

RM6183 Trade Law Panel

Lot 1 – International Trade and Disputes PROSPECTUS FOR TEREPOSKY & DEROSE LLP

Version 1.0

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Introduction

Tereposky & DeRose LLP is a globally recognized boutique law firm that is dedicated to international trade and investment law. Our lawyers have decades of hands-on experience advising on trade and investment issues and acting as counsel, advocates, and advisors to States in disputes under the World Trade Organization (WTO), regional trade agreements (RTAs), and investment treaties.

WTO Dispute Settlement

Our lawyers have appeared as counsel and advocates for WTO Members in 27 WTO dispute settlement proceedings, including on behalf of complainants, respondents, and third participants. Our experience covers all stages of WTO dispute settlement procedure, including pre-initiation preparations, consultations, panels, appeals, compliance proceedings, arbitrations (to determine the reasonable period of time for compliance implementation or the level of authorized countermeasures), and the implementation of adopted Dispute Settlement Body recommendations and rulings. We tailor our services to our clients' needs. In a further 14 WTO proceedings, we have undertaken narrower dispute settlement roles such as developing strategies, preparing evidence and submissions, serving as second readers on submissions and statements, and acting as liaison counsel on behalf of industry stakeholders. Our experience goes beyond active involvement in dispute settlement proceedings. We have advised on many other WTO disputes and proceedings.

Dispute Settlement under Regional Trade Agreements and Investment Treaties

Our lawyers have appeared as counsel in disputes under RTAs and have represented the United Mexican States in its defence of over 30 investor-state arbitrations. Our experience covers all stages of RTA and investment proceedings. We are also experienced with strategic, procedural, and legal issues that arise at the intersection between WTO, RTA, and investment treaty disputes. We have acted as counsel in disputes that have addressed WTO-RTA choice-of-forum issues and in a dispute involving parallel WTO and investment treaty proceedings.

Practical and Forward-Looking Advice for Governments

We understand the importance of government policy in shaping claims as well as in defending domestic measures in international dispute settlement proceedings. Winning a case will not be sufficient if the outcome inadvertently compromises long-term policy objectives and work that is being done contemporaneously in other contexts. Rather, a successful outcome must be achieved in a manner that is consistent with these interests. Similarly, a defence that is likely to lead to a loss must be carefully managed so as to safeguard policy objectives and stakeholder interests to the greatest degree possible.

Complementary Experience in Relevant Subject Matters

Our lawyers' international experience is complemented by their experience in the interpretation and application of Canadian domestic trade laws in a variety of factual circumstances, including customs, trade remedies, procurement, technical standards, sanitary and phytosanitary (SPS) measures, and other trade-related matters. They have represented clients on trade matters before the Canada Border Services Agency, Global Affairs Canada, Finance Canada, the Canadian International Trade Tribunal, and Canadian Courts.

1. Mandatory Specialisms

a. Advice and support for international trade disputes, including acting on behalf of government

Acting for States in international trade and investment disputes is the foundation of our firm. In this specialism, our lawyers have decades of hands-on experience. We understand the importance of government policy in shaping claims in offensive disputes and in defending domestic measures in defensive disputes. A successful outcome must be achieved in a manner that is consistent with the UK Government's long-term policy objectives and the work that is being done in other contexts. Potential losses must be carefully managed so as to safeguard policy objectives and stakeholder interests to the greatest degree possible.

WTO Dispute Settlement

We have appeared as counsel and advocates for WTO Members in 27 WTO proceedings, including in both defensive and offensive disputes. Our experience covers all stages of WTO dispute settlement procedure, including: (i) pre-initiation preparations (policy and case analysis, consultation with stakeholders, and dispute strategy development); (ii) consultations with WTO Members; (iii) panels; (iv) appeals; (v) compliance proceedings; (vi) arbitrations (e.g., to determine the reasonable period of time for compliance implementation or the level of authorized countermeasures); and (vii) the implementation of adopted Dispute Settlement Body recommendations and rulings. In an additional 14 WTO disputes, we have undertaken narrower roles (e.g., developing strategies, providing support, preparing evidence and submissions, serving as second reader on submissions and statements, and acting as liaison counsel on behalf of industry stakeholders). We have also advised on numerous other WTO disputes.

Dispute Settlement under Regional Trade Agreements (RTAs) and Investment Treaties

Our team has appeared as counsel in disputes under regional trade agreements (RTAs) and have represented the United Mexican States in its defence of over 30 investor-state arbitrations. Our experience is comprehensive, covering all stages of arbitration proceedings, from notice of intent to arbitrate to challenging awards. We have acted as counsel in disputes that have addressed WTO-RTA choice-of-forum issues and in a dispute involving parallel WTO and investment treaty proceedings.

CASE STUDIES

Offensive Dispute: *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (DS381)*: Our lawyers acted as counsel for Mexico, the Complainant in this dispute. The pre-initiation stage involved extensive intra-governmental stakeholder consultations and the assessment of policy considerations, along with complicated choice-of-forum issues between the WTO and the *North American Free Trade Agreement* (NAFTA). To further case objectives, third party rights were strategically exercised in a separate WTO dispute involving the key WTO provisions (*US - Clove Cigarettes*, DS406). Complex procedural issues were encountered, including procedural sequencing issues.

There were three dispute settlement rounds: the original proceedings (panel and appeal); the first round of compliance proceedings (panel and appeal); and the second round of compliance proceedings (panel and appeal). There was also an arbitration concerning the authorized level of countermeasures.

Our lawyers were fully involved in all aspects of the dispute, including oral advocacy before the panels, the Appellate Body, and arbitrators. The original Appellate Body report in this dispute was the second of a trilogy of Appellate Body reports that established the framework for the interpretation and application of Articles 2.1 and 2.2 of the WTO Agreement on Technical Barriers to Trade (TBT Agreement) concerning discriminatory and trade-restrictive technical regulations.

We were also counsel for Mexico in the other two disputes in this trilogy: *United States – Certain Country of Origin Labelling* (DS384, DS386) (Complainant) and *United States – Measures Affecting the Production and Sale of Clove Cigarettes* (DS406) (Third Party).

Defensive Disputes: Our lawyers were Respondent's counsel in, inter alia, *Mexico – Measures Affecting Telecommunications Services (DS204)*, *Mexico – Tax Measures on Soft Drinks and Other Beverages (DS308)*, and *Australia – Anti-Dumping Measures on A4 Copy Paper (DS529)*. These three disputes illustrate the construction of a defensive case in a manner that safeguards the Respondent's policy and strategic goals. The *Soft Drinks* dispute is unique because it took place in the context of three parallel investor-state arbitrations against Mexico claiming in excess of half a billion US dollars: *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/5), *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2); and *Corn Products International, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/1). Every defensive argument in the WTO dispute was carefully designed to support the defences to the investment claims.

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Dan Hohnstein advises and represents governments, industries, and private enterprises in international trade and investment matters. His expertise covers state-to-state dispute settlement; the negotiation, interpretation, and implementation of international trade agreements; trade remedies (anti-dumping, countervailing, and safeguard measures); and cross-border customs issues. On behalf of the Government of Mexico, he has appeared as counsel and made submissions before WTO panels, arbitrators, and the Appellate Body. In addition, he has advised other State governments in WTO disputes, providing legal analyses and risks assessments, assisting with case development and procedural issues, and drafting submissions.

Mandatory Specialisms (cont.)

b. Advice on all stages of international trade disputes

We have comprehensive experience in advising on all stages of WTO disputes. We have also advised on the less-sophisticated dispute settlement procedures pursuant to the pre-WTO GATT 1947, GATT Code, and regional trade agreements.

Optimally, our legal advice for offensive disputes begins in the early pre-initiation stage, before formal consultations have been sought. During this stage, (i) stakeholders will be consulted by our client, (ii) the relevant facts, laws, and policy implications will be carefully researched, (iii) a formal legal assessment will be completed, and (iv) strategic decisions on the conduct of the dispute will be taken. From this, a request for consultations will be drafted and questions for the responding State prepared. Our recommended best practice is to have a highly advanced draft of the first written submission prepared by the end of consultations and before the request for establishment of a panel is filed. Recognizing that circumstances may not allow for optimal preparation, our objective is to assist in advancing preparations as far as possible prior to the request for establishment of a panel.

In the case of defensive disputes, our legal advice will often not begin until after the request for consultations is filed by the complaining State. We recommend that our State clients establish an “early warning” system so that trade officials are informed of contentious matters that are likely to advance to dispute settlement. This could allow for earlier and more complete preparations.

We have advised and represented WTO Members in relation to the following stages of WTO disputes:

- Pre-initiation
- Request for consultations, third party requests to join consultations, and conducting consultations
- Request for the establishment of a panel
- Panelist selection and composition of the panel
- Panel proceedings
- Notices of appeal and cross-appeal
- Appeal proceedings
- Arbitrations for determining the reasonable period of time for compliance implementation (DSU, Article 21.3(c))
- Arbitrations for determining authorized level of suspension of concessions (DSU, Article 22)
- Sequencing agreements (for compliance proceedings and Article 22 arbitrations)
- Compliance proceedings (DSU, Article 21.5), both at the panel and appeal stages
- Compliance implementation

CASE STUDY

Holistic approach to the stages of a WTO dispute: Our firm takes a holistic approach to our advice on the stages of a WTO dispute. Actions taken in one stage of a WTO dispute can limit (or facilitate) actions taken in another. The claims and arguments of the disputing parties and the reasoning and findings of the panel and the Appellate Body in the original proceedings may limit subsequent claims and grounds for appeal in compliance proceedings. Similarly, claims, arguments, reasoning, and findings in a first round of compliance proceedings may limit claims and appeal grounds in a second round of compliance proceedings. These considerations must be taken into account when structuring claims, arguments and grounds for appeal.

Our lawyers have extensive experience addressing these matters. Examples include our advice in *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (DS381), where there were two rounds of compliance proceedings; and in *United States – Certain Country of Origin Labelling* (DS384, DS386) and *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* (DS344), where there was one round of compliance proceedings. For example, in the compliance proceedings in DS381 and DS386, our team assisted the complainant in overcoming arguments raised by the respondent that certain claims fell outside the panels’ jurisdiction because they involved issues that had been considered by the panel and Appellate Body in the original proceedings. Another example is our team’s experience with the negotiation of “sequencing agreements” to manage procedures for arbitrations and compliance proceedings, which must also be addressed by taking into account multiple stages of a dispute.

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Dan Hohnstein advises and represents governments, industries, and private enterprises in international trade and investment matters. On behalf of the Government of Mexico, he has appeared as counsel and made submissions before WTO panels, arbitrators, and the Appellate Body. In this context, he has advised on all procedural stages of WTO dispute settlement. In addition, he has advised other State governments in WTO disputes, providing legal analyses and risks assessments, assisting with case development, and drafting submissions. Dan's expertise also covers state-to-state dispute settlement under regional trade agreements; the negotiation, interpretation and implementation of international trade agreements; trade remedies (anti-dumping, countervailing, and safeguard measures); and cross-border customs issues.

Mandatory Specialisms (cont.)

c. Prevention of international trade disputes

For decades, our lawyers have advised governments on the consistency of their measures—including laws, regulations, practises, procedures, and policies, whether proposed or already in force—with their rights and obligations under WTO agreements, regional trade agreements (RTAs), and investment treaties. Our experience covers advice on how to design measures in a manner that avoids or minimizes the risk of a challenge or an investment claim. We have advised on both substantive issues and procedural issues, such as notification requirements for technical regulations. We take into account all WTO, RTA and investment treaty provisions applicable to the measure at issue as well as the interplay between these different instruments. We understand how “purposeful ambiguity” in the provisions of a trade agreement often provides options to implementing government authorities, allowing our clients to maximize the benefits of negotiated outcomes in a manner consistent with their policy objectives.

We are experienced in the application of the rules of interpretation in the Vienna Convention on the Law of Treaties, through both our day-to-day practice of international trade law and our roles as editors for TradeLawGuide (the leading WTO law research database, relied upon by the WTO Secretariat) and InvestorStateLawGuide (the leading investment treaty law research database). Finally, our extensive dispute settlement experience brings a practical element to our advice, particularly when risk minimization (not elimination) is the only realistic option.

Our partnerships with key subcontractors in the United Kingdom, including DLA Piper UK LLP and Brodies LLP, provides us with subject matter experts in UK policies, laws, and regulations, complementing our comprehensive experience interpreting and applying the provisions of international trade agreements and investment treaties.

Our experience advising on risk management and prevention of international trade disputes encompasses the following subject matters:

- Accreditation requirements (accounting, engineering)
- Access to electrical grids
- Access to oil and gas pipelines
- Anti-dumping laws, measures and procedures
- Agricultural measures
- Container size requirements
- Customs duties, rules and formalities
- Domestic content requirements
- End-use requirements
- Export restrictions, duties and charges
- Fishery landing and processing requirements
- Government procurement measures
- Import licensing
- Labelling requirements
- Minimum price requirements
- Quota and tariff-rate quota (TRQ) access and administration
- Restrictions on trade
- Rules of origin
- Sanitary and phytosanitary measures
- Safeguards
- Subsidies and countervailing duty measures and procedures
- Taxes
- Technical regulations

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Mandatory Specialisms (cont.)

d. Trade remedies

Tereposky & DeRose LLP offers in-depth expertise on all trade remedy matters, including investigations and other proceedings relating to anti-dumping, countervailing duty, and safeguard measures.

Greg Tereposky's experience dates back to the foundational issues concerning subsidies and trade remedies that arose during the implementation of the Canada-US Free Trade Agreement (CUSFTA) in 1989, including on the Canadian side of the Canada-US Working Group on Subsidies and Trade Remedies.

Greg was also involved in the Uruguay Round trade negotiations that resulted in the conclusion of the WTO Anti-Dumping Agreement and the Agreement on Subsidies and Countervailing Measures (SCM Agreement), where he advised on the definition of a "subsidy" under what became Articles 1 and 2 of the SCM Agreement. In addition, he represented the Canadian industry in the US – Softwood Lumber II dispute (1991-1993). He recently served as a panelist on a WTO anti-dumping panel in the EU – Fatty Alcohols (Indonesia) dispute (DS442).

Greg was part of the team that advised Mexico in the NAFTA negotiations, including on the special procedures governing trade remedy disputes in Chapter 19 of the NAFTA. He also acted as counsel to Mexico on the first Mexico-US Chapter 19 dispute, Flat Coated Steel (MEX-USA-1994-1904-01), which concerned US anti-dumping measures. During this dispute, several fundamental legal issues relating to the interface between common law and civil law systems in the context of international dispute settlement were addressed for the first time.

Building on Greg's expertise, our lawyers have been involved in many different trade remedies issues, including:

- Whether natural resource harvesting/extraction measures are countervailable subsidies;
- Whether export restraints are countervailable subsidies;
- The determination of the amount of a subsidy using an option pricing model (Black & Scholes);
- Countervailing a price support program under Article 1.1(a)(2) of the WTO SCM Agreement;
- Loans and financing subsidies;
- Equity subsidies, including debt-to-equity swaps;
- The interface between duty relief (drawback and deferral) programs and margins of dumping;
- The pass-through of subsidies to downstream manufacturers;
- Government ownership and benchmarks for the calculation of the amount of subsidies;
- The effect of privatization on pre-privatization subsidies;
- Price support subsidies;
- Input cost distortions;
- Non-market economies;
- Particular market situation under Article 2.2 of the WTO Anti-Dumping Agreement;
- Determination of the costs of production in the country of origin for constructed normal value; and
- Zeroing methodologies.

We have addressed these issues under the WTO General Agreement on Tariffs and Trade, 1994, the Anti-Dumping Agreement, the SCM Agreement, the CUSFTA, the North American Free Trade Agreement (NAFTA), and in Canada under the Special Import Measures Act (SIMA). We have advised anti-dumping authorities how to design their measures and take actions in a manner consistent with trade obligations and how to comply with the recommendations and rulings of the WTO Dispute Settlement Body. We are experienced in trade remedy issues from all perspectives, including the investigating authority, the domestic industry, the producers and exporters of the goods under investigation, the importers and end-users, and governments making or defending claims in state-to-state dispute settlement proceedings. We understand the law and the policy of trade remedies.

We have been actively involved in numerous trade remedy cases in Canada and other jurisdictions. WTO, RTA and GATT 1947/GATT Code disputes concerning trade remedy measures in which we were counsel or actively involved include the following:

- Australia – *Anti-Dumping Measures on A4 Copy Paper* (WTO)
- Canada – *Beer* (AD) (CUSFTA)
- Canada – *Gypsum* (AD) (CUSFTA)
- Canada – *Refined Sugar* (AD) (NAFTA)
- Mexico – *High Fructose Corn Syrup* (HFCS) *from the United States* (WTO)
- Mexico – *Cut-to-Length Plate* (AD) (NAFTA)
- Mexico – *Flat Coated Steel* (AD) (NAFTA)
- United States – *Continued Dumping and Subsidy Act* (WTO)
- United States – *Final Anti-Dumping Measures on Stainless Steel from Mexico* (WTO)
- United States – *Investigation of the International Trade Commission in Softwood Lumber from Canada* (WTO)
- United States – *Laws, Regulations and Methodology for Calculating Dumping Margins* (“Zeroing”) (WTO)
- United States – *Measures Relating to Zeroing and Sunset Reviews* (WTO)
- United States – *Measures Treating Export Restraints as Subsidies* (WTO)

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Dan Hohnstein advises and represents governments, industries, and private enterprises in international trade and investment matters. His expertise covers trade remedies (anti-dumping, countervailing, and safeguard measures); state-to-state dispute settlement; the negotiation, interpretation and implementation of international trade agreements; and cross-border customs issues. Dan has appeared as counsel in trade remedies proceedings in Canada and advised on trade remedies proceedings in Costa Rica, Australia, and China. His expertise also covers the principles established under the WTO Anti-Dumping Agreement and SCM Agreement and the jurisprudence that continues to develop their interpretation and application.

Mandatory Specialisms (cont.)

e. International law relating to trade

In addition to our expertise in dispute settlement, Tereposky & DeRose LLP also operates a broader international trade practice that advises governments, industries, and private enterprises on all matters of international law relating to trade. Our experience is primarily focused on advising clients on the interpretation, implementation, and application of provisions in regional trade agreements (RTAs), investment treaties, and the WTO agreements. However, if relevant, we include in our advice an examination of general or customary principles of international law, international conventions, international standards, bilateral or plurilateral agreements on specific subject matters, memoranda of understanding, and similar texts.

We routinely provide advice on provisions in the WTO Agreements, the Canada-EU *Comprehensive Economic and Trade Agreement* (CETA), the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (CPTPP), the new North American *Canada-United States-Mexico Agreement* (USMCA/CUSMA/T-MEC), and many other regional trade agreements. Examples of the subject matter that we are most often asked to examine include:

- Rules of origin, including product-specific rules of origin, and origin procedures;
- Preferential tariff treatment, tariff rate quotas, origin quotas, and similar market access commitments;
- Government procurement of goods and services;
- Requirements relating to technical regulations and SPS measures;
- Prohibitions on discriminatory treatment, as well as the national treatment and most favoured nation (MFN) obligations with respect to trade in goods and services and investment;
- Rights and obligations with respect to direct Investment; and
- Exclusions and reservations provided in the RTA texts.

Our work sometimes requires us to go further than the law of the WTO and RTAs. We are experienced in addressing other sources of international law relevant to trade, such as conventions, treaties, and harmonized standards governing, e.g., export controls on certain goods and technology, environmental protection and sustainability, human rights and labour rights, human health, intellectual property, the production and sale of goods, taxation, transportation, and shipping. Examples of international organizations that we reference include the World Trade Organization (WTO) (in particular, the Harmonized System of Tariff Nomenclature), the Organization for Economic Co-operation and Development (OECD), the United Nations (UN), the International Maritime Organization, and the International Standards Organization (ISO).

CASE STUDIES

Clause-by-Clause Analysis of the Canada-EU Comprehensive Economic and Trade Agreement (CETA):

From 2017 to 2019, Dan Hohnstein supervised a team of lawyers in completing a comprehensive two-year analysis concerning the interpretation, application and implementation of the Canada-EU *Comprehensive Economic and Trade Agreement* (CETA). The outcomes of this project included (i) a clause-by-clause analysis of the implementation of the CETA into Canadian domestic law; (ii) a detailed analysis of market access opportunities for industry stakeholders under the CETA; and (iii) a detailed analysis of ongoing barriers to trade faced by stakeholders under the CETA (including both intentional barriers built into the reservations and exclusions of the CETA text and unintentional barriers that continued notwithstanding the CETA).

Government of Mexico (Secretaría de Economía): Greg Tereposky was part of the legal team advising Mexico on all elements of the negotiations that led to the *North American Free Trade Agreement* (NAFTA), the seminal modern regional trade agreement. Among other things, he advised on the side agreements for environment and labour, which were the first of their kind. Greg and others at Tereposky & DeRose LLP continue to advise Mexico on trade and investment matters.

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Dan Hohnstein advises and represents governments, industries, and private enterprises in international trade and investment matters. His expertise covers all issues relating to the interpretation, implementation, and application of trade rules under regional trade agreements (RTAs), the WTO Agreements (as interpreted and applied in the WTO jurisprudence), and other sources of international law. Dan's expertise also covers state-to-state dispute settlement under regional trade agreements; the negotiation, interpretation and implementation of international trade agreements; trade remedies (anti-dumping, countervailing, and safeguard measures); and cross-border customs issues.

Mandatory Specialisms (cont.)

f. Domestic law of different jurisdictions in the context of international trade and/or disputes

To complement the expertise of Tereposky & DeRose LLP in all matters related to international trade and investment law, we have partnered with **DLA Piper LLP**, the world's largest legal services organisation, with almost 4,000 lawyers working in over 40 countries throughout Europe, Africa, the Middle East, Asia, North America and Australasia. As our key subcontractor, DLA Piper provides comprehensive coverage for advice on the domestic law of different jurisdictions.

DLA Piper's global reach is mapped on to priority trading routes. It operates a "sector first" approach, with specialists in the most highly-regulated sectors and industries in each jurisdiction. These practitioners are backed up by market-leading practice experts and thought leaders. DLA Piper's dispute settlement and investment experts regularly work on an integrated basis with specialists from across DLA Piper's international network. This framework allows us to readily incorporate into our team, on an as-needed basis, the appropriate legal experts to advise on the relevant domestic laws, regulations, and policies of different jurisdictions throughout the world.

We have also partnered with **Brodies LLP**, which operates the largest government and public sector practice in Scotland. The Brodies team is regularly involved in thought leadership, shaping and commenting on proposed UK legislation, and responding to changes in government policy. With expertise and experience in devolution and constitutional law, UK and Scottish regulatory matters, and trade issues affecting UK stakeholders, Brodies provides us with the capacity to comprehensively understand UK measures and UK interests in the context of international trade matters.

Finally, **Tereposky & DeRose LLP** is located in Canada's national capital, Ottawa. Together with DLA Piper's west coast office in Vancouver, we can readily provide comprehensive coverage of domestic legislation, regulations, and policies throughout Canada, including at the federal, provincial, and municipal levels.

CASE STUDIES

Advising UK clients on trade remedies matters: Led by Charles Livingstone, Brodies LLP has advised a steel manufacturing client on responding to proposed EU anti-dumping sanctions on particular Chinese steel products. The Brodies team has also advised a construction client on EU safeguard measures concerning steel products to protect against the diversion of trade flows into the EU after the US imposed tariffs on steel products.

Advising the Kingdom of Saudi Arabia on the development of a domestic export incentives programme: Led by John Forrest, DLA Piper LLP supported the Government of the Kingdom of Saudi Arabia (KSA) in the development of its Export Incentives Programme (EIP) to support and encourage KSA business to improve their competitiveness, enter and develop export markets, and expand their global reach. International trade and WTO law specialists worked in conjunction with local lawyers based in the KSA to support in the design and implementation of nine export incentive schemes to ensure that: (i) the export incentive schemes were developed and administered in consistency with KSA's legal obligations as a member of the World Trade Organisation (WTO) as well as bilateral and multilateral trade agreements to which it is a party; (ii) the legal risks associated with the implementation of the EIP in accordance with existing KSA domestic law were identified and managed; and (iii) the Government of KSA could understand and limit the risk of challenge from another WTO Member in relation to actionable schemes.

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Greg Tereposky is a founding partner of Tereposky & DeRose LLP. He has practised international trade and investment law for his entire three-decade career. He has appeared as counsel and advocate before panels, arbitrators and the Appellate Body in WTO dispute settlement proceedings, NAFTA panels, investor-state arbitration tribunals and Canadian domestic trade authorities and tribunals. He was appointed as a panellist in the WTO dispute *European Union - Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia*. He acts as counsel and adviser on all types of Canadian customs and trade issues, including matters before the Canada Border Services Agency (CBSA), Global Affairs Canada, Finance Canada, and the Canadian International Trade Tribunal (CITT).



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John Forrest practices in the area of international trade law, with a particular focus on economic sanctions, export controls, embargoes, customs regulation the negotiation and implementation of free trade agreements and preference schemes and trade defence instruments. His client relationships embrace major multinational corporations and small start-up companies across a range of sectors including financial services, energy, high tech and telecommunications, manufacturing, defence, agribusiness, and mining. John previously served as a senior official within the UK civil service and as an advisor to the UK government on trade and investment issues.



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Charles heads Brodies' competition law practice, advising clients on the full range of antitrust matters, plus procurement and State aid. Charles also has a significant public law practice, including acting in judicial review cases and advising on (and challenging) the legislative competence of the Scottish Parliament and devolved competence of the Scottish Ministers. Charles has extensive litigation experience, including cases in the UK Supreme Court and the Court of Justice of the European Union. Charles is convenor of the Law Society of Scotland's Trade Law Working Group and a member of the Society's Constitutional Law sub-committee, and in those capacities is closely involved with preparing and approving the Society's responses to various legislative and trade policy matters at both UK level and in Scotland.

Mandatory Specialisms (cont.)

g. Conducting advocacy in WTO disputes

Our lawyers have appeared as counsel and advocated on behalf of WTO Members in 27 WTO proceedings, including in both defensive and offensive disputes. We have appeared before panels and the Appellate Body, including in original proceedings and subsequent rounds of compliance proceedings under Article 21.5 of the DSU. We have also appeared before arbitrators established to determine the reasonable period of time for compliance implementation under Articles 21.3(c) of the DSU and to determine the authorized level of countermeasures under Article 22 of the DSU. Our oral advocacy complements our client's oral advocacy, and our contributions will vary depending on the client's needs and the circumstances of the dispute. One of our primary objectives is to support our client's team of lawyers in their oral advocacy in WTO disputes.

The State-to-State nature of WTO dispute settlement dictates that our client, as represented by the delegation assigned to the dispute, controls all advocacy. To the degree possible, we prepare the delegation so that its members can conduct all oral advocacy. We do this by: (i) working closely with the delegation in preparing the case; (ii) developing case "themes" that can form anchors for key issues to provide direction during questioning in a hearing; (iii) assisting in identifying members of the delegation who can take responsibility for specific key issues; (iv) debating all issues with the delegation and preparing likely questions that will arise and answers to those questions (Q&As); and (v) assisting in preparing opening and closing oral statements that will be delivered by the delegation. The Q&A process is ongoing, and questions are identified and answers debated and revised up to the time of the hearing. The Q&A process extends to breaks in sessions and between days when the hearing is more than one day. During a hearing, we work with the delegation as a team, assisting to craft responses to issues that arise.

We participate in oral advocacy only when instructed by the head of the delegation. In most instances, our oral advocacy has been in the context of questions and answers during a hearing. In highly complex disputes, we have been very active (e.g., *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (DS381) and *United States – Certain Country of Origin Labelling* (DS384, DS386)), and in less complex disputes our oral advocacy has been minimal.

When we do speak, the basic messaging on an issue is generally agreed upon during our preparatory sessions. If it has not been agreed upon, such as in the case of an unforeseen substantive or procedural issue, the messaging is quickly agreed with the delegation before advocating. Our role is to advance our client's case in a compelling manner by tying the agreed messaging into the question and then into the context of the hearing, including the positions presented by the opposing party and third parties. Often, our assistance is most valuable to (i) address fast-paced questioning when the positions of the parties on an issue are becoming intertwined, and (ii) address unforeseen procedural issues that we have experienced in prior disputes.

Our style of oral advocacy and our demeanour and protocol in hearings reflects three decades of experience working with government officials. We understand and respect that we are representing a Sovereign State.

CASE STUDIES

Offensive Dispute: *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (DS381): Our lawyers acted as counsel for Mexico, the Complainant in this dispute. Complex procedural issues were encountered, including procedural sequencing issues. There were three dispute settlement rounds: the original proceedings (panel and appeal); the first round of compliance proceedings (panel and appeal); and the second round of compliance proceedings (panel and appeal). There was also an arbitration concerning the authorized level of countermeasures. Our lawyers were fully involved in all aspects of the dispute, including oral advocacy before the panels, the Appellate Body, and arbitrators. The original Appellate Body report in this dispute was the second of a trilogy of Appellate Body reports that established the framework for the interpretation and application of Articles 2.1 and 2.2 of the WTO Agreement on Technical Barriers to Trade (TBT Agreement).

Defensive Disputes: Our lawyers were Respondent's counsel in, inter alia, Mexico – Measures Affecting Telecommunications Services (DS204), Mexico – Tax Measures on Soft Drinks and Other Beverages (DS308), and Australia – Anti-Dumping Measures on A4 Copy Paper (DS529). These three disputes illustrate the construction of a defensive case in a manner that safeguards the Respondent's policy and strategic goals. The Soft Drinks dispute is unique because it took place in the context of three parallel investor-state arbitrations against Mexico claiming in excess of half a billion US dollars: Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States (ICSID Case No. ARB(AF)/04/5), Cargill, Incorporated v. United Mexican States (ICSID Case No. ARB(AF)/05/2); and Corn Products International, Inc. v. United Mexican States (ICSID Case No. ARB(AF)/04/1). Every defensive argument in the WTO dispute was carefully designed to support the defences to the investment claims.

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Dan Hohnstein advises and represents governments, industries, and private enterprises in international trade and investment matters. On behalf of the Government of Mexico, he has appeared as counsel and made submissions before WTO panels, arbitrators, and the Appellate Body. In addition, he has advised other State governments in WTO disputes, providing legal analyses and risks assessments, assisting with case development and procedural issues, and drafting submissions. Dan's expertise also covers state-to-state dispute settlement under regional trade agreements; the negotiation, interpretation and implementation of international trade agreements; trade remedies (anti-dumping, countervailing, and safeguard measures); and cross-border customs issues.

2.Optional Specialisms

a. International investment law

Defending States in investment disputes is one of the foundations of our firm. Our lawyers have defended the United Mexican States in over 30 investor-state arbitrations since 1997, involving individual claims ranging between USD 20 million and USD 2.7 billion. We have extensive experience at all stages of arbitration proceedings under the ICSID, ICSID AF, and UNCITRAL arbitration rules, and under many investment treaties, including: United Kingdom-México Treaty; France-México Treaty; Netherlands-México Treaty; Spain-México Treaty; North American Free Trade Agreement (NAFTA); Singapore-México Treaty; Panama-México Treaty; and Portugal-México Treaty.

Our arbitrations have covered a broad range of investments, including public-private partnerships, hazardous waste disposal sites, health services, telecom services, satellite services, energy and mining (including undersea mining), gaming, hotels and tourism, and cultural industries.

We have first-hand knowledge of an enormous range of facts, strategies, and substantive and procedural complexities, and we have experienced the evolution of investment protections from traditional treaties to the NAFTA to recent multilateral agreements such as the *Canada-European Union Comprehensive Economic and Trade Agreement* (CETA) and the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (CPTPP).

Our team brings together complementary expertise. Greg Tereposky has acted as counsel in both WTO and investor-state proceedings. He brings to investment claims defences his knowledge of the nuances of discrimination, restrictions and exceptions, and the application of Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*, which have been highly developed in WTO law. He has also acted as counsel in parallel WTO and investor-state proceedings. Jennifer Radford is an experienced court litigator who defends States in investment arbitrations and assists in other State matters including recovering sovereign assets. She has strong cross-examination skills that have been recognized by arbitrators. Her recent successes include the dismissal of a USD 500 million claim in *Joshua Dean Nelson, in his own right and on behalf of Tele Fácil Mexico, S.A. DE C.V. ("Tele Fácil") v. United Mexican States* (ICSID Case No. UNCT/17/1). Cameron Mowatt, our Senior Counsel, has experienced every investment claim and arbitration procedural matter encountered by Mexico since 1997. We also have a full-time economist, Alejandro Barragan, who has 15 years of experience defending damages claims.

Our arbitration experience complements our legal advice on the interpretation and application of investment treaties and on the negotiation and implementation of such treaties.

CASE STUDIES

***Lion Mexico Consolidated L.P. v. United Mexican States* (ICSID Case No. ARB(AF)/15/2):** We succeeded in bifurcating the proceedings into a preliminary jurisdictional phase and then won a jurisdictional objection that excluded USD 141 million of a USD 200 million claim. We objected that the definition of "investment" under the treaty did not include short-term promissory notes and that the Tribunal did not have jurisdiction to hear claims regarding the notes.

***Joshua Dean Nelson, in his own right and on behalf of Tele Fácil Mexico, S.A. DE C.V. ("Tele Fácil") v. Mexico* (ICSID Case No. UNCT/17/1):** We succeeded in having the entire claim for USD 500 million dismissed on the merits. This arbitration involved complicated factual issues and matters of Mexican domestic law. The investment treaty legal issues included the scope of expropriation, the legal tests to be applied when considering a claim for denial of justice, and whether "judicial expropriation" can exist without a corresponding denial of justice. The Tribunal also ordered costs payable to Mexico in the amount of USD 2,054,199.

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Greg Tereposky is a founding partner of Tereposky & DeRose LLP. He has practised international trade and investment law for his entire three-decade career. Over his career, he has appeared as counsel and advocate for States in a wide variety of disputes before WTO panels, arbitrators and the Appellate Body, regional trade agreement panels, and investor-state arbitration tribunals.



Jennifer Radford
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Jennifer Radford is a founding partner of Tereposky & DeRose LLP. Over her two-decade career, she has honed her strategic skills as a litigator and now applies them principally to investment arbitrations. In addition to investment law, she has represented States in various capacities, including representing sovereign and diplomatic missions in Canada in complex cases that have set precedents on diplomatic and state immunity issues.

Optional Specialisms (cont.)

b. Trade remedies investigations

Tereposky & DeRose LLP offers in-depth expertise on all trade remedy matters, including investigations and other proceedings relating to anti-dumping, countervailing duty, and safeguard measures.

Building on Greg's expertise, our lawyers have been involved in many different trade remedies issues, including:

- Whether natural resource harvesting/extraction measures are countervailable subsidies;
- Whether export restraints are countervailable subsidies;
- The determination of the amount of a subsidy using an option pricing model (Black & Scholes);
- Countervailing a price support program under Article 1.1(a)(2) of the WTO SCM Agreement;
- Loans and financing subsidies;
- Equity subsidies, including debt-to-equity swaps;
- The interface between duty relief (drawback and deferral) programs and margins of dumping;
- The pass-through of subsidies to downstream manufacturers;
- Government ownership and benchmarks for the calculation of the amount of subsidies;
- The effect of privatization on pre-privatization subsidies;
- Price support subsidies;
- Input cost distortions;
- Non-market economies;
- Particular market situation under Article 2.2 of the WTO Anti-Dumping Agreement;
- Determination of the costs of production in the country of origin for constructed normal value; and
- Zeroing methodologies.

We have addressed these issues under the WTO General Agreement on Tariffs and Trade, 1994, the Anti-Dumping Agreement, the SCM Agreement, the CUSFTA, the North American Free Trade Agreement (NAFTA), and in Canada under the Special Import Measures Act (SIMA).

We have advised anti-dumping authorities on how to design their measures and on how to take actions in a manner consistent with their international trade obligations. We have also advised on how to comply with the recommendations and rulings of the WTO Dispute Settlement Body. We are experienced in trade remedy issues from all perspectives, including the investigating authority, the domestic industry, the producers and exporters of the goods under investigation, the importers and end-users, and governments making or defending claims in state-to-state dispute settlement proceedings. We understand the law and the policy of trade remedies.

We have been actively involved in numerous trade remedy cases in Canada and other jurisdictions. WTO, RTA and GATT 1947/GATT Code disputes concerning trade remedy measures in which we were counsel or actively involved include the following:

- *Australia – Anti-Dumping Measures on A4 Copy Paper* (WTO)
- *Canada – Beer* (AD) (CUSFTA)
- *Canada – Gypsum* (AD) (CUSFTA)
- *Canada – Refined Sugar* (AD) (NAFTA)
- *Mexico – High Fructose Corn Syrup (HFCS) from the United States* (WTO)
- *Mexico – Cut-to-Length Plate* (AD) (NAFTA)
- *Mexico – Flat Coated Steel* (AD) (NAFTA)
- *United States – Continued Dumping and Subsidy Act* (WTO)
- *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* (WTO)
- *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada* (WTO)
- *United States – Laws, Regulations and Methodology for Calculating Dumping Margins* (“Zeroing”) (WTO)
- *United States – Measures Relating to Zeroing and Sunset Reviews* (WTO)
- *United States – Measures Treating Export Restraints as Subsidies* (WTO)
- *United States – Softwood Lumber II* (GATT Subsidies Code Panel)

CASE STUDIES

Global Safeguards on Certain Steel Products: Global Safeguards on Certain Steel Products: Our lawyers acted as counsel on behalf of the Government of the Republic of Korea and the Government of the Province of Nova Scotia (Canada) in successfully opposing the imposition of safeguard measures in the Canadian International Trade Tribunal's Safeguard Inquiry concerning the Importation of Certain Steel Goods (Inquiry No. GC-2018-001). Although the Tribunal recommended the imposition of safeguard measures on global imports of heavy steel plate and stainless steel wire, it accepted that imports of these goods from Korea were excluded on the basis that the additional criteria set forth in the Canada-Korea Free Trade Agreement had not been met. The Tribunal also agreed that imports of the other steel products at issue, including hot-rolled steel sheet, energy tubular products, pre-painted steel, and wire rod, did not warrant safeguard measures. These outcomes fully satisfied the objectives of each of our clients.

Advising on UK safeguarding measures and TRID transition review: Our key subcontractor, DLA Piper LLP, is providing advice in relation to the legislative and regulatory framework governing the transition of EU steel safeguard measures, in the form of Tariff Rate Quotas (TRQs), into UK domestic legislation, including in connection with the transition review led by the Trade Remedies Investigations Directorate (TRID).

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Dan Hohnstein advises and represents governments, industries, and private enterprises in international trade and investment matters. His expertise covers trade remedies (anti-dumping, countervailing, and safeguard measures); state-to-state dispute settlement; the negotiation, interpretation and implementation of international trade agreements; and cross-border customs issues. Dan has appeared as counsel in trade remedies proceedings in Canada and advised on trade remedies proceedings in Costa Rica, Australia, and China. His expertise also covers the principles established under the WTO Anti-Dumping Agreement and SCM Agreement and the jurisprudence that continues to develop their interpretation and application.

