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LEGAL PROBLEMS TO BE ENCOUNTERED IN THE OPERATION OF THE TRADE EXPANSION ACT OF 1962*

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Since the introduction of the tariff policy in 1933, which authorized the negotiating for a reciprocal lowering of import duties, the Trade Expansion Act of 1962¹ is certainly the most basic legislation affecting United States trade relations. Essentially it gives considerably expanded authority to the President to negotiate tariff reductions, and reductions of other trade barriers with all countries, and specifically with the EEC, the European Economic Community. It changed materially the safeguards against injury to American business resulting from tariff reductions and added a new concept in the law—adjustment assistance programs both to companies and labor groups which are or might be injured by tariff reductions.

It is fair to say that the motivating factor in getting the bill through Congress was the need to arrive at a different basis for negotiations with the European Community. The existence of the Community and the great efforts the Community has made in lowering internal tariffs, as among themselves, and at the same time adjusting to uniform external tariffs, made it necessary for the United States to be in a better position to negotiate with the European Community. If the Community program had not developed so quickly, I do not believe we would have had the Trade Expansion Act of 1962.

Today this leaves us in a somewhat peculiar position. It is clear that in the consideration of the act last year, the official position was that the United Kingdom would be a part of the European Community. In fact, the Senate Finance Committee accepted an amendment by Senator Douglas with respect to the eighty per cent dominating trade provision for reduction of our tariff to zero. The position that the House Ways and Means Committee had taken, at the request of the administration, was that you could reduce tariffs to zero where

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¹ 76 Stat. 872 (1962), 2 U.S. CODE CONG. & AD. NEWS 1021 (1962).

eighty per cent of the trade was conducted by the United States and the European Community at the time the reduction was proposed. This was the dominant supplier theory. If a tariff were reduced to zero, then the most favored nation provision would be applicable, so the tariff would be reduced to zero for everyone.

Senator Douglas, perhaps with greater foresight and a greater knowledge of General DeGaulle than others, had recommended that the dominant supplier authority include the authority to reduce to zero where eighty per cent of the trade is carried on in the United States and the countries belonging to the European Community and also the outer seven, the European Free Trade Association—Great Britain, Norway, Sweden, Denmark, Austria, Switzerland, and Portugal, with Finland as an associate member. Had this amendment, which passed the Senate, remained in the conference bill, there would be authority today to negotiate down to zero on the basis of the eighty per cent dominant supplier provision for a considerable number of categories of goods.

It would be easy for all of us to criticize the decision of the administration to oppose this amendment by Senator Douglas. I think that the reason it was opposed was the fear by the State Department that it would be interpreted in Europe as a weakening of the United States position of wanting Great Britain to become a member of the European Economic Community. Thus the decision was the result of a calculated risk.

In any event, Senator Douglas has reintroduced this amendment. The administration had taken the position of not supporting its introduction. It is uncertain what its position will be with respect to the support of the amendment now that it has been introduced.

The present practical inoperativeness does not mean that the authority of the Trade Expansion Act of 1962 to reduce to zero is a meaningless document. Authority to reduce by fifty per cent or increase by fifty per cent over rates existing on July 1, 1962, with respect to specific items is still applicable not only to all other countries, but to negotiations with the European Community. The possibility of reducing a tariff to zero where the tariff now does not exceed five per cent of the *ad valorem* value still remains. Authorities specifically covering agriculture commodities still remain, and the European Community authority is certainly not necessarily dead for the period of the Trade Adjustment Act. Thus, this provision can still become very much alive.

There will be problems, however, if the Douglas amendment is adopted. The European Community has as its clear-cut objective under the Treaty of Rome not only to eliminate internal tariffs, but also to stabilize to a single uniform external tariff for every item. The Free Trade Association has as its objective the reduction and elimination of internal tariffs among the members, but it does not provide for the establishment of common external tariffs. However, in practice, and in the theory of many of those within the European Free Trade Association, it can be expected that as you reduce internal tariffs, you eventually, through the process of this operation, arrive at common external tariffs.

Apart from the authority given to the President to reduce tariffs, there are several basic changes from the previous laws in the new act. The safeguards against economic injury are substantially changed. The peril point and escape clause provisions, both of which relate to injuries caused or threatened by an increase in imports as a result of concessions or proposed concessions, have been radically changed insofar as their conceptions are concerned and insofar as their implementation is concerned. The National Security and section 22 proceedings of the Agriculture Adjustment Act remain about the same. Also, as previously mentioned, the President's authority has been broadened. He can enter into orderly marketing arrangements—which really means quotas among exporting and importing countries, and he has the authority to provide adjustment assistance to injured firms and to adversely affected groups of workers.

Let's first turn to the peril point provision. The peril point concept had originally been put in the 1948 Act, was taken out in the 1949 Act, and put back in the 1951 Act. It has remained there ever since. Under the previous law, before the executive branch could commence negotiations with foreign countries for reciprocal tariff reductions, it had to arrive at an agreed list of items for modification of duties by the United States. The Tariff Commission then had to conduct investigations, including public hearings, and report back within six months on each article that was being considered by the United States for a reduction in the U.S. tariff in its negotiations with other countries. The Commission had to find, with respect to each of these articles, the limit to which a modification of the tariff could be made without causing or threatening to cause serious injury to domestic industry producing like or competitive articles, *i.e.*, the peril point. In the negotiations, the President could

breach the peril point, but he had to report to Congress on the breach and why he had breached it.

This was a real "Alice in Wonderland" procedure. Within six months, with respect to thousands of items proposed to be negotiated, as was the case in 1960, the Tariff Commission had to find a specific limit for tariff reduction below which it had to say that there could be serious injury or threat of serious injury to that industry. Even if you gave them six years, it would still be a very difficult economic problem.

This obviously acted as a brake on the President in his efforts to increase trade. It was not even good economics. These aspects were dramatically revealed in the negotiations concluded in 1962. It took the United States from the fall of 1958 to the spring of 1960 to draw up the items on which they proposed to negotiate and to determine the peril points. But in the negotiations, they found they could not go far enough, particularly to meet the joint desire of the EEC and the United States to lower tariffs. In some of these cases the EEC had to accept less than the fullest reciprocity for reductions they were making. But even then, on sixty-one items, valued at about 76,000,000 dollars on the import basis, the President breached the peril point.

It thus became crystal clear that this procedure, to make sense, and to make the determination realistic, had to be changed. This change has been accomplished to a considerable extent in the 1962 Act. The President furnishes the Tariff Commission with a list of either specific articles or categories—under his EEC authority to reduce tariffs to zero—for which modification of the tariff is being considered. Where the reduction is to below fifty per cent, he identifies that provision of the law on which he is relying. Under the executive order that has just recently been issued, the special representative is responsible for preparing the list of items and categories.

The Tariff Commission, within six months, is to advise the President as to the probable economic effect of the proposed modification of tariff duties or other import restrictions on industries producing like or directly competitive articles. This means that they conduct an economic survey of the effect of the proposed modifications. It does not constitute, however, a finding of a specific peril point for each item, a point below which they are saying to the President "you can't go" without injury or threat of injury. The report is now directed to the economic consequences on the domestic

industry affected if a reduction to a given point is finally negotiated. In making this study, the Tariff Commission must take into account the conditions, causes, and effects relating to competition between foreign industries and United States industries producing like or competitive articles. They must also take into account employment in the United States, profit levels, prices, wages, the use of productive facilities in the domestic industry, and whether such use will be lessened because of the proposed reduction. Also to be taken into consideration is the state of the obsolescence of equipment in the domestic industry, the nature and extent of the change in employment that might result, and whether there will be an idling of productive facilities. The Commission can also make special studies, including studies of the foreign industry—what are the real wages it pays and how do they compare to wages here.

The list submitted to the Tariff Commission cannot include any item concerning which there is in effect a national security or escape clause ruling; or which is already covered by an orderly marketing agreement. Further, if the Tariff Commission has previously found in an escape clause proceeding that the import at the reduced tariff rate would cause serious injury, a finding not then accepted by the President, and in the new hearing the Commission finds that there is no change in its views, the item cannot be considered for tariff reduction.

The President, when he receives the report from the Tariff Commission, has to consult, before entering into any negotiations, with the Secretaries of Agriculture, Commerce, Defense, Interior, Labor, State, and Treasury. He must then hold public hearings conducted by an agency or inter-agency committee appointed by him. These hearings are primarily to determine what concessions the United States should seek to obtain from other countries in return for the concessions it is proposing to make on the basis of the Tariff Commission's recommendations.

Thus, the peril point provision has gotten away from this mythical identification for each commodity of a specific modification point below which the tariff cannot be reduced without causing or threatening to cause serious harm. There has been substituted a more general economic guidance report for the President and his negotiators.

The basic provision authorizing relief from the adverse affects of a tariff reduction to an industry injured from such reduction is

still the old escape clause. The escape clause concept first came into the trade agreements program in 1942 in the trade agreement with Mexico. There the agreement provided that either country could modify a concession made in the agreement if the increased imports threatened to injure domestic industries in that country—Mexico or the United States. In 1943 the executive branch agreed, in testimony before Congress, to include an escape clause in all trade negotiation agreements. This was implemented by an executive order some years later. In 1951 the concept was written into the extension of the act, in section six, which required it not only to be included in all new agreements, but as soon as possible to be negotiated in all existing agreements. The concept of the availability of the escape clause for all countries was recognized in Article 19 in the General Agreements on Tariffs and Trade.

Let's examine what has happened with respect to changes affected by the new act in the escape clause concept. It had been assumed by the Tariff Commission previously that in order for the escape clause to be invoked, there had to be a causal connection between increased imports resulting from the concession and the injury, although this was never in the law as such. However, it was in executive branch testimony before the House Ways and Means Committee in an earlier extension, and the principle was clearly accepted by the Committee. In the new act, however, this causal connection is made very clear. The law provides that before there can be a modification through the escape clause procedure of a concession already made, there must be a finding that the increased imports causing the injury result in a major part from a trade agreement concession. A causal connection is thus clearly required.

The new act eliminates the concept that existed in the previous acts that if the imports remained at the same level but domestic production went down, you had a relative increase in imports and the escape clause procedure would be available. Under the 1962 Act, the relative injury concept has been abandoned. There now must be a finding of an actual increase in the imports.

Previously the Tariff Commission was required to consider serious injury as having resulted from increased imports when it found that such increased imports had contributed substantially toward causing or threatening to cause serious injury. Under the 1962 Act, it must find that the increased imports have been the major factor in causing or threatening to cause such injury. While on the

surface it would appear that the change of language from "contributing substantially," as in the old act, to the phrase "major factor," as in the new act, is not of great significance, the legislative history reveals the intent of the new phrase is to require a clearer proof of the fact that the increased imports cause the damage, and this is reflected in recent Tariff Commission findings.

There are also changes in what the Tariff Commission should consider in determining whether there has been a serious injury. Neither the old act nor the new act defines serious injury, but they do describe what should be taken into account. The new act stresses idling of productive facilities, inability to operate at a reasonable profit, unemployment and underemployment in an industry, as factors to be considered in making a determination as to whether a serious injury has taken place.

There was also a problem under the previous act of how to deal with the question of the segmentation of an industry. In defining a domestic industry producing like or directly competitive articles, the previous act provided that a portion or subdivision of a producing organization "manufacturing, assembling, processing, extracting, growing, or otherwise producing like or directly competitive articles" could be considered. The Tariff Commission, in considering a given industry, had to distinguish the separate operations of the producing organization which was producing like or directly competitive products from other operations in that organization.

In the 1962 Act, there is omitted all reference to the segmentation problem. The Ways and Means Report, however, makes it clear that the principle of segmentation remains. The report provides, however, some guidelines for determining when the Tariff Commission should try to consider a segment of the industry or the company. For example, if the domestic articles are produced in an establishment along with other articles, the overall operation is included. Thus, if you are producing five different items within an organization, and one of these is threatened by the concessions in a tariff agreement resulting in increased imports, to determine whether there has been serious injury to that industry, you look to the total operation of the industry. However, if this corporate entity has several establishments in only one of which a specific article is being produced, and it is that article which is being threatened, then you look to that one segment if it is clearly identifiable. Where there are many establishments, the question of how much you separate will be affected by

the accounting procedures. If the accounting procedures of the corporation or the industry separate out the different items, then the Commission may also deal with the segment, not the whole.

Another change in the escape clause procedure is where, for example, the Tariff Commission is considering an import in a processed state, and the competing domestic industry is producing the basic raw material. For a specific case, consider the effect on the domestic production of sheep and lamb-on-the-hoof of imports of processed items, such as mutton and lamb products, claimed to affect adversely the domestic industry. The Tariff Commission previously held that these were not like or directly competitive items and that therefore escape clause relief was not available to the domestic sheep and lamb-on-the-hoof industry.

This decision was based on the fact that in the consideration of the 1958 Act, an amendment was contemplated which provided that glacé cherries were directly competitive with raw cherries. The amendment was defeated. In light of this legislative history, the Tariff Commission followed the rule that if there is a difference in the processing between the imported article and the domestic article they are not competitive and escape clause relief does not lie. The 1962 Act provides that imported articles are directly competitive with domestic articles when they are in an earlier or later stage of processing, and the importation of the article has an economic effect on the producers of the comparable articles here, even though they are in a different stage of processing. However, you must be able to identify the processed articles as coming from the raw material form. This would clearly mean in the sheep and lamb-on-the-hoof case that the mutton and lamb products would be considered as competitive. Therefore, if the increased imports of mutton and lamb products are adversely affecting the "on-the-hoof" industry, then escape clause relief would be possible.

Another change accomplished in the 1962 Act is that when the Tariff Commission under the old act found that there had been injury and recommended either escape clause relief, increase of the tariff or the imposition of a quota, and the President did not accept this finding, the President could be overruled by a two-thirds vote of each House on a procedurally privileged motion. Under the 1962 Act a majority of both Houses is all that is necessary, but the motion is not procedurally privileged.

There is also a change in how long escape clause relief remains

in effect. Under the previous act if escape clause relief was granted in the form of an increased tariff, that increase remained indefinitely, unless it was changed or terminated by the President on the advice of the Tariff Commission, which was required to conduct biennial reviews.

The 1962 Act establishes termination dates for escape clause relief action where it has been imposed. Under the 1962 Act affirmative escape clause action is to terminate not later than four years after the date of the initial proclamation providing the escape clause action, or the date of the enactment of the act itself, whichever is later. Therefore, escape clause relief granted under previous acts will be in effect for four years from the date that the new act became effective. However, the President can still extend the relief if he finds, on a recommendation of the Commission or after seeking the advice of the Secretaries of Commerce and Labor, that it is in the national interest to so extend it.

Turning for a moment to the other provisions of the safeguards against injury, there are the three mentioned before in addition to the escape clause. One is the orderly marketing arrangement procedure. This means that the President, as an alternative to escape clause action (where such action is recommended by the Tariff Commission) may negotiate an agreement with foreign countries providing for limiting exports from such countries, and the resultant imports into the United States (and other importing countries) of the articles causing or threatening serious injury. This may be compared to what has occurred with respect to the textile industry, under authority limited to cotton and cotton textiles in the previous act. The quota arrangement on cotton textiles was undertaken in part by the President during the consideration of the 1962 Act as a means of securing Congressional support. This is not to say that such action would not have been taken in any event, but it has been claimed that this action did result in insuring at least seventy-three votes in favor of the 1962 Act which might otherwise not have been available.

New concepts which are important to the practicing attorney are provisions for the adjustment assistance to a firm or to employees where injury has occurred by reason of increased imports resulting from a tariff concession. In any given case any group, or firm, or group of employees, or the House Ways and Means Committee, or the Senate Finance Committee, or the executive branch, can

institute a review of whether serious injury has resulted or been threatened by reason of increased imports resulting from a tariff concession. Escape clause relief can be sought. A firm or a group of employees can also apply for more direct assistance relief. The relief requested and granted can be in the form of escape clause action, adjustment assistance to firms, adjustment assistance to workers, or any combination of these.

The procedure for initiating consideration is really the same whether you are applying for adjustment assistance for a firm or for a group of employees or for escape clause relief. It begins with a petition for determination of eligibility to apply for adjustment assistance, filed by the firm, the workers, or a certified union. It can be filed together with escape clause relief. If the Tariff Commission finds that the industry has been injured as a result of increased imports resulting from a tariff concession, the President can then authorize the firm making application to request the Secretary of Commerce for certification of eligibility to apply for adjustment assistance, or alternatively the labor group to request the Secretary of Labor for certification of eligibility.

If the President takes this action, then the Secretary of Commerce, in the case of firms, or the Secretary of Labor in the case of workers, must certify eligibility for adjustment assistance, upon a showing to his satisfaction that the increased imports which the Tariff Commission determines result from a concession, have actually caused serious injury. The Tariff Commission might find that the industry as a whole has not been affected. But the President may still certify that the firm or labor group is eligible to apply if the Commission finds that the concession in a major part resulted in importation of an article like or directly competitive with the articles being produced by the firm in such increased quantities as to cause or threaten to cause serious harm to the firm. This means that the industry as a whole may not be affected, but a given entity within the industry, if damaged, may obtain relief.

As previously discussed the Tariff Commission has six months to determine whether there should be escape clause relief. But if the petition is for adjustment assistance it has only sixty days. The decision the Commission has to make in either case involves many of the same issues. But there are differences. In escape clause relief, you are dealing with a causal connection between increased imports and injury to an entire industry. In adjustment assistance relief only,

the injury to a single entity within that industry is at issue. The difference in the time schedule reflects the fact that if you made the company or the employees applying for relief wait six months for a finding, you seriously prejudice their economic position. So the problem was to expedite the consideration of relief to the individual firm or to the group of workers.

This may create difficult problems for the Tariff Commission. It is often difficult to prove an injury to an entire industry—the economic study that is involved in this can be a rather difficult one in proving a causal connection between the increased imports arising out of a tariff concession and the injury. But consider how much harder it may be to find that the increased imports adversely affected a specific firm in North Carolina, which for many reasons may be having economic problems, whereas the entire industry may not be experiencing adverse effects.

After filing an application, and being certified as eligible, the firm must submit its own proposals for economic adjustment. This procedure is not designed to give the firm indemnification for past injury. The purpose is for the firm to present a program to the Secretary of Commerce which gives evidence that there is a reasonable chance for the firm to pull itself out of its adverse economic position, either by modification of its equipment or production procedures, or by converting to a new industry, or whatever it may be. There has to be a showing of maximum self-help effort by the firm itself. Preference is given to those plans which permit the rehiring of dismissed workers.

This procedure presents a problem for a lawyer, for the presentation of such a plan is partially legal and partially economic. You have to present a plan that shows chance of success, through self-help efforts combined with government assistance.

What is the government assistance you can seek? You can secure financial assistance for plant and equipment modernization or conversion, and in some cases you can obtain working capital. You can receive deferred government participation in financial assistance. In addition you might seek a limited form of tax relief, obtaining from the Secretary of Commerce a determination that the firm qualifies for tax assistance in the form of an extension to five years of the normal provision for three years net-operating loss carry-back period under section 172 of the Internal Revenue Code. So the Secretary of Commerce becomes a tax expert.

Insofar as the workers are concerned, the type of relief you can seek may be workers' adjustment allowances, which would be payable to workers who had been employed substantially over a three-year period preceding separation from employment. These workers must have been attached for at least six months in the last year to a firm or firms found by the Tariff Commission to have been adversely affected by increased imports resulting from a concession, and who became unemployed mainly because of the effect of the increased imports. Weekly cash allowances paid entirely out of federal funds are available for fifty-two weeks of unemployment, which can be extended for a worker who is completing a retraining program, or for a worker over sixty.

The workers can also apply for a retraining program, with preference to be given to training arrangements which coordinate a training program for the workers with a readjustment program for the employer. In addition, additional benefits to workers to cover transportation costs for himself and his family can be granted, provided there is a showing that the worker has a reasonable chance of securing work in another area or actually has an offer of work in another area.

The adjustment assistance provisions introduce an entirely new concept into the trade act. It is difficult to determine how it will prove out, and how much it is going to cost. Secretary Dillon in his testimony estimated that the cost of adjustment relief to employers would total about fifty million dollars for the period 1962 to 1967, forty million dollars in loans, four and one-half million for technical assistance, a few million for taxes, and administrative costs of two and one-half million. No estimate was given as to the cost with respect to the adjustment assistance to the workers.

I think that the inclusion of these provisions explain the philosophy of the act. It is a philosophy that the American business man should learn to recognize. And his lawyer can educate him in this process of learning. If the United States is to engage in a real reciprocal trade agreement program as is involved in this act, at some point injury to certain industries and certain segments of a given industry and its work force is bound to result.

In the long run, this is a good philosophy. It is a better procedure than limiting relief only to the escape clause procedure. In the long run, the world is becoming too small for the only recourse to be the raising of tariffs. Our economy as a whole needs increased trade, and in the 1962 Act, an overall basis is provided to achieve that result.