SECTIONS 201 - SAFEGUARDS

Introduction

Section 201 of the Trade Act of 1974 differ from other U.S. trade remedies in that no allegation of "wrongdoing" on the part of the exporters is required. Rather, these provisions consider only whether a given import is causing or threatening to cause injury to the U.S. domestic industry. If the U.S. International Trade Commission ("ITC") determines that there is injury, Section 201 provides the President with a range of remedies to protect, temporarily, the domestic industry from import competition. As anti-dumping measures come under increasing attack, the availability of these safeguard provisions to protect U.S. industries threatened by import competition may become increasingly important. Section 201 is often called the "Escape Clause."

Overview of Sections 201

The United States implements measures to address import relief (or a safeguard action) under Section 201 of the Trade Act of 1974. These actions are in accordance with GATT Article XIX and the WTO Safeguards Agreement. Congress included Section 201 in the Trade Act of 1974 in response to several developments under GATT. Article XIX of the GATT is sometimes referred to as the escape clause because it permits a country to "escape" temporarily from its obligations under the GATT by taking actions against foreign-produced products that would otherwise be barred by WTO principles of fair trade, if increased imports of such products are causing or are threatening to cause serious injury to domestic producers. Section 201 involves an investigation by the ITC as to whether "an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or threat thereof, to the domestic industry producing an article like or directly competitive with the imported article." If the ITC finds such injury, then Section 201 authorizes the President to impose a range of temporary remedies, such as special tariffs, quotas, industry assistance, or other actions.

Section 201 does not require a finding of an unfair trade practice, as do the antidumping and countervailing duty laws and section 337 of the Tariff Act of 1930. However, the level of injury that must be established under section 201 is more difficult to satisfy than that required for the unfair trade statutes. Section 201 requires that the injury or threatened injury be "serious" and that the increased imports must be a "substantial cause" (important and not less than any other cause) of the serious injury or threat of serious injury. Criteria for import relief under section 201 are based on those in article XIX of the GATT, as further defined in the WTO Agreement on Safeguards. The theory behind Section 201 is not to punish or compensate for unfair trade, but rather to assist domestic industries who are suffering serious injury because of the increased fair trade encouraged by the otherwise liberal WTO standards, and provides the domestic industry some "breathing room" to adjust to import competition. Safeguard remedies are explicitly temporary, normally lasting no longer than five years. The domestic industry is supposed to use the temporary protection to re-tool, reorganize, or otherwise prepare itself and its workers for the

new conditions of competition that arise from the unfettered fair trade encouraged by the WTO trade regime.

Procedure for Administering Safeguard Actions

The process for Section 201 safeguard mechanisms starts with the receipt of an appropriate petition, the ITC conducts an analysis to determine whether relevant imports are, or threaten to be, a cause of injury to the domestic industry. If a positive determination is made, the ITC then makes recommendations to the President as to the type of remedy that would provide for import relief.

The ITC is an independent federal quasi-judicial agency. Under Section 201, the ITC's task is to determine whether "an article is being imported into the United States in such increased quantities" as to be a cause of the requisite injury (or the threat thereof) "to the domestic industry producing an article like or directly competitive with the imported article."

The ITC will conduct its investigation under Section 201 (or Section 421) upon receipt of a petition from a trade association, firm, certified or recognized union, or group of workers which is representative of a domestic industry; upon receipt of a request from the President; upon receipt of a resolution of the U.S. House of Representatives or Senate; or upon its own motion.

The ITC generally must make its injury finding within 120 days (150 days in more complicated cases) and must transmit its report to the President, together with any relief recommendations, within 180 days. If the ITC makes an affirmative injury determination, the investigation proceeds to a remedy phase, during which the ITC recommends specific actions to address the serious injury to the domestic industry.

The proceeding then moves to a different agency, the United States Trade Representative ("USTR"), which is an executive branch agency tasked with advising and representing the President on international trade issues. The USTR reviews the ITC's findings and recommendations, and then provides the President with its recommendation as to whether import relief is in the national economic interest, and if so what form it should take. To do so, USTR works with other government agencies involved in trade, commerce, and foreign relations to develop a consensus position.

Once the inter-agency review process is complete, and USTR makes its final recommendation to the President. The President then has 60 days to "take all appropriate and feasible action to facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs." Thus, after all the agency findings and recommendations, in the end imposition of safeguard measures depends on a political determination by the President, balancing the benefits and costs to the various interests involved.

Potential Remedies Under Safeguard Actions

The actions that the President may authorize include increasing or imposing duties, imposing a tariff-rate quota, modifying or imposing quantitative restrictions, implementing adjustment measures (i.e., direct industry assistance), withdrawing or modifying concessions provided to

U.S. trading partners, and commencing negotiations with foreign governments to limit exports into the United States. The remedy chosen normally lasts no longer than five years, and typically is degressive, meaning the it will decline over time, consistent with the concept of temporary relief to help an industry and its workers adjust to the new conditions of competition.

If import relief is provided, the ITC periodically reports on developments within the industry during the period of relief. Upon request, the ITC advises the President of the probable economic effect on the industry of the reduction, modification, or termination of the relief in effect. At the conclusion of any relief period, the ITC is required to report to the President and Congress on the effectiveness of the relief action in facilitating the positive adjustment of the domestic industry to import competition.

The Law Offices of Nithya Nagarajan, LLC, help companies located around to globe to defend themselves against safeguard actions.