

SEPTEMBER-IN-REVIEW

International Trade

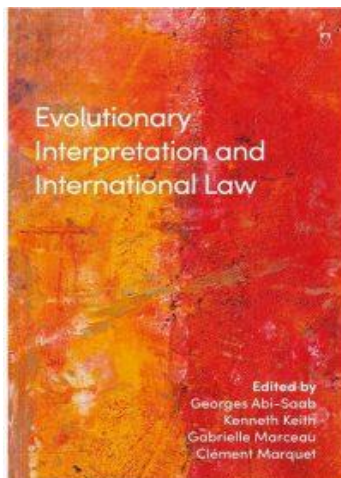
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International Trade

1. MODERNIZED CANADA-ISRAEL FREE TRADE AGREEMENT (CIFTA) ENTERS INTO FORCE

The modernized [Canada-Israel Free Trade Agreement \(CIFTA\)](#) entered into force today (1st September 2019). Compared to the [original text of the CIFTA](#), which entered into force in 1997, the modernized CIFTA updates the provisions relating to trade in goods (including the rules of origin) and also adds new chapters focusing on trade facilitation, technical barriers to trade, sanitary and phytosanitary measures, electronic commerce, intellectual property, environmental protection, labour rights, gender discrimination, small and medium-sized enterprises, and dispute settlement.

The updated text brings the CIFTA's substantive provisions into alignment with those in Canada's other modern trade agreements, such as the Canada-EU *Comprehensive Economic and Trade Agreement* (CETA) and the *Comprehensive and Progressive Agreement on Trans-Pacific Partnership* (CPTPP), further liberalizing trade between Canada and Israel, while advancing Canada's progressive international agenda on environmental, labour, and gender equality issues.

A number of additions to the CIFTA highlight the increasingly important role that regional free trade agreements may play in regulating international trade between WTO members. For example, where a matter arises under both the CIFTA and the WTO Agreements, a complaining Party has the discretion to initiate the new bilateral dispute settlement process set forth in Chapter 19 of the CIFTA as an alternative to – and to the exclusion of – the WTO dispute settlement process.

Notably, where Canada and Israel each have free trade agreements with a “non-Party” third country, a straightforward and highly liberal cumulation provision allows them to treat the non-Party's territory as part of the CIFTA free trade area when applying the rules of origin. While Canada and Israel must agree on the “applicable conditions” before this provision is given effect, there is no requirement for their respective free trade agreements with the third country to include equivalent cumulation provisions. This flexibility would allow, for example, Canada and Israel to agree between themselves to treat U.S.-origin goods and materials as “originating” for the purposes of the CIFTA rules of origin, notwithstanding the absence of an equivalent provision in the NAFTA or the CUSMA/USMCA/T-MEC.

Tereposky & DeRose regularly provides advice on regional trade agreements. Should you have any questions regarding this matter, we are at your disposal.

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2. CANADA IMPLEMENTS NEW ANTI-DUMPING RULES TARGETING RELATED-COMPANY INPUT DUMPING AND “PARTICULAR MARKET SITUATION” INPUT DISTORTIONS

On 4th September 2019, amendments to Canada’s *Special Import Measures Regulations* (SIMR) were published in the [Canada Gazette](#). The SIMR implements Canada’s anti-dumping and countervailing (i.e., trade remedy) regime. The amendments address concerns raised by the Canadian steel industry regarding the effectiveness of the trade remedy regime in addressing related company input dumping and input cost distortions.

The changes modify how the Canada Border Services Agency (CBSA) may calculate the cost of production for the purpose of determining a constructed normal value in anti-dumping investigations. These changes have been made to address situations where (i) production inputs (i.e., materials used in the production of the subject goods) are acquired from associated parties at prices below cost or below a representative benchmark, and (ii) to provide further scope to address cost distortions created by a “particular market situation” in the exporting country (e.g., where government intervention results in price distortions or when factors such as significant macroeconomic volatility affect the prices and input costs in the market). In such cases, the CBSA may calculate an alternative price for the goods through a constructed cost methodology, where the price of the goods is determined as the cost of production in the country of origin, plus a reasonable amount for administrative, selling and general costs, as well as profits. The amendments to the SIMR provide a methodology for the CBSA to determine an appropriate amount for the cost of production in relation to two categories of input costs.

The first category targets “input dumping” between related parties. Where inputs are acquired from an associated person, it may no longer be sufficient to demonstrate that the cost is based on an arms-length price (i.e., a price between unrelated parties). Instead, if an input used in the production of the subject goods is acquired by the exporter or producer from an associated person and is a significant factor in the production of the goods, the cost of that input in the country of export is considered to be the greater of the following amounts:

- (a) the price paid in respect of that input by the exporter or producer to the associated person;
- (b) the cost incurred by the associated person in the production of that input, including the administrative, selling and all other costs with respect to that input; and
- (c) the price in the country of export of the same or substantially the same inputs, if sufficient information is available to enable the price to be determined on the basis of
 - (i) the selling prices of those inputs in the country of export, in the same or substantially the same quantities, between parties who are not associated persons, or
 - (ii) the published prices of those inputs in the country of export.

Items (a) and (c) (i) reflect a traditional approach to determine an arms-length price. Item (b) will result in higher dumping margins in certain situations, such as where the price of the input is reduced below its full cost because of market forces in the exporting country. Whether item (c)(ii) affects the margin of dumping calculation compared to a traditionally-determined arms-length price will depend on how accurately the published prices of an input reflect actual arms-length prices.

The second category of amendments targets input cost distortions. The common example is where a government distorts the price of inputs by implementing export restrictions or taxes on inputs that have the effect of lowering their price in the national market below freely-traded world market prices.

Specifically, the amendments clarify how the CBSA will implement the “particular market situation” provision in Article 2.2 of the WTO Anti-Dumping Agreement. That provision permits anti-dumping authorities to use one of two alternative methods to determine normal value in the anti-dumping calculation where domestic selling prices in the exporter’s market are affected by a “particular market situation” such that they do not “permit a proper comparison” with the export price (in which the difference between the export price and the normal value provides the margin of dumping). The Anti-Dumping Agreement neither elaborates on the meaning of the term “particular market situation” nor provides guidance on how this provision should be implemented.

The SIMR amendments provide that “if a particular market situation exists which does not permit a proper comparison of the sale of like goods with the sale of the goods to the importer in Canada, such that the acquisition cost of an input used in the production of the goods does not reasonably reflect the actual cost of that input, the cost of that input in the country of export shall be considered to be the first of the following amounts that reasonably reflects the actual cost of the input so as to permit a proper comparison:

- (a) the price of the same or substantially the same inputs that are produced in the country of export and sold to the exporter or to other producers in the country of export;
- (b) the price of the same or substantially the same inputs that are produced in the country of export and sold from the country of export to a third country;
- (c) the price of the same or substantially the same inputs determined on the basis of the published prices of those inputs in the country of export;
- (d) the price of the same or substantially the same inputs that are produced in a third country and sold to the exporter or to other producers in the country of export, adjusted to reflect the differences relating to price comparability between the third country and the country of export; or
- (e) the price of the same or substantially the same inputs determined on the basis of the published prices outside the country of export, adjusted to reflect the differences relating to price comparability with the country of export.”

The meaning of the term “actual cost” is important. The use of the phrase “does not reasonably reflect the actual cost of that input” in conjunction with the phrase “the first of the following amounts that reasonably reflects the actual cost of the input” indicates that “actual cost” means the cost that would exist in the absence of the distortion that creates the “particular market situation ... which does not permit a proper comparison”. Using the common example of export restrictions or taxes on inputs, this would mean that the price depressing effect of such actions would have to be removed to determine to the “actual cost”.

In this light, items (b), (d) and (e) are significant. Where a “particular market situation” exists in the exporting country, all three of these items allow the use of prices in markets outside the exporting country, where the “particular market situation” and its effects are absent.

In addition, items (d) and (e) are qualified with the language “adjusted to reflect the differences relating to price comparability with the country of export”. This language mirrors the reasoning of the WTO Appellate Body in [EU – Biodiesel \(Argentina\) \(DS473\)](#). In that dispute, the Appellate Body determined that when an investigating authority uses out-of-country information (e.g., international prices) to calculate the cost production, such information must be “adapted” to represent the cost of production in the exporting country. The Appellate Body rejected the use of out-of-country prices because they were specifically used to remove the distorting effect of export taxes in the exporting country, and the removal of the distorting effect meant that the prices did not represent the cost of production in the exporting country. While that reasoning may seem at odds with the use of the term “actual cost” in the SIMR amendments, it should be noted that the *EU – Biodiesel* decision did not address the interpretation and application of the “particular market situation” provision in Article 2.2. Whether or not that provision will permit the removal of such distortions is the subject of another WTO dispute, [Australia – Anti-Dumping Measures on A4 Copy Paper \(DS529\)](#). The panel in that dispute is expected to issue its decision at the end of this year.

Tereposky & DeRose regularly provides advice on Canadian trade remedy matters, including anti-dumping and countervailing duty investigations and safeguard actions. Should you have any questions regarding these amendments, we are at your disposal.

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3. NAFTA CHAPTER 19 PANEL REMANDS ITC DETERMINATION AGAINST IMPORTS OF CANADIAN SOFTWOOD LUMBER

On 4 September 2019, a NAFTA binational panel established under Chapter 19 of the NAFTA issued a **decision** remanding the injury determination of the U.S. International Trade Commission (ITC) in the *Softwood Lumber from Canada* anti-dumping and countervailing duty investigation. This is the ninth binational panel decision in the long-running *Softwood Lumber* dispute, with seven decisions previously being issued under the NAFTA and two decisions under the precursor to the NAFTA, the *Canada-US Free Trade Agreement* (CUSFTA). There was also one Extraordinary Challenge Committee proceeding under Chapter 19 of the CUSFTA, which is a special procedure that was invoked by the United States to challenge the decision of a *Softwood Lumber* binational panel.

The binational panel process is unique to North America. In contrast to the state-to-state dispute settlement provisions in other trade agreements that assess compliance with the international rights and obligations set out in those agreements, this process replaces the domestic judicial review procedures in Canada, Mexico and the United States with binational panels for matters relating to anti-dumping and countervailing duty determinations. Rather than assessing compliance with the international rights and obligations under the NAFTA, a binational panel assesses whether determinations are “in accordance with the anti-dumping or countervailing duty law of the importing Party” – in this instance the law of the United States.

Five panelists make up a binational panel. They are normally chosen from rosters of qualified individuals that are created by each of the NAFTA countries. In this instance, the panelists selected were three Canadians and two Americans, with an American Chairing the panel. The panel’s decision was unanimous.

The panel assessed the “injury” determination of the ITC, the two major components of which are (i) the adverse impact on the U.S. domestic softwood industry, and (ii) the existence of a causal linkage between the dumped and subsidized imports and the adverse impact. The panel remanded back to the ITC for its reconsideration the following 12 elements of its determination, directing the ITC to:

- reconsider the record evidence in relation to the business cycle(s) distinctive to the U.S. lumber industry, and to apply its findings in its analysis of volume, price effects, impact, and causation;
- provide a reasoned determination on whether or not to reduce the weight accorded to interim 2017 data;
- clarify whether or not it is also reducing the weight accorded to third- and fourth-quarter 2017 data;
- if, upon reconsideration, the ITC decides to reduce the weight given to post-petition data, clarify what weight, if any, it is giving to post-petition data and the reasons for this determination;

- reconsider its calculation of substitution elasticity, explaining how it reached its conclusion and demonstrating how that conclusion was applied in the Commission’s analysis of volume, price effects, impact, and causation;
- demonstrate how, and to what extent, the limitations to substitutability implied in its conclusion that the goods were “at least moderately substitutable” factored into the Commission’s analysis of volume, price effects, impact, and causation;
- consider all record evidence to demonstrate how, and to what extent, the limitations to substitutability implied in its conclusion that the goods were “at least moderately substitutable” factored into its conclusion that subject imports experienced significant gains in market share directly at the expense of the domestic industry;
- reconsider its volume analysis as the ITC determines appropriate;
- consider whether to take the more recent Forest Economic Advisors (“FEA”) data into account in its domestic capacity analysis, explain its decision, and, if it decides to take the updated FEA data into account, reconsider its price effects analysis as it determines is appropriate;
- reconsider its conclusion that the prices of different species closely track each other to take into consideration that price movements of one species “affect” prices of other species, the existence of a “great difference in price movement” of one species compared to another, and that prices for different species “generally track” each other, as well as any other record evidence, and to determine what effect such reconsideration has on its price suppression analysis;
- reconsider its cost of goods sold and price trends analysis to take into account the Commission’s finding that subject imports and domestic products are at least moderately substitutable, and determine what effect such reconsideration has on its finding that subject imports prevented price increases which otherwise would have occurred to a significant degree; and
- reconsider the relevant record evidence and its conclusion that purchasers confirmed purchasing subject imports rather than domestic product solely due to their lower prices, and to determine what effect such reconsideration has on its price suppression analysis.

The panel found that the ITC’s findings of adverse impact and causation were lawful and supported by substantial evidence in light of its determinations regarding the above remanded elements. However, the panel further directed that if the ITC reaches a different finding or conclusion on a particular issue in any of the foregoing remands, then it must determine and explain what effect such reconsideration has on its adverse impact and causation analyses.

The ITC has 90 days to submit a Redetermination on Remand that addresses the above-referenced issues. The panel can then review the revised determination and either affirm it or issue a further remand on some or all of the elements of the revised determination. There were multiple remands in the two previous binational panel proceedings on ITC injury

determinations in *Softwood Lumber* (three remands in the 1993-1994 review; and three remands in the 2003-2004 review). Thus, it is possible that there will be multiple remands in this proceeding. If so, this is just the first step in the process, and the final outcome has yet to be determined.

Tereposky & DeRose regularly provides advice on NAFTA matters and our lawyers are experienced in binational panel reviews in Canada, Mexico and the United States. Should you have any questions regarding binational panel reviews, we are at your disposal.

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4. WTO APPELLATE BODY ISSUES REPORT IN THE KOREA-JAPAN DISPUTE CONCERNING ANTI-DUMPING DUTIES IMPOSED BY THE GOVERNMENT OF KOREA ON CERTAIN PNEUMATIC VALVES FROM JAPAN

On 10 September 2019, the Appellate Body of the World Trade Organization (**WTO**) Dispute Settlement Body (**DSB**) issued its [report](#) in *Korea – Anti-Dumping Duties on Pneumatic Valves from Japan* (DS504). The underlying dispute concerned the definitive anti-dumping duties imposed by Korea on imports of pneumatic valves originating from Japan following the investigation conducted by the Korea Trade Commission (**KTC**) and the KTC’s Office of Trade Investigation (**OTI**). The Panel Report in this dispute was issued on 12 April 2018. In this appeal, both Japan and the Republic of Korea (Korea) appealed certain issues of law and legal interpretations developed in the Panel Report.

Before the Panel, Korea had challenged the sufficiency of Japan’s request for the establishment of a panel. The Panel had assessed each of Japan’s claims to determine whether each claim fell within its terms of reference under the legal standard outlined in Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (**DSU**). For each claim that the Panel found to be within its terms of reference, it then proceeded to examine the merits pursuant to the relevant provisions of the *Agreement on Implementation of Article VI of the GATT 1994* (**Anti-Dumping Agreement**). On appeal, the Appellate Body applied the same approach to the appeal claims of Japan and Korea. However, the Appellate Body found that it was unable to complete the analysis on a number of points due to the absence of relevant factual findings by the Panel or undisputed facts on the Panel record.

The Appellate Body found that the Panel had erred in finding that certain claims in Japan’s panel request under Articles 3.1, 3.2, 3.4, 4.1, and 6.9 of the Anti-Dumping Agreement were not within its terms of reference, reversed these findings, and instead found that the claims were within the Panel’s terms of reference. At the same time, the Appellate Body also found that the Panel had not erred in finding that certain other claims under Articles 3.1, 3.5, 6.5, and 6.5.1 of the Anti-Dumping Agreement were within its terms of reference.

Having reversed the Panel’s findings on the points referenced above, the Appellate Body then proceeded to complete the analysis where sufficient facts on the Panel record permitted it to do so. It found that the Korean investigating authorities had acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement for two reasons: (i) they had improperly found price suppressing and depressing effects of dumped imports based on average price comparisons without ensuring the comparability of the prices being compared; and (ii) they had failed to provide an explanation and analysis of how and to what extent the prices of the domestic like product were affected in light of the consistent overselling by dumped imports.

However, the Appellate Body found that it was unable to complete the legal analysis on a number of issues, including:

- the inconsistency of the Korean investigating authorities’ definition of the “domestic industry” with Articles 3.1 and 4.1 of the Anti-Dumping Agreement;
- whether the Korean anti-dumping authorities acted inconsistently with Articles 3.1 and 3.2 in their consideration of the volume of dumped imports from Japan;
- whether the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.2 on the basis that:
 - the KTC failed to address the counterfactual question of how prices might have been different in the absence of dumping;
 - the “reasonable sales price” analysis was flawed and insufficient because the KTC had failed to examine market interactions between the subject imports and domestic like products; and
 - the KTC never considered whether the alleged price suppression and price depression were “significant”; and
- whether the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement on the basis of Japan’s argument that the KTC failed to adequately explain how imports had negatively impacted the domestic like products as a whole in light of positive trends experienced by the domestic industry.

In addition, Japan appealed the Panel’s conclusion that Japan had failed to demonstrate that the KTC’s evaluation of the magnitude of the margin of dumping was inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement. Japan argued that the Panel’s finding had no factual support and was contradicted by the fact that the prices of the dumped imports were consistently higher than domestic like product prices. According to Japan, the investigating authority should pay particular attention to the “impact of the margin of dumping” when examining the magnitude of the margin of dumping under Article 3.4, including through a counterfactual analysis in which the margin of dumping is removed from prices. The Appellate Body rejected Japan’s arguments and upheld the Panel’s finding. In doing so, it considered that Articles 3.1 and 3.4 require an investigating authority to evaluate the magnitude of the margin of dumping as a substantive matter, and to assess the relevance and the weight to be attributed to this factor in the overall assessment of injury under Article 3.4. The Appellate Body considered that a counterfactual analysis may be useful in certain circumstances, but Japan had not established that the overselling in this case made a counterfactual analysis obligatory under Article 3.4.

The appeal also dealt with two of the three claims that Japan had raised before the Panel concerning the Korean authorities’ causation analysis (i.e., whether the dumped imports from Japan had caused injury to Korea’s domestic industry). Japan had argued on a number of grounds that this part of the Korean authorities’ investigation was inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

First, the Appellate Body reversed the Panel’s finding that the Korean investigating authorities had acted inconsistently with Articles 3.1 and 3.5 in their causation analysis as a result of flaws in their evaluation of the effect of the dumped imports on prices in the domestic market. The Appellate Body found that the Panel had erred in its application of Article 3.5 by incorporating requirements that are set out in the first sentence of Article 3.2 and Article 4 rather than properly applying the requirements set out in Article 3.5.

Second, the Appellate Body upheld the Panel’s finding that Japan had failed to demonstrate that the Korean investigating authorities’ conclusion that the dumped imports, through the effects of dumping, were causing injury to the domestic industry was inconsistent with Articles 3.1 and 3.5. Japan argued that the KTC had ignored the lack of correlation between the domestic industry’s profit, the dumped import prices, and the volume and market share of the dumped imports. The Appellate Body disagreed and saw no error in the Panel’s finding that Japan had not established an “insufficient correlation” that would preclude the Korean authorities’ finding of a causal relationship.

Finally, the Appellate Body upheld the Panel’s finding that the Korean investigating authorities had acted inconsistently with Article 6.5 of the Anti-Dumping Agreement in their treatment of information provided by the Korean domestic industry as confidential without requiring that good cause be shown. It also upheld the Panel’s finding that the Korean investigating authorities had acted inconsistently with Article 6.5.1 by failing to require that the submitting parties provide a sufficient non-confidential summary of the information for which confidential treatment was sought.

Some of the points of interest in the Panel’s reasoning include the following:

- Whether a panel request complies with the requirements of Article 6.2 of the DSU must be determined on the face of the panel request, on a case-by-case basis. Defects in the panel request cannot be cured in the subsequent submissions of the parties during the panel proceedings. (However, in considering the sufficiency of a panel request, submissions and statements made during the course of the panel proceedings — in particular, in the first written submission of the complaining party — may be consulted in order to confirm the meaning of the words used in the panel request.)
- Articles 3.1 and 3.4 of the Anti-Dumping Agreement do not require any one of the listed factors, such as the magnitude of the margin of dumping, to be evaluated in a particular manner or given a particular relevance or weight, in examining the impact of the dumped imports on the domestic industry.
- The phrase “through the effects of dumping, as set forth in paragraphs 2 and 4” in Article 3.5 does not require a panel to duplicate the analysis under Articles 3.2 and 3.4. The use of the phrase “as set forth in paragraphs 2 and 4” in Article 3.5 makes it clear that proper assessments under Articles 3.2 and 3.4 are necessary building blocks, which contribute to, rather than replicate, the overall determination of injury and causation that is required under Article 3.5. Article 3.5 establishes a standard that is distinct from Articles 3.2 and 3.4, inasmuch as Article 3.5 is concerned with the establishment of the causal link between dumped imports and injury. It covers a broad basket of evidence that

encompasses, and is not limited to, the evidence relating to the inquiries under Articles 3.2 and 3.4, suggesting that it has a broader scope of examination than Articles 3.2 and 3.4.

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

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5. FEDERAL COURT OF APPEAL UPHOLDS CANADIAN INTERNATIONAL TRADE TRIBUNAL'S FINDING THAT DRY WHEAT PASTA FROM TURKEY HAS CAUSED MATERIAL INJURY TO CANADIAN PASTA PRODUCERS

Ruling from the Bench earlier today (September 11, 2019), the Federal Court of Appeal dismissed the application for judicial review of the Canadian International Trade Tribunal's finding concerning dumped and subsidized imports of dry wheat pasta from Turkey (see [Inquiry No. NQ-2018-001](#)).

The application (file no. A-261-18) was brought before the Court by exporters and importers of dry wheat pasta from Turkey, including AGT Food and Ingredients, Durum Gida Sanayi Ve Ticaret A.S., and the Mediterranean Food Exporters Association (the "Applicants"). They challenged the Tribunal's finding that unfairly priced imports from Turkey have caused material injury to Canadian producers of dry wheat pasta. Their primary argument was that the Tribunal had improperly focused its analysis on the effects of the dumped and subsidized goods imported from Turkey and not on the effects of the dumping and the subsidizing of the goods (i.e., the amount of the dumping and subsidization) as a separate matter.

Successfully defending the Tribunal's decision was the Canadian Pasta Manufacturers Association (CPMA), whose members include Primo Foods Inc., Italpasta Limited, and Grisspasta Products Ltd.

In brief reasons that were read by Justice Webb from the Bench, the Court unanimously rejected the Applicants' arguments and dismissed the case. The Court found that the standard of review was reasonableness, and deference to the Tribunal's reasoning was warranted on account of its specialized expertise in the subject matter. Considering both the relevant provisions of Canadian legislation and Canada's obligations under World Trade Organization Agreements, the Court determined that an analysis of the effects of the "dumped and subsidized goods" was equivalent to an analysis of the effect of the "dumping and subsidizing of the goods" for the purposes of determining whether unfairly priced imports have caused injury to Canada's domestic industry. The Court did not agree with the distinction that the Applicants attempted to draw and saw no reason to disturb either the Tribunal's reasoning or its finding.

As a result, the Tribunal's finding that dumped and subsidized imports of dry wheat pasta from Turkey have caused material injury to Canadian producers continues to stand, and the anti-dumping and countervailing measures continue to apply (see [measures in force](#) concerning imports of dry wheat pasta from Turkey).

Tereposky & DeRose regularly provides advice on Canadian trade remedy matters, including anti-dumping and countervailing duty investigations and safeguard actions. Should you have any questions regarding these amendments, we are at your disposal.

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Investor-State Arbitration

6. SECURITY FOR COSTS IN INVESTMENT TREATY ARBITRATION: MORE CERTAINTY EXPECTED UNDER THE PROPOSED ICSID RULES AMENDMENTS

On 16 August 2019, the International Centre for Settlement of Investment Disputes (the “ICSID”) Secretariat published its third working paper on proposals for amendment of the ICSID Rules (Working Paper #3).

In addition to many other changes, the proposed amended Rules provide, for the first time, guidance and clarity to tribunals on security for costs orders with the addition of Rule 52.

In theory, it is broadly accepted that tribunals’ jurisdiction to order security for costs is implied under the applicable arbitral rules, including under the ICSID, UNCITRAL and International Chamber of Commerce (“ICC”) Rules. In practice, however, tribunals have been reluctant to order security for costs, applying a high threshold to the circumstances that would warrant such an order. Some tribunals have even gone so far as to hold that security for costs cannot be ordered as a provisional measure in investment treaty arbitration because there is no *right* to cost reimbursement at this stage of the proceedings.

Proposed Rule 52 now expressly allows ICSID tribunals to order security for costs and significantly lowers the threshold by providing a non-exhaustive list of relevant circumstances that tribunals must consider in deciding whether it is appropriate to make such an order. Relevant circumstances include: (1) the party’s ability to comply with an adverse decision on costs; (2) the party’s willingness to comply with an adverse decision on costs; (3) the effect that providing security for costs may have on that party’s ability to pursue its claim or counterclaim; and (4) the conduct of the parties.

In this new version of the proposed amendments, the ICSID considered comments received from States and public commentators with respect to the importance of third-party funding in determining whether it is appropriate to order a party asserting a claim or counterclaim to provide security for costs.

While the ICSID did not include third-party funding as an independent relevant circumstance justifying an order for security for costs, it added an express reference to third-party funding, stating that it can serve as “evidence relating to a circumstance”.

The new version of proposed Rule 52 on security for costs reads as follows:

Rule 52

Security for Costs

- (1) Upon request of a party, the Tribunal may order any party asserting a claim or counterclaim to provide security for costs.
- (2) The following procedure shall apply:
 - (a) the request shall specify the circumstances that require security for costs;

- (b) the Tribunal shall fix time limits for written and oral submissions on the request, as required;
- (c) if a party requests security for costs before the constitution of the Tribunal, the Secretary-General shall fix time limits for written submissions on the request so that the Tribunal may consider the request promptly upon its constitution; and
- (d) the Tribunal shall issue its decision on the request within 30 days after the latest of:
 - (i) the constitution of the Tribunal;
 - (ii) the last written submission on the request; or
 - (iii) the last oral submission on the request.

(3) In determining whether to order a party to provide security for costs, the Tribunal shall consider all relevant circumstances, including:

- (a) that party's ability to comply with an adverse decision on costs;
- (b) that party's willingness to comply with an adverse decision on costs;
- (c) the effect that providing security for costs may have on that party's ability to pursue its claim or counterclaim; and
- (d) the conduct of the parties.

(4) The Tribunal may consider third-party funding as evidence relating to a circumstance in paragraph (3), but the existence of third-party funding by itself is not sufficient to justify an order for security for costs.

(5) The Tribunal shall specify any relevant terms in an order to provide security for costs and shall fix a time limit for compliance with the order.

(6) If a party fails to comply with an order to provide security for costs, the Tribunal may suspend the proceeding. If the proceeding is suspended for more than 90 days, the Tribunal may, after consulting with the parties, order the discontinuance of the proceeding.

(7) A party shall promptly disclose any material change in the circumstances upon which the Tribunal ordered security for costs.

(8) The Tribunal may at any time modify or revoke its order on security for costs, on its own initiative or upon a party's request.

While these proposed amendments provide more guidance for proceedings under the ICSID Rules, there remains inconsistencies between applicable arbitral rules and uncertainty as to the manner in which these rules will be interpreted and applied. To address this issue, States should consider incorporating provisions on security for costs into their investment treaties. For example, the investment chapter of the EU-Viet Nam FTA includes a provision that a tribunal may order an investor to post security for costs "if there is reasonable grounds to believe that the claimant risks not being able to honour a possible decision on costs issued against the claimant".

Security for costs orders assist to ensure that the public funds that States spend to defend unmeritorious claims will be covered, filter out claims that are speculative or marginal, and protect against investors declaring bankruptcy or absconding from the jurisdiction before satisfying an order for costs made against them.

The ICSID will hold the next in-person consultation with Member States on Working Paper # 3 from 11 -15 November 2019 before the amended rules are placed before the Administrative Council for a vote.



Tereposky & DeRose LLP regularly provides advice and counsel on investment arbitration disputes. Should you have any questions regarding investor-state dispute settlement (ISDS), we are at your disposal.

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New Anti-Dumping Investigation

7. CBSA INITIATES ANTI-DUMPING INVESTIGATION CONCERNING OIL PUMP SUCKER RODS FROM ARGENTINA, BRAZIL AND MEXICO

On 30 September 2019, the Canada Border Services Agency (CBSA) published a Notice of Initiation of Investigation ([SR2-2019-IN](#)) concerning allegations that dumped imports of certain sucker rods designed for oilfield pumps (usually classified under tariff classification no. 8413.91.00.10) from Argentina, Brazil and Mexico are causing or threatening to cause material injury to the domestic industry.

This investigation was triggered by a formal complaint filed by Apergy Canada ULC – Alberta Oil Tool Division (**Apergy**). In December 2018, Apergy was successful in litigating a similar complaint against certain sucker rods from China (see [Inquiry No. NQ-2018-001](#)).

It is expected that the CBSA will publish its Statement of Reasons for its decision to initiate the investigation by Tuesday 15 October 2019.

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.

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