WTO Panel Issues an Important Reminder That Safeguards Are Not Safe from Challenge

November 16, 2018

The Ontario Court of Appeal in *Rivers v. Waterloo Regional Police Services Board* has upheld the Superior Court of Justice’s determination that it was without jurisdiction to hear a proposed class action on behalf of current and former female officers with the Waterloo Regional Police Service against the Waterloo Regional Police Services Board and the Waterloo Regional Police Association. The claim alleged systemic gender-based discrimination, Charter breaches, and sexual harassment by male members of the Service, over a 30-year period.

The November 6 panel report is just the latest in a long line of cases in which WTO Members have been unable to justify their safeguard measures.

A November 6, 2018, World Trade Organization (WTO) dispute settlement panel report\(^1\) is further confirmation that while safeguard actions are in principle permitted by WTO rules, establishing compliance with those rules will be a daunting task when a safeguard is challenged by other WTO Members.

The November 6 panel report is just the latest in a long line of cases in which WTO Members have been unable to justify their safeguard measures. The case involved a complaint by Japan regarding a measure imposed by India on imports of hot-rolled flat steel products. The panel found the adequacy of the explanations by India’s authority to be lacking, including with respect to the existence of serious injury or threat of serious injury and the causal relationship between the increase in imports and that serious injury or threat.

Safeguards are emergency measures in the form of tariffs, quotas or both, that are intended to address serious injury or the threat of serious injury caused by an unforeseen increase in imports. Unlike the rules that allow WTO Members to derogate from their trade liberalizing commitments to address unfair trade practices like dumping or subsidization, safeguards are derogations to address increased volumes of fairly traded imports and are exceptional in that important sense. It therefore is not surprising that the WTO rules governing safeguards carefully limit when they are permitted and hold members imposing them to a very high standard to demonstrate that they are justified.
A WTO Member contemplating a safeguard on more than a provisional basis (i.e. beyond 200 days) is required to assess whether the proposed safeguard is warranted. It must demonstrate the existence of unforeseen developments and must show through “reasoned and adequate explanations that the unforeseen developments have resulted in increased imports of the specific products targeted by the safeguard, and that there is a causal link between the increased imports and serious injury or threat of serious injury to the relevant domestic industry.

To establish the existence of serious injury or threat, the WTO Member must examine all relevant factors, including those listed in the WTO’s Agreement on Safeguards relating to the scale of the increase in imports, the share of the market captured by them, and factors relating to the performance of the domestic industry. If the trends in only some factors are positive, there must be a compelling explanation as to how and why the domestic industry is nevertheless injured. Care must also be taken to distinguish between other factors that may be injuring the domestic industry and the injurious effects of the increased imports.

The November 6 panel report has particular resonance in Canada, where the federal Government has asked the Canadian International Trade Tribunal (CITT) to conduct an inquiry as to whether there is a rationale for definitive safeguards on seven classes of steel products, which are currently the subject of provisional safeguards. Canada has never before imposed a safeguard in the WTO era. The panel’s report serves as an important reminder for the Canadian Government that any recommendation for safeguard measures by the CITT will need to be thoroughly justified if it is to withstand the WTO challenge that is almost certain to follow quickly if Canada does impose definitive safeguards.

India – Certain Measures on Imports of Iron and Steel Products (DS518)

By:

Matthew Kronby, Jesse Goldman

Services:

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BLG Offices

Calgary
Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3
T 403.232.9500
F 403.266.1395

Ottawa
World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9
T 613.237.5160
F 613.230.8842

Vancouver
1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2
T 604.687.5744
F 604.687.1415

Montréal
1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4
T 514.954.2555
F 514.879.9015

Toronto
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3
T 416.367.6000
F 416.367.6749

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