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# THE U.S. IMPORTER'S PERSPECTIVE ON U.S. ANTITRADE ACTIONS AGAINST KOREA AND TAIWAN

*Valerie A. Slater\**

Good afternoon. It is certainly my pleasure to speak to you today. After listening today to so many learned speakers who are experienced in the area of Korean and Taiwanese trade with the U.S., I thought I would tell you one of my favorite stories.

The story has it that during a May Day celebration, an American dignitary was in the stands with Soviet officials, watching the parade go by. First, trucks carrying missiles passed. They were followed by several miles of Soviet soldiers marching in perfect step, and they were followed by many regiments of young Red Guards perfectly dressed in their marching uniforms. Tanks and other military equipment came next. At the end of this very long procession there was a small group of well-dressed, but confused-looking people. The American asked who those people were. The Soviet hosts replied, "Oh, those are our trade lawyers. They can do more damage than everything else put together." In that spirit, I will try to do a little more damage today.

What I am going to talk about today, briefly, is U.S. antidumping and countervailing duty law as it relates to U.S. importers, how U.S. importers react to it, and what it means to them. When I say U.S. importers, I am principally referring to unrelated importers, not U.S. subsidiaries of Taiwanese or Korean companies. These independent companies view themselves, for the most part, as innocent bystanders in the antidumping and countervailing duty procedures. The reason for that is rather clear—the issues of dumping and subsidies have little to do with the importer. "Dumping" is determined by relative prices in the producer's or exporter's home market and prices that are being charged to the importer. Sometimes the cost of production in the home market will be the benchmark with which U.S. prices are compared. In countervailing duty cases, the unfair trade practice at issue is a government subsidy to a foreign supplier. That is not something about which the importer normally knows or with which he is involved. What the U.S. importer does know is that he is a businessman who is marketing a product for which he sees a good market niche.

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He is probably selling it because he has received or expects to receive a good return. He may have made quite an investment in marketing this product, particularly where he has had a long-term relationship with the supplier. Then, one day, he is engaging in his normal competitive activity in the marketplace and is faced with the prospect that he may have to put up a substantial amount of money to continue bringing this merchandise into the country.

There have been many reactions to this reality. The first reaction, often expressed in much stronger terms than this, is, "This is not fair! I am a U.S. company. What is my government doing to me? I am a good competitor. Why are they doing this?" The next reaction, after the initial shock and anger, is, "What should I do now? Where can I go?" Neither of these questions is easy to answer, but they are questions that those of you who practice trade law know we face every day. I would like to talk a little bit today about what kinds of problems lead the importer to have this reaction from both a practical and technical point of view. I also want to mention briefly some of the things that may make it easier for the importer to cope with, although certainly not to accept, antidumping or countervailing duty cases.

I know it was mentioned this morning that foreign producers often feel like they do not have to deal with dumping cases or CVD cases; that is a problem for the importer. Foreign producers think, "Our importers will take care of it." Indeed, we see that happen from time to time, particularly where foreign exporting companies are small, family-run concerns. Unfortunately, the importers, as I said, view themselves as innocent bystanders. They, for a variety of reasons, may not feel compelled to jump in. One simple reason may be that they have one or more other sources of the merchandise and it may not be difficult for them to go elsewhere, especially if it is not a situation in which there is any particular identification with the foreign producer, or if the product is fungible. They say, "Fine. If there is going to be a problem with Taiwan, I will get my widgets from country X. If the situation with Taiwan clears up, I will consider going back." This is one initial reaction.

The second reason that some importers do not actively address themselves to antidumping or countervailing duty actions is that they are unfamiliar with these cases and the issues they present. This is true in the case of very large companies as well as small ones. Dumping and countervailing duty laws are still somewhat obscure to many in the business community. It is not an issue about which the general business community is sophisticated.

Once you get past all those hurdles and the reality sets in, what

happens? When an antidumping petition or subsidy petition is filed, the market is automatically thrown into a state of uncertainty, in part because of a lack of information about the cases, and in part because of the simple fact that no one knows whether and what level of additional extra duties or deposits will be imposed. Secondly, within a matter of weeks after the cases are filed, the International Trade Commission (I.T.C.) sends out questionnaires to importers of the product. The importer often thus receives word that the trade case, which he may not understand, has been filed. He opens his mail and finds a thirty-, forty-, or fifty-page questionnaire from the I.T.C. It asks him to report information on his company's sales, imports, profits, specific prices and sometimes costs, to give names of customers, including phone numbers of contacts. In practice, many importers say, "I do not have time for this." That is the end of their contact with the antidumping proceeding. The next contact the importer may have with the case, however, will be the day when his shipment hits the port and the customs official says, "We cannot turn this shipment over to you unless you provide us with a bond to cover estimated dumping duties." With that, things begin to happen.

What I would like to do is to give you some idea of how these procedures work and show what points along the way are important for the importer. Normally, when an antidumping case is commenced, let's say in January 1988, there is a petition filed. As far as the importer is concerned, at that point nothing changes. Products can still come into the market; he is not required to put up cash at the port. The only difference may be some uncertainty created in the market.

Forty-five days after the petition is filed, some time in February 1988, the I.T.C. issues its first decision, a preliminary ruling on the question of injury. In most antidumping and countervailing duty cases, duties cannot be imposed unless the imports are found to have caused or threatened to cause material injury to U.S. producers. At this point, for the importer, nothing has yet happened. Even if the I.T.C. finds that this is a reasonable indication that imports are causing injury, nothing happens as a practical matter. The importer is likely to have received an ITC questionnaire early in that forty-five day period, but that may be the extent of his involvement.

The case then goes to the Commerce Department. At the earliest, in June, (roughly six months after the petition is filed), the Commerce Department issues its first preliminary determination. It will be a detailed decision concerning the extent to which the imports were dumped. When this decision is published, if it is affirmative, i.e., there

is a finding that the goods were dumped, they will not be permitted to enter the U.S. unless the importer of record posts a bond. The bond will be equal to the percentage of dumping found in the preliminary decision. The bonds must be posted by the importer of record, and may not be provided by the exporter.

Some time later, at the earliest in August, the Commerce Department will issue a final antidumping determination. The duty rate may increase or decrease from the percentage found in the preliminary ruling. Some forty-five days after that, in October 1988, the I.T.C. will issue its final injury decision. If it is an affirmative decision, an anti-dumping order will be issued. We have now gone for ten months since initiation, although the procedure can take up to fourteen months. Importers could still bring investigated goods into the country during that period, as long as bonds are posted. Once the I.T.C. renders its final determination, however, normally the bonding requirement is replaced with a "cash deposit on entry" rule. The importer must now put up *cash* equal to the dumping margin in order to enter the goods. That cash may *not* be deposited by the foreign producer, nor may the importer be reimbursed by the foreign producer.

What does the importer do in this situation? If the deposit or bond rate is so high that he cannot afford to continue importing from the affected producer, or if supply alternatives are readily available he will go to another source. If the rate is such that cash deposits are acceptable commercially and/or the importer is committed to the exporter, he may continue to import, despite the cash deposits. In the event that imports continue, the importer and/or the exporter may choose to utilize the legal process for recouping cash deposits. One way to cope with it, and this has been increasingly looked at, is to put up the cash deposit and then go into the next procedure.

In the U.S., we have something called an administrative review procedure. When a dumping order is issued, Customs is still not collecting the dumping *duties*. Rather, Customs is collecting *deposits* to cover potential dumping duties. These deposits were based on the dumping found to exist for prior entries. Under U.S. dumping or countervailing duty procedure, each year after the publication of an order, the importer can request the Commerce Department to determine whether its entries for the preceding year were dumped, and if so, whether they were dumped by more or less than the cash deposit rate in effect upon entry. The foreign producer may have changed its pricing policy. The U.S. importer may have increased its prices. Nevertheless, every one of these entries has been covered upon entry by a cash deposit. Thus, every year, in the anniversary month of the issu-

ance of the order, the importer may say, "Please, Commerce Department, review my entries and give me back my deposits because, as you see, I have not been dumping or my margin of dumping was less than the cash deposit rate." The domestic producers who brought the petition may also ask for a particular producer's imports to be reviewed. Commerce will perform the review if requested and has up to a year to complete that process. If the importer is lucky, after one year, there will be a decision issued for the reviewed entries, and the importer will get back any money to which he was entitled because his exporter was not dumping. For an importer, it is extremely difficult to continue importing a product with any significant margin, even though you know that eventually it will be found not to have been dumped, because of the fact that cash is tied up in the meantime. The process is lengthy. In fact, Commerce frequently does not meet the one year deadline for review completion. Some reviews have covered entries that were made seven to ten years earlier. The procedure can be very frustrating for importers from that perspective.

My purpose here is not to be critical of the Commerce Department. The problem is partly one of the Department's administrative burden and heavy case load, and largely a function of the way the laws were set up. This is, for many importers, the most difficult thing to understand about the antidumping laws.

One last comment about the administrative review procedure is that if an importer has the funds to survive it and decides to "stick it out," wait for the administrative reviews, and get a lower (or zero) dumping margin, it is important to realize that refunds may not be made as soon as the Commerce Department delivers its decision. It is not that simple. The refund checks are issued by the National Finance Center, an office which is also involved with dispersing other funds held and issued by Customs. There is normally some processing time involved. The delay in receiving refunds can sometimes be an added frustration.

Once an importer understands the administrative review process, the next question is, "What else can I do?" Well, he can, as mentioned earlier, import from another source. Sometimes that does happen. In some cases, the importer's or exporter's pricing will change, or subsidies are discontinued and the unfair trade practice is ameliorated or abolished. A number of other different approaches may be considered, based, of course, on the particular industry. Sometimes the importer, (most often jointly with the exporter), will consider establishing a production facility in the U.S. Sometimes the importer may seek to purchase from the same producer, sourcing from a plant in a third

country. Sometimes importers (and exporters) have been unconcerned with dumping or countervailing duty orders because they believe that the product is at the end of its cycle and will be replaced by the next generation of the product.

In considering appropriate reactions to an antidumping or countervailing duty order, it is imperative that importers now be aware of the "anti-circumvention" provisions of the 1988 Trade Act. With these provisions, Congress sought to give the Commerce Department the authority to deal with certain situations in which importers or exporters are trying to unfairly "get around" the dumping, or countervailing duty orders. There are now four situations, all less than clearly defined, found in the 1988 Trade Act in which a dumping order essentially can be "expanded" to prevent circumvention.

19 U.S.C., section 1677(j), authorizes the Commerce Department to include within the scope of a previously-issued antidumping or countervailing duty order the same kind of merchandise completed or assembled in the United States using parts or components produced in the country covered by the order, if the value added by U.S. assembly is "small." Similarly, the Department may include the same kind of merchandise completed or assembled in a third country using merchandise subject to or produced in the country covered by the order if the value added by assembly is "small."

Thus, the Commerce Department may apply its antidumping or countervailing duty order to subject merchandise produced in the country covered by the order, but assembled or completed in the U.S. or elsewhere. While the idea is to prevent "circumvention" by changing the situs of minor assembly or completion operations, it is unclear what amount of value-added will be considered "small." Commerce will examine each allegation of circumvention on its own facts, and exercises a great deal of discretion in so doing.

The 1988 Trade Act also authorized Commerce to include within the scope of its dumping and countervailing duty investigations and orders merchandise which is "altered in form or appearance in minor respects" from the merchandise otherwise covered by the investigation or order. "Minor respects" is not statutorily defined. Finally, Commerce may now include within the scope of an order certain "later-developed" merchandise. The law essentially seeks to ensure the viability of an antidumping order even though the next generation of the product replaces the one that was at issue at the time of the Department's investigation.

While these provisions in some respects formalize authority that the Commerce Department previously exercised in any event, they

create another set of concerns for importers seeking to cope with trade relief actions.

What is an importer to do? One thing that importers can do is to become aware of some of the issues, many of which are founded in U.S. law and, in some cases in the GATT Antidumping Code itself. More importantly, at this time, importers as well as domestic producers should be working through their government to express their concerns about existing import relief procedures.

There will at some point be legislation in the area of the antidumping and countervailing duty laws, but that is very unlikely to come in the next year. We are unlikely to see additional trade legislation making any significant changes until at least 1991. In the meantime, interested parties—both foreign and domestic—should be paying close and active attention to developments in the GATT Uruguay Round.

There is another action that importers can take when faced with import relief cases. The 1988 Trade Act changed the I.T.C. injury proceedings significantly. There is a new openness to the proceedings which allows all of the parties litigating an antidumping or countervailing duty case to have access, through their counsel, to all of the data that is submitted to the Commission. We have come out of the Star Chamber, and injury proceedings now permit all parties to comment meaningfully on the information before the Commission—information that will be used to assess the impact of imports on domestic producers. In this regard, importers are most often the parties who know what is going on in the U.S. market. They are the people who have the information which will allow an assessment of whether imports are the cause of the problems in the domestic industry. Importers sometimes are, but, as a rule, could become more active in that process—not just reactive, filling out an occasional questionnaire, but very pro-active in impressing their view of “no causation” before the I.T.C.

In closing, there are not any easy “answers” to how importers can cope with import relief cases. I can tell you it is very difficult for them. However, by being informed about the legal processes involved in import relief actions and the options available to them under those processes, importers will have the ability to take meaningful, affirmative steps when faced with such actions.