Guide to Import Relief and Unfair Trade Actions Available Under United States International Trade Law

Introduction

The challenge facing American corporations and labor unions today, with respect to foreign competition, has never been more clear. Foreign corporations continue to penetrate markets traditionally dominated by United States producers. In many cases, foreign manufacturers have been able to gain a substantial share of United States markets because of the superior value and quality of their products. In other cases, however, foreign corporations have used unfair trade practices in penetrating markets in the United States and abroad.[1] For this reason American industry can ill afford to ignore import trends or fail to monitor the trade practices of their foreign competition. In the face of this challenge, the provisions of the United States law governing international trade practices have taken on a new and added importance.

Under the Tariff Act of 1930,[2] the Trade Act of 1974,[3] and the Trade Agreements Act of 1979,[4] a variety of remedies are available to domestic industries facing import competition by reason of fair and unfair foreign trade practices. While proceedings under these statutes and the regulations promulgated thereunder are complex, counsel to the domestic corporation, trade association or labor union should be familiar with the basic import relief provisions under United States law and able to recognize a legal problem in the international trade area should one arise. Set forth below are the basic legal standards governing the major unfair trade and import relief actions available under United States international trade law. While guidance is offered with respect to the selection of the appropriate remedy, this article is not intended as a comprehensive manual setting forth the procedures for filing an import relief case. Prior to taking legal action under

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[1] *See, e.g.* Cap Screws Countervailing Duties from Italy, T.D. 76-225, August 9, 1976, 41 Fed. Reg. 34250 (1976); Certain Textile Products from Uruguay, T.D. 78-444, Nov. 7, 1978, 43 Fed. Reg. 53424 (1978); Steel Units for Transmission Towers from Italy, T.D. 67-102, April 17, 1967, 32 Fed. Reg. 6274 (1967); Certain Welded Stainless Steel Pipe and Tube from Japan (U.S. Int'l Trade Comm'n Pub. No. 863 Feb. 22, 1978).

[2] Codified in 6 U.S.C. § 1; 19 U.S.C. 6, 11, 31, 32, 43, 44, 257, 258, 528, 1001-54; 22 U.S.C. 401; 31 U.S.C. 541, 549; 46 U.S.C. 28, 58, 274, 321, 333 (1976).

[3] Trade Act of 1974, Pub. L. No. 93-618, § 1, 88 Stat. 1980 (1975) (19 U.S.C. § 2101 (1976)) [hereinafter cited as 1974 Trade Act].

[4] Trade Agreements Act of 1979, Pub. L. No. 96-39, § 2, 93 Stat. 147 (1979) (19 U.S.C. § 2503 (1976)) [hereinafter cited as 1979 Trade Act].

United States trade laws each factual situation should be considered carefully in light of the applicable statutory and regulatory provisions.

There are five basic unfair trade and import relief actions available under United States international trade law.[5] They are as follows:

1. "Antidumping" actions brought under Subtitle B of Title VII of the Tariff Act of 1930, as added by the Trade Agreements Act of 1979.[6]
2. "Countervailing Duty" actions brought under Subtitle A of Title VII of the Tariff Act of 1930, as added by the Trade Agreements Act of 1979,[7] and section 303 of the Tariff Act of 1930, as amended.[8]
3. "Escape Clause" actions brought under section 201(b) of the Trade Act of 1974,[9] and actions brought under section 406(a) of the Trade Act of 1974.[10]
4. "Unfair Methods of Competition in Import Trade" actions brought under section 337 of the Tariff Act of 1930 as amended by the Trade Act of 1974.[11]
5. "Unjustifiable Foreign Trade Practice" actions brought under section 301 of the Trade Act of 1974, as amended by the Trade Agreements Act of 1979.[12]

Although these five statutory provisions are the principal avenues of import relief, actions challenging customs classification and valuation of merchandise, labeling and sales practices, and improper invoicing, also may be effective.

I. Antidumping Cases

An antidumping proceeding may be brought by any one company or group of companies against foreign producers and United States importers.[13] Basically the petitioners in such a case would allege that imports are being sold in the United States market at "less than fair value" (LTFV).[14] Evidence of dumping may occur when a foreign producer is selling the items in the United States at less than the netback[15] to the foreign producer

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[5]Other import relief and unfair trade provisions include the Wilson Tariff Act 15 U.S.C. §§ 8-11 (1976), the Antidumping Act of 1921, 19 U.S.C. 160-71 (1976), and Section 2253 of the Trade Act of 1974, note 3 *supra*.

[6]19 U.S.C. § 1673 (1976).

[7]19 U.S.C. § 1671 (1976).

[8]19 U.S.C. § 1303 (1976).

[9]19 U.S.C. § 2251(b) (1976).

[10]19 U.S.C. § 2436(a) (1976).

[11]19 U.S.C. § 1337 (1976).

[12]19 U.S.C. § 2411 (1976).

[13]1979 Trade Act, *supra* note 4 at § 731, *adding* 19 U.S.C. § 1673 (1976). *See generally* 45 Fed. Reg. 8121 (1980) (to be codified in 19 C.F.R. Part 353).

[14]*Id.*

[15]To make this determination a comparison of "foreign market value" and the United States price is required. Foreign market value is calculated on the basis of the wholesale price, after certain adjustments for sales in customary quantities in the home market f.o.b. the factory. The United States price is defined as the purchase price or exporter's sales price.

on sales of the same item in its home market.[16]

Petitions are filed with the Department of Commerce and the International Trade Commission (ITC) simultaneously.[17] The Commerce Department determines whether dumping is occurring. The ITC is charged with determining whether the United States industry has been injured by reason of LTFV imports. If dumping and injury are proved, dumping duties are assessed representing approximately the difference between the ex-factory netback price in the home market and the price of the product less certain deductions in the United States.

The complaining industry is not directly involved in the investigation of LTFV sales once a petition has been filed. The petitioners, however, do have the right under new provisions of the law to challenge adverse rulings in the Customs Court.[18]

The remedy in dumping cases is the application of extra dumping duties. Payment of these duties may be avoided by the foreign producers by adjusting their United States price upward, lowering their home market prices, or a combination of these. All the law requires is that dumping margins be eliminated, whether by payment of the extra duty or by price adjustments.

A decision on whether to proceed with a dumping complaint should be based upon the following factors:

A. *Size of the Dumping Margins*

Although there may be evidence that foreign producers are dumping their products in the United States, the size of the margins may be such (*i.e.*, in the five to eight percent range) that it may not be profitable to proceed with a dumping action. However, if the margins are more significant such factors would auger in favor of proceeding.

B. *Ability to Demonstrate Injury*

Once LTFV margins are established, an industry still would be required to prove that it has been directly affected by LTFV sales.[19] The standard in dumping cases is "material injury", where "material" means the injury is

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[16] If sales in the home market are nonexistent or are too small in relation to the quantity sold for export to countries other than the United States to form an adequate basis for comparison (less than 6 percent is generally considered inadequate), foreign market value is determined on the basis of the price at which the merchandise is sold or offered for sale for exportation to "third countries" (countries other than the United States), or on the basis of "constructed value". Constructed value is generally used for comparison where third-country and home market sales are inadequate, or where the Commerce Department has reason to believe exports are being sold at a price less than the cost of production.

[17] 1979 Trade Act, *supra* note 4 at § 732, *adding* 19 U.S.C. § 1673a (1976). *See* 45 Fed. Reg. 8198 (1980) (to be codified in 19 C.F.R. § 353.35).

[18] *Id.* § 516A, *adding* 19 U.S.C. 1516a (1976). *See* CUST. CT. R. 3.2 (1980).

[19] *Id.* § 735(b), *adding* 19 U.S.C. § 1673(d) (1976). *See generally* 44 Fed. Reg. 76458 (1979) (to be codified in 19 C.F.R. Parts 201 and 207).

not "immaterial, inconsequential or unimportant".[20] Evidence of such injury may include, but is not necessarily limited to, price suppression or depression, lost sales, reduced production, unemployment or underemployment of workers, or reduced profits. It should also be emphasized that an industry or corporation may demonstrate a threat of material injury in addition to, or in lieu of, proof of current damage caused by the less than fair value imports. If the threat of injury issue were to be raised, additional information regarding the capability of foreign producers to continue their penetration of the United States market would be required.

C. *Amount of Potential Relief*

Significant resources should not be devoted to projects in which the expected recovery or relief would be less than the actual cost of prosecuting an action. In making this analysis, it is important to analyze the potential as well as current losses if action is not taken. If foreign producers are not dissuaded from their unfair trade practices an analysis should be made as to their capabilities for continuing and even intensifying their ability to take significantly greater shares of the United States market.

II. Countervailing Duty Cases

Countervailing duty cases generally are filed simultaneously with the Commerce Department and with the ITC. The petition alleges: (1) that a foreign country, or citizen or national thereof is providing directly or indirectly a subsidy ("bounty or grant") of the production, manufacture or export of merchandise imported into the United States; and (2) that an industry in the United States has been injured by reason of the subsidized imports.[21] Commerce determines whether subsidies are being paid, and the ITC determines whether the United States industry is being injured by the subsidized imports.[22]

The kinds of practices which can constitute subsidies may be government grants, capital loans or loan guarantees on terms inconsistent with commercial considerations, export rebates, certain types of tax incentives, or the

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[20] *Id.* § 777(7), *adding* 19 U.S.C. 1677 (1976). *See* 44 Fed. Reg. 76464 (to be codified in 19 C.F.R. § 207.25).

[21] *Id.* § 701, *adding* 19 U.S.C. 1671 (1976). *See* 45 Fed. Reg. 4942 (1980) (to be codified in 19 C.F.R. § 355.25).

[22] The requirement that an industry be materially injured by reason of imports of the subsidized article is applicable only where the country subject to investigation is a country under the agreement on subsidies and countervailing measures, the code negotiated by parties of the Tokyo Round of Multilateral Trade Negotiations in Spring 1979. *See* Murphy, *Antidumping and Countervailing Duties under the Trade Agreements Act of 1979: A Preliminary Analysis*, 14 INT'L LAW. 203 (1980).

"Countries under the agreement" include: (1) countries which have signed the agreement; (2) those which have assumed obligations with respect to the United States which are substantially equivalent to obligations under the agreement; and (3) those with which the United States has an unconditional most-favored-nation agreement obligation that runs specifically to countervailing duties.

assumption of any cost of production or distribution.[23]

After a petition is filed, Commerce investigates on its own, and no further action is required on the part of the petitioner. The ITC holds hearings on the injury question and forwards its findings to Commerce.

If subsidization and injury are proved, the Commerce Department will impose countervailing duties, which are designed to remove the unfair competitive advantage resulting from government subsidies.

Procedurally, countervailing duty cases are similar to antidumping proceedings. The size of the subsidy conferred by the foreign government is critical to the question of whether relief may be afforded. In addition, in almost all cases, injury to the domestic industry producing a product like the imported articles must be shown. Unless injury can be demonstrated, relief cannot be obtained.

III. "Escape Clause" Actions under Section 201 of the Trade Act of 1974

The "escape clause" remedy is literally an "escape" from the requirements of the General Agreement on Tariffs and Trade (GATT).[24] An industry files a petition with the ITC alleging that increasing imports are a substantial cause of serious injury to the domestic industry. It is not necessary to prove unfair trade practices by foreign competitors.

The key elements of an escape clause case are as follows:

a. imports are increasing, either in actual terms or relative to domestic production;
b. the domestic industry has suffered serious injury, or is threatened with serious injury; and
c. imports are a cause of the serious injury no less important than any other cause.[25]

Unlike other types of legal action, section 201 cases have the advantage of covering *all* countries exporting to the United States. Other legal approaches are generally aimed at one company or at a group of companies within a single country.

The ITC must make its determination within six months following the filing of the petition. If the ITC concludes that the three tests described above have been met, it recommends import relief or adjustment assistance to the President.

The President then has sixty days to review the findings and recommendations of the ITC. He can accept, reject or modify the ITC's recommendations. If the President decides import relief is desirable, he can impose quotas, tariff-rate quotas, increased import duties, or the negotiation of

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[23] 1979 Trade Act, supra note 4 at § 771(5), *adding* 19 U.S.C. § 1677 (1976).

[24] General Agreement on Tariffs and Trade, *entered into force*, May 11, 1959, T.I.A.S. No. 4345.

[25] Trade Act of 1974, *supra* note 3, at § 201, 19 U.S.C. § 2251 (1976). *See* 19 C.F.R. § 206.7 (1979).

orderly marketing agreements with foreign governments.[26] Such import relief can be imposed for up to five years.[27] The President can also order that adjustment assistance be provided to firms or to workers.

If the President's determination differs from that of the ITC, Congress can override his decision within ninety legislative days by a majority vote of both Houses.[28] This forces the President to implement the recommendation of the ITC.

Escape clause cases obviously involve a substantial political effort. In order to persuade the President to provide effective relief, it is necessary to generate support in the Congress and among key economic advisors in the Administration. A carefully planned public relations program, too, must supplement the legal effort. Continuous coordination of the legal, political and public relations aspects of the case is necessary to insure success.

IV. Section 337 Actions

Section 337 is an antitrust-type statute which prohibits "unfair methods of competition in import trade" without specifying the precise kinds of prohibited practices.[29] The Trade Act of 1974 strengthened this section, and it can be a useful vehicle for enforcing our antitrust laws against unfairly priced imports. While section 337 has been around for a long time, it has until recently been used to enforce patents and trademarks against international encroachments.

Section 337 cases are generally less "political" than section 301 or escape clause cases. Also, in contrast to other forms of international trade cases, section 337 matters are governed by the Administrative Procedure Act (APA).[30] The APA establishes standards similar to those found in an ordinary court proceeding. There is ample provision for "discovery", filing of motions, hearings, etc. Counsel for both the importers and domestic producers have access to all the facts in the case and can effectively control its direction. The ITC has exclusive jurisdiction over section 337 cases; they are not referred to the Department of Commerce at all.

With regard to remedy, section 337 provides for a cease-and-desist order backed up by temporary or permanent exclusion of the offending articles from the United States.[31] The APA also contemplates bonding during the investigation should there be a preliminary finding of unfair practices. The President has the authority to disapprove of an ITC determination, thereby ending the case.[32]

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[26] *Id.* § 202, 19 U.S.C. § 2252 (1976).

[27] *Id.* § 202(a), 19 U.S.C. 2253(a) (1976).

[28] *Id.* § 203(c)(1), 19 U.S.C. 2253(c)(1) (1976).

[29] Tariff Act of 1930, note 2 *supra, as amended by* the Trade Act of 1974, *supra* note 3 at § 337, 19 U.S.C. § 1337 (1976). *See* 19 C.F.R. Part 210 (1979).

[30] *See* 5 U.S.C. 551, 701 (1976).

[31] 1974 Trade Act, *supra* note 3 at § 337(f), 19 U.S.C. 1337(f) (1976).

[32] *Id.* § 337(g)(2), 19 U.S.C. § 1337(g)(2) (1976).

Because such cases involve discovery and complex antitrust issues, they are more costly than other forms of import relief cases. The result, however, can be extremely effective in dealing with unfair trade practices.

V. Section 301 Cases (Presidential Action against Unjustifiable Foreign Trade Practices)

Whenever the President determines that action by the United States is appropriate:

1. to enforce the rights of the United States under any trade agreement; or
2. to respond to any act, policy, or practice of a foreign country or instrumentality that——
   (a) is inconsistent with the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or
   (b) is unjustifiable, unreasonable, or discriminatory and burdens or restricts United States commerce—

the Trade Agreements Act of 1979 mandates that the President take appropriate steps to enforce such rights or obtain the elimination of such act, policy, or practice.[33]

The Trade Agreements Act specifically provides that the President, may,

1. suspend, withdraw, or prevent the application of, or refrain from proclaiming, benefits of trade agreement concessions to carry out a trade agreement with such country or instrumentality involved; and
2. impose duties or other import restrictions on the products of, and fee or restrictions on the services of, such foreign country or instrumentality, for such time as he determines is appropriate.[34]

The President has virtually complete discretion as to whether or not to retaliate under these provisions. The mandate to him is to "take all appropriate and feasible steps" to obtain the elimination of the unfair practices. However, the President may determine that any retaliatory measures proposed are not appropriate or feasible, or consistent with the broad and comprehensive purposes stated in the Trade Act of 1974 or Trade Agreements Act of 1979. Any retaliatory measures taken by the President may be removed by him whenever he deems it appropriate to do so. However, the President will be under strong compulsion to act in the event of flagrant foreign acts because of the clear congressional intent that he do so.

Normally, the President would take retaliatory action only against the foreign country maintaining the import restrictions or other discriminatory measures. But the Trade Act of 1979 authorizes him in his discretion to

[33] 1974 Trade Act, *supra* note 3 at § 301(a), *as amended by* the 1979 Trade Act, *supra* note 4 at § 2411(a). *See* 45 Fed. Reg. 34870 (1980) (to be codified in 15 C.F.R. Part 2006).

[34] 1974 Trade Act, *supra* note 3 at § 301(b), 19 U.S.C. § 2411(b) (1976).

take action against a country other than the one whose restrictive actions led to the retaliation.[35] Thus, for example, he could raise the tariff on a given product for all imports.

Like "escape clause" cases, section 301 proceedings involve a substantial political effort. Support of the Congress is necessary to persuade the President to provide effective relief. Continuous coordination of legal, political and public relations aspects of the case is necessary to ensure success.

VI. General Considerations

From the foregoing it is clear that the selection of an appropriate import relief action depends upon an assessment of several factors. These factors include:

1. the nature and extent of injury to the domestic industry;
2. trend in imports;
3. the types of trade practice used by foreign competitors in the United States market, *i.e.*, dumping, use of foreign subsidies, antitrust type practices such as below cost pricing, or perhaps fair competitive practices which nevertheless injure United States industry;
4. political support for the injured industry;
5. the time, effort and financial support the domestic industry or corporation is willing to put forth to be successful.

In addition to these factors, consideration should be given to a number of less tangible factors, including:

1. The policy preference of the trade laws and administrative agencies in favor of import relief based on unfair trade practices and against those based on injury to the domestic industry alone.
2. The makeup and policy direction of the different agencies which administer different import relief provisions.
3. The procedural and structural obstacles which must be overcome to obtain relief. For example, import relief in antidumping cases is always dependent upon an affirmative finding by both the ITC and the Department of Commerce. If the ITC determines preliminarily that there is no reasonable indication of injury to the petitioning domestic industry, the entire investigation is terminated. Although interlocutory review by the Customs Court of ITC preliminary determinations is available, the standard of review is such that a presumption of correctness attaches to the administrative decision. The likelihood of judicial reversal of an adverse administrative determination, therefore, is remote absent clear error by the agency with respect to questions of law.
4. The economic significance of the industry, particularly the number of jobs represented by the industry and the importance of the product to

[35] *Id.* § 301(a), 19 U.S.C. § 2411(a) (1976).

the domestic economy or national security interests. (A large industry with a broad geographical base generally has greater political clout in pursuing an import relief action than does a smaller industry).

As suggested by the foregoing, the implementation of an import relief strategy involves more than legal expertise. In maximizing an industry's political clout, alliances should be cemented with related industries and labor unions. In addition, the services of domestic and international economic consultants and public relations experts should be retained to assist in the preparation of an industry's case.

Finally, consideration should be given to the cyclical aspects of the economy in bringing an import relief action. For example, where the economy is healthy and product demand is strong it may be more difficult for a domestic industry to demonstrate injury by reason of imports.

From a political standpoint, timing is important as well, particularly in connection with "escape clause" and section 301 actions. Consideration should be given to gearing a petition under United States trade laws to an election, the passage of legislation or adoption of an administrative program.

Conclusion

The statutory standards governing United States international trade law, are for the most part, consistent with the international framework of trade concessions embodied in the General Agreement on Tariffs and Trade, the International Antidumping Code and the recently adopted Code on Subsidies and Countervailing Measures. While these international agreements are designed to achieve the harmonization, reduction or elimination of trade barriers, they do authorize the use of non-tariff charges and retaliatory measure on a global level where unfair trade practices are evidenced. Thus, rather than protectionist in nature, United States international trade laws are an effective means of enforcing, from the United States perspective, the international framework of trade agreements upon which the major trading nations of the world rely.

ERIC I. GARFINKEL
Washington, D.C.