NOVEMBER-IN-REVIEW

New Anti-dumping Investigation

1. CBSA Initiates Trade Remedies Re-Investigations Concerning Certain Dry Wheat Pasta from Turkey

2. CBSA and CITT Initiate Trade Remedies Proceedings Concerning Certain Corrosion-Resistant Steel Sheet from Turkey, the United Arab Emirates and Vietnam

International Trade

3. WTO Panel Issues Report in U.S.-India Dispute Concerning Export Subsidies

4. WTO Arbitrator Issues Report in the China-U.S. Dispute Concerning Certain Methodologies Applied in U.S. Anti-dumping Proceedings Concerning Goods from China

5. Norway Joins Canada and the European Union in Establishing an Interim WTO Appeal Arbitration System

6. Global Affairs Canada Opens Public Consultations Concerning how Steel Safeguard Quotas should be Administered from 1st February 2020 through 24th October 2021

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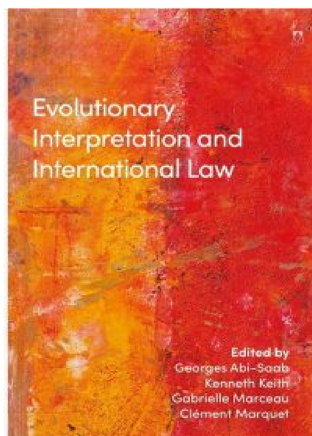

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New Anti-dumping Investigation

1. CBSA INITIATES TRADE REMEDIES RE-INVESTIGATIONS CONCERNING CERTAIN DRY WHEAT PASTA FROM TURKEY

On 27th November 2019, the Canada Border Services Agency (**CBSA**) published a Notice of Re-investigation (**DWP-2019-RI**) of the normal values, export prices and amounts of subsidy respecting imports of certain dry wheat pasta from Turkey. This re-investigation is further to the Canadian International Trade Tribunal's finding on 26th July 2018 (**Inquiry No. NQ-2017-005**) that dumped and subsidized imports of dry wheat pasta from Turkey have caused material injury to the Canadian domestic pasta industry. Pursuant to this finding, **anti-dumping and countervailing duty measures** are currently applied under the *Special Import Measures Act* (**SIMA**) to imports of dry wheat pasta from Turkey.

As part of the ongoing enforcement of these measures, the purpose of the re-investigation is to determine whether the amounts of the anti-dumping and countervailing duties on imports of Turkish pasta need to be adjusted.

The subject goods include all dry wheat-based pasta products from Turkey, whether or not they are enriched, fortified, organic, whole wheat or made containing milk or other ingredients (provided they are not stuffed or otherwise prepared and contain no more than two percent eggs). Refrigerated, frozen or canned pasta products are expressly excluded.

The CBSA's **re-investigation schedule** has been posted online. Importers must file their responses to the CBSA's requests for information no later than Wednesday

18th December 2019. The exporter and government responses must then be filed by Friday 17th January 2020. The record will close on 7th April 2020, after which interested parties may file (i) case arguments by 12 noon on Tuesday 14th April 2020, and (ii) reply submissions by 12 noon on Tuesday 21st April 2020. The CBSA is expected to conclude the re-investigation and issue its determinations on or about Thursday 7th May 2020.

Tereposky & DeRose represents the Canadian Pasta Manufacturers Association (**CPMA**) in this matter and regularly provides advice on other anti-dumping and countervailing duty matters. Should you have any questions regarding anti-dumping and countervailing duty issues, we are at your disposal.

Greg Tereposky	Vincent DeRose	Daniel Hohnstein
613.237.1210	613.237.8862	613.237.9005
gtereposky@tradeisds.com	vderose@tradeisds.com	dhohnstein@tradeisds.com

2. CBSA AND CITT INITIATE TRADE REMEDIES PROCEEDINGS CONCERNING CERTAIN CORROSION-RESISTANT STEEL SHEET FROM TURKEY, THE UNITED ARAB EMIRATES AND VIETNAM

On 8 November 2019, the Canada Border Services Agency (**CBSA**) published a Notice of Initiation of Investigations (**COR2-2019-IN**) concerning allegations that dumped and subsidized imports of certain corrosion-resistant steel sheet from Turkey, the United Arab Emirates and Vietnam are causing or threatening to cause material injury to the domestic industry. On 12 November 2019, the Canadian International Trade Tribunal (**CITT**) published a Notice of Commencement of Preliminary Injury (**PI-2019-002**) with respect to the same matter.

These proceedings were triggered by a formal complaint filed by ArcelorMittal Dofasco G.P. (**ArcelorMittal**). Earlier this year, in February 2019, ArcelorMittal was successful in litigating a similar complaint against certain corrosion-resistant steel sheet from China, Chinese Taipei, India and South Korea (see **measures in force** and **Inquiry No. NQ-2018-004**).

The subject goods include corrosion-resistant flat-rolled steel sheet products of carbon steel, including products alloyed with boron (up to 0.01%), niobium (up to 0.1%), titanium (up to 0.8%), and vanadium (up to 0.3%), in coils or cut lengths up to 0.168 inches (4.267 mm) thick and 72 inches (1,828.8 mm) wide, plus or minus allowable tolerances. A number of specific products are excluded from the scope of

the proceedings, including subject goods that are imported for use in manufacturing motor vehicles and aeronautic products and certain coated, plated, pre-painted, perforated, and tool steel products.

Interested parties who wish to oppose or support the complaint must file their notices of participation with the Tribunal no later than Thursday 21 November 2019. Submissions by parties opposed to the complaint must then be filed by 12 noon on Friday 6 December, with submissions by parties in support of the complaint following no later than 12 noon on Friday 13 December. The Tribunal is expected to issue its preliminary injury determination on or about Tuesday 7 January 2020, with its statement of reasons following by Wednesday 22 January. Subject to the CBSA's preliminary determination (discussed below), if the Tribunal determines that the evidence before it discloses a reasonable indication that the alleged dumping and/or subsidizing of the subject goods has caused injury or is threatening to cause injury, it will proceed with a full inquiry.

In the meantime, the first stage in the CBSA's investigations is a preliminary determination on the alleged dumping and subsidizing of the subject goods. The **schedule** of the CBSA's investigation has been posted online. It is expected that the CBSA will publish its Statement of Reasons for its decision to initiate the investigations by Friday 22 November 2019. Importers must then file responses to the CBSA's requests for information no later than Monday 2 December 2019; exporters and the governments of the subject countries must file their responses by Monday 16 December 2019. The CBSA's preliminary determination is expected to be issued on Thursday 6 February 2020, with the Statement of Reasons following by Friday 21 February.

Tereposky & DeRose regularly provides advice on Canadian anti-dumping and countervailing duty matters. Should you have any questions regarding this matter or anti-dumping and countervailing duty issues more generally, we are at your disposal.

Greg Tereposky	Vincent DeRose	Daniel Hohnstein
613.237.1210	613.237.8862	613.237.9005
gtereposky@tradeisds.com	vderose@tradeisds.com	dhohnstein@tradeisds.com

International Trade

3. WTO PANEL ISSUES REPORT IN U.S.-INDIA DISPUTE CONCERNING EXPORT SUBSIDIES

On 31st October 2019, the **report** of the World Trade Organization (**WTO**) Panel in *India – Export Related Measures* (DS541) was released. This dispute concerned the United States' challenge of certain alleged export subsidy measures in India under the WTO *Agreement on Subsidies and Countervailing Measures* (**SCM Agreement**).

Two interesting aspects of this proceeding included: (i) the Panel's interpretation and application of its Working Procedures in the abbreviated proceedings under Article 4 of the SCM Agreement in the light of its obligation under Article 12.10 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (**DSU**) to accord sufficient time to a developing country Member to prepare and present its argumentation; and (ii) the Panel's distinction between "exceptions" and "excluding provisions" in WTO agreements for the purposes of determining the applicable burden of proof when a responding Member raises an "excluding provision" to defend a measure.

Overview of the Panel's Report

The United States challenged the following schemes maintained by India: (a) the Export Oriented Units (EOU) Scheme and Sector-Specific Schemes, including the Electronics Hardware Technology Parks (EHTP) Scheme and the Bio-Technology Parks (BTP) Scheme (the EOU/EHTP/BTP Schemes); (b) the Merchandise Exports from India Scheme (MEIS); (c) the Export Promotion Capital Goods (EPCG) Scheme; (d) the Special Economic Zones (SEZ) Scheme; and (e) the Duty-Free Imports for Exporters Scheme. These measures provide certain exemptions from customs duties and taxes or grant freely transferable "scrips" that Indian exporters can use to satisfy certain liabilities *vis-à-vis* the Indian government.

The Panel concluded that certain exemptions from customs duties, taxes, and taxable income provided to Indian enterprises under the above-referenced measures constitute prohibited export subsidies (i.e., subsidies contingent upon export performance, either in law or in fact) within the meaning of Articles 3.1(a) and 3.2 of the SCM Agreement.

Accordingly, the Panel recommended that, pursuant to Article 4.7 of the SCM Agreement, India proceed "without delay" to: (a) withdraw within 120 days from adoption of the Panel's Report the prohibited subsidies under the EOU/EHTP/BTP

Schemes, EPCG Scheme, and MEIS; (b) withdraw within 90 days from adoption of the Panel's Report the prohibited subsidies under DFIS; and (c) withdraw within 180 days from the date of adoption of the Report the prohibited subsidies under the SEZ Scheme.

Taking account of India's status as a developing country Member

In accordance with Article 12.11 of the DSU, the Panel explained how it had taken account of India's status as a developing country Member in adopting and reviewing its Working Procedures and timetable for this proceeding. Although the Panel had been established under the fast-track procedures contemplated in Article 4 of the SCM Agreement, it had allowed additional time for India to prepare each of its first and second written submissions and also its responses to the Panel's questions following the substantive meeting. Although the Panel did not accede to India's request to consider holding more than one meeting, it did consider India's developing country Member status in the process of reconciling competing considerations in its decision to hold a single substantive meeting.

In addition, India argued as a preliminary matter that Articles 3 and 4 of the SCM Agreement do not apply to India by virtue of Article 27.2. Article 27.2(a) provides that the prohibition on export subsidies under Article 3.1(a) does not apply to developing country Members referred to in Annex VII (i.e., those designated as "least developed countries" by the United Nations). Article 27.2(b) provides the same exception to other developing country Members for a period of eight years from the date of the entry into force of the WTO Agreement. Annex VII(b) provides that when India's GNP reaches US $1,000 per capita, it shall become subject to the provisions applicable to other developing country Members under Article 27.2(b).

The parties agreed that India has graduated from Annex VII(b) and that Article 27.2(a) no longer excludes India from the application of the prohibition of export subsidies under Article 3.1(a). However, India argued that the exemption under Article 27.2(b) continued to apply to India because the eight-year exemption period set out in that provision did not start for India on the date of the entry into force of the WTO Agreement, but rather on the date of India's graduation from Annex VII(b) — i.e., starting in 2017 and ending in 2025. The Panel rejected India's argument, finding instead that it was clear from the wording of Article 27.2(b) that the eight-year period had commenced on the date of the entry into force of the WTO Agreement and had therefore expired in January 2003. As a consequence, India was subject to the prohibition on export subsidies under Article 3.1(a).

The distinction between exceptions and excluding provisions

Another interesting aspect of this report is the Panel's considerations related to the distinction between "exceptions" and "excluding provisions" for the purposes of determining the applicable burden of proof. The Panel considered this issue to be relevant in relation to the defensive arguments raised by India under footnote 1 to Article 1.1(a)(1)(ii) and Article 27 of the SCM Agreement.

The general rule in WTO dispute settlement is that the burden of proof rests upon the party who asserts the affirmative of a particular claim or defence. The Panel considered that while the application of this rule is obvious in many instances — e.g., where a responding Member invokes an exception under Article XX of the GATT 1994 — the dividing line is sometimes less clear in cases involving provisions which could potentially disqualify a claim but are not considered to be "exceptions" or "affirmative defences".

The Panel considered that "exceptions" afford a justification for measures that are found to be inconsistent with other provisions of the WTO Agreements, while "excluding provisions" limit the scope of other provisions without there being a violation in the first place. The Panel explained that although the outcome of upholding an "exception" or an "excluding provision" is the same (i.e., the complaint fails), an "exception" presupposes a valid claim, to which it responds, whereas if an "excluding provision" applies, there is no valid claim under the provision that is excluded.

The Panel considered that the question of which party bears the burden of raising an "excluding provision" is different from the question of which party bears the burden of proof under an "excluding provision". It also considered that the responding Member is best placed to know whether its measures fall under a particular "excluding provision". On this basis, the Panel determined that the respondent bears the burden of raising "excluding provisions", but once the respondent has properly raised an "excluding provision", the complainant will bear the burden of proof under the "excluding provision", i.e. the burden of proving that the "excluding provision" does not apply.

Tereposky & DeRose LLP regularly provides advice and acts as counsel in international trade disputes, including WTO dispute settlement proceedings.

Greg Tereposky	Daniel Hohnstein
613.237.1210	613.237.9005
gtereposky@tradeisds.com	dhohnstein@tradeisds.com

4. WTO ARBITRATOR ISSUES REPORT IN THE CHINA-U.S. DISPUTE CONCERNING CERTAIN METHODOLOGIES APPLIED IN U.S. ANTI-DUMPING PROCEEDINGS CONCERNING GOODS FROM CHINA

On 1 November 2019, the **decision** of the World Trade Organization (**WTO**) Arbitrator in *United States – Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China* (DS471) was released. The purpose of the arbitration was to determine the exact amount of the countermeasures that China is authorized to take against the United States, further to the **Appellate Body's findings in May 2017** and the **Panel's findings in October 2016** that the use of certain methodologies by the United States in anti-dumping investigations concerning products imported from China were inconsistent with provisions of the WTO *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (Anti-Dumping Agreement) and Article VI:2 of the *General Agreement on Tariffs and Trade 1994* (GATT 1994).

The Arbitrator's mandate, under Articles 22.4, 22.6 and 22.7 of the DSU, required it to determine the economic value of the "nullification or impairment" of the benefits accruing to China as a result of the United States' failure to bring its WTO-inconsistent methodologies into compliance before the expiry of the "reasonable period of time" (which had been **determined in a previous arbitration** under Article 21.3(c)). The Arbitrator estimated this value by reference to a "counterfactual", which is a hypothetical scenario that describes what would have happened in terms of trade flows between China and the United States if the United States had implemented the recommendations and rulings set out in the Appellate Body and panel reports. This is an important analytical tool that WTO arbitrators routinely employ, together with complex economic modelling, in arbitrations of this kind.

The Arbitrator considered that the US methodologies found to be inconsistent with WTO obligations fell into two categories: (a) the United States' use of the weighted average-to-transaction (WA-T) methodology with zeroing in calculating dumping margins; and (b) the United States' treatment of multiple exporters as a single, government-wide entity under the so-called Single Rate Presumption. For the purpose of determining the level of nullification or impairment, the Arbitrator based its analysis on twenty-five anti-dumping orders in which one or both of these methodologies had been applied. In each case, the Arbitrator examined a counterfactual in which the United States had ceased applying the WTO-inconsistent methodologies, but had otherwise continued to apply the anti-dumping measures to products imported from China.

While the level of countermeasures proposed by China was USD 7.043 billion, the Arbitrator determined that (i) the level of nullification or impairment of benefits accruing to China as a result of the WTO-inconsistent methodologies was USD 3.57 billion per year, and (ii) China may request authorization from the WTO Dispute Settlement Body (**DSB**) to suspend concessions or other obligations to the United States at a level not exceeding this amount.

An interesting aspect of this proceeding was the disagreement of one member of the Arbitrator with the two-member majority over the extent to which the Arbitrator should consider the consistency of the counterfactuals with WTO obligations. The three members of the Arbitrator agreed that a proposed counterfactual should be consistent with the covered agreements in order to represent a reasonable or plausible compliance scenario.

The majority, however, considered that the Arbitrator could examine the WTO consistency of a proposed counterfactual broadly, taking account of not only the WTO obligations that formed the basis of the original findings of violation, but also other WTO obligations that may be relevant. Applying this approach, the majority rejected certain arguments raised by the United States on the basis that it could not be assumed that the proposed counterfactual would be consistent with certain WTO obligations, even though there had been no findings of inconsistency with respect to those obligations in the original proceedings.

The dissenting member disagreed with this approach, taking the view that only the provisions forming the basis of the original panel's findings of violations should be taken into account when assessing whether a proposed counterfactual reflects a reasonable or plausible compliance scenario. The dissenting member considered that the majority should have exercised "particular and extra restraint" when considering the possibility of taking into account potential inconsistencies with WTO obligations other than those that were found to have been violated in the original proceedings.

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Greg Tereposky
613.237.1210
gtereposky@tradeisds.com

Daniel Hohnstein
613.237.9005
dhohnstein@tradeisds.com

TEREPOSKY & DEROSE LLP

5. NORWAY JOINS CANADA AND THE EUROPEAN UNION IN ESTABLISHING AN INTERIM WTO APPEAL ARBITRATION SYSTEM

On 21st October 2019, the European Union and Norway notified the Dispute Settlement Body (**DSB**) of the World Trade Organization (**WTO**) of their agreement on an **interim appeal system**, in the form of a **bilateral arbitration arrangement**, to preserve their dispute settlement rights in the event that the WTO Appellate Body is unable to continue operating.

The terms of the EU-Norway arrangement are identical to those of the **Canada-EU interim appeal mechanism** that was **agreed on 25th July 2019** and **updated on 22nd October 2019** (for more information see "**Canada and the European Union announce an interim bilateral arbitration solution for the WTO Appellate Body deadlock**"). This development is further to the **European Commission's mandate to the EC Commissioner for Trade** "to enter into interim appeal arbitration arrangements with third countries whenever necessary", which was adopted in September 2019.

The WTO Appellate Body is composed of seven members who are appointed to serve for four-year terms and may be reappointed for an additional four-year term. The United States has been blocking the appointment of new members since 2017. As a consequence, there are currently only three members remaining, which is the minimum number needed for the Appellate Body to function. The terms of two of these three members — Ujal Singh Bhatia (India) and Thomas R. Graham (United States) — will expire on 10th December 2019, leaving only Hong Zhao (China) as the single remaining member. The Appellate Body is therefore expected to cease functioning on 11th December until new members are appointed. Graham has stated that he has not yet decided whether he will observe the standard practice of continuing to serve beyond the expiration of his term to complete the disposition of appeals that were commenced while he was a member. If he does not, this would leave suspended almost twenty pending appeals at various procedural stages.

In addition, it has **recently been reported** that the United States may consider blocking the adoption of the WTO budget, citing as one of its concerns the possibility that WTO funding may be diverted to support the interim appeal system established by Canada, the European Union, and Norway. To address this concern, one wonders whether the proposed interim appeal mechanism could be separately funded by the disputing parties on a case-by-case basis, in a manner similar to the funding of *ad hoc* tribunals in investor-state dispute settlement arbitrations.

TEREPOSKY & DEROSE LLP

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Daniel Hohnstein
613.237.9005
dhohnstein@tradeisds.com

Greg Tereposky
613.237.1210
gtereposky@tradeisds.com

6. GLOBAL AFFAIRS CANADA OPENS PUBLIC CONSULTATIONS CONCERNING HOW STEEL SAFEGUARD QUOTAS SHOULD BE ADMINISTERED FROM 1ST FEBRUARY 2020 THROUGH 24TH OCTOBER 2021

On 25th November 2019, Global Affairs Canada **announced the commencement of public consultations** concerning how the final safeguard measures on imports of heavy steel plate and stainless steel wire should be administered after 31st January 2020.

The final safeguard measures have been imposed in the form of tariff rate quotas (**TRQs**) on imports of these products since 13th May 2019 (see "**Final Safeguard Measures Imposed on Imports of Heavy Steel Plate and Stainless Steel Wire**"). During the current allocation period, which began on 3rd June 2019 and will end on 31st January 2020, quota allocations have been administered through two pools: (i) an "allocation pool", from which allocations are granted to applicants based on their historical import activities; and (ii) a "residual pool", which is available on a "first-come, first-served" basis to all other applicants. This methodology has provided vital certainty to Canadian importers and end-users who rely upon well-established, long-term supply chains, while also providing some flexibility to other stakeholders. However, Global Affairs Canada is currently considering whether to continue administering the TRQs in the same way or change to a different methodology.

From 1st February 2020 through 12th May 2020, the total in-quota volumes available will be approximately 27,595.3 tonnes of heavy steel plate and 772.3 tonnes of stainless steel wire. In accordance with **Customs Notice 19-08**, the surtax applicable to over-quota imports during this time will be 20 percent for heavy steel plate and 25 percent for stainless steel wire.

Then, from 13th May 2020 through 12th May 2021, the TRQ volumes will be 110,000 tonnes of heavy steel plate and 3,080 tonnes of stainless steel wire. During this period, the surtax applied to over-quota imports will decrease to 15 percent for both product categories.

Finally, from 13th May 2021 through 24th October 2021, the TRQ volumes available will be 54,699 tonnes of heavy steel plate and 1,532 tonnes of stainless steel wire. During this time, the surtax on over-quota imports will decrease to 10 percent for heavy steel plate and 5 percent for stainless steel wire.

Interested parties have until Sunday 8th December 2019 at 11:59 p.m. to submit their views by completing the **online questionnaire** prepared by Global Affairs Canada and/or by filing written comments at the following email address: TIN.consultations@international.gc.ca. Additional information is available in a "**backgrounder**" recently published by Global Affairs Canada, which links directly to the online questionnaire.

Tereposky & DeRose regularly provides advice on Canadian trade matters, including safeguard actions. Should you have any questions regarding this matter, we are at your disposal.

Greg Tereposky
613.237.1210
gtereposky@tradeisds.com

Vincent DeRose
613.237.8862
vderose@tradeisds.com