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# PRACTICING INTERNATIONAL TRADE LAW AFTER THE URUGUAY ROUND

*Robert J. Leo\**

Thank you. I would like to thank the organizations that are sponsoring this symposium. I think it is incumbent upon me, as an alumnus of Brooklyn Law School, to bring the discussion from the policy level back down to "street" level.

What I think I should comment on is the effects on United States trade law of the current negotiations of the General Agreement on Tariffs and Trade (GATT) — the Uruguay Round (Round). My perspective is that whether the Round is a success or a failure — and it looks at this point that it will be a success — there are going to be changes in United States trade law and in the general practice of trade law. These changes will not necessarily be from a procedural perspective, but rather from what the new laws mean to the lawyers for United States businesses that import and export, and the lawyers for United States businesses that don't import and export and actually are not interested in importing or exporting.

What I see happening are changes in certain sections of United States trade laws (Trade Laws). Mr. Horlick spoke of the dumping laws and primarily section 301. I would like to briefly comment on those laws and to mention the escape clause section of the Trade Laws, section 201.

Section 201 concerns fairly traded imports. There is a two-prong test. First, it must be a fairly traded import and second, it must be coming into the United States in increased quantities that are causing serious injury to the domestic industry.

Before I explain this section of United States law further let us consider the bigger picture. Regardless of what happens in the Round, the United States Congress is not going to be happy. If there is a successful Round, Congress is still going to — at least certain Congressmen, especially those with some trade knowledge — pick apart what the United States did not get, or what it gave up.

For example, I believe that in order for the United States to obtain something it wants, such as market access, or coverage of

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services and intellectual property under the GATT, it will have to make concessions in our United States dumping laws. There are always going to be certain Congressmen who want to pick apart such concessions. The way these Congressmen do that, besides issuing a statement, is to go back and change the rules and regulations for the existing laws. When the Round is completed, it must be transformed into United States domestic legislation. This executing action gives Congress and United States companies a great deal of time. These same parties spend a great deal of energy trying to adjust United States laws once the agreement has come back from the Round in some sort of final form. Congress will do this whether the Round is a success or failure. I think that if the Uruguay Round fails there will be even more changes to United States domestic laws than there would be with a successful Round. This is because everyone will then be fighting harder for his or her own special interests. Sections 201 and 301 will be tinkered with, and the rules and regulations for the United States Customs Service will be altered to make it easier for a domestic company to determine what foreign goods should gain access to United States markets, and what goods should not.

Section 201 is a perfect example of this dilemma. In the past, that is, late 1986 to early 1987, there was a section 201 case brought against imported footwear. Imported footwear accounts for about eighty percent of the United States market. On its face it looked like there was injury to the United States domestic industry. While addressing this case, the International Trade Commission found that there had been numerous successful attempts to tinker with section 201 from 1977 through 1986, in 1987, and again in 1988. These changes were made in order to make it easier for domestic industries to not only bring a petition, but also to win on the merits. Once these companies won, they were entitled to relief — supposedly temporary import relief in the form of tariffs or quotas.

The footwear industry made a pretty good case for relief. The commissioners deliberated very carefully, and they decided that there had indeed been substantial imports of footwear. Additionally, they found that these imports had increased over the past few years, and that there was injury. At that point, it was up to the President to determine whether he should implement any remedies. The President had a lot of discretion in this regard. The President said, in essence, that there was too much

risk to the economic security of the United States or to consumers, and he did not see a reason for a remedy in this case. Therefore, no import restrictions were imposed. Senator Danforth, who was one of the prime movers behind the section 201 bill, and a very big supporter of the footwear industry, and also a recent star of some congressional hearings, said that this result shows that section 201 does not work and must be changed.

Section 301 works in much the same way. Section 301 is the unilateral retaliation law you have already heard about. I will not get into the policy issues at this time. Suffice it to say that if the Uruguay Round fails there will be more section 301 cases. Section 301 is a very good weapon for the United States to use against foreign trading partners in order to gain some measure of foreign market access. Most of the domestic industries that push the United States Trade Representative to bring a 301 case are interested in overseas access. However, once the 301 process gets started, all of the domestic industries that do not even sell goods overseas and do not care about getting protection in the foreign market, but rather, want to retaliate against imports in the United States, get involved in the process. Section 301 has become more of a political battle in recent years, but there is going to be a turning point. In the coming years the protectionists in the United States Congress will find ways to make section 301 investigations a little bit easier to implement, and the sanctions under 301 a little bit easier to impose.

A good example is China. There is a section 301 case against China relating to its intellectual property rights. There was to have been a list of those imports the United States was going to retaliate against should China fail to adopt adequate intellectual property protection. The list should have been released by now, but as far as I know it has not been. I am sure the domestic industry has access to the list of items, but the importers who will be either put out of business, or have their businesses severely curtailed do not have access to that list. It is at this practical level where the success or failure of the Uruguay Round is going to be felt.

One of the other laws that has been mentioned today is section 337. Professor Brand has discussed a case before the GATT, which the United States lost. Consequently, the United States is supposed to be changing section 337, which allows a company to bring a petition against another company charging unfair patent violation through importation of a particular commodity. The

GATT said that the way the law was applied was discriminatory and violated the national treatment policies of the GATT. I think the GATT was right, but the United States has not changed the law yet. For my firm, which does a lot of intellectual property work and a lot of section 337 cases, we are actually happy that nothing has changed yet. But the point is that there will be more changes to these types of laws, and less ability and willingness of the Congress to change these laws in accordance with the GATT. And I think that situation will happen even if the Round is successful because Congress will say "okay, you have your completed negotiations, and after we enact legislation implementing them, everything else is fair game." Therefore, Congress might decide to change section 301 even more, or to tinker with the rules and regulations as much as they want.

The current battleground of this attitude is the "fast track," and I agree with my fellow panelists on the importance of the fast track as the prime vehicle for the implementation of trade policy. My view on the fast track is, however, a little different. I do not believe that Congress will change the fast track process. They love the process just the way it is. Congressional members are not subject to any blame under the fast track, absolutely none. The Congress of the past four or five years has been terrific about not wanting to take any blame for anything. Instead, its members can criticize everything. Whether the topic is the beginning of the negotiation process, or the final results, they can criticize to their hearts' content. Members of Congress can play to their constituencies and also represent their constituents' interests. I agree with Professor Koh that the democracy issue is a nonstarter. Congress has so much access to the information of what is happening on fast track negotiations and the agreements that are being negotiated. They also have tremendous assistance if they want the input. Every time a Congressman sneezes, and puts it in writing and sends it off to the United States Trade Representative (USTR) in Geneva, the USTR must come back and answer that letter. The USTR must respond to all congressional concerns. Thus, as you can see, there is constant and total input into the fast track process. I think the process will continue the way it is.

If, however, Congress did wish to change the fast track in any of the five ways mentioned by Professor Koh, perhaps a separate fast track system would be the best. However, changing the fast track itself would be a mistake. Because the world's po-

litical and economic systems are changing so rapidly that in order to just keep up with, and distinguish, United States concerns, you must give the President the authority to negotiate trade agreements, even if for only a limited period of time — say two to three years. If the President is not given enough authority to represent the interests of the United States in trade issues, the country can miss a lot of export opportunities, and can also miss the boat on a lot of fast changing economic issues.

One other thing that I would like to say about Professor Brand's presentation is that I agree that private party access of United States importers to challenge United States laws is a good idea. However, I think that if extended too far, which Congress has tried to do in the past, that idea could cause problems for the United States trading system. What Professor Brand is talking about is basically considered a private right of action. The problem with giving United States companies the power to challenge laws made under the GATT, in a United States court, is that it could lead to United States companies bringing actions against other United States companies to interpret United States laws that involve United States agency determinations. I question whether we would want such a situation. To me this is an extension of what Professor Brand was talking about.

It is possible, and necessary, for a United States company to challenge what the United States Government has done. For example, back in 1971 President Nixon imposed a ten percent surcharge on imports. This surcharge was challenged in court and was upheld as within the President's authority. However, this is not the same as the private right of action that has come up a number of times in Congress over the past five or six years. Congress would like to allow for a private right of action, which is mostly mentioned in connection with dumping cases. Then IBM could sue AT&T, saying that your telephone sets made in Thailand are being dumped, and although we really do not have proof, we believe we have enough evidence from going out to the stores, and we basically know what your production costs are in Thailand, and we have talked to people in Thailand and know that you are selling these telephones at below market cost here in the United States. For AT&T to try to rebut this allegation would severely drain its time and resources. Such an action by IBM chills the economic development of AT&T. The ability of IBM to bring such an action would be the same as if I could sue you because I think you filed your income tax wrong and I have

some proof of that because you told me once that you fudged a few things on your deductions. So I am going to bring you to federal court because I think you violated the Internal Revenue Code. It is somewhat analogous to that concept. It could have a real chilling effect on what companies do, how they invest, and how they conduct their businesses.

In conclusion, my last point for discussion is what trade law is coming to. This reflects, and the practice is, that trade law is currently budget-driven. Maybe that is a simplification, or maybe it is obvious to everyone. The United States trade deficit has been driving trade law and trade policy for at least the last five or six years. When this happens, Congress does not really care about the GATT, or the Uruguay Round, or what the international rules are, they look for short-term solutions. If tariff revenue is coming down through tariff reductions in the GATT, then Congress wants to find some other way to not only protect their constituents — United States industry — but also to protect revenue. Many of the changes we have seen are because of economic conditions and problems with the budget. A prime example is the user fees which are something I have been jousting with for a while. When I was with the Association of Exporters and Importers (Association), we were trying to convince the European Community (EC) to file another complaint with the GATT after the original one on customs user fees was decided in the EC's favor. These customs user fees were imposed on the value of the item. Now there is a cap and a minimum. The fees are charged on the importation of the merchandise. The way the United States had set it up was held to be GATT inconsistent. While a fee itself is not GATT inconsistent, this fee was enacted by the Congress over the objections of nearly everyone in the United States business community.

Even the President objected to the user fees back in 1986, although not vociferously. The Association thought it had won the fight and went away for the Labor Day weekend. When it came back, all of a sudden Congress had reinserted the user fees into the budget. The Association found out that the fees were added solely because the Chairman of the committee decided that they needed to find another 500 million dollars and asked where it could be found. Someone, in his infinite wisdom, remembered the user fees, and boom, they were back in.

When this type of policy, this type of perspective, drives international trade policy, you get changes in the trade law that

make it easier for companies to use that law to further their own private goals and for Congress to play politics with it.

What this means is that in the next few years, and for those students reading this that are going to be graduating soon, there is going to be a lot of opportunity in the international trade field for lawyers. The trade laws are going to be constantly changing, the regulations are going to be constantly changing, United States companies are becoming more global every day. Companies are not only going to have to be concerned about United States laws, but they are also going to have to be concerned about foreign trade laws, especially that of the EC: for example, how to get goods in there and what is the correct country of origin marking. All of these problems are going to require legal solutions. While the success of the Round will make these solutions a little bit easier to follow and a lot less disjointed, the failure of the Round could indeed be overwhelming, although such failure would result in a lot of business for trade lawyers. I think I'll conclude with that happy thought.



