

Trade Remedies From Unfair Foreign Imports

American industry is facing unprecedented competition from foreign imports. Often, these imports are being sold at extremely low prices or are illegally subsidized by the exporting country. Issued in March of 2009, the U.S. government's annual trade report shows a marked increase in violations of U.S. intellectual property law by imports into the United States, primarily from the Pacific Basin. The recent worldwide economic downturn has greatly increased this economic pressure. Many countries are seeking to export their recessions. Recent statistics show that Germany, France and Spain have substantially increased their exports in the last three quarters. Trade data show that China and India have cut prices to unprecedented levels. China has long been accused of being an unfair trader through its currency manipulation, rebate of export taxes and government financing of raw materials and bank credit. China is currently the subject of 19 trade investigations by the Department of Commerce (DOC). In the past six months, India also has been the target of a record number of unfair trade cases filed in the United States.

If a company is facing severe import pressure because of price, it should consider seeking recourse under the antidumping and countervailing duty laws of the United States. These laws prohibit the importation of goods sold at less than fair value or that are illegally subsidized and provide for the imposition of penalty tariffs on the imports to offset this unfair competition. Likewise, if a company believes that imported goods are being sold which infringe its U.S. patents, registered trademarks or copyrights, it should consider filing a complaint with the U.S. International Trade Commission (ITC). Section 337 of the Tariff Act of 1930 prohibits the importation of goods which infringe a U.S. company's intellectual property rights and authorizes the ITC to exclude these infringing goods from the United States.

Anti-Dumping and Countervailing Duty Laws

Anti-dumping (AD) and countervailing duty (CVD) laws prohibit the sale of goods in the United States at prices less than fair value (dumping), or that are illegally subsidized by foreign governments. Less than fair value is defined as selling in the United States at less than one sells in the home market. Countervailing subsidies exist when foreign governments provide financial assistance to benefit the production, manufacturing or exportation of goods. These subsidies take many forms, such as direct cash payments, credits against taxes and loans at terms that do not reflect market conditions.

AD and CVD cases are conducted before the Department of Commerce and the ITC. The DOC will determine whether foreign merchandise is being sold, or is likely to be sold, in the United States at less than its fair value (in an AD case), or whether the foreign government or public entity within the foreign country is providing a countervailable subsidy of merchandise for importation into the U.S. (in a CVD case). In both cases, the ITC will determine whether an industry in the United States is materially injured, threatened with material injury, or the establishment of an industry in the United States is materially disabled by reason of the imports of the subject merchandise or sales, or likelihood of sales, of that merchandise for importation.

The penalty for violating AD/CVD laws is a special duty, enforced by the Customs and Border Protection, which offsets the amount of the low cost sales or the illegal subsidies. An example of a penalty duty would be if a foreign company sold a good in the United States for \$50 and the cost of production was \$75, then the DOC would institute an antidumping duty in the amount of 50%.

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Section 337

Section 337 prohibits unfair trade and unfair methods of competition when importing goods into the United States. It is primarily used to block imported goods that infringe a United States patent, trademark or copyright. The cases are conducted before the ITC under legal procedures substantially similar to those in a U.S. district court. Cases are instituted by filing a complaint with the ITC, which has the power to exclude the infringing goods from the U.S. and to issue cease and desist orders against the importers.

Section 337 actions have many advantages over the traditional patent, trademark or copyright case filed in federal district court. First, ITC proceedings are much faster and less expensive than proceedings in federal

court. The statute requires that investigations be completed at the earliest practicable time after institution of the investigation. ITC guidelines define this as 12 to 18 months. Second, the statute's remedies are effective against imported goods because the exclusion order is *in rem* and runs against all infringing imports regardless of the source. Therefore, a complainant does not have to find all of the infringing parties in order to receive a comprehensive order. Because the statute is *in rem*, the complainant can obtain judgment against entities over which the U.S. does not have personal jurisdiction. Discovery also is made easier against foreign companies, because if a foreign entity does not fully comply with ITC discovery requests, sanctions may be taken which may include the exclusion of the products from the U.S.

If you would like to discuss these trade remedies or any other issue related to unfair foreign trade practices, or are interested in a one-on-one consultation, please contact our International Trade Group attorneys:

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