

Fordham International Law Journal

Volume 10, Issue 4

1986

Article 12

International Trade Policy: The Lawyer's Perspective

Kevin G. Nealer*

*

Copyright ©1986 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

International Trade Policy: The Lawyer's Perspective

Kevin G. Nealer

Abstract

In *International Trade Policy: The Lawyer's Perspective*, the editors offer a look at the landscape of issues in United States import relief law which should remain useful for some time. This is accomplished through a series of essays by a group of seasoned commentators. The initial chapters provide an intellectual framework and policy perspectives on current import relief law, along with proposals for change. The core of the book is given over to topical writings on current import relief law, each addressing some aspect of practice under Section 201, countervailing duty, or antidumping statutes. The final section reach beyond to important topics that are, to a greater or lesser extent, not covered by existing law.

INTERNATIONAL TRADE POLICY: THE LAWYER'S PERSPECTIVE. Edited by John H. Jackson, Richard O. Cunningham and Claude G. B. Fontheim. New York: Matthew Bender, 1985. xxvi + 470 pp., tables, index. \$75.00 Library of Congress No. 85-71801.

*Reviewed by Kevin G. Nealer**

Baseball great Satchel Paige has been quoted as offering the warning, "don't look back—something might be gaining on you." The something that is gaining on the trade bar is a broad political consensus in favor of basic changes in United States trade law and policy. That consensus has come slowly over the past several years. It was a leitmotif in both the presidential election of 1984 and the recent midterm elections that returned control of the Senate to the Democratic Party. The trade problem seldom became the central theme in the campaigns, but candidates understood its political potency. Few neglected to sprinkle their stump speeches with a few lines of outrage over the declining terms of trade.

The basis for that outrage is easy to understand. The 1986 trade deficit of nearly US\$170 billion exceeded the total trade shortfall in all four years of the Carter Administration. Despite currency adjustments, the monthly trade figures have yet to signal a meaningful improvement. Moreover, growth in world trade has been nearly stagnant for the past five years, and GATT economists predict an anemic growth rate of about three percent for the near term.

Faced with a mounting U.S. trade shortfall and little growth in total trade, members of Congress have witnessed a fundamental shift in interest group lobbying on trade. Members of the House and Senate listen to a steady stream of calls for restrictions on access to United States markets from those sectors of the economy—agriculture and technology groups among them—that have been the traditional voices of free trade in the post-war period. Declining export sales and loss

* Senior Associate, Arnold & Porter Consulting Group. A.B., University of Michigan, 1975; J.D., Case Western Reserve University, 1978. Mr. Nealer served as Trade Policy Adviser, United States Senate Democratic Policy Committee, 1982-1987.

of domestic market shares have turned the free trade stalwarts into skeptics.

In this environment, the American Bar Association (A.B.A.) and editors Jackson, Cunningham, and Fontheim have undertaken an ambitious effort in their new book, *International Trade Policy: The Lawyer's Perspective*. In the past, the A.B.A.'s Section on International Law has offered guidance to practitioners on the fundamental aspects of trade law practice through its seminars and such publications as *Current Legal Aspects of International Trade Law* (P. Macrory & P. Suchman eds. 1982). But in *International Trade Policy: The Lawyer's Perspective*, the editors offer a look at the landscape of issues in United States import relief law which should remain useful for some time. This is accomplished through a series of essays by a group of seasoned commentators. As Professor Jackson explains in the introduction,

[t]hese essays are not designed to initiate the beginner, nor are they designed to present an overview of the law or a 'how to do it' manual. Instead, each practitioner was asked to focus on some particular problem which he or she had experienced, and to address not only the technical legal questions of that problem but the related policy issues. (p. xii.).

The initial chapters provide an intellectual framework and policy perspectives on current import relief law, along with proposals for change. Richard Cunningham's opening essay sounds the theme against which the rest of the book—and the current congressional debate on trade law reform—will be played out. Cunningham recognizes the strains that an extraordinary U.S. trade shortfall and the associated loss of faith in the process have created on import relief laws and the international system. He points out the important foreign policy concerns that are ineluctably bound up in trade policy choices—a fact underlined by recent government actions in the proposed Fujitsu/Fairchild merger and the evolving dispute over the semiconductor agreement between the United States and Japan. Finally, he points out that the loss of faith in the process has found expression through greater politicization of the trade debate.

The stage further is set in three essays that challenge the

basic premises of United States import relief law, and offer their own prescriptions for change. Noel Hemmendinger attacks the idea that United States trade law—and, therefore, economic policy—should be driven by an adversarial process. He proposes that all import relief be consolidated under a modified escape clause that would allow the political dimensions of trade policy to come to the surface. Hemmendinger sees a world trade system shaped by government intervention—a premise he shares with the new Chairman of the Senate Finance Committee, Senator Lloyd Bentsen.¹

Thomas Howell and Alan Wolff echo some of Hemmendinger's concerns in an essay that concludes that trade law is trade policy in the United States. They offer the important observation that the adversarial trade law process shapes the actions of the trade bureaucracy and describes the terms of debate on trade in this country. This leaves us with a policy process that is reactive—keyed to problem resolution—rather than one moved by national priorities.

A final essay by Charles Johnston, Jr. calls for consolidation of all trade remedy laws under Section 337 of the Tariff Act of 1930. Johnston accepts much of the foundation built in the earlier pieces, but comes to the conclusion that a unified legalistic approach will solve the problems that the other authors attribute to the very fact that legalism has been given primacy over policy formation.

The core of the book is given over to topical writings on current import relief law, each addressing some aspect of practice under Section 201, countervailing duty, or antidumping statutes. These essays will be instructive notwithstanding the action that Congress will take in rewriting the underlying statutes, because they address the theoretical underpinnings of the law in these important areas.

Stuart Rosen and Charles Bayar examine the causation standard under Section 201 in a discussion that tracks the current debate in the House and Senate. In one of the most important essays in the book, Gary Clyde Hufbauer and Andrew James Samet go beyond a review of the operation of the escape

1. See generally *THE NEW GLOBAL ECONOMY: FIRST STEPS IN A UNITED STATES TRADE STRATEGY*, Preliminary Report of the Senate Democratic Working Group on Trade Policy, April, 1985.

clause and reassess the role of Trade Adjustment Assistance (TAA) in an effective trade policy. A reconsideration of this program has begun in the context of the competitiveness debate now so much a part of the trade law reform effort. Indeed, the Senate Omnibus Trade Bill (S. 490) addresses the adjustment assistance program in its competitiveness title. After actively seeking the destruction of TAA in 1981, the Administration has done an about-face in its own trade proposal (H.R. 1155/S. 5.39), calling for US\$1 billion in funding for the TAA program. Hufbauer and Samet urge a re-invigorated TAA effort, with an emphasis on long-term adjustment and a training voucher program similar to that proposed in S. 490.

Antidumping or countervailing duty law is also examined in the book. For practitioners in this area, the essays by A. Paul Victor and Thomas Ehrgood, John Sciortino, Peter Koenig, Claire Reade, Elaine Frangedakis, Christopher Dunn, and Harvey Applebaum and Paul Gaston will be a welcome addition to the literature.

The final section assures this book a lasting place in the literature. While the preceding chapters deal with current trade law and policy, the final essays reach beyond to important topics that are, to a greater or lesser extent, not covered by existing law. Gary Horlick and Shannon Stock Shuman discuss the question of bringing greater certainty to non-market economy cases by urging passage of the Heinz Bill for establishing a reference price. Here again, the essay offers a useful backdrop to the current legislative effort, though more recent proposals to extend countervailing duty law to non-market economies show how fast the debate is moving. This entire topic has taken on a much greater importance with the emergence of the People's Republic of China as a serious participant in world trade, as evidenced by its recent interest in GATT participation.

The final three essays reach the cutting edge of the trade debate in discussing industrial targeting, cartels and competitiveness, and the role of export credits. Those who wish to enter the competitiveness debate armed with something better than their own preconceptions and prejudices are well served by these chapters.

As noted at the outset of this review, this new collection is

especially relevant now that Congress is debating the most sweeping trade law revisions in more than fifty years. But the greatest utility of *International Trade Policy: The Lawyer's Perspective* is found in its examination of *policy* concerns. It goes behind the statutes and examines the underpinnings of key provisions of United States import law. In so doing, it gives the reader a sense of perspective and continuity from which to view the coming changes.