⁹ The CIT emphasized the importers’ direct interest because of “contractual relationships based upon the former regulations.”¹¹⁰ Further, the CIT reasoned that a sufficient adverse effect existed in that “‘business relationships . . . could be disrupted and adversely affected by the quotas.’”¹¹¹

The Federal Circuit affirmed this reasoning in Am. Ass’n of Exporters II, holding that trade associations representing importers of textile and apparel products had sufficient standing to challenge CITA’s unilateral implementation of quotas because there was no market disruption.¹¹² The Federal Circuit agreed with the lower court that textile importers were entities having a “direct interest in purchasing the textile and apparel products . . . involved (and with contractual relationships based thereon).”¹¹³


¹⁰⁸. Mast Indus., 8 Ct. Int’l Trade at 216-17, 221; see also MFA, supra note 1. The MFA was the original textile agreement providing a basis on which limitations could be placed on textile imports, negotiated pursuant to section 204 of the Agricultural Act of 1956, and was succeeded by the ATC. Mast Indus., 8 Ct. Int’l Trade at 217 n.2.

¹⁰⁹. Mast Indus., 8 Ct. Int’l Trade at 221 (finding that the importers had standing due to their “direct interest in purchasing textile products” and the fact that they had already “entered into contractual relationships”).

¹¹⁰. Id.

¹¹¹. Id. (omission in original) (quoting U.S. Cane Sugar Refiners’ Ass’n v. Block, 3 Ct. Int’l Trade 196, 202 (1982)). The CIT did not require that the effect be legal in the sense that it have the force of law, but rather in the sense that a legal contractual interest was affected. See id.

¹¹². Am. Ass’n of Exps. & Imps.—Textile & Apparel Group v. United States (Am. Ass’n of Exporters II), 751 F.2d 1239, 1246 (Fed. Cir. 1985) (concluding that the plaintiffs had standing due to the injury they would endure as a result of the challenged quantitative restrictions).

¹¹³. Id. The action taken by CITA in Am. Ass’n Of Exporters II—the implementation of quotas on textile imports—constitutes a more final action than the interim regulations
Ten years later, the CIT applied the same rationale in *Fieldston Clothes, Inc.* to determine that importers of a category of wool garments had standing to challenge CITA's import restrictions of that category pursuant to the Agreement on Textiles and Clothing (ATC),\(^4\) and that such an import restriction constituted a final agency action ripe for review.\(^5\) The CIT found that Fieldston Clothes, Inc. was sufficiently adversely affected by a restriction inhibiting the entry of their wool garments into the United States.\(^6\)

2. Limited Scope of Review

The leading case governing the restricted scope of review in the sphere of international trade, *Florsheim Shoe Co. v. United States,*\(^7\) established that "the Executive's decisions . . . are reviewable only to determine whether the President's action falls within his delegated authority, whether the statutory language has been properly construed, and whether the President's action conforms with the relevant procedural requirements."\(^8\) In *Mast Industries,* the CIT applied this standard to reject the importers' contention that CITA's interim regulations violated section 706(2)(A) of the APA.\(^9\) The CIT found that CITA's authority to issue such regulations was properly delegated under section 204 of the Agricultural Act.\(^10\) The CIT did not consider whether the interim regulations promulgated by CITA were arbitrary within the meaning of section 706(2)(A).\(^11\)

Additionally, the *Mast Industries* court found that Customs was exempt from the notice-and-comment provisions of the APA under both the general statement of policy and the foreign affairs exemptions in 5
U.S.C. § 553(a)(1) and § 553 (b)(A). Under the foreign affairs exemption, an agency may be exempt from notice-and-comment rulemaking procedure “to the extent that there is involved a military or foreign affairs function of the United States.” The court noted that there is no clear framework for determining when to invoke the foreign affairs function. Moreover, the court emphasized that the exception “cannot apply to functions merely because they have impact beyond the borders of the United States . . . it is the function of the regulations that is determinative, and not the source of the authority invoked.” The court was not willing to accept that any action “remotely relating to foreign affairs” is exempt from APA rulemaking provisions because this would effectively render all Customs regulations of textiles under section 204 exempt, “even if entirely domestic in impact.” Nevertheless, the court ultimately concluded that the “negotiation of agreements” under section 204 was exempt in that it “clearly and directly involve[s] a” foreign affairs function.

Similarly, in *Am. Ass'n of Exporters II*, the Federal Circuit held that CITA did not exceed its statutory authority under section 204 of the Agricultural Act in implementing textile quotas. The court also held that CITA was exempt from notice-and-comment proceedings under the foreign affairs exemption. Further, the court found that inquiries into CITA’s reasoning were beyond proper judicial review.

In *Fieldston Clothes, Inc.*, the CIT examined whether CITA’s action of imposing import quotas governed by the ATC was beyond the scope of

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125. *Id.* at 230.

126. *Id.*

127. *Id.* at 231.

128. *Id.* at 232.


130. *Id.* at 1249 (reasoning that prior disclosure of CITA’s intentions to impose quotas would “provoke definitely undesirable international consequences” (quoting H.R. REP. NO. 69-1980, at 23 (1946))).

131. *Id.* at 1248 (concluding that “[o]nce it is determined, as we have just done, that the President’s exercise of his authority . . . was within his constitutionally delegated power . . . [t]he President’s findings of fact and the motivations for his actions are not subject to review” (first omission in original) (quoting Florsheim Shoe Co. v. United States, 744 F.2d 787, 795-96 (Fed. Cir. 1984))).
the President's authority under section 204. 132 The plaintiff, Fieldston, submitted comments to CITA in response to CITA's notice, arguing in part that the proposed quota limits at issue were "inconsistent with the United States' obligations under the ATC." 133 The CIT limited the scope of review to the issue of whether CITA's actions were ultra vires, refusing to consider whether CITA's actions were inconsistent with its own prior procedures or the Uruguay Round Agreements Act and the ATC. 134 The CIT further declined to address Fieldston's objections to the procedural implementation of the ATC by CITA. 135 The CIT considered the relevant issue to be "whether the imposition of the import quota" being challenged was "relevant to the enforcement of some existing textile agreement"—the test for determining whether CITA's actions were ultra vires. 136 The CIT ultimately concluded that CITA acted within its authority. 137

132. Fieldston Clothes, Inc. v. United States, 19 Ct. Int'l Trade 1181, 1182-84 (1995) (representing the only court case to address CITA's actions undertaken with respect to the ATC).
133. Id. at 1183-84. The plaintiff also argued that CITA's interpretation of section 204 of the Agricultural Act was incorrect; the plaintiff asserted that the Act only applied to bilateral agreements, not multilateral agreements like the ATC. Id. at 1187. The court rejected this argument, finding section 204 and its applicability to multilateral agreements sufficiently clear. Id.
134. Id. at 1184-85 ("[T]he exercise of broad discretionary authority delegated by Congress to the President in the sphere of international trade . . . is reviewable . . . only to determine whether the President's action falls within his delegated authority [and] whether the statutory language has been properly construed." (alteration and first omission in original) (quoting Florsheim Shoe Co. v. United States, 6 Ct. Int'l Trade 1, 11 (1983), aff'd, 744 F.2d 787 (Fed. Cir. 1984))).
135. Id. at 1184. The CIT limited its review in view of 19 U.S.C. § 3512(c)(1) which, in pertinent part, provides:

No person other than the United States—
(A) shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or
(B) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency or other instrumentality of the United States, any State, or any political subdivision of a State on the ground that such action or inaction is inconsistent with such agreement.

136. Fieldston Clothes, Inc., 19 Ct. Int'l Trade at 1188. The court recognized that, contrary to Fieldston's contention, the ATC qualifies as an agreement limiting export of textiles within the meaning of section 204. See id.
137. Id.
II. U.S. ASS‘N OF IMPORTERS OF TEXTILES & APPAREL V. UNITED STATES: AGENCY DEFERENCE PREVAILS DESPITE INCONSISTENCY

Facing the elimination of all quotas on imported textile and clothing products manufactured in WTO member countries, and relying on textile-specific safeguard measures set forth in the WTO’s Report of the Working Party on the Accession of China (Working Report), CITA departed from its own previously published and practiced procedures, which required specific information that demonstrated actual market disruption in the past, and in September 2004, announced that it would allow safeguard petitions based solely on a mere threat. From October 2004 to December 2004, CITA requested public comments on twelve petitions for safeguards based solely on a threat of market disruption.

In response, the U.S.-ITA commenced an action before the CIT on December 1, 2004, seeking an injunction against CITA that would prevent it from considering threat-based petitions. In support of its action, the U.S.-ITA argued that U.S. textile and apparel importers had conducted their business operations in reliance on CITA’s previously published procedures for considering petitions, thus they would be disrupted and irreparably harmed by the change.

The CIT granted U.S.-ITA’s motion for a preliminary injunction, finding that U.S.-ITA raised substantial questions concerning the propriety of CITA’s acceptance of petitions based on a threat of market disruption, that the balance of hardships favored an injunction against such actions, and that issuance of an injunction would serve the public interest.


141. Id. at 1350.

142. Id. at 1349.
interest. The government appealed the CIT’s ruling to the Federal Circuit, which reversed the lower court’s ruling as an abuse of discretion.

In its decision, the Federal Circuit found that the lower court clearly erred in both its legal analysis and fact-finding, and reversed the CIT’s decision. In his opinion, Judge Michel first addressed whether U.S.-ITA had a complaint ripe for judicial review, and then evaluated each of U.S.-ITA’s four claims to determine whether a “fair chance of success on the merits” existed. The four claims presented were: (1) CITA’s reinterpretation of prior published procedures to permit threat-based requests for safeguards was arbitrary and capricious; (2) CITA violated APA section 552(a)(1) by neglecting to publish the reinterpretation in the Federal Register; (3) CITA violated rulemaking requirements under APA section 553; and (4) CITA exceeded statutory authority under section 204 of the Agricultural Act in its consideration of petitions for textile-specific safeguard measures pursuant to the Working Report.

Judge Goldberg, writing the opinion for the lower court, reasoned that to prevail on its motion for a preliminary injunction, the petitioner would need to demonstrate: (1) that it will be immediately and irreparably injured; (2) that the balance of hardship on all the parties favors the petitioner; (3) that there is a likelihood of success on the merits; and (4) that the public interest would be better served by the relief requested. Id. at 1346.

Regarding the first factor, Judge Goldberg concluded that the plaintiff’s forced cancellation of orders in China and the possibility that failure to deliver goods on time would impair business reputation constituted irreparable harm. Id. at 1347-49. With regard to the second factor, the court determined that the balance of hardship favored a preliminary injunction because irreparable harm would be caused to the petitioner, whereas CITA could still administer textile-specific safeguards based on actual disruption. Id. at 1349-50. Then considering the third factor, the CIT concluded that the plaintiff had a likelihood of success on the merits in that it had “raise[d] serious substantial, difficult, and doubtful questions that are the proper subject of litigation where it [wa]s clear that the moving party [would] suffer substantially greater harm... than the non-moving party would by its grant.” Id. at 1350 (internal quotation marks omitted) (quoting Ugine-Savoie Imphy v. United States, 24 Ct. Int’l Trade 1246, 1251 (2000)). Finally, regarding the fourth factor, the lower court held that a preliminary injunction served the public interest of ensuring that trade laws are properly administered. Id. at 1351.

Judge Michel highlighted an unresolved dispute as to whether U.S.-ITA was required to show more than a fair chance of success on the merits in seeking an injunction against the government, or whether a stricter standard should apply. Id. at 1347. Ultimately, the court determined that U.S.-ITA did not even meet the burden of proving the lesser standard, and noted that, even if this were the correct standard, the CIT incorrectly applied it. Id.

See id. at 1347, 1350-53.

Id. at 1350-53.
In its analysis, the court first found that the controversy was not ripe for review because CITA’s consideration of threat-based petitions did not constitute a final agency action. The court applied the Abbott Laboratories test, comprised of: (1) the fitness of the issue at hand for judicial review, and (2) the potential for hardship. In applying this test, the court compared CITA’s action to the agency action imposing labeling requirements on drug manufacturers in Abbott Laboratories, but ultimately concluded that CITA’s action more closely resembled the “threshold determination” in Standard Oil, than it did a final agency action. The court reasoned that even if a challenge to the validity of CITA’s alleged reinterpretation was a “purely legal” question, it was not fit for review because it was not a final agency action. Applying the second factor, the Federal Circuit concluded that U.S.-ITA’s resulting business uncertainty was not comparable to the hardship resulting from the legal force of the drug labeling mandates in Abbott Laboratories.

After determining that CITA’s alleged reinterpretation was not a final agency action ripe for judicial review, the court rejected U.S.-ITA’s first claim that CITA acted arbitrarily and capriciously in reinterpreting its prior published procedures to permit petitions based on a threat of market disruption. The court reasoned that CITA’s interpretation of published procedures coincided with the express language in the Working Report. The court also declined to accept prior inconsistent interpretations.

148. See id. at 1348-50.
149. Id.
150. Id. at 1349.
151. Id. at 1349-50.
152. Id. at 1350.
153. Id. at 1350-52.
154. Id. at 1350-51. Instead of determining whether CITA’s prior interpretation of the terms set forth in paragraph 242 of the Working Report was consistent with its most recent interpretation, the court conducted its own interpretation of the terms. See id. at 1351. Ultimately, the court relied on the phrase “avoiding . . . market disruption,” to conclude that the provision must have contemplated consideration of petitions based on threat. Id. Specifically, the court reasoned:

The primary focus of the Association’s argument is on the language from the procedures—“due to market disruption, threatening to impede the orderly development of trade in these products.” The Association contends that this language requires that data describing current market disruption be presented before CITA can lawfully consider whether to request consultations with China.

The Association’s argument is unpersuasive because it would require us to read this language out of context. CITA’s procedures and paragraph 242 both follow the disputed language with a description of the stated purpose of the paragraph 242 safeguard, which is “easing or avoiding such market disruption.” The word “avoiding” shows that current market disruption is not a prerequisite for action under either the procedures or paragraph 242 because “such market disruption” cannot be “avoid[ed]” if it has already occurred.
statements made by CITA officials as formal or binding, finding that these interpretations did not officially represent CITA's position.  

Given that the Federal Circuit found no actual reinterpretation, the court quickly rejected U.S.-ITA's second and third contentions that CITA violated APA's publication requirements under section 552 and formal rulemaking procedures under section 553. Ultimately, the court declined to decide the petitioner's final claim that CITA's actions in implementing safeguards pursuant to the Working Report were ultra vires.

III. DOES LIMITATION OF THE AVAILABILITY AND SCOPE OF JUDICIAL REVIEW DEPRIVE U.S.-ITA OF ANY RECOURSE AGAINST ARBITRARY OR UNLAWFUL AGENCY ACTIONS?

A. The Federal Circuit Incorrectly Restricted the Availability and Scope of Judicial Review

The Federal Circuit in U.S. Ass'n of Importers II incorrectly applied the Abbott Laboratories test, deviated from Federal Circuit and CIT precedent for ripeness, and overlooked Morton v. Ruiz when it considered the arbitrary nature of CITA's actions.

First, the Federal Circuit failed to conduct a thorough analysis when it applied the twofold Abbott Laboratories test, which requires a consideration of the fitness of the issue for review and the potential hardship to the claimant. The court's method was entirely based on analogy, relying too heavily on whether CITA's alleged reinterpretation of its procedures for accepting petitions seemed to more closely resemble the agency action in Abbott Laboratories or Standard Oil, without closely examining the criteria that the Supreme Court relied upon to arrive at

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Id. (citations omitted); see also supra note 5.

155. U.S. Ass'n of Importers II, 413 F.3d at 1352.

156. Id. at 1353. Thus, the court avoided deciding whether CITA was exempt from APA formal rulemaking procedural requirements under either the foreign affairs exemption or the general statement of policy exemption. See supra notes 122-128 and accompanying text (describing the interpretation that the Mast Industries court provided these exceptions).

157. U.S. Ass'n of Importers II, 413 F.3d at 1353. The court noted that this was a matter of first impression, but concluded that "mere novelty [was] insufficient to establish a fair chance of prevailing." Id.

158. See supra notes 42-49, 52-60 and accompanying text; cf. U.S. Ass'n of Importers II, 413 F.3d at 1348-50.

159. See supra notes 42-49 and accompanying text.
the two different outcomes in those two cases. In its evaluation for fitness for review in *Abbott Laboratories*, the Court acknowledged that the issue to be reviewed was "a purely legal one: whether the statute was properly construed by the Commissioner to require the established name of the drug to be used every time the proprietary name is employed." The Court noted that such an analysis still requires the agency to "justify [its] regulation in factual terms." The Federal Circuit in *U.S. Ass'n of Importers II*, however, disregarding the purely legal effect of CITA's reinterpretation as insufficient alone, and failing to consider any factual justifications, simply concluded that CITA's action was neither final nor definitive, without defining either of these terms. In evaluating the second factor, potential hardship, the court similarly disregarded the adverse effect of CITA's alleged reinterpretation on the business operations of U.S. importers, referring to it as merely "businesses' perceived uncertainty." Second, *U.S. Ass'n of Importers II* strays from Federal Circuit and CIT precedent that has strongly favored broad availability of judicial review. The alleged reinterpretation at issue in *U.S. Ass'n of Importers II* closely mirrors the Customs Service's revision of criteria for determining the country of origin in *Mast Industries*, in that both represent a change in procedures used to make final determinations. The *Mast Industries* court found that the adverse effect on existing contractual relationships and business operations constituted a direct interest on the part of importers sufficient to invoke judicial review. If the Federal Circuit had relied on this method of analysis, the court likely would have given

160. See *U.S. Ass'n of Importers II*, 413 F.3d at 1348-50 (concluding that CITA's reinterpretation of safeguard implementation procedures "is more analogous to the 'threshold determination' warranting further investigation in *Standard Oil*").


162. *Id.*

163. See *U.S. Ass'n of Importers II*, 413 F.3d at 1348-50; *supra* notes 150-52 and accompanying text. The Federal Circuit did not address CITA's efforts to justify the factual terms of its actions, which the Court in *Abbott Laboratories* considered important in evaluating the "purely legal" effect. See *id.*; *Abbott Labs.*, 387 U.S. at 149.

164. See *id.* at 1350.


167. The same consideration was given to the adverse effect on business' operations and contractual relationships by the Federal Circuit in *Am. Ass'n of Exporters II* and by the CIT in *Fieldston Clothes, Inc.* See *Am. Ass'n of Exp's. & Imps.—Textile & Apparel Group v. United States (Am. Ass'n of Exporters II)*, 751 F.2d 1239, 1250 (Fed. Cir. 1985); *Fieldston Clothes, Inc. v. United States*, 19 Ct. Int'l Trade 1181, 1185-86 (1995).
more significance to the adverse effect on U.S. importers' business operations and found CITA's reinterpretation ripe for review.

Finally, the Federal Circuit fell short of conducting a complete analysis of U.S.-ITA's chances of success on the merits.\textsuperscript{168} With respect to U.S.-ITA's first claim—that CITA's alleged reinterpretation constituted an arbitrary and capricious abuse of discretion—the Federal Circuit failed to consider the standard set forth in\textit{ Morton v. Ruiz}, and incorrectly applied established precedent in international trade decisions.\textsuperscript{169} The Federal Circuit derived its own interpretation of CITA's published procedures for evaluating textile-specific safeguard petitions, comparing the express language to that of the textile-specific safeguard provisions in the Working Report in conjunction with the corresponding provisions in the Accession Agreement.\textsuperscript{170} Ultimately, the court concluded that CITA's

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\textsuperscript{168}\textit{See U.S. Ass'n of Importers II}, 413 F.3d at 1350-54. \\
\textsuperscript{169}\textit{Id.} at 1350-53; see also supra notes 55-60 and accompanying text. \\
\textsuperscript{170}\textit{U.S. Ass'n of Importers II}, 413 F.3d at 1350-52. It is noteworthy that the Federal Circuit did not address whether or not \textit{Chevron}, or even \textit{Mead-Skidmore}, deference is warranted here. \textit{Id.; see also supra} notes 51, 84-89, 100 and accompanying text. Instead of applying the first part of the \textit{Chevron} test to determine whether the enabling statute (arguably section 204 of the Agriculture Act) is ambiguous, the court seems to have examined and concluded that neither CITA's procedures nor the text of the Accession Agreement or Working Report contain ambiguity. \textit{U.S. Ass'n of Importers II}, 413 F.3d at 1350-52. The Federal Circuit, nevertheless, continued to interpret the terms of the Working Report as a court would under \textit{Chevron} where Congress' express intent was unclear in the enabling statute. \textit{See id.; supra} notes 84-89 and accompanying text. This unusual method of deciphering the correct interpretation of the Working Report and CITA procedures is a reflection of the fact that neither section 204 of the Agriculture Act, nor any other statute enacted by Congress, contains implementing legislation corresponding to paragraph 242 of the Working Report. \textit{See supra} note 8 (discussing the fact that the textile-specific safeguard measures implemented by CITA are the only type of safeguards that are not implemented subsequent to extensive statutory procedures outlined in the U.S. Trade Act of 1974). Thus, the court could not accurately have concluded that the first step of \textit{Chevron} was satisfied because this step requires Congress to have specifically addressed the issue in question. \textit{See supra} notes 84-89 and accompanying text. Consequently, the court should have moved to the second inquiry under \textit{Chevron}, which would have forced the court to determine whether CITA's interpretation was reasonably permissible. \textit{See supra} notes 84-89 and accompanying text (explaining that where Congress intended to be silent on the issue, the second part of the \textit{Chevron} test should be applied). In effect, this would have required the court to evaluate whether the interpretation was arbitrary and capricious. \textit{See supra} notes 84-89 and accompanying text. Moreover, because the court held that CITA never "reinterpreted" its procedures, it evaluated CITA's initial published procedures as if they allowed for threat-based decisions. \textit{U.S. Ass'n of Importers II}, 413 F.3d at 1350-52. Thus, if the court had properly addressed the appropriate degree of deference to afford CITA's alleged reinterpretation, it would have done so as if it were an agency's interpretation via published notice-and-comment procedures. \textit{See 5 U.S.C.} § 553 (2000). Although notice-and-comment procedures do not always warrant \textit{Chevron} deference, they operate as evidence that \textit{Chevron} deference is appropriate. \textit{See supra} notes 84-89, 100 and accompanying text. If
procedures included consideration of threat-based petitions, and complied with the express terms of the pertinent textile-specific safeguard petitions. The court then briefly addressed the effect of prior published statements of CITA officials who expressed their intention not to consider threat-based petitions, finding that the statements were not the formal position of CITA, and therefore not binding.

The Federal Circuit's analysis in U.S. Ass'n of Importers II is faulty when compared with the Supreme Court's analysis in Morton v. Ruiz. First, the Federal Circuit quickly reached the conclusion that the CITA procedures expressly included petitions based on the threat of import surge. The court hastily concluded that no ambiguity existed when express terms contained in both CITA's initial procedures and the Working Report appeared to conflict, and when neither CITA nor the pertinent provisions of the Report defined these terms. The Federal Circuit reasoned that the phrase "avoiding ... market disruption" clearly demonstrates that market disruption is not a prerequisite to consideration of a petition for safeguard measures because market disruption that is already occurring can no longer be avoided. However, the same rationale could be applied to the phrase "due to market disruption," which, if not a prerequisite to consideration of a request, would likewise render that phrase erroneous. Further, the court had considered the possibility that CITA's reinterpretation could be an informal statement of policy change, as in Christensen, it may have concluded that the Mead-Skidmore analysis was more appropriate to determine the degree of respect to which the agency was entitled. See supra notes 51, 100. Under the Skidmore factors, the inconsistency in prior practice and procedures would have weighed against providing strong deference to CITA's actions. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). Due to the evident ambiguity—evidenced by the very absence of implementing legislation in section 204—whether the court applied Chevron or Mead-Skidmore analysis, it should have determined, at the very least, if the reinterpretation was arbitrary under the second part of the Chevron test. See supra notes 84-89 and accompanying text.

171. U.S. Ass'n of Importers II, 413 F.3d at 1352.
172. Id.
174. See U.S. Ass'n of Importers II, 413 F.3d at 1351-52 (The court noted that "no deference is required where ... the procedures themselves are clear.").
175. See supra notes 5, 7-8.
176. U.S. Ass'n of Importers II, 413 F.3d at 1351.
177. Id.
178. Id.
179. See id. at 1352; supra notes 5, 7-8. The Federal Circuit rejected U.S.-ITA's arguments that certain data is required to demonstrate market disruption by focusing on CITA's use of the term "should" versus the word "shall." See U.S. Ass'n of Importers II, 413 F.3d at 1352. CITA's published procedures do state that consideration of requests shall be in accordance with "longstanding Committee practice in considering textile actions." See supra note 7. Arguably, the Committee has established a longstanding
Federal Circuit erred in its refusal to place emphasis on prior statements of intent and prior implementation of procedures as evidence of CITA’s intent. Conversely, the Morton Court gave greater weight to the prior interpretation and implementation by the Bureau of Indian Affairs in its allocation of assistance than it did to the express terms in the enabling legislation itself.

Moreover, the Federal Circuit neglected to reference any precedent governing the scope of judicial review in cases involving international trade. If the court had applied the standard set forth in Florsheim Shoe Co., it would have decided whether CITA regulations, the China Accession Agreement, or the Working Report constituted law under section 706 of the APA prior to determining whether CITA had acted contrary to any law. It is likely that the court’s consideration of practice of accepting petitions based only on actual market disruption. See supra note 17. Further, CITA’s procedures expressly provide that “[a] request will only be considered if the request includes . . . specific information . . . that the Chinese origin textile or apparel product is . . . threatening to impede the orderly development of trade in like or directly competitive products.” China Textile Safeguard Procedures, supra note 7, at 27,788 (emphasis added); see supra note 8. The prior U.S. definition of the terms “like or directly competitive” under the Trade Act of 1974 governing all other safeguard measures (other than textiles) is well-established. See supra note 8. If threat-based petitions were evaluated under the Trade Act of 1974, they would be deemed inadequate for failing to establish that the domestic producer seeking protection produces a “like or directly competitive product” to the foreign product causing or threatening to cause market disruption. Id. Because CITA’s published procedures similarly require data to demonstrate that the product of concern is a “like or directly competitive” product, even threat-based petitions would need to provide data sufficient to satisfy this established definition. Cf. Morissette v. United States, 342 U.S. 246, 263 (1952); see also supra note 8.

See U.S. Ass’n of Importers II, 413 F.3d at 1352; supra notes 52-60 and accompanying text.

Morton v. Ruiz, 415 U.S. 199, 236 (1974); supra notes 52-60 and accompanying text. The Morton Court specifically reasoned:

Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required. The BIA, by its Manual, has declared that all directives that “inform the public of privileges and benefits available” and of “eligibility requirements” are among those to be published. The requirement that, in order to receive general assistance, an Indian must reside directly “on” a reservation is clearly an important substantive policy that fits within this class of directives. Before the BIA may extinguish the entitlement of these otherwise eligible beneficiaries, it must comply, at a minimum, with its own internal procedures.

Morton, 415 U.S. at 235 (citations omitted).

See U.S. Ass’n of Importers II, 413 F.3d at 1350-52.


See 5 U.S.C. § 706 (2000); Mast Indus. v. Regan, 8 Ct. Int’l Trade 214, 224 (1984). Because there is no legislation implementing procedures for the enforcement of textile-specific safeguards as there are for other agency safeguards, CITA’s regulations can only be evaluated as to whether they are ultra vires under section 204 of the Agricultural Act.
whether CITA's actions were arbitrary would have been limited to whether CITA failed to comply with procedural requirements because precedent indicates that there will be no review of an agency's reasoning or fact-finding in the sphere of international trade. Furthermore, CITA's obligation to comply with notice-and-comment rulemaking requirements under the APA would likely have hinged on whether the court applied the APA's foreign affairs function exemption.186

Precedent in international trade cases strongly suggests that the court would have invoked the foreign affairs function exemption to excuse CITA's disregard for APA rulemaking requirements.187 The crux of the recognition of the foreign affairs exemption in international trade cases is that if an agency action is sufficiently final to be reviewable, it most likely impacts a foreign interested party and falls under the exemption.188 The inequitable result is that agency actions ripe for judicial review are not reviewable for arbitrariness.189

However, an evaluation of the applicability of the foreign affairs exemption under Mast Industries might have yielded a result favoring U.S. textile importers. The court in Mast Industries refused to accept that any action "even ... remotely relating to foreign affairs"190 is exempt from APA rulemaking provisions because this would effectively render all agency actions under section 204 of the Agriculture Act exempt—even those "entirely domestic in impact."191 CITA's internal change in domestic procedures arguably constitutes an action "entirely domestic in impact," such that the court could have refused to exempt CITA from compliance with APA notice-and-comment procedures under the foreign affairs exemption.192

See supra note 8. The Federal Circuit, however, declined to address the question of whether the Working Report even meets the definition of a textile agreement under that Act. See 7 U.S.C. § 1854 (2000); supra note 182 and accompanying text.

186. See id. at 229-30; supra notes 122-28.
187. See supra notes 122-28 and accompanying text.
188. See Am. Ass'n of Exps. & Imps.—Textile & Apparel Group (Am. Ass'n of Exporters II), 751 F.2d 1239, 1249 (Fed. Cir. 1985); supra notes 122-28 and accompanying text. In both Am. Ass'n of Exporters II and Mast Industries, the court found the agency action in question to be ripe for review, but ultimately held the agency was exempt from APA requirements under the foreign affairs exemption. See Am. Ass'n of Exporters II, 751 F.2d at 1246, 1249; Mast Indus., 8 Ct. Int'l Trade at 221, 232.
189. See supra notes 119-28 and accompanying text.
191. Id. at 231; see supra notes 122-28 and accompanying text (emphasizing that it is the function, and not the source, of the authority granted to an agency that determines the applicability of the foreign affairs exemption).
Regardless, even if the court had invoked the exemption, it would still have been required to review whether CITA exceeded its delegated authority under section 204 of the Agriculture Act, an issue untouched by the Federal Circuit in *U.S. Ass'n of Importers II*.193

An equitable approach would have been to review CITA's reinterpretation as a final agency action, and either rely on the *Morton* decision or expand on the dicta in *Mast Industries* to force APA compliance and protect U.S. importers from arbitrary, ad hoc determinations.194 The Federal Circuit, however, opted for a less equitable approach that effectively afforded CITA unprecedented authority and broad discretion to alter procedures for implementing textile-specific safeguard measures.195

**B. The Federal Circuit Decision Will Continue to Cause Irreparable Harm to U.S. Importers of Textile and Apparel Products**

*U.S. Ass'n of Importers II* continues to cause irreparable harm to U.S. importers of textile and apparel products in the form of strained business operations and uncertain contractual relationships resulting from unpredictability in the law governing textile-specific safeguards.196 Since the Federal Circuit's June 2005 ruling, CITA has implemented quotas as a result of its consideration of threat-based petitions that restrict a

193. See *U.S. Ass'n of Imps. of Textiles & Apparel v. United States (U.S. Ass'n of Importers II)*, 413 F.3d 1344, 1353 (Fed. Cir. 2005); *Mast Indus.*, 8 Ct. Int'l Trade at 224-25; supra note 185.

194. See supra notes 52-60, 122-28 and accompanying text.

195. See *Hitt*, supra note 8 (quoting Dan Ikenson, trade policy specialist at the CATO Institute, who likened CITA's procedures to a "'kangaroo court,'" and opined that "'to expect objectivity ... is expecting something miraculous'" (omission in original)).

196. Martin Crutsinger, *U.S. Industry Officials Say United States and China Have Tentative Textile Agreement*, ASSOC. PRESS, Nov. 5, 2005 (quoting Laura E. Jones, U.S.-ITA's Executive Director, who noted that "'[M]any of the quotas imposed ... filled up so quickly this year that retailers were left scrambling to find alternate sources of supply'". In May 2005, following the Federal Circuit's decision, CITA announced—three months ahead of schedule—its intention to impose additional safeguards quotas, hindering the business operations of "U.S. retailers and importers who were counting on buying products from China." *Hitt*, supra note 8; see also Evan Clark & Kristi Ellis, *Let's Make A Trade Deal: U.S.-China Sign Accord To Limit Surging Imports*, WOMEN'S WEAR DAILY, Nov. 9, 2005, at 12, available at http://www.wwd.com/search/article/102485?query=%26%23034%3Btrade+deal+%26%23034%3B (quoting China's Minister of Commerce, "'The U.S. is, of course, facing pressures from employment of hundreds of thousands of people, but in China we are facing the employment of around 20 million people.'"); He Qinglain, *The China-U.S. Trade Conflict: Just a Beginning*, CHINASCOPe, July 30, 2005, at 31, available at http://www.chinascope.org/july05/economy.pdf ("To the Chinese government, the repeated levying of quota limitations on Chinese textiles by the United States and the European Union are simply hostile acts that totally ignore the Chinese government's kind gesture of self-imposed export tariffs on textiles.").
number of categories of textile imports. Because U.S. importers enter into contracts for the purchase of textile imports months before shipment, many of them, particularly those operating small businesses, have suffered financial loss from merchandise barred from entry into the United States.

Moreover, CITA's change in procedures has angered Chinese officials, causing strain on business relationships between U.S. importers and Chinese exporters and a general distrust of the United States administration. Despite the Federal Circuit's finding that CITA procedures expressly include consideration of threat-based petitions for textile-specific safeguards, it is clear that Chinese officials did not intend to enter into an agreement permitting such consideration. The United States' willingness to negotiate with China, and its concession to exercise restraint in considering future petitions for safeguards under the recently signed U.S.-China Textile Agreement, support the conclusion that


CITA rules currently in effect for implementing the China-specific safeguards only provide specific guidance for petitions filed on the basis of actual import increases and corresponding evidence of market disruption. Moreover, Chinese government officials have commented that putting all the blame on China for recent textile trade disputes is "groundless." China's Trade Minister Bo Xilai charged the United States and the European Union of using double standards in their trade dealings, saying, "Double standards should not be adopted in international trade where you demand free trade for your own products, while restrictions are placed on the competitive products of developing countries. This kind of trade protectionism will only harm the healthy development of trade.

Id. at 9-10 (citation omitted).

200. See China Protests, supra note 199 (accusing the United States of abuse).
predictability and transparency are necessary steps to achieving reliable business operations and improving foreign relations.\(^\text{201}\)

The recently signed U.S.-China Textile Agreement has temporarily mitigated tensions between the two trading partners, and restored some level of certainty to the business operations of U.S. textile importers for thirty-four categories of textile products.\(^\text{202}\) It remains to be seen, however, whether CITA will exercise the promised restraint in pending and future safeguard requests covering those categories not included in the U.S.-China Textile Agreement.\(^\text{203}\) The agreement does not resolve the problem that CITA's procedures lack consistency and transparency concerning these excluded categories.\(^\text{204}\) Promulgating domestic law to

\(^\text{201}\) See MOU, supra note 14, pmbl., para. 7. The Preamble specifically states that a main goal of the agreement is “resolving trade concerns through consultations.” Id. pmbl. Paragraph 7 further provides:

The United States and China will work to create a stable environment for bilateral trade in all textile and apparel products. The United States shall not request consultations with China pursuant to Paragraph 242 with respect to any textile or apparel product integrated into the General Agreement on Tariffs and Trade 1994 before January 1, 2002. In addition, the United States shall not request consultations with China pursuant to Paragraph 242 with respect to any textile or apparel product listed in Annex I. With respect to all other textile and apparel products not subject to agreed levels under this Memorandum, the United States shall exercise restraint concerning the application of its rights under Paragraph 242. Id. para. 7 (emphasis added).

\(^\text{202}\) Id. para. 2; see also Fong & Hitt, supra note 198 (“The agreement, still tentative, is expected to significantly reduce uncertainty hanging over U.S. retailers and Chinese manufacturers . . . .”).

\(^\text{203}\) Memorandum from Laura E. Jones, U.S. Ass’n of Imps. of Textiles & Apparel, to Members, U.S. Ass’n of Imps. of Textiles & Apparel 2 (Nov. 17, 2005) (on file with author).

Five pending safeguard requests on products not included in the November 8 U.S.-China Agreement should be dead. However, CITA has now raised a question regarding that assumption. Specifically, CITA announced that it is postponing decisions on safeguard requests for categories not included in the agreement, until November 30. Some decisions had been due on November 8, the day the agreement was signed. Others had previously been postponed until November 30 . . . .

While CITA’s announcement suggesting that it is still considering these safeguard requests is highly disconcerting, the commitment contained in the agreement, that the United States will exercise “restraint” in considering additional safeguard requests, argues strongly against implementation of those requests.

\(^\text{204}\) See supra notes 196-201 and accompanying text. This issue is exacerbated by CITA’s ostensibly unbridled authority. Hitt, supra note 8 (“CITA’s founding charter gives it unilateral power to impose limits on textile imports. Its actions are final. Its deliberations are exempt from public disclosure on the grounds that they have foreign-
incorporate transparency and consistency in all categories is necessary to maintain positive business and foreign trading relationships. Absent some meaningful way of holding CITA accountable for employing implementation procedures that will "provide[e] the textile and apparel industries in the United States and China with a stable and predictable trading environment," U.S. textile importers will continue to suffer financial loss, and relationships with foreign trading partners will continue to deteriorate.

IV. CONCLUSION

U.S. Ass'n of Importers II incorrectly limited the availability and scope of judicial review of CITA's reinterpretation of its procedures for the consideration of requests for textile-specific safeguards. Consequently, U.S. textile importers have suffered irreparable harm in the form of financial loss, loss of reputation in business operations, and strained relationships with foreign trading partners. Absent the establishment of clear, objective, and consistent procedures governing the implementation of textile-specific safeguards, U.S. textile importers will continue to suffer.

policy implications. Until recently, CITA publicized its decisions only through filings in the Federal Register.

205. See Hitt, supra note 8 (discussing CITA's bias toward the domestic textile manufacturing industry, the absence of any checks on CITA's actions, and the enormous amount of pressure on CITA from powerful industry lobbyists). James C. Leonard III, Chairman of CITA, previously a prominent member of, and advocate for, the domestic textile manufacturing community, states that CITA is intended to be unbiased, but concedes that it has a "protectionist bent." Id. The Chairman further describes CITA's "core mission" as "trying to help maintain a domestic manufacturing industry." Id.

206. MOU, supra note 14, pmbl.

207. See supra notes 197-202.