TEREPOSKY & DEROSE LLP

DECEMBER-IN-REVIEW

International Trade

---

1. And then there was one…The WTO Appellate Body Situation (11 December 2019)

2. CUSMA Protocol Signed in Mexico City, Paving the way for Ratification and Implementation Procedures to Continue (11 December 2019)

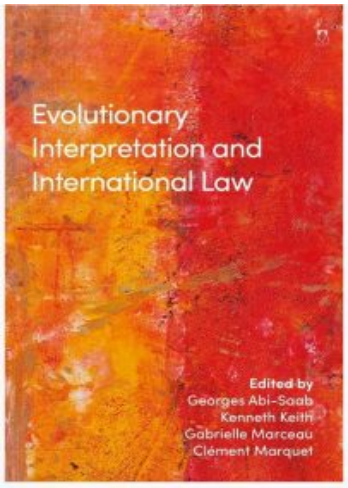
3. CBSA and CITT Initiate Expiry Review Proceedings Concerning Certain Steel Concrete Reinforcing bar (Rebar) from China, South Korea and Turkey (10 December 2019)

4. New Notice to Importers Published Concerning the Administration of the Safeguard Measures on Certain Imports of Heavy Steel Plate and Stainless Steel Wire (31 December 2019)

New Anti-dumping Investigation

---

5. WTO Panel Rules for First Time on the Meaning of "Particular Market Situation" in Anti-dumping Investigation (12 December 2019)



Be sure to purchase your copy of,
"Evolutionary Interpretation and International Law"
Edited by Georges Abi-Saab, Kenneth Keith, Gabrielle Marceau & Clement Marquet

With Chapter 25 "*Investment Treaty Signatories' Joint Interpretation and the Case of the NAFTA Free Trade Commission: Evolutionary Interpretation or Modification*" by Tereposky & DeRose LLP's very own Jennifer Radford, Greg Tereposky and Kun Hui

International Trade

1. AND THEN THERE WAS ONE…THE WTO APPELLATE BODY SITUATION

On 10th December 2019, the terms of two of the three remaining members of the WTO Appellate Body expired, leaving just one member and rendering the Appellate Body unable to function. According to **reports**, it is expected that four of the fourteen pending appeals will be decided despite the shutdown, including: two appeals brought by Honduras and the Dominican Republic in their disputes concerning Australia's plain packaging measures for tobacco products (**DS435** and **DS441**); one appeal brought by the United States in its dispute with Canada concerning US countervailing measures on supercalendered paper (**DS505**); and one appeal brought by Ukraine in its dispute with Russia concerning Russian measures restricting imports of railway equipment (**DS499**). It appears that the other pending appeals will be left in limbo. These circumstances, combined with a **95% reduction in the Appellate Body's operating fund**, have compelled some to question the viability of the WTO dispute settlement system going forward.

Although it is currently facing unprecedented challenges, the WTO dispute settlement mechanism has not been rendered unviable. It will continue to be used to resolve trade disputes between members, at least up until the conclusion of the panel stage. In addition to the interim WTO appeal arbitration model adopted by the EU, Canada and Norway (see "**Norway joins Canada and the European Union in Establishing an Interim WTO Appeal Arbitration System**"), other options being considered include procedural agreements between disputing parties to forego their appeal rights and allow for the adoption of panel reports by the Dispute Settlement Body. This would allow successful complainants to invoke the WTO enforcement mechanism, if necessary. Even if panel reports remain unadopted, and the enforcement mechanism is not applicable, the existence of such reports could assist in the mutual resolution of disputes by the disputing parties, as they did under the pre-WTO system.

The WTO dispute settlement system is invaluable to the stability of the world trading system. There is now a strong incentive for all Members to come together and resolve the issues that have led to this predicament. 2020 will be a challenging, albeit interesting, year for WTO dispute settlement.

Tereposky & DeRose LLP regularly provides advice and acts as counsel in international trade disputes, including WTO dispute settlement proceedings. If you have any questions about the foregoing subject, please do not hesitate to contact us.

Daniel Hohnstein
613.237.9005
dhohnstein@tradeisds.com

Greg Tereposky
613.237.1210
gtereposky@tradeisds.com

2. CUSMA PROTOCOL SIGNED IN MEXICO CITY, PAVING THE WAY FOR RATIFICATION AND IMPLEMENTATION PROCEDURES TO CONTINUE

On Tuesday 10th December 2019, representatives of Canada, the United States, and Mexico signed a "***Protocol of Amendment to the Agreement between Canada, the United States of America, and the United Mexican States***" (the **Protocol**) in Mexico City. As its name suggests, the Protocol serves to amend certain provisions in the text of the ***Canada, United States, and Mexico Agreement*** (**CUSMA**) that was concluded and signed on 30th November 2018 in Buenos Aires. This new trade agreement, which is intended to eventually replace the *North American Free Trade Agreement* (**NAFTA**), is referred to as the "USMCA" (*United States, Mexico, and Canada Agreement*) in the United States, the "T-MEC" (*Tratado entre México, Estados Unidos y Canadá*) in Mexico, and has also been called the "new NAFTA", "NAFTA 2.0", and most recently the "**NAFTA 2.1**" (with the fractional "1" denoting the amendments made pursuant to the Protocol).

The amendments that the Protocol incorporates into the CUSMA text include changes to certain provisions related to dispute settlement, intellectual property, labour, environment, and product-specific rules of origin for the steel materials used to manufacture passenger vehicles and trucks. These changes were necessary to address concerns raised by U.S. lawmakers and to secure Congressional approval of the agreement in the United States.

The next step is for all three of the CUSMA parties to implement the agreement, as amended by the Protocol, into their domestic laws and regulatory regimes. Canada started this process in May 2019, when the Parliament of Canada began to consider **Bill C-100**, "*An Act to implement the Agreement between Canada, the United States of America and the United Mexican States*" (the "***CUSMA Implementation Act***"). As this implementing legislation was based on the November 2018 version of the CUSMA text, it may need to be tweaked to reflect the changes set forth in the Protocol before the legislative process resumes. There will be limited progress until the end of January 2020, when Canada's Parliament returns from the winter adjournment. After that, however, steps forward could be swift, with passage of the proposed legislation into law by March 2020. (For example, it took only 37 days, from the date of Second Reading and referral to the Standing Committee on International Trade to the date of Royal Assent, for Parliament to pass the **legislation** necessary to implement the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (**CPTPP**) into law).

The CUSMA will enter into force within 2-3 months after all three of the parties have completed their internal implementation processes. Paragraph 2 of the ***Protocol replacing the North American Free Trade Agreement with the Agreement between Canada, the United States of America, and the United Mexican States*** provides that each party shall provide written notification to the other parties "once it has completed the internal procedures required for … entry into force", and that the agreement will enter into force "on the first day of the third month following the last notification".

Tereposky & DeRose LLP regularly provides advice on the interpretation, implementation, and application of the provisions of international trade agreements, including the CPTPP, the CETA, the NAFTA, and the forthcoming CUSMA. Should you have any questions regarding potential opportunities under these trade agreements or any other trade related issues, we are at your disposal.

Daniel Hohnstein
613.237.9005
dhohnstein@tradeisds.com

Jennifer Radford
613.237.9777
jradford@tradeisds.com

Greg Tereposky
613.237.1210
gtereposky@tradeisds.com

Vincent DeRose
613.237.8862
vderose@tradeisds.com

3. CBSA AND CITT INITIATE EXPIRY REVIEW PROCEEDINGS CONCERNING CERTAIN STEEL CONCRETE REINFORCING BAR (REBAR) FROM CHINA, SOUTH KOREA AND TURKEY

On 9th December 2019, the Canadian International Trade Tribunal (**CITT**) initiated expiry review proceedings (**RR-2019-003**) concerning the anti-dumping measures that are currently in force with respect to hot-rolled deformed steel concrete reinforcing bar in straight lengths or coils (commonly referred to as "rebar") from China, South Korea, and Turkey, and the countervailing duty measures that are currently in force with respect to such goods from China. These measures have been in place since January 2015 (see **NQ-2014-001** and **measures in force**). The Tribunal determined that an expiry review was warranted on the basis of the information it reviewed in the **LE-2019-002** expiry process.

The following day, on 10th December 2019, the Canada Border Services Agency (**CBSA**) published a Notice of Initiation of Expiry Review Investigation (**REB-2019-ER**) concerning the dumping of the subject goods from China, South Korea, and Turkey, and the subsidizing of such goods from China.

The subject goods include steel rebar in various diameters up to and including 56.4 millimeters and in various finishes (usually classified under tariff classification numbers 7213.10.00.00, 7214.20.00.00, 7215.90.00.00 and 7227.90.00.90). Excluded from the scope of the product definition are plain round bar products, fabricated rebar products, and 10-mm-diameter (10M) rebar produced to meet the requirements of CSA G30 18.09 (or equivalent standards) and coated to meet the requirements of epoxy standard ASTM A775/A 775M 04a (or equivalent standards) in lengths from 1 foot (30.48 cm) up to and including 8 feet (243.84 cm).

The **schedule** of the CBSA's investigation has been posted online. Notices of representation and disclosure undertakings must be filed with the Tribunal by Thursday 9th January 2020. Questionnaire responses and other information from domestic producers, importers, exporters and the relevant government entities must be submitted no later than Thursday 16th January 2020. The record will close on Tuesday 28th January 2020, after which interested parties may file (i) case briefs by 12 noon on Monday 10th February 2020 (arguing that continued or resumed dumping and/or subsidizing of the subject goods is either likely or not likely), and (ii) reply submissions by 12 noon on Tuesday 25th February 2020. The CBSA is expected to conclude the investigation and issue its determinations on Thursday 7th May 2020, with its statement of reasons expected to follow on or about Friday 22nd May 2020.

If the CBSA determines that the dumping and/or subsidizing of subject goods is likely to resume or continue following the expiry of the anti-dumping and countervailing duty measures, the Tribunal's expiry review inquiry will be initiated on Friday 8th May 2020. The Tribunal's mandate will be: (i) to determine, in the light of the CBSAs determinations, whether the expiry of the measures is likely to result in injury to the domestic industry; and then, accordingly, (ii) to make an order either continuing or rescinding the finding with or without amendment.

According to the Tribunal's **schedule**, interested parties who wish to oppose or support the continuation of the measures must file their notices of participation no later than Friday 22nd May 2020. Replies to the Tribunal's questionnaires will be due from all participants by 12 noon on Friday 29th May 2020. A public hearing is scheduled to commence on Tuesday 4th August 2020, and the Tribunal's order and statement of reasons is expected on or about Wednesday 14th October 2020.

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
613.237.1210
gtereposky@tradeisds.com

Vincent DeRose
613.237.8862
vderose@tradeisds.com

Daniel Hohnstein
613.237.9005
dhohnstein@tradeisds.com

4. NEW NOTICE TO IMPORTERS PUBLISHED CONCERNING THE ADMINISTRATION OF THE SAFEGUARD MEASURES ON CERTAIN IMPORTS OF HEAVY STEEL PLATE AND STAINLESS STEEL WIRE

On 31st December 2019, the Trade Controls Bureau at Global Affairs Canada published a new **Notice to Importers (Serial No. 983)** concerning the administration of the safeguard tariff rate quotas (TRQs) for certain imports of heavy steel plate and stainless steel wire for the period from 1st February 2020 through 24th October 2021. Further to the **public consultation conducted by Global Affairs Canada** from 25th November until 8th December

2019, each of the quotas will continue to be divided into two pools: (i) an allocation pool, from which in-quota volumes are allocated to eligible applicants based on their import history during a 12-month reference period (1st July 2017 to 30th June 2018); and (ii) a residual pool, available on a first-come, first-served basis to those who do not hold allocations.

From 1st February 2020 until the last day of the safeguard measures on 24th October 2021, the TRQs will be administered in three "quota periods" as follows:

- **Quota Period 1** will run from 1st February 2020 until 12th May 2020.
    - During this period, the total TRQ quantities available will be:
        - 27,595,333 kg for imports of heavy steel plate, and
        - 772,333 kg for imports of stainless steel wire.
    - Import surtax will apply to all non-quota imports of the covered products (i.e., all shipments for which the importer does not have a valid import permit) in the following amounts:
        - 20 percent for heavy steel plate, and
        - 25 percent for stainless steel wire.
    - Applicants must submit a completed **Application Form 3145** by email to steel-acier@international.gc.ca. Applications for quota allocation will be accepted no later than 22nd January 2020.
- **Quota Period 2** will run from 13th May 2020 through 12th May 2021.
    - During this period, the total TRQ quantities available will be:
        - 110,000,000 kg of heavy steel plate, and
        - 3,080,000 kg of stainless steel wire.
    - Import surtax will apply to all non-quota imports of the covered products (i.e., all shipments for which the importer does not have a valid import permit) in the amount of 15 percent for both heavy steel plate and stainless steel wire.
    - Applications for quota allocation will be accepted no later than 29th April 2020.
- **Quota Period 3** will run from 13th May 2021 until 24th October 2021.
    - During this period, the total TRQ quantities available will be:
        - 54,699,000 kg of heavy steel plate, and
        - 1,532,000 kg of stainless steel wire.
    - Import surtax will apply to all non-quota imports of the covered products (i.e., all shipments for which the importer does not have a valid import permit) in the following amounts:
        - 10 percent for heavy steel plate, and

- 5 percent for stainless steel wire.

- Applications for quota allocation will be accepted no later than 29th April 2021.

The Notice provides that, going forward, Global Affairs Canada will publish a public list of the names of allocation holders on its website (without disclosing their quota allocation quantities or their utilization rates).

For more information about the administration of these steel safeguard TRQs, please see the new **Notice to Importers (Serial No. 983)** published by Global Affairs Canada and **Customs Notice 19-08** published by the Canada Border Services Agency.

Tereposky & DeRose regularly provides advice on Canadian trade matters, including safeguard measures. Should you have any questions regarding these matters or any other trade-related issues, we are at your disposal.

Daniel Hohnstein
613.237.9005
dhohnstein@tradeisds.com

Greg Tereposky
613.237.1210
gtereposky@tradeisds.com

Vincent DeRose
613.237.8862
vderose@tradeisds.com

New Anti-dumping Investigation

5. WTO PANEL RULES FOR FIRST TIME ON THE MEANING OF "PARTICULAR MARKET SITUATION" IN ANTI-DUMPING INVESTIGATIONS

On 4 December 2019, the WTO dispute settlement Panel in *Australia – Anti-Dumping Measures on A4 Copy Paper* (DS529) released its report. This dispute concerned Australia's measures imposing anti-dumping duties on certain exporters of A4 copy paper from Indonesia. The central focus of the Panel was the meaning and application of the "particular market situation" provision in the WTO Anti-Dumping Agreement.

The meaning of this provision is important to the treatment of government-distorted costs in anti-dumping investigations. Can the effects of such distortions be offset by anti-dumping duties? Canada recently implemented new anti-dumping rules that target "particular market situation" input distortions (see Canada Implements New Anti-Dumping Rules Targeting Related-Company Input Dumping and "Particular Market Situation" Input Distortions").

The Panel found that a situation arising from government action in whole or in part is not necessarily disqualified from constituting the "particular market situation". The phrase has a potentially broad meaning that requires a fact-specific analysis that must be conducted on a case-by-case basis. The Panel explained that where a "particular market situation" is found to exist, the investigating authority must examine whether a "proper comparison" of the

domestic and the export price is permitted or not, which calls for an assessment of the relative effect of the "particular market situation" on domestic and export prices. This requires a qualitative comparison of the domestic and export prices because a purely numerical comparison between the two prices may not reveal anything about whether the domestic price can be properly compared with the export price. The qualitative assessment should focus on how the "particular market situation" affects that comparison, which can only be ascertained through an examination of all relevant factual circumstances.

The Panel's report provides valuable guidance on the meaning and application of the "particular market situation" provision. However, it was not necessary for the Panel to comprehensively address all elements of the provision. It left some questions unanswered, including whether the distortion created by the "particular market situation" can be fully offset in the cost calculation when the "particular market situation" prevents a proper comparison between domestic and export prices.

Tereposky & DeRose has extensive experience in the interpretation and application of the WTO Anti-Dumping Agreement including the "particular market situation" provision. Should you have any questions regarding this Panel Report, we are at your disposal.

Greg Tereposky
613.237.1210
gtereposky@tradeisds.com

Daniel Hohnstein
613.237.9005
dhohnstein@tradeisds.com