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UNITED STATES PROCEDURES FOR DETERMINING INJURY
IN ARTICLE XIX CASES

Communication from the United States

The attached working paper, dated 23 February 1988, has been received from the office of the United States Trade Representative in Geneva.

Introduction

The United States has developed over time a set of transparent, objective procedures for making injury determinations through an independent, impartial investigatory process consistent with Article XIX of the GATT. These procedures as described below are presently set out in section 201 of the U.S. Trade Act of 1974, as amended.

The purpose of this paper is not to advocate that the specific procedures of the United States be incorporated into a safeguards agreement or that the U.S. experience readily lends itself to use by other contracting parties. This paper is presented more for the purpose of demonstrating how one country has defined injury in its national trade law and developed a transparent process for making injury determinations consistent with Article XIX.

U.S. procedures for making injury determinations are designed to afford adequate opportunity for all affected parties to participate in the decision-making process. Timely notice is provided and all affected parties have the right to participate in a public hearing to present evidence and arguments. The investigation is concluded with a written report which provides a published statement of facts and reasoning incorporated in making a determination of injury.

Differing procedures may more appropriately apply to differing national circumstances. The U.S. delegation feels strongly, however, that a safeguards agreement should provide for establishment of a transparent set of procedures for making injury determinations. This paper does not prejudge the position of the United States in the future work of the Safeguards Negotiating Group.

This paper addresses four concepts that in our view comprise an injury determination under Article XIX:

1. the definition of the domestic industry;
2. increased imports
3. serious injury or threat; and
4. the causal link between increased imports and serious injury or threat.

Section 201 of the Trade Act of 1974

Section 201 of the U.S. Trade Act of 1974 is the so called U.S. escape clause law. The section 201 standard is based on that of Article XIX of the GATT. Section 201 provides that the U.S. International Trade Commission, an independent, fact-finding agency of the U.S. Government, is to conduct an investigation

upon receipt of (1) an appropriate petition from an entity representative of a domestic industry, (2) at the request of the President or the U.S. Trade Representative, (3) upon receipt of a resolution from the Committee on Ways and Means of the U.S. House of Representatives or the Committee on Finance of the U.S. Senate, or (4) on the Commission's own motion. An "entity" "representative" of an industry includes a trade association, firm, certified or recognized union, or group of workers. The Commission is not to investigate the same subject matter within one year of a prior determination "[e]xcept for good cause" shown to exist, or, with respect to an article that has been the subject of section 201 import relief, within 2 years of the date on which such relief terminated.

Section 201 requires that the International Trade Commission determine whether "an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article." The Commission considers this standard to require that all of three of the following conditions be satisfied:

- (1) imports are in increased quantities:
- (2) the domestic industry is seriously injured or is threatened with serious injury; and
- (3) such increased imports are a substantial cause of the serious injury or threat thereof to the domestic industry.

If the Commission finds that the standard is met, it must then recommend a remedy to the President. The commission must complete its investigation, make its determination and any findings and recommendations, and transmit its report to the President not later than 6 months after the date on which the petition is filed, the request or resolution is received, or the investigation is self-initiated. The Commission is required to hold a public hearing in connection with all section 201 investigations.

The President then makes the final determination of whether to grant relief, taking into account the national economic interest of the United States and other considerations, such as the impact on consumers and the probable effectiveness of import relief in promoting adjustment.

The issues of domestic industry, increased imports, serious injury or threat, and substantial cause are discussed in greater detail below.

Domestic industry

In making its determination the Commission must first decide what producers constitute the domestic industry that is allegedly being seriously injured or threatened with serious injury. The domestic industry consists of the producers of articles that are "like or directly competitive" with the imported articles.

U.S. legislative history defines "like" articles as those which are "substantially identical in inherent or intrinsic characteristics" and it defines "directly competitive" articles as those which, "although not substantially identical in their inherent or intrinsic characteristics, are substantially equivalent for commercial purposes, that is, are adapted to the same uses and are essentially interchangeable therefore."¹ Imported and domestic articles may also be directly competitive at an earlier or later stage of processing, but no Commission determination has relied on this definition. A court decision made clear the fact that imported finished articles are not like or directly competitive with domestic component parts and vice versa.

In the case of a domestic producer which also imports, the Commission may treat as part of the domestic industry only its domestic production. In the case of a producer which produces more than one article, the Commission may treat as part of the domestic industry only that portion or subdivision producing the like or directly competitive article.

The Commission could also find there to be a geographic industry if three basic conditions are stratified: (1) production facilities in a major geographic area constitute a substantial portion of the domestic industry, (2) such producers primarily serve the market in that area, and (3) imports are concentrated in that area. Relief, however, would be imposed against all imports into the United States, not just imports into the geographic area.

In deciding the industry question, the Commission generally follows a product-line approach, finding the industry to consist of the domestic facilities producing an article like (or in the absence of a like domestic article, directly competitive with) the imported article. Thus, when the investigation covers two or

¹Senate Finance Committee report. U.S. Congressional committees frequently issue reports on bills describing or further defining provisions in the bill at the time the bill is reported out of committee and sent to the House or Senate floor, as the case may be. These reports are part of the "legislative history" of a statute and are used by the courts and others in understanding legislative intent and the meaning of key terms. They have legal status.

more different products, the Commission may find two or more industries. This is consistent with the GATT practice of negotiating trade agreements on a product-by-product-basis. However, when products are closely related and are produced in the same facilities and by the same workers using similar skills and technology and when producing firms do not regularly maintain separate profit or other data on a product-by-product basis, the Commission will often consider the two or more related products to be produced by one industry.

Increased imports

The increased imports requirement provides that the increase must have been "either actual or relative to domestic production". Thus, the requirement is satisfied if imports have increased in actual terms or if they have declined in actual terms but have increased relative to domestic production (i.e., domestic production is falling at a faster rate than imports). In determining whether imports have increased the Commission generally examines import trends over the most recent 5-year period.

Serious injury or threat

The second condition which must be satisfied is that the domestic industry be seriously injured or threatened with serious injury. Generally, the Commission would first determine whether there is a threat of serious injury. The U.S. statute does not define the term "serious injury, or threat thereof," but rather sets forth certain economic factors which the Commission is to take into account.

Section 201 (b)(2) of the Trade Act of 1974 provides that the Commission "shall take into account all economic factors which it considers relevant, including (but not limited to):"

(a) with respect to serious injury, the significant idling of productive facilities in the industry, the inability of a significant number of firms to operate at a reasonable level of profit, and significant unemployment or under-employment within the industry;

(b) with respect to threat of serious injury, a decline in sales, a higher and growing inventory (whether maintained by domestic producers, importers, wholesalers, or retailers) and a downward trend in production, profits, wages, or employment (or increasing underemployment) in the domestic industry concerned.....

The Trade and Tariff Act of 1984 amended section 201 to clarify the injury test in two respects. First, it amended section 201 to make it clear that the term "significant idling of productive facilities" includes closing of plants or the underutilization of

production capacity; and second, it amended section 201 to provide that the presence or absence of any of the economic factors "shall not necessarily be dispositive" of injury. The data considered with respect to both serious injury and threat of serious injury are for the most part the same, although trends in the data would generally be more important in deciding the threat question.

The term "threat" is defined in the legislative history. The report of the U.S. Senate Finance Committee defines a threat as occurring "when serious injury, although not yet existing, is clearly imminent if import trends continue unabated." The Commission generally has interpreted the term to require that serious injury be a virtual certainty in the foreseeable future rather than a mere possibility.

Substantial cause

The third criterion requires a finding that the increase in imports be a "substantial cause" of the serious injury or threat thereof. Section 201 (b)(4) defines the term as "a cause which is important and not less than any other cause." In addition, section 201 (b)(2) provides that the Commission, in deciding the cause question, is to take into account "all economic factors which it considers relevant, including (but not limited to)--"

(C)...an increase in imports (either actual or relative to domestic production) and a decline in the proportion of the domestic market supplied by domestic producers.

Thus, the third criterion requires a weighing of causes. The increase in imports must be both an important cause and a cause that it equal to or greater than any other cause of serious injury or threat. If increased imports are not both an important cause and at least as important a cause as any other, the Commission must make a negative determination. The Senate Finance Committee report states that the Commissioners must assure themselves that imports are a substantial cause" and not just one of a multitude of equal causes".

The Senate Finance Committee report noted that injury could result from a number of causes other than imports, including "changes in technology or in consumer tastes, domestic competition from substitute products, plant obsolescence, or poor management."