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An Overview of the International Trade Commission and Its Role in a Possible North American Free Trade Area

*Anne E. Brunsdale**

I **am truly honored** that this distinguished and talented group of legal scholars has invited me to share my free advice on freer trade. Ordinarily, at the International Trade Commission, my colleagues and I receive mounds of good advice from lawyers. So I am pleased to be able to take modest advantage of this opportunity to reciprocate professionally. But before doing so, let me make the usual disclaimer. As a member of a collegial body that is, by design, seldom of *one* mind, I speak for myself alone.

I would like to start with an historical observation. Two hundred years ago the original thirteen American colonies formed a mosaic, loosely joined by military necessity, but greatly separated by special commercial interests. At that time, inter*state* commerce was as encumbered by tariffs, quotas, and regulations as inter*national* commerce is today. Then a remarkable thing happened in Philadelphia—some call it a miracle. Fractious politicians came together and, in an ultimate act of statesmanship, wrote a constitution that became the bedrock on which our new nation was built. A critical part of that document was the agreement, viewed so skeptically at the time, to remove the turnstyles and gates at each state border. Who can doubt the contribution that that act—producing free interstate commerce from the Atlantic to the Pacific—has made to the economic prosperity Americans enjoy today? No one now, in 1987, views with alarm Ohio's or Florida's or Alaska's merchandise trade deficit against the other forty-nine states.

The United States was North America's first free trade area. Canada, following its own route, was the second. Now our two countries are trying to become, together, the third.

The goal of the U.S.-Canadian discussions that are currently underway is not a full-scale economic union, but a mutually beneficial arrangement that would substantially reduce barriers to trade. Many of the proposals being put forward, by participants and academic observers alike, would change our two countries' trade laws so as to reduce the chances that either of us will make adverse determinations against the other in dumping and subsidy cases. I shall not discuss such matters here. They are now under negotiation and are more constructively left in that forum.

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* Vice Chairman, U.S. International Trade Commission.

Whatever the outcome of the negotiations, there will always be trade tensions between us. Indeed, tension cannot be avoided because what we seek is some degree of economic integration combined with political and cultural autonomy. Still, I believe the International Trade Commission (ITC) and the Canadian Import Tribunal (the Tribunal - to avoid confusion with the Court of International Trade) can work constructively in that environment—and even help to ease the tensions. I'll present a few ideas about that later. But first let me perform my assigned task, and that is to describe the International Trade Commission. The better you know us, the better you can help us determine our most useful role.

The ITC recently celebrated its seventieth anniversary. From the beginning, we have been an independent regulatory agency. By independent, I mean that we are not directly accountable to either Congress or the President; but rather we administer the trade laws as provided in the statutes, free from outside political influences. To ensure impartiality, no more than three of our six commissioners may be from the same political party. Moreover, the chairman serves for only two years and the chairman and vice chairman cannot be of the same political party.

The ITC is one of three major federal agencies that work directly in the field of international trade regulation. The other two are the Office of the United States Trade Representative (USTR) and the Commerce Department's International Trade Administration (ITA). The USTR is a cabinet-level officer who assists the President in formulating U.S. trade policy and negotiating agreements with our trading partners. The ITA helps American businesses sell their products abroad, and also has a role in administering the laws against dumped and subsidized imports. These agencies are important players in implementing policy, and often are asked by Congress and the President to provide advice on trade matters, including possible changes in policy. None of them, however, has ultimate decision-making authority.

That is especially true of the ITC. Congress has established very strict standards that tightly control the ITC's activities, particularly in Title VII and section 201 cases. Indeed, in this area of trade law, unlike any other I can think of, Congress has prescribed in great detail and specificity the factors that the implementing agency is obliged to consider. While there is some leeway in the statutes, it would be a mistake to assume that the ITC has much discretion in deciding what it can or should consider when it evaluates whether the requisite standards of injury and causation are satisfied in a given case.

Football metaphors are popular in government. Let me see if I can pull one off here. If the trade laws were a football game, the President would be the coach, the Trade Representative would be the quarterback, and the Commerce Department would be the blockers and running backs. I think the ITC would be the kicker. A coach doesn't have much to do with whether a field goal is made; likewise with the President and

the ITC's decisions. It works the other way as well. The kicker does not have much to say about the way the game is played, and neither does the ITC.

Basically, the ITC has two functions. First, with its staff of five hundred, it is a source of expertise and knowledge on a vast array of trade matters. The most important of its major studies are known as section 332 reports. These are requested under section 332 of the Tariff Act of 1930 by the President or Congress, or they are initiated by the ITC itself. They can cover such narrow topics as clothespins or such broad topics as the probable economic effects on all U.S. industries of a free trade area with Canada. (The latter ran to nine volumes.)

The second basic function of the ITC is to administer the U.S. import relief laws. There are three principal statutes that provide such protection. As I briefly review these statutes, let me ask you to keep in mind the basic distinction in U.S. trade law between fair and unfair trade.

1. Section 337 of the Tariff Act of 1930.

Starting with the unfair trade statutes, the first one I will cover is section 337 of the Tariff Act of 1930. In practice, almost all investigations under this section involve allegations that imported products infringe intellectual property rights, such as patents, copyrights, and trademarks.

In order for a U.S. producer to win its case in a section 337 investigation, the ITC has to find three things: first, that there is an unfair act in the importation or sale of such a product; second, that there is an efficiently and economically operated domestic industry producing the product; and third, that the unfair acts have the effect or tendency of *substantially injuring* the domestic industry. (The ITC seems to regard substantial injury as requiring not just infringement of a property right but also evidence that the overall condition of the industry is deteriorating.) These three things comprise a higher standard than the corresponding standard in domestic intellectual property law.

Two basic forms of relief are available under section 337— exclusion orders, which direct the Customs Service to keep the offending goods out of the United States, and cease-and-desist orders, which threaten firms with fines if they sell existing inventories or continue to import such articles. Either the ITC, or the President in his review of the ITC's determination, can decline to issue such relief if either determines that it would not be in the public interest.

2. Title VII of the Tariff Act of 1930.

The second principal unfair trade statute administered by the ITC is Title VII of the Tariff Act of 1930. Title VII establishes procedures for imposing duties on dumped or subsidized imports that cause or threaten to cause injury to a domestic industry. Dumping and subsidization are, of course, considered "unfair" under the GATT, meaning that the im-

porting country may impose tariffs to offset these practices without giving the exporting country the right to "compensation" in return.

Both Title VII and the GATT provide that producers are not automatically entitled to protection merely on a showing that their foreign competitors are dumping or benefiting from government subsidies. Rather, with certain exceptions not relevant here, domestic producers must be found to be *materially injured* by reason of dumped or subsidized imports. If the appropriate tests are met, the importing country can impose a tariff to offset the effects of the unfair practice.

Responsibility for conducting Title VII investigations is divided between the ITC and the Department of Commerce's ITA. In a dumping case, the ITA determines if imports have been sold at "less than fair value" (usually an export price which is lower than the domestic price) and, if so, how much lower in percentage terms the prices of such goods were than they would have been had they been fairly traded. This measure is referred to as the "dumping margin." In countervailing duty cases, the ITA determines if a prohibited subsidy exists within the parameters of U.S. law and the GATT and, if so, the size of the subsidy as a percentage of the sales price of the subsidized goods. This measure is referred to as the subsidy margin.

I am pleased to report that the ITC has absolutely nothing to do with determining the existence or size of dumping or subsidy margins. So if you have complaints in this area, you should talk to people like Gary Horlick, who used to head this portion of the Commerce Department's operation.

Once the ITA has determined the margins, the ITC is responsible for deciding whether the relevant domestic U.S. industry is materially injured or threatened with material injury by reason of the offending imports. Historically, the Commission has approached this task as a three-step process—considering, first, what is the relevant domestic industry (that industry which produces the "like" product); second, whether that industry is in a state of material injury; and finally, whether there is a sufficient causal link between the injury and the dumping or subsidization. Establishing that link is an essential element of our analysis and frankly, the one on which my colleagues and I most often disagree.

Title VII defines material injury as "harm which is not inconsequential, immaterial, or unimportant." While the injury analyses of different members of the ITC vary, we generally look at levels and trends in such things as production, shipments, capacity utilization, employment, and profitability within the industry. If these indicators are pointed downward in a significant way, we will find that the industry is materially injured. If these indicators are not so depressed but suggest vulnerability to injury in the future, the ITC will explore the possibility that the industry is threatened with material injury.

If the Commissioners conclude that the domestic industry is materi-

ally injured, they move on to analyze the effects of the dumped or subsidized imports. It is the generally accepted view at the ITC that, in analyzing causation under Title VII, we are prohibited from weighing causes. In other words, the causation requirement is satisfied by a finding that the unfair imports are only a cause of material injury. Still, it is not enough that the imports cause merely some slight level of injury, because economics teaches us that a domestic injury will almost always be worse off with imports in the market than without. Thus, the injury independently caused by the dumped or subsidized imports must rise to the level of material injury.

The question of what factors should be considered in determining causation is a controversial one at the ITC. Traditionally we have considered such factors as the market penetration of the allegedly unfair imports, the size of the dumping or subsidy margin, whether the imports are priced below the domestic product, whether domestic producers have lost sales to imports, and whether changes in the level of imports correlate over time with changes in the fortunes of the domestic industry.

In cases which involve a threat of material injury, the ITC considers the probability that the imports in question will grow in the near future. It does this by examining such factors as the size of importers' inventories, the amount of excess productive capacity in the exporting countries, and the likelihood that the exporters will expand their capacity or divert sales from other markets to the United States.

Now, if both the ITC and the ITA reach affirmative final determinations on their parts of the case, duties are automatically imposed on the imports in question. These duties are set at levels which are equal to the dumping and subsidy margins subsequently calculated by the ITA.

3. Section 201 of the Trade Act of 1974.

The third principal statute administered by the ITC is section 201 of the Trade Act of 1974. Section 201 is also known as the escape clause because it implements a GATT provision that allows countries to temporarily escape from their GATT obligations. Like Title VII, section 201 establishes the procedure for restricting imports that are causing injury to a U.S. industry. But there is one critical difference. Whereas Title VII provides protection against *unfairly* traded imports, section 201 applies to imports that are *fairly* traded.

As a consequence, relief under section 201 is a much more complex issue. The GATT specifies that trading partners adversely affected by restrictions imposed under the escape clause are entitled to claim compensation via trade concessions in other areas; and if concessions are not obtained, those partners have the right to retaliate by imposing offsetting restrictions against other U.S. exports. So under section 201, in order to protect an ailing U.S. industry, it is necessary to sacrifice the interests of other, healthier U.S. industries. These sacrifices are made either by exposing the industries to greater competition from imports in the U.S.

market or by authorizing foreign countries to deprive the industries of overseas markets. No similar trade-off is required under Title VII. Thus, it is not surprising that it is much harder for domestic producers to obtain relief under section 201 than under Title VII.

The relevant standards in a section 201 case are *rising imports* of the product in question, *serious injury* or threat of such injury to a domestic industry, with the imports being a *substantial* cause. To take these standards in order, determining whether the imports have risen might sound like a straightforward task. Nevertheless, members of the ITC disagree on whether section 201 requires an absolute increase in the volume of imports or merely an increase in their relative market share. I have not yet had to take a position on this issue, so I will not comment on it beyond observing that it only arises in cases where the overall market is shrinking.

The serious injury standard requires a higher level of injury than the material injury standard under Title VII. While material injury is defined as injury that is not inconsequential, immaterial, or unimportant, serious injury is defined as an important, crippling, or mortal injury, one having permanent or lasting consequences. The ITC examines essentially the same indicators as under Title VII but requires evidence of more significant and pervasive hardship.

Finally, if the ITC concludes that serious injury, or the threat thereof, exists and that imports have risen, it proceeds to consider causation. Once again, the standard here—*substantial* cause—is stricter than the Title VII requirement, which is a cause. Also, the ITC is required to weigh causes under section 201. In other words, to satisfy the substantial cause requirement, we must consider all of the factors that have contributed to an industry's injury and conclude that none is more important than imports.

If the ITC returns an affirmative determination—a finding that the statutory requirements are satisfied—it must then recommend a remedy to the President. Possible remedies include tariffs, quotas, and adjustment assistance to workers and firms adversely affected by the imports. If tariffs or quotas are recommended, the ITC can, within certain limits, recommend their amount and duration. The ITC is also free to recommend that no remedy be granted.

The President has sixty days in which to decide what action, if any, to take. In making his decision he must consider a number of factors in addition to the ITC's recommendation, including the effect of import relief on consumers, on U.S. international economic interests and on the industry's ability to adjust to import competition. If the President adopts a remedy different from that recommended by the ITC, Congress may disapprove his action by joint resolution and direct him to adopt the ITC's recommendation. The President can, of course, veto such a resolution, but then Congress can override his veto.

Let me sum up by noting briefly that section 201 is intended to provide only temporary relief in cases where the industry is experiencing extraordinary hardship and where the facts show that such relief will enable the domestic industry to adjust to fair competition from imports. As a result, the ITC conducts fewer investigations under this statute than under section 337 and Title VII. In 1986, we completed only five section 201 investigations—wood shakes and shingles, electric shavers, metal castings, steel arms for forklifts, and apple juice—and reached negative determinations in the last four.

That, in a rather large nutshell, is the International Trade Commission. Why have I taken you on this long excursion? Because I believe that a more detailed understanding of the ITC's operations will facilitate the development of a greater feeling of confidence in our decisions.

I turn now in conclusion to specific measures that the ITC and the Canadian Import Tribunal could take to foster cooperation on trade matters between our countries. I have three suggestions.

First, we should both try to make our decisions more predictable by placing heavy and explicit reliance on the analytical tools provided by economics and statistics. It seems obvious to me that if the ITC and the Tribunal administer their respective trade laws so that the results of cases are difficult to predict and equally difficult to understand, it will lead to a feeling on the part of producers of each country that these laws are arbitrary, capricious, ad hoc, and, moreover, unduly protectionist. Sound economic and statistical analysis, along with less reliance on anecdotal evidence, will result in more consistent application of our trade laws and, therefore, greater confidence in the integrity of our proceedings.

Second, we should examine and learn from each other's procedures. I am told that our two agencies now follow vastly different procedures when they handle cases which involve allegations of injury to the domestic industry. The Tribunal does extensive field work among purchasers of domestic and imported products; the ITC does not. The Tribunal's hearings are like trials, with cross-examination of adverse witnesses; the ITC's hearings are like hearings before a legislative body, with little or no real cross-examination. In Tribunal investigations, counsel for the parties have access to confidential business information; in ITC proceedings, by contrast, respondents and their counsel have virtually no access to confidential business information from members of the domestic industry.

Observers can decide for themselves which procedures are better. I do not presume to suggest that either the ITC or the Tribunal should abandon its way of doing business. I do presume to suggest that we work toward greater understanding, if not more common rules of practice, so that differences in procedures will not be misconstrued as differences in substance.

Finally, I suggest that the Tribunal and the ITC adopt a formal pro-

gram of swapping personnel and ideas. Joint committees of the two agencies should meet and discuss approaches to cases and other common problems. We might exchange personnel on a regular basis. A useful step in that direction was taken two years ago when several International Trade Commissioners and staff members visited Ottawa and several Tribunal members visited Washington.

If our agencies can build a closer professional relationship, it will foster greater confidence in what we do. In the Canadian press I have noted frequent expressions of impatience with the ITC's decisions; and in the U.S. press I have noted occasional concern about the Tribunal's decisions. As we work for free trade between our two nations, let us commit ourselves to improving the clarity of our decisions and to increasing public confidence in the results of each other's work.