

Congress of the United States  
U.S. House of Representatives  
Committee on Small Business  
2361 Rayburn House Office Building  
Washington, DC 20515-6515

To: Members, Subcommittee on Agriculture, Energy and Trade  
From: Committee Staff  
Re: Hearing: Combating Unfair International Trade Practices: Barriers and Obstacles  
for Small Businesses  
Date: May 19, 2014

---

On May 22, 2014, at 10 a.m., the Subcommittee on Agriculture, Energy and Trade of the Committee on Small Business will meet in Room 2360 of the Rayburn House Office Building to receive testimony regarding the processes and procedures for ensuring fair international trade. While there are a number of procedures to protect American businesses from unfair trade practices perpetrated by foreign competitors, the hearing will specifically examine their availability to small businesses and the obstacles small businesses face in ensuring that they can compete fairly against foreign competitors.

## I. Background

Many small businesses compete in a global economy. The most recent data from the Census Bureau reveals that small and medium-sized companies<sup>1</sup> comprise 97.7 percent of all exporters and 97.1 percent of all importers.<sup>2</sup> Almost one-third of the value of American exports are generated by firms with fewer than 500 employees, while just slightly more than 30 percent of the value of imports are purchased by small and medium-sized businesses.<sup>3</sup> Thus, there is little doubt that international trade plays a vital role for America's small businesses. However, that vitality may be sapped by foreign competitors who refuse to play by the rules.

---

<sup>1</sup> The Census classification is based on businesses with less than 500 employees. UNITED STATES CENSUS BUREAU, A PROFILE OF U.S. IMPORTING AND EXPORTING COMPANIES, 2011-2012, at 4 (2014). This categorization both over and under-inclusive since it does not directly comport with the size standards established by the Administrator of the Small Business Administration (SBA) pursuant to the authority in § 3(a) of the Small Business Act, 15 U.S.C. § 632(a). Despite the potential disparities, the memorandum will adopt the characterization of small businesses utilized by the Census Bureau.

<sup>2</sup> *Id.* In dollar terms, small and medium-sized exporters account for a little more than a trillion dollars in value. *Id.* Even Sen. Everett Dirksen (yes the one after which the Senate Office Building is named) would consider that to be real money.

<sup>3</sup> *Id.*

There are a number of mechanisms by which foreign firms illegally compete with America's small businesses in international trade. They include: dumping (the practice by foreign firms of selling products at less than fair value, including below the cost of production);<sup>4</sup> theft of intellectual property (also called infringement);<sup>5</sup> currency manipulation;<sup>6</sup> and non-tariff barriers.<sup>7</sup> These unfair trade practices impinge on the benefits emanating from international trade, including hindering the ability of small businesses to compete on a global basis.

## II. International Trade Agreements

Since the days of Adam Smith and David Ricardo, political economists have recognized the benefits of open, free international trade due to the comparative advantages that various countries may have in the production of various products.<sup>8</sup> Individual countries, however, could never ensure free and open international trade.<sup>9</sup>

After World War II, 23 countries signed the General Agreement on Tariffs and Trade (GATT) with the aim of ensuring a more open free and international trade regime which

---

<sup>4</sup> *United States v. Eurodif, S.A.*, 555 U.S. 305, 311 (2009); see UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, ANTIDUMPING AND COUNTERVAILING DUTIES: KEY CHALLENGES TO SMALL AND MEDIUM-SIZED ENTERPRISES' PURSUIT OF THE IMPOSITION OF TRADE REMEDIES 3 (2013) (GAO-13-575) [hereinafter "GAO Antidumping Study"]. GAO adopts the same characterization of small business that the Census Bureau uses.

<sup>5</sup> Intellectual property constitutes ownership of an intangible good – an idea, whose ultimate expression can be in some type of good. There are four types of intellectual property – trade secrets, trademarks, copyrights, and patents. C. BAGLEY & C. DAUCHY, *THE ENTREPRENEUR'S GUIDE TO BUSINESS LAW* 516-17 (4<sup>th</sup> ed. 2012). The owner of the intellectual property can monetize the value of the idea in two ways: 1) by producing a tangible good with the property; or 2) selling the right to use the property to another party who will then produce a tangible good. *Id.* at 573-74. Theft occurs when someone uses the intellectual property to produce a tangible good without paying the owner of the intellectual property. Llewellyn Gibbons, *Do As I Say (Not As I Did): Putative Intellectual Property Lessons for Emerging Economies from the Not so Long Past of the Developed Nations*, 64 SMU L. REV. 923, 935-36 (2011).

<sup>6</sup> Currency manipulation involves governments ensuring that their currency does not appreciate over the value of another country's currency. Alternatively, currency manipulation may involve a government's purposeful devaluing of a currency relative to another country's currency. For example, China buys large quantities of United States dollars to keep them off the international market in an effort to maintain the value of the dollar so the Chinese currency, the renminbi (or yuan), does not appreciate in international markets. See F. MISHKIN, *THE ECONOMICS OF MONEY, BANKING AND FINANCIAL MARKETS* 457 (10<sup>th</sup> ed. 2013); see also Jane Perlez, *Lew Urges China to Ease Exchange Rate Controls*, N.Y. TIMES, May 14, 2014, at B3.

<sup>7</sup> Non-tariff barriers (often given the acronym of NTB) are any restriction imposed by a government to prevent the importation of a product into the country. NTBs include, but are not limited to, numerical quotas on products entering a country or technical standards that a product must meet before its importation is permitted. T. PUGEL, *INTERNATIONAL ECONOMICS* 167-68 (15<sup>th</sup> ed. 2012).

<sup>8</sup> See A. LOWENFELD, *INTERNATIONAL ECONOMIC LAW* 4-6 (2d ed. 2008).

<sup>9</sup> One country (let us call it Zenda) that imposed no tariffs or NTBs on goods entering the country could be at a disadvantaged if another country (call it Xanadu) imposed tariffs and NTBs on Zenda's products. The rational decision for Zenda would then be to retaliate by imposing tariffs and NTBs on Xanadu's products. The end-result would be that the comparative advantages in the production of goods by Zenda and Xanadu would be eliminated thereby reducing the benefits of international trade. See PUGEL, *INTERNATIONAL ECONOMICS*, *supra* note 7, at 146-58.

by 1990 had 99 signatories.<sup>10</sup> Efforts to create an international trade organization were resuscitated in the early 1990s due to dissatisfaction among GATT members. By 1995, 128 countries became signatories to an international agreement that created the World Trade Organization (WTO).<sup>11</sup> Today, the WTO has 159 member countries accounting for 97 percent of the total value of international trade.<sup>12</sup> The WTO adopted, subsumed and expanded on the GATT by implementing global rules that circumscribe individual government's policies that impose barriers to free, open international trade.<sup>13</sup> The WTO enforces three primary principles of international trade: reduce barriers to trade (both tariffs and NTBs); nondiscrimination among countries (often referred to as most-favored nation or MFN);<sup>14</sup> and no unfair encouragement of exports.<sup>15</sup>

The negotiations that created the WTO did not solely focus on tangible goods. Negotiators also recognized the importance of intellectual property in ensuring the benefits of free trade.<sup>16</sup> They created the Trade Related Intellectual Property Agreement (TRIPS) which establishes minimum standards for protection of intellectual property among all WTO members.<sup>17</sup> The basic standard for TRIPS is that WTO members either have or create laws that permit effective enforcement against intellectual property infringement.<sup>18</sup>

The agreement to create the WTO also established a more comprehensive dispute resolution mechanism than had existed under the GATT regime.<sup>19</sup> A WTO member is authorized to file a complaint against another member for violating a commitment made when it joined the WTO or a rule of the WTO that protects against unfair trade

---

<sup>10</sup> *Id.* at 144. GATT was not the ideal organization and a number of countries, including the United States, were coetaneous with the GATT negotiations, trying to create the International Trade Organization (ITO). LOWENFELD, INTERNATIONAL ECONOMIC LAW, *supra* note 8, at 27-28. However, like the League of Nations before it, the ITO never came into existence as Congressional objections ensured that the largest economy in the world, the United States, would not be a signatory. *Id.*

<sup>11</sup> A. NARLIKAR, THE WORLD TRADE ORGANIZATION: A VERY SHORT INTRODUCTION 22-23 (2005).

<sup>12</sup> WORLD TRADE ORGANIZATION, ANNUAL REPORT 9 (2013), *available at* [http://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/anrep13\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/anrep_e/anrep13_e.pdf).

<sup>13</sup> PUGEL, INTERNATIONAL ECONOMICS, *supra* note 7, at 144. Many provisions of the GATT were maintained in the treaty establishing the WTO. *Id.* at 145-46.

<sup>14</sup> MFN basically ensures that if Xanadu has some preferential relationship with Zenda, the WTO tries to ensure that all other countries that trade with Xanadu obtain the same benefit that Zenda receives. *Id.* at 262. Or in contradistinction, if Xanadu imposes some burden on imports by Zenda, that burden also must be imposed on all other countries. Rachel Brewster, *The Surprising Benefits to Developing Countries of Linking International Trade and Intellectual Property*, 12 U. CHI. J. INT'L L. 1, 21 (2011).

<sup>15</sup> PUGEL, INTERNATIONAL ECONOMICS, *supra* note 7, at 144.

<sup>16</sup> For example, if Xanadu produces books that are protected by copyright and Zenda enables publishers to copy the books without paying the authors located in Xanadu, the authors in Xanadu will have less economic incentive to write books. The unremunerated copying of Xanadus' authors in Zenda is called an externality; such externalities reduce the amount of a good produced below that ultimately demanded by the consumers in Zenda. *See id.* at 202 (discussing impact of externalities on international trade).

<sup>17</sup> Brewster, *The Surprising Benefits to Developing Countries of Linking International Trade and Intellectual Property*, *supra* note 14, at 2.

<sup>18</sup> *Id.* at 21-22.

<sup>19</sup> A comprehensive discussion of trade dispute resolution mechanisms including GATT, unilateral action by an individual country (particularly the United States under § 301 of the Trade Act of 1974, 19 U.S.C. § 2411), and the WTO are beyond the scope of this memorandum.

practices.<sup>20</sup> WTO then arranges consultation in an attempt to resolve the matter prior to a formal examination. If no resolution is reached, a panel of experts examines the issues and renders a decision which can be appealed (the WTO equivalent of an appeals court in the United States). Once the appellate decision has been rendered, the WTO obligates both parties to abide by the decision. If the decision still is being ignored, the WTO may authorize the winning party to take retaliatory action (such as imposing tariffs or NTBs) on the non-compliant WTO member.<sup>21</sup>

### III. Enforcement Actions Available to Counter Unfair International Trade Practices

As already noted, small businesses play a significant role in American international trade. Their participation and potential success in the international marketplace also makes them a prime target for unfair practices. A panoply of options are available under the WTO and federal law to take action against these practices. However, most of these alternatives involve substantial barriers for small businesses.

#### A. WTO Enforcement

The WTO has an elaborate mechanism to ensure international trade occurs on a fair field. However, only member countries are eligible to bring a dispute to the WTO. To the extent that American small businesses believe that unfair practices, including NTBs, could be ameliorated through the WTO dispute resolution process, they would have to convince the federal government to file a complaint.<sup>22</sup> The marshaling of the resources (hiring lobbyists to contact members of Congress and the Office of the United States Trade Representative<sup>23</sup>) and data necessary to convince the United States to bring a complaint are significant. As a result, the efforts to convince the federal government to bring a WTO complaint may not be within financial wherewithal of small businesses.<sup>24</sup>

Although small businesses may ultimately benefit from WTO enforcement of fair trade practices, they cannot directly protect themselves at the WTO. Even if WTO enforcement is not an available remedy, other avenues exist to redress harm from unfair international trade practices by foreign competitors.

---

<sup>20</sup> PUGEL, *INTERNATIONAL ECONOMICS*, *supra* note 7, at 193.

<sup>21</sup> *Id.*

<sup>22</sup> G. SHAFFER, *DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION* 19 (2003)

<sup>23</sup> The Office of the United States Trade Representative administers overall trade policy, negotiates trade agreements, and represents the United States at the WTO. CONGRESSIONAL Q. PRESS, *FEDERAL REGULATORY DIRECTORY* 783 (15<sup>th</sup> ed. 2012).

<sup>24</sup> Presumably, the United States would be unwilling to bring a complaint before the WTO absent convincing economic evidence that unfair trade practices were harming American businesses. *Cf.* Karsten Nowrot, *Transnational Corporations as Steering Subjects in International Economic Law: Two Competing Visions of the Future*, 18 *IND. J. GLOBAL LEGAL STUD.* 803, 815 (2011) (noting that private businesses provide critical information and data on unfair trade practices of WTO member countries).

## B. Antidumping/Countervailing Duty Proceedings<sup>25</sup>

When an American firm faces competition from a foreign business that is either selling a good below normal value (dumping) or being improperly subsidized by a foreign government to lower the costs below those of the American firm,<sup>26</sup> the adversely affected American business may institute an antidumping or countervailing duty proceeding.<sup>27</sup> These proceedings involve multiple federal agencies. First, a firm petitions the Department of Commerce that it is the subject of below cost sales or unfair subsidies.<sup>28</sup> Commerce commences an investigation to determine whether the firm is facing unfair trade practices.<sup>29</sup> Coetaneous with the Commerce Department investigation, the United States International Trade Commission (ITC)<sup>30</sup> is tasked with determining whether the industry in which the business that petitioned the Commerce Department is threatened or subjected to material injury.<sup>31</sup> Thus, for a small business to prevail on an antidumping or countervailing duty complaint, it must establish that products have been submitted at below cost or unfairly subsidized and then show that the industry in which it participates may be materially harmed by the unfair trade practice.

Given the aforementioned summary of the proceeding, one can easily surmise that initiating an antidumping or countervailing duty proceeding requires a considerable amount of legal and economic analysis which is probably beyond the resources of most small businesses. Of the 56 antidumping and countervailing duty proceedings filed between 2007 and 2012, GAO found that only 8 were filed solely by small businesses.<sup>32</sup> Despite assistance available to small businesses from the Commerce Department and the ITC, GAO found that small businesses are inhibited from pursuing such claims because: 1) the cost of legal advice may run from \$1 million to \$2 million; 2) the difficulty in providing reasonably available pricing, production, and injury data (which only adds to the cost of the proceeding as lawyers need input from economists); and 3) the work needed to demonstrate overall industry support for the claim which the Commerce Department requires as part of its decisional calculus in determining whether to proceed.<sup>33</sup> These significant transaction costs make it unlikely that most small businesses

---

<sup>25</sup> Antidumping and countervailing duty proceedings do not run afoul of the commitments made by the United States when it became a member of the WTO. PUGEL, INTERNATIONAL ECONOMICS, *supra* note 7, at 229, 246.

<sup>26</sup> The remedy for the improper subsidization is a tariff (or duty) that eliminates the value of the subsidy. This is termed a countervailing duty because it countervails the subsidy provided by the foreign government. *See* PUGEL, INTERNATIONAL ECONOMICS, *supra* note 7, at 246.

<sup>27</sup> GAO Antidumping Study, *supra* note 4, at 4-5.

<sup>28</sup> *Id.* at 5-6.

<sup>29</sup> *Id.* at 7.

<sup>30</sup> The ITC is a collegial body agency of the federal government that investigates how American businesses are harmed by unfair trade practices of foreign firms. CONGRESSIONAL Q. PRESS, FEDERAL REGULATORY DIRECTORY 410 (15<sup>th</sup> ed. 2012).

<sup>31</sup> GAO Antidumping Study, *supra* note 4, at 8.

<sup>32</sup> *Id.* at 11. Of course, given that the GAO definition may include businesses classified as other than small by the SBA, GAO may be overstating the number of small businesses, as defined under the Small Business Act, that commence an antidumping or countervailing duty proceeding.

<sup>33</sup> *Id.* at 16-19.

will use an antidumping or countervailing duty proceeding to protect themselves from unfair foreign competition.

### C. Infringement of Intellectual Property Rights

Infringement of a small business' intellectual property remains an issue of major concern particularly for firms in high technology where most of the value of the firm is tied to its intellectual property.<sup>34</sup> TRIPS requires WTO members to provide an adequate remedy against infringement of intellectual property.

The United States meets that standard by allowing owners of intellectual property to sue those who are infringing (that is – stealing) those rights, be they patents, trademarks, or copyrights. However, federal court litigation is lengthy process (in which an end result, including appeals, could take years) and is quite costly in the realm of patents.<sup>35</sup> While trademark litigation is less complex, trademark owners are not guaranteed reimbursement of attorney fees and, in certain instances, may have to pay a defendant's fees if they lose the claim of infringement.<sup>36</sup> And while copyright holders only need prevail to obtain attorney fees, a plaintiff who sues for violation and loses may be liable for the defendant's fees and the defendant, unlike in the trademark circumstance, need not show exceptional circumstances,<sup>37</sup> although the award still remains within the discretion of the judge.<sup>38</sup> Thus, although a remedy exists for potential theft of intellectual property in the United States, the potential costs and risks for small businesses is likely to militate against their utilization of this as a tool to protect against foreign infringers selling goods in the United States based on such intellectual property.<sup>39</sup>

There is one other potential option to protect small businesses against theft of their intellectual property – bringing a § 337 action<sup>40</sup> before the ITC. The gravamen of a § 337 complaint is that a foreign firm has sold products in the United States that infringes on a patent, trademark, or copyright owned by an American firm.<sup>41</sup> Unlike antidumping and countervailing duty proceedings, complainants in § 337 actions need not show injury – only that the product sold violated the intellectual property rights of the American

---

<sup>34</sup> C. BAGLEY & C. DAUCHY, *THE ENTREPRENEUR'S GUIDE TO BUSINESS LAW*, *supra* note 5, at 516 (noting that 70 percent of an average firm's value now resides in its intellectual property).

<sup>35</sup> See David Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, 64 ALA. L. REV. 335, 348-51 (2012) (explaining cost, expense, complexity, and length of patent infringement litigation).

<sup>36</sup> See *Nightingale Home Healthcare, Inc. v. Anodyne Therapy, LLC*, 626 F.3d 958, 960-62 (7<sup>th</sup> Cir. 2010). Award of attorney fees, even for the exceptional instances in trademark litigation remains up to the discretion of the court.

<sup>37</sup> *Fogerty v. Fantasy, Inc.*, 510 U.S. 510, 534-35 (1994) (noting that John Fogerty of Creedence Clearwater Revival might be entitled to attorney fees after successful defense against copyright infringement).

<sup>38</sup> *Id.* at 534.

<sup>39</sup> If the infringement occurs by a firm that has no contacts with the United States, i.e., only sells products overseas, the American owner may have to resort to the unfamiliar judicial systems of foreign countries.

<sup>40</sup> Section 337 refers to the section of the Tariff Act of 1930, 19 U.S.C. § 1337.

<sup>41</sup> ITC, SECTION 337 INVESTIGATIONS: ANSWERS TO FREQUENTLY ASKED QUESTIONS 1 (2009) (ITC Pub. No. 4105), available at <http://www.usitc.gov/intellectualproperty/documents/337faqs.pdf>.

owner.<sup>42</sup> The ITC provides an office to assist small business owners in lodging complaints under § 337.<sup>43</sup> Should the ITC find infringement, it may order that the infringing item be barred from entry into the United States.<sup>44</sup> Although less complex than antidumping and countervailing duty actions, the legal costs of a § 337 action are significant and may dissuade small businesses from using this avenue to protect themselves from unfair infringement actions.

#### D. Currency Manipulation

Currency manipulation may have significant adverse consequences on small businesses competing in a global environment. To the extent that one country's currency valuation is artificially lower than it should be relative to the dollar, it lowers the cost of goods sold by that country's firms and raises the costs for American businesses. There is the possibility that such currency manipulation constitutes a type of unfair subsidy in violation of the WTO<sup>45</sup> or that it violates the principles upon which a country acceded to membership in the WTO.<sup>46</sup> Since only member countries may invoke the dispute resolution mechanisms of the WTO, small businesses' only alternative is to convince the federal government to bring a complaint before the WTO.<sup>47</sup>

#### IV. Conclusion

International trade has been recognized as a benefit for the world economy since Adam Smith constructed the first sound philosophic argument in favor of free, open trade among nations. However, those benefits are diminished if some countries and the firms located in those countries erect barriers to such free trade. While agreements exist among nations to reduce such barriers, small businesses represent only one voice in whether the United States should seek enforcement of those treaty obligations. To the extent that other remedies exist, they impose significant transaction costs that may make it difficult for small businesses to protect their rights under various agreements to open world markets. This hearing represents an opportunity to hear from small businesses about the problems they have faced in protecting themselves against unfair international competition. Ultimately, Congress may need to revisit existing protections and find ways to reduce the transaction costs associated with eliminating unfair international trade practices that violate the principles of the WTO and federal law.

---

<sup>42</sup> *Id.* at 1 n.1. Another type of § 337 action entails showing that the foreign firm took an action that constituted unfair competition rather than infringed on intellectual property rights. For these actions, the complainant must show injury to the domestic industry. *Id.* at 1 n.2.

<sup>43</sup> *Id.* at 4.

<sup>44</sup> *Id.* at 3.

<sup>45</sup> Elizabeth Pettis, *Is China's Manipulation of Its Currency an Actionable Violation of the IMF and/or the WTO Agreements?*, 10 J. INT'L BUS. & LAW 281, 287-91 (2011).

<sup>46</sup> *Id.*

<sup>47</sup> To the extent that currency manipulation creates an unstable world currency market, it may violate the treaty that created the International Monetary Fund (IMF), the organization charged with maintaining an orderly currency market. PUGEL, INTERNATIONAL ECONOMICS, *supra* note 7, at 498-499. However, the task of interacting with the IMF and resolving disputes over currency rests with the Secretary of the Treasury and the President. 22 U.S.C. § 5305. Small businesses have no vehicle other than lobbying the Secretary of the Treasury to resolve the currency manipulation.