

The Role of EU Trade Associations in the Initiation and Resolution of Trade Disputes

U.S. Perspectives on Trade Associations in the Initiation and Resolution of Trade Disputes: Competition/Antitrust Compliance Issues Pose Some Potential EU Lessons

Howard W. Fogt, Jr.

hfogt@foley.com

Gregory Husisian

ghusisian@foley.com

Foley & Lardner LLP

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INTRODUCTION AND OVERVIEW: U.S. PERSPECTIVE

Trade/Competition Interface: Conflicting or Complementary Goals?

- Trade Cases seek competitive restraints
 - ✓ Dumping cases seek to remedy “injurious” price discrimination and “dangers” of foreign companies charging too low prices
 - ✓ Countervailing duty cases seek to prevent subsidies that result in low U.S. prices that cause injury
 - ✓ Safeguard cases seek to prevent injury without proof of either subsidy or dumping
 - ✓ In all cases, tariffs, quotas, or a combination are used to increase prices and/or decrease quantity of imports
- Claimed compatibility with general U.S. policy to protect competitive process by preserving ability of the U.S. industry to compete, such as against foreign subsidies
- Contrary to goals of U.S. government in many other contexts (e.g., antitrust) to foster competition and thereby provide for consumer welfare
- Perspectives from the new U.S. Administration



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INTRODUCTION AND OVERVIEW: U.S. PERSPECTIVE

Perspectives from the new U.S. Administration

- Focus on China
 - ✓ Unusual decision to award section 421 relief (China safeguard) to U.S. industry
 - ✓ Reaction to focus on China antidumping and countervailing duty cases
 - ✓ Potential countervailing of Chinese currency practices
- Stated commitment to double exports through seeking continued free trade expansions
- Little movement on stalled free trade treaties (Korea, etc.)
- Initiative to double exports – at odds with trade restrictions?



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Trade Disputes Involve Trade Restraints

Regardless of goals, trade cases result in arrangement that would not be countenanced in a competitive market

- Trade Policy: Trade cases are always about industries (domestic or foreign)
- Trade cases are government procedure to legitimize restraint and protect domestic industry
 - ✓ Artificially increased import prices or restrictions on volume of imports
 - ✓ Use of government controls to lessen rivals' ability to compete
 - ✓ Limitations on volume of export or maintenance of minimum prices
 - ✓ Settlement of trade disputes using government controls as enforcement mechanism
 - ✓ Public interest or community interest



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TRADE CASES AS GOVERNMENT SANCTIONED RESTRAINTS ON COMPETITION (ALBEIT “UNFAIR”)

Restrictions on imports imposed through government imposed tariffs or quotas affect free flow of goods, market definition, consumer welfare, along with protecting domestic industries: The political question: where are the jobs?

- The anti-competitive effects of such government imposed restraints are sanctioned while the identical anti-competitive effects if imposed by private parties would be unlawful and in the United States, likely prosecuted as criminal violations
- See *United States v. National Board of Fur Farm Organizations, Inc.*, 1971-1 Trade Cas. (CCH) ¶61,522 (criminal/civil prosecution of private trade restraints between U.S./Swedish competitors)
- U.S. Antitrust Guidelines for International Operations www.doj.gov/atr/pubdocs (§ 3.3 and 3.4).



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Antitrust Defenses To Collusion Charges

- Right to petition to protect/defend interests: so-called *Noerr Pennington* doctrine, U.S. Supreme Court 365 U.S. 127 (1961) (Noerr immunity extends to U.S. and non-U.S. citizens alike when there is government involvement)
- Sovereign compulsion: immunity for private restraints compelled by sovereign
- Implied immunity: so-called state action doctrine where there is clearly articulated state policy and supervision
- Suspension agreements: risks, liabilities and value: public interest determinations under 19 USC 1737c(a)(2)
- How do industries approach these delicate questions?



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Antitrust Defenses To Collusion Charges

Dangers of approach

- Cannot be cover for secret agreements to allocate world market, set prices, restrict output or retard innovation
- Cannot be sham – must be real dispute and genuine resolution
- Domestic and foreign industry negotiations: government interface



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ROLE OF INDUSTRY IN TRADE DISPUTES

Associations work within the context of trade cases

- Whether the industry is the “domestic” industry seeking protection from injury or the “foreign” industry charged with “unfair trade” practices, trade cases are virtually always about “industries,” whether relating to initiation, prosecution, or resolution.
- U.S. focus on domestic industry: 1) petitions filed on behalf of an industry; 2) establishment of material injury; 3) questionnaires sent to industry members; 4) domestic industry and like product; and (5) decision made as to whether there is “material injury” to an industry producing the domestic like product
- U.S. focus on foreign industry: 1) questionnaires sent to industry members; 2) industry takes lead in responding to case (as opposed to foreign governments); and 3) remedies imposed nationally on all producers of foreign subject merchandise, thus imposing tariffs on the entire “foreign industry” producing the product (even if it did not participate in the injurious conduct)



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INTRODUCTION AND OVERVIEW: U.S. PERSPECTIVE

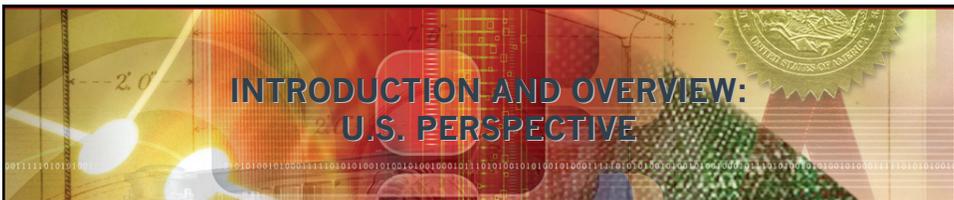
Role of trade associations in the process

- Advantages
 - ✓ Provide unified legal approach for people and entities with common interests
 - ✓ Increases impact of message for manipulating the political levers (legal and media)
 - ✓ Cost sharing
 - ✓ Potential settlement advantages
- Disadvantages
 - ✓ Coordination difficulties when members numerous
 - ✓ Policy differences can mute message (least-offensive message as default)
 - ✓ Immunity and risks when dealing with regulators



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Typical forms of trade associations

- Ad hoc
 - ✓ Most common – temporary coalition forming around specific trade issue
 - ✓ Very commonly used by U.S. petitioners bringing case (e.g., the Aluminum Extrusions Fair Trade Committee, formed to bring the Aluminum Extrusions case filed March 31st)
 - ✓ Also used by foreign interests opposing a trade case
 - ✓ Very often driven by a few entities or a single entity that takes the lead internally within organization



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Typical forms of trade associations

- Permanent
 - ✓ Also common— permanent organization that has many trade or even non-trade issues intervenes in a case
 - ✓ Examples include the Ad Hoc Utilities Group (which played a major role in various uranium trade cases)
 - ✓ Very often used by consumer groups that seek to influence trade cases (e.g., the Home Builder's Association in the Softwood Lumber cases)
 - ✓ Also used by foreign interests opposing a trade case, such as the China Iron and Steel Association's formation to fight multiple recently filed steel and pipe cases filed in the United States



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Issues for Trade Associations in Trade Disputes

- When using associations as proxy for domestic or foreign industry, balancing legitimacy, convenience, and risk
- Determining who has the authority to coordinate the defense and solve differences between members
- Determining the role of the association with the regulator, political constituencies, and the media
- Determining the role of individual interests in dealing with the regulator, political constituencies, and the media (undermining or augmenting the message?)
- Solving the perennial riddles of funding and governance
- Dealing with the evolution of the industry and the interests of members over the span of the dispute
- Dealing with unanticipated conflicts



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Role of Associations in Other Trade Disputes

Political Considerations – Not all trade disputes are settled through trade procedures

- U.S. Example – Role of CSUSTL (Committee to Save U.S. Trade Law) which lobbies for modifications to U.S. law and WTO commitments that favor trade actions
- EU Example – EU Footwear cases
 - ✓ American Apparel and Footwear Association lobbying U.S. government to take action in the EU decision to impose duties on imports from Vietnam and China
 - ✓ Federation of European Sporting Goods Industry both lobbying the EU and taking legal action to oppose extension of duties
- Advantages include building contacts with administration and congressional players, pooling resources, and pushing a broader agenda



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Potential Issues for Trade Associations

Conduit of Information

- Trade disputes – initiation, prosecution and resolution depend on highly confidential industry information
- Best practices for collection, assimilation and dissemination of information: See 2010 EU Commission Work plan

Trade associations as Facilitator Collusion

- Treuhand AG v. Commission, [2008] 5 CMLR 13
- United States v. Wiring Device Association



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Potential EU Issues for Trade Associations

Legal Privilege

- **Akzo Nobel** ECJ 2007 competition case:
 - ✓ No protection for communication with counsel unless documents specifically and exclusively to seek advice from outside counsel on rights of defense: counsel must be fully independent even if member of EC member bar/requires great care
 - ✓ Commission reaffirms limits on privilege in January 2010
 - ✓ Extremely important for non-EU lawyers in-house and out-house



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Extremely Low Liability Threshold for Associations

Liability Thresholds

- **T-Mobile**: ECJ (June 4, 2009) lowers threshold of liability
- Single meeting can result in liability under EU § 101(1)
- No systematic pattern of conduct is required
- Issue is whether exchange of competitive information is capable of reducing uncertainty about future market conduct/presence of market effects only relevant for purposes of damage analysis/burden on actors to prove competition not affected
- Burden of proof is on the association



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Conclusions

Concluding Thoughts on the Role of Associations

- Although there are some disadvantages (coordination costs, slowed decision-making) there is major role for associations in trade disputes
- This is as true on the foreign side as the domestic side
- To achieve full advantages, issues of governance, decision-making, costs, dealing with media, etc., need to be addressed at the outset
- There are significant competition/antitrust risks that must be addressed and carefully monitored by experienced counsel as an industry deals with the initiation, prosecution, and resolution of trade disputes



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Contacts

Howard W. Fogt, Jr. and Gregory Husisian

**3000 K Street, N.W.
Washington, DC 20007**

Phone: 202.672.5300/Fax: 202.672.5399

**Avenue Louise 480
1050 Brussels, Belgium**

Phone 32.2. 787.9700/Fax: 32. 2. 787.9 709

E-mail: hfogt@foley.com and ghusisian@foley.com

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