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LEGAL RESOLUTION OF EXPORT TRADE DISPUTES WITH THE REPUBLIC OF CHINA

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I. INTRODUCTION

When an underdeveloped country blessed with an intelligent and energetic population and favored with a skillful and dedicated government adopts a course of economic development, its export growth inevitably collides with the business and labor groups producing competing products in the receiving countries.

For the Republic of China, the initial collisions between exports from Taiwan and domestic industry began about fifteen years ago, with plywood and mushrooms, and have intensified since. Presently under attack in the United States are such important products as footwear, TV receivers, textiles, solid-state watches, and a number of lesser articles. With continued expansion of exports to the United States from the Republic of China, future collisions may be expected, both as renewals of attacks against present export products, and as new products are developed and become significant factors in the United States market.

The scope of this paper is therefore directed to the legal mechanisms in the United States by which these economic conflicts are resolved.

II. SOURCES OF APPLICABLE LAW

A. International Sources

1. *US-ROC Treaty of Friendship, Commerce & Navigation (FCN)*

It is this bilateral treaty which serves as the framework for U.S. trade relations with the ROC. It provides, *inter alia*, for most-favored-nation treatment in matters affecting imports.

2. *General Agreement on Tariffs and Trade*

The Republic of China is not a member of the General Agreement on Tariffs and Trade (GATT) and therefore does not benefit directly from the rights and privileges enjoyed by GATT signatories.

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However, to the extent that the United States must resolve its trade conflicts with GATT members within the framework of that body, in multination trade disputes involving both the Republic of China and one or more GATT members, the Republic of China receives indirectly the benefit of United States-GATT resolutions by virtue of most-favored-nation treatment under the FCN treaty. Not all GATT benefits pass to the Republic of China in this way; *e.g.*, it is doubtful whether, after restriction of its exports to the United States, the Republic of China would be entitled to compensation or retaliation vis-à-vis the United States under the GATT rules. Similarly, in a trade dispute involving the United States and the Republic of China alone, the United States is not obliged to apply the GATT rules, but only the less comprehensive articles of the FCN treaty.

3. Special International Agreements

Special international agreements, either bilateral or multilateral, are a not infrequent device for resolving trade disputes. The most significant such agreement presently in force is the Multifiber Textile Trade Agreement, under which the United States has concluded a number of bilateral agreements with exporting countries, including the Republic of China, limiting the quantity of textiles which may be exported to the United States.

4. Voluntary Restraint Assurances

A useful device sometimes used to resolve trade disputes on an informal basis is the giving of "assurances" by the government of an exporting country to the United States, usually in the form of a memorandum of understanding, that it will restrain its exports for a period of time to a stipulated level. While it is doubtful that such assurances constitute law in the sense of treaties or executive agreements, the device can enable more flexible solutions than can be achieved under the formal legal means. An example of its use with the ROC was to restrain the level of canned mushroom exports to the United States in 1968 and again in 1976.

B. Domestic Sources

1. Legislation

With Congress reposes the principal constitutional authority to regulate foreign trade. Congress can, and from time to time does, pass legislation increasing import duties in response to

domestic industry pleas. One example of a significant such bill currently under consideration, which would adversely affect exports from Taiwan to the United States, is H. R. 14600 (94th Congress) to impose very large duty increases on solid state watches and parts thereof.

2. *Antidumping*

The Antidumping Act of 1921, and the regulations issued thereunder, require that when it is determined that imports have been sold at "less than fair value," and that the articles thus imported have caused injury to the domestic industry, an additional duty equal to the dumping margin will be assessed. Procedurally, the Treasury Department conducts an investigation during six months from the date of its Antidumping Proceeding Notice, which initiates the matter, to determine the existence of sales at less than fair value. If Treasury finds the existence of such sales, it forwards the matter to the International Trade Commission (ITC), which conducts a three month investigation to determine whether the dumped imports have caused injury to the domestic industry. If the ITC so finds, it returns the matter to the Secretary of the Treasury, who thereupon issues a dumping order.

The existence of an antidumping order can seriously inhibit the growth of exports. For example, an order applying to clear sheet glass from Taiwan issued in 1971. Despite the best efforts of the manufacturer to remove all possibility of dumping margins, by revising its home market and export pricing, uncertainties concerning United States Customs administration under the order have discouraged would be importers, and exports of clear sheet glass from Taiwan have been seriously impaired.

An antidumping proceeding notice against PVC sheet and film from Taiwan was issued on April 1, 1977. The Antidumping Act thus remains a serious threat to export expansion from the Republic of China.

3. *Countervailing Duty*

Section 303 of the Tariff Act of 1930 provides that when the government of an exporting country bestows a "grant or bounty" upon exports to the United States, an additional duty equal to the amount of the subsidy will be imposed.

The Republic of China, similarly to many other developing countries, offers a number of governmental incentives to encourage new investment in productive enterprises. If such encourage-

ment measures are to be deemed to constitute subsidization of exports to the United States, the resulting countervailing duty burden could become a major barrier to the Republic of China's export growth.

Presently or recently before the Treasury Department, which administers the countervailing duty statute, are three cases on articles from Taiwan: non-rubber footwear, bicycles, and handbags. All are based on claims by the domestic petitioners that the Republic of China's investment encouragement measures constitute countervailable export subsidization. While final determination has not been issued as yet in bicycles and handbags, it appears from tentative determinations in these cases that Treasury will probably finally determine the following incentives not to constitute countervailable grants or bounties:

- (a) Reduction in foreign exchange commissions charged by banks in converting currency.
- (b) Reduction in import license fees charged by banks for the obtaining of an import license.
- (c) Exemption from the business tax (a gross receipts tax) on export sales.
- (d) Reduction in the stamp tax on export documents.
- (e) Suspension of interest charged by banks on bills of exchange and letters of credit.
- (f) Resumption of duty remissions on imported raw materials and component parts which reflects internationally accepted principles of "drawback" on such items.
- (g) Suspension of harbor dues on exported items.
- (h) Suspension of airport safety dues.
- (i) Increase in processing loss ratios for purposes of duty drawback.

Treasury will probably find that the following incentives do constitute grants or bounties:

- (a) Loans at preferential rates of interest for the purchase of equipment by manufacturers and short-term export financing.

- (b) Exemption from income taxes, deed taxes and customs duties on imported capital items for firms located in Export Processing Zones.
- (c) Income tax holidays for newly established firms granted under the Statute for Encouragement of Investment.

However, it appears likely that as applied to exports of bicycles and handbags, the impact of these measures on stimulating exports to the United States has been *de minimis*, and that countervailing duties will therefore not be assessed.

4. *Escape Clause*

The most significant legal mechanism by which domestic industries can seek protection from import competition is the "escape clause" found in sections 201-203 of the Trade Act of 1974. Under this authority, upon petition by an interested group, a request by the President, or upon its own motion, the ITC conducts a six month investigation to determine with respect to the imported article whether:

- (a) Imports are increasing;
- (b) The domestic industry producing like or directly competitive articles is being seriously injured, or is threatened with serious injury; and
- (c) The increased imports are a substantial cause of the serious injury.

If the ITC so finds, it reports its findings to the President together with its recommendation of the quantum of import restriction necessary to remedy the injury, and its opinion on whether adjustment assistance would provide a remedy.

Within 60 days after receipt of the ITC's report and recommendations, the President must determine whether and to what extent he will grant import relief and/or adjustment assistance. The President is not bound to follow the recommendation of the ITC, but, being guided by the total interest, may provide (1) a duty increase, (2) a tariff rate quota, (3) an absolute quota, (4) negotiate orderly marketing agreements, (5) take any combination of these actions, or (6) take no restrictive action. If his action differs from the ITC's recommendation, the Congress

may within 90 days override the President's determination by a concurrent resolution of both houses.

Since first implemented in domestic law as section 7 of the Trade Agreements Extension Act of 1951, the escape clause has been the device most used by domestic industries to attack import competition. It is more flexible than the other statutory remedies, since the President may tailor the final result to policy and international considerations with which the more narrow determinations of the ITC are not concerned.

Plywood and canned mushrooms were the first Republic of China products to be attacked via the escape clause in the early 1960s. Since then the escape clause investigations have been directed to canned asparagus, sheet glass, footwear (twice), TV receivers (twice), canned mushrooms (twice), marble products, sugar, and presently cast iron cookware and stoves, all of which are important elements in the Republic of China's exports to the United States.

5. Unfair Trade Practices in International Trade

Under section 337 of the Tariff Act of 1930, upon petition, the ITC conducts an adjudicatory proceeding to determine whether there exists in connection with the importation of an article "unfair methods of competition and unfair acts . . . the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States." If the ITC finds a violation, it may bar the offending article from entry or may issue cease and desist orders. The President can revoke the ITC's orders for public policy reasons.

When this statute was first enacted in 1922, it was hailed as the foreign trade counterpart of the Federal Trade Commission Act. However, in the past, this mechanism has been applied virtually exclusively to articles claimed to infringe the United States letters patent.

An example of its application to Republic of China exports was the recent exclusion of reclosable plastic bags for patent infringement. It does not represent a serious threat to the Republic of China's export expansion as long as it is applied only to cases of patent infringement. However, there is now pending before the ITC a section 337 case against TV receivers imported from Japan, which is based solely on allegations of unfair practices. If the ITC

should find affirmatively for the petitioners in this case, it would represent a very considerable extension of the jurisdiction of the United States antitrust laws beyond the scope hitherto allowed them.

III. WHAT DOES THE FUTURE HOLD?

The hypothesis stated at the outset of this paper makes it highly probable that trade disputes between export industries in the Republic of China and the competing industries in the United States will expand as the Republic of China's exports grow. There is no doubt that increasingly recourse will be had by domestic interests to the protective mechanisms outlined above. However, the aggregate outcome of these disputes, in addition to the case-to-case merits, will be determined very substantially by two extra-legal factors: United States foreign trade policy and the Republic of China governmental policy toward such disputes.

A. United States Foreign Trade Policy

As of this time, only one major trade case has been decided by the Carter Administration, but its implications give a fair appreciation of the policy direction in which the Carter Administration may move. This is the non-rubber footwear escape clause case. Involving some \$2 billion in trade annually, it is economically important. Due to the geographic dispersal of footwear factories in the United States and the long protection-seeking effort of the industry, it is politically important. The ITC had recommended a tariff-rate quota which would have had a very depressing effect on footwear imports. President Carter chose, however, to take the least restrictive action, that of announcing that he would seek orderly marketing agreements with the Republic of China, which by the way is the largest import supplier, and Korea. The policy thus indicated is one of reluctance to impose unilateral trade restraints, and to seek instead solutions based on negotiation.

B. Policy of the Government of the Republic of China

Some industries in Taiwan such as the mushroom packers, have through long experience become knowledgeable and capable in coping with trade disputes. Other industries, either small, or facing such problems for the first time, are not sophisticated in

this sense and have not always taken timely and vigorous defensive steps. However, the Board of Foreign Trade, which is an agency of the Ministry of Economic Affairs, under the guidance of Director Y. T. Wong and Deputy Director H. K. Shao, has long been sensitive to the need for the affected industries actively to defend these actions in the United States at the administrative level, rather than relying solely on government-to-government efforts. The BOFT is actively encouraging and guiding Taiwan's export industries. The continuation of this policy will undoubtedly favorably affect the future.

Professor Oldman thanked Mr. Solter for his presentation and then invited the discussants to contribute their comments. The first discussant was Edward Laing, Associate Professor of International Law and International Transactions at the University of Maryland School of Law.

[The following is the summary of Professor Laing's statement.]
