

Trade Remedy Law: Leveling the Playing Field

Held on July 14, 2008, 12:30 p.m. to 1:30 p.m.
Rayburn HOB, Room B340

As part of its ongoing education series, the WIIT Charitable Trust and Co-Sponsor Blank Rome LLP held a luncheon discussing Trade Remedy Law on Monday, July 14, 2008. The program had 43 registrants and was reported in BNA's Executive Daily summary. The general topics covered were the U.S. trade remedy laws, *i.e.*, antidumping, countervailing duty, and safeguard proceedings. Speaking on the issues were Cathi Jones, a specialist in International Trade and Finance in the Foreign Affairs, Defense, and Trade Division of the Congressional Research Service; Laura Baughman, President of the Trade Partnership, a trade and economic consulting firm she started in 1991, who follows the impact of trade policies and programs on the U.S. economy and the trade flows of U.S. trading partners; and Steve Charnovitz, an Associate Professor of Law at the George Washington University Law School who writes and lectures on international trade, international organizations, and environmental sustainability. Peggy Clarke, a partner at Blank Rome, who specializes in trade remedy and market access issues, moderated the program. As part of the program, the WIIT Charitable Trust and Blank Rome LLP produced and distributed a glossary of Trade Remedy terms, which will be available on the WIIT Charitable Trust website.

Ms. Jones began the program by addressing the procedural aspects of the various trade remedy options. Antidumping and Countervailing duty proceedings have similar procedural approaches although the focus of the investigation varies. In both instances, before a remedy can be imposed the U.S. International Trade Commission must find that a U.S. industry is injured by the relevant imports and the U.S. Department of Commerce, International Trade Administration, Office of Import Administration, must find that the imported product is either sold at less than normal value or is benefiting from subsidies. She noted that antidumping and countervailing duty proceedings were largely administrative with duties being imposed upon final affirmative findings by the two agencies. Safeguard proceedings in contrast are largely handled by the International Trade Commission, without the involvement of the Department of Commerce (although in certain types of safeguard proceedings the Department may have a role). However, the decision to impose a remedy following an affirmative finding of serious injury and massive imports is made by the President and is discretionary. Ms. Jones speculated that this may be the reason why there are substantially more antidumping/countervailing duty proceedings than safeguard proceedings.

Ms. Jones provided some statistics noting that approximately half of the antidumping and countervailing duty investigations begun result in the imposition of duties. In safeguard proceedings, approximately 25 percent of the time a remedy is imposed. Ms. Jones also noted that while there are some provisions for the relevant agencies to self-initiate the proceedings the vast majority of times the proceedings are initiated upon a petition brought by the U.S. industry producing comparable product.

Finally, Ms. Jones discussed the various stakeholders in these proceedings. The stakeholders include the U.S. industry that is competing with the imports and the foreign producers/exporters. In addition, the government of the exporting country has an interest in the proceedings and two other groups of U.S. entities have a stake: the importers and the

industries/individuals that consume the imports. A copy of the slides Ms. Jones used for her presentation will be available on the WIIT Charitable Trust's website.

Ms. Baughman discussed the economic implications of trade remedy law. Ms. Baughman noted that the original economic predicate for antidumping was predatory pricing, *i.e.*, the idea that foreign producers would sell in the United States at sufficiently low prices to drive U.S. producers out of business then raise prices in the United States. However, intent proved to be very difficult to demonstrate, particularly when dealing with cross-border transactions. Therefore, the focus shifted to price discrimination between the United States and the foreign market, with the idea being that a "sanctuary market" (*i.e.*, a protected home market) permitted the producers to charge higher prices in their home market and use the excess profits to "subsidize" their sales in the U.S. market. Ms. Baughman noted that not all price discrimination is bad and that there are many legitimate reasons why prices may differ in different markets, for example: quality/brand differences, demand differences, supply differences, transportation costs, and different selling costs. Countervailing duties is based on the idea that government subsidies can distort the comparative advantage of a country, allowing it to sell in the United States at lower costs than it otherwise would be able to. In both antidumping and countervailing duty, the focus is on the price effects in the U.S. market.

The impact of such proceedings on the market can be substantial regardless of the outcome of the proceeding. Economic studies have shown that once preliminary antidumping duties are imposed (before a final decision is made) trade volumes fall dramatically, on average 60% - 70% by quantity and 50% - 70% by value. Estimates are that at least half the impact of these trade remedy proceedings is felt during the investigation. Even if no duties are finally imposed, *i.e.*, no dumping or injury found, trade patterns can be distorted with imports falling by about 20%. Thus, the "investigation effect" can be enough to make a case profitable for the domestic producers. Indeed, some industries seek to benefit before bringing a case by "leaking" (or holding press conferences) their intent to bring cases, in the hopes that the mere threat will change market behavior.

Ms. Baughman also noted that there were different perspectives on the economics of antidumping and countervailing duties. The domestic producer view is that dumping and subsidization can distort international trade by shifting production to countries that might not otherwise produce because of comparative advantage. Champions of the proceedings argue that the process eliminates distortions in comparative advantage and creates a level playing field on which all producers – domestic and foreign – may compete. The domestic producers are aiming to raise the foreign prices in the U.S. market so that they are "fair" and restore the comparative advantage by imposing a duty on the imports equal to the margin of "unfairness."

In contrast, according to Ms. Baughman the foreign producers/U.S. consumers (and most trade economists) believe that the administrative procedures for the trade remedy proceedings have become so arcane that they hardly measure accurate contemporaneous price distortions and offsets in a timely manner. Fair differences in price are now deemed unfair because the process for calculating fair prices has become so warped. Even the threat of a case can chill trade, without ever bringing a case or showing unfair practices. The increased prices after duties arise are harmful to the consumers, individuals pay higher prices, and import consuming industries complain that the duties make them uncompetitive in the global marketplace. Moreover, the results may not benefit the U.S. industry in the long run. In some cases, supply just shifts to other countries that are not subject to the duties or foreign producers may begin producing in the

United States which can put downward pressure on the existing domestic producers by increasing supply.

Therefore, the goal of most critics is to “repair” the laws, not eliminate them, to make the calculations more accurate and to ensure that the injury found is really caused by the imports. On the injury issue, Ms. Baughman explained that if certain statutory factors in the domestic industry are trending down and imports are trending up, chances are that injury will be found. However, economic critics contend that little effort is made to measure actual causation – just because you have a body, a gun, and a person in the room is not sufficient evidence that the person in the room is the one who shot the body.

Ms. Baughman spoke briefly on the safeguards issue, noting that here the imports were considered to be fairly traded but just to have increased in quantity so rapidly that the U.S. industry has not had the opportunity to take steps to become competitive. Thus, the goal of safeguard remedies is to provide a temporary respite while the domestic industry takes moves to become more competitive. Nevertheless, the imposition of duties or quotas can have serious negative consequences for the consuming industries that also must be considered before deciding to impose a remedy.

Mr. Charnovitz then discussed the intersection of U.S. law and the World Trade Organization Agreement, which has rules regarding the use of antidumping, countervailing duty, and safeguard remedies. Mr. Charnovitz noted that the United States is the biggest target of dispute settlement actions in the WTO and that it has generally lost the cases that it defended. Mr. Charnovitz also acknowledged that most defendants in WTO dispute settlement proceedings lose. The United States has been slow to comply with these findings, although it has eventually complied with most such decisions. Mr. Charnovitz noted that the United States has an obligation to comply with such rulings even where the rulings may be poorly reasoned. In complying with these decisions the United States has different levels of difficulty depending on whether compliance requires a change in law or merely a change in practice. There are consequences to non-compliance, both economic in nature (the suspension of concessions by other WTO members – generally in the form of increased duties on U.S. exports) and political (loss of leadership status in the WTO).

Many of these dispute settlement cases have been related to the trade remedy laws. Because the United States has lost so many trade remedy cases in the WTO, Mr. Charnovitz noted that many would argue that the trade remedy laws themselves “unlevel” the playing field for international Trade.

Mr. Charnovitz also discussed the role that the WTO Agreement had in U.S. law. He noted that the Agreement itself is not U.S. law, but rather that the statute that implemented the Agreement is the U.S. law reflection of the WTO Agreement. Therefore, one could not directly challenge the United States’ compliance with the WTO Agreement in a U.S. court. However, in interpreting U.S. laws, the WTO Agreement has the potential to be relevant. Mr. Charnovitz noted that there are two strands of legal theory that are relevant to the interpretation of the trade statutes. One is the “Charming Betsy” doctrine. This arises from a Supreme Court decision over 200 years ago, to the effect that U.S. law should be interpreted to be consistent with international law (and U.S. treaty obligations) if at all possible. Thus, unless Congress clearly indicated its intent that a statute contradict U.S. international legal obligations, the statute should be interpreted in a manner consistent with those obligations. The other strand is the “Chevron Doctrine.” This too arises from a Supreme Court decision, albeit a more recent one than Charming Betsy. Under the Chevron Doctrine if the statute is ambiguous, then the Courts must

uphold an agency's interpretation as long as that interpretation is "reasonable" even if it conflicts with U.S. international legal obligations. In U.S. court litigation concerning trade remedy law, the Chevron Doctrine has generally been applied. Thus, there are U.S. antidumping practices that have been found to be a violation of the WTO Agreement but that are considered consistent with U.S. law. It is possible, however, that sometime in the future Charming Betsy will again be considered in interpreting U.S. trade remedy law in the courts.

After the three speakers concluded their brief presentations, the floor was opened to questions. There was spirited questioning on many of the issues raised by the speakers. The program concluded at 1:30 p.m.