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Canadian Trade Law Year in Review, 2023

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In this second edition of the *Canadian Trade Law Year in Review*, the team at CLK Canada has analyzed key judicial and administrative decisions from 2023 that will be of interest to trade practitioners.

These cases consist of decisions of Canada's Federal Courts reviewing findings of the Canadian International Trade Tribunal ("CITT") and Canada Border Services Agency ("CBSA"), determinations by the CITT and CBSA, and decisions from binational panels pursuant Canada's international trade agreements. These decisions are divided according to their subject area, with this year's review covering judicial decisions involving the *Special Import Measures Act*, the *Customs Act*, and Canada's free trade agreements. This review is intended to provide practitioners and users of Canada's international trade regime with a reference guide for jurisprudential developments across Canadian trade law.

The Special Import Measures Act

This year featured three decisions from the Federal Court of Appeal ("FCA") dealing with Canada's trade remedies regime under the *Special Import Measures Act* ("*SIMA*"). Two consisted of applications for judicial review of decisions by the CBSA to terminate investigations of certain exporters, while the third was a decision from the CITT that the domestic industry neither had been injured nor faced the threat of injury. These decisions will be of interest of practitioners as they provide guidance on questions of procedural fairness in CBSA investigations, deal for the first time with the scope of analysis in Particular Market Situation ("PMS") determinations by the CBSA, and provide clarifications on the methodology for conducting injury and threat assessments before the CITT. Notably, all three decisions were dismissed by the FCA, suggesting that

the Court continues to defer heavily to the expertise of the CBSA and CITT in international trade matters.

Canadian Hardwood Plywood and Veneer Association v Canada (Attorney General), 2023 FCA 74 [*Plywood I*]

In this first decision, the FCA considered the meaning of a PMS and whether the CBSA is required to disclose its anti-dumping calculation worksheets. Justice Rivoalen, in dismissing the application for judicial review, found the CBSA's decision to not disclose calculation worksheets was both procedurally fair and not unreasonable, and that the CBSA's determination that a PMS did not exist was reasonable. Note that the Court heard the application for judicial review in *Algoma Steel Inc v Canada (Attorney General)*, 2023 FCA 164—which involved several similar issues—the following day, and that Court relied on its reasons in *Plywood I* for overlapping issues.

By way of background, the CBSA advised that it was terminating dumping and subsidizing investigations for certain exporters (the "Zero-Rated Exporters") with respect to decorative and other non-structural plywood from China (the "Final Determination"). The Canadian Hardwood Plywood and Veneer Association and other applicants ("CHPVA") sought judicial review of the notice of Final Determination of the President of the CBSA pursuant paragraph 96.1(1)(a) of the *SIMA*. The Applicants advanced arguments challenging the CBSA's decision to terminate the investigation into the Zero-Rated Exporters, one on procedural fairness grounds and two pertaining to the reasonableness of the Final Determination.

As a preliminary matter, the Court clarified that the decision under review in this type of proceeding is a combination of the Final Determination, the CBSA's Statement of Reasons, the confidential Dumping Memorandum supplied to the President of the CBSA by Agency officers, and a confidential PMS Memorandum prepared by Agency officers, with the latter three documents "extensively documenting" the reasoning behind the Final Determination. Thus, regard must be had to more than just the public Final Determination (effectively the public reasons) as these other documents supporting the Final Determination are highly relevant when reviewing the CBSA's decisions.

First, the Court found that the CBSA's practice of not including dumping calculation worksheets in the Statement of Reasons and not sharing them with domestic producers did not breach procedural fairness, despite the fact that they are disclosed on request to the respondent participating exporters. These worksheets contain the detailed calculations that underpin the final margin of dumping found by the CBSA. The Court reaffirmed that the duty of fairness owed by the CBSA in the *SIMA* context, is set to a low threshold for two reasons: first, because of the magnitude of the investigation and the legislated limitation on time; and second, because interested parties—including the Applicant domestic producers—may obtain access to

information provided by the exporters to the CBSA and which is used by the CBSA in making their calculations. In any event, Justice Rivoalen noted the Court may only look at the evidence that was before the decision-maker in a judicial review. Given that the dumping calculations were not part of the record before the President of the CBSA, calculations could not have been relied upon in an application for judicial review going to the reasonableness of the Final Determination.

Second, the Court held that the failure on the part of the CBSA to provide the calculations to the President of the CBSA or to include the calculations in the Statement of Reasons does not render the Final Determination unreasonable. The Court noted that in most administrative tribunals the calculations or details of an investigation are not put before the decision-maker. Rather, the decision-maker is provided with a report summarizing the factual findings and the methodology used to determine an issue or reach a conclusion. Having found that the Final Determination must be read with the Statement of Reasons and the confidential Dumping Memorandum, the Court concluded that it was not unreasonable for the President of the CBSA to render a decision without the calculation worksheets. There is nothing in the *SIMA* that requires the President of the CBSA to have the calculations when making the preliminary and final determinations, and the absence of the calculation worksheets did not mean that the President could not provide adequate and intelligible reasons. Rather, the Court concluded that the President's discretion not to request the calculations was not arbitrary, and the Final Determination was based on an internally coherent and rational chain of analysis which is justified in relation to the facts.

Third, the Court found that it was not unreasonable for the President of the CBSA to conclude that a PMS did not exist. A PMS relates to provisions in the *SIMA* that allow the CBSA to disregard prices and costs and use alternative information in determining the margin of dumping because those prices and costs are distorted in the exporting market. Highlighting that neither the *SIMA* nor the *Special Import Measures Regulations* ("*SIMR*")—nor any Canadian jurisprudence—defined the term PMS, the Court declined to provide a definition and merely observed that the determination of whether a PMS exists is a highly contextual and fact-intensive exercise. That said, it provided two points of guidance on PMS methodology that will be of interest to practitioners. First, it was not unreasonable for the President of the CBSA in considering government support programs in the context of a PMS, to consider only programs already assessed in a parallel subsidy investigation. Second, it was not unreasonable that the President of the CBSA declined to cumulatively consider the impacts of various market factors and instead considered such factors individually for the purpose of the PMS analysis.

Finally, the Court provided a number of residual observations that will be useful for trade practitioners in proceedings before the CBSA. First, the Court observed that the SIMA Handbook (an internal guidance document produced by the CBSA for officers conducting trade remedy proceedings) is a "policy document that does not bind the President of the CBSA" but is rather a useful guide for the CBSA and all parties involved. Second, the Court confirmed

that the President of the CBSA is under no obligation to obtain or solicit additional information in making a finding on the existence of a PMS. While the Court acknowledged the CBSA's authority to request additional information or verify data, it held that the language of the *SIMA* means the CBSA has discretion over whether to engage in those further steps. The CBSA therefore did not act unreasonably in not requesting further information on the existence of a PMS or in not conducting supplemental comparative analysis on data submitted by the complainant.

Canadian Hardwood Plywood and Veneer Association v Canada (Attorney General), 2023 FCA 154 [*Plywood II*]

This application for judicial review arose from a finding by the CITT that the dumping and subsidizing of plywood from certain Chinese exporters did not cause injury and did not threaten to cause injury to the domestic industry. Of interest to practitioners, the domestic industry sought judicial review before the FCA, arguing that the CITT erred in its assessment of the temporal scope of injury and in its threat of injury analysis. Justice Rivoalen, writing for the Court, dismissed the application in its entirety.

First, the FCA held that the CITT did not apply an unreasonable test by requiring that injurious effects must have "crystallized" during the period of inquiry ("POI", essentially the set time period in which the CITT collects key data and information) and focusing its analysis exclusively on injury occurring during the POI. The Court noted that a finding of injury under the *SIMA* requires that "the injury was caused by the dumping and subsidizing of the subject goods during the POI." Justice Rivoalen noted that it was impossible for the CITT to have found that injury sustained by the domestic industry prior to the POI was caused by dumping or subsidizing, as the CBSA made findings on the existence of dumping or subsidizing only during the POI. As such, the absence of a finding by the CBSA of dumping prior to the POI means that any injury sustained by the domestic industry during that period cannot be causally tied to dumping and does not satisfy the causal requirement under the statutory framework.

Second, the FCA held that it was not unreasonable for the CITT to require that the domestic industry show with a high degree of probability that a "change in circumstances" will occur to find a threat of injury after failing to find past injury. Notwithstanding that "change in circumstances" does not appear in the *SIMA*, Justice Rivoalen agreed that the structure of the *SIMA* implies that a change of circumstances is necessary: "It would be illogical for the circumstances of the POI (which were found not to cause injury) to threaten to cause injury in the future, absent some change in circumstances." Moreover, and contrary to the submissions of the Applicants, Justice Rivoalen found that the CITT reasonably relied on the *Anti-Dumping Agreement* in its interpretation of subsection 2(1.5) of the *SIMA*, and did so in a manner consistent with binding jurisprudence on the use of international treaties in conducting statutory interpretation. In sum, the Court found that the CITT's interpretation was internally

logical, supported by the text of an international treaty that is not inconsistent with the domestic legislation, and was consistent with the CITT's past approach to assessing the threat of injury.

Justice Rivoalen made a further series of findings that will be of interest to practitioners. First, she held that it was not unreasonable for the CITT—on the evidence before it—to find that domestic like goods and the imported subject goods did not compete due to the existence of a significant price difference between them. Second, she cautioned that the CITT is not required to explain why subject goods did not compete with the like goods where there is evidence supporting the absence of competition. Such a requirement would improperly "impose a presumption that the subject goods compete with the like goods" in the face of evidence showing the contrary, and could lead to illogical results. Third, she found that a finding that a lack of competition between products that fall within a single class of goods is not internally contradictory, and merely reflects some stratification in the market.

The decision in *Plywood II* provides trade remedies practitioners greater certainty in regards of the temporal scope of the injury analysis in *SIMA* proceedings and on the requisite elements for establishing a threat of injury. It therefore marks a significant development that will assist practitioners in assessing the viability of potential trade remedies cases.

Algoma Steel Inc v Canada (Attorney General), 2023 FCA 164

Like *Plywood I*, this decision involved judicial review of a final determination of the President of the CBSA pursuant to section 96.1 of the *SIMA*. Algoma Steel Inc. ("Algoma") challenged the CBSA's finding that a PMS did not exist in the exporting country and the CBSA's scope of disclosure to interested parties. Justice Roussel dismissed the application, finding the CBSA's decision reasonable and that the decision not to disclose its final calculations did not infringe procedural fairness. Given the overlapping issues, the Court relied on its reasoning in *Plywood I*.

By way of background, Algoma filed a complaint with the CBSA alleging that certain heavy plate originating in five countries, including Turkey, were being dumped and had caused—or threatened to cause—injury to the domestic industry. Algoma claimed that a PMS existed in Turkey, such that neither sales in the Turkish home market nor Turkish exporter costs allowed for the calculation of dumping margins. The CBSA initiated the investigation and issued a preliminary determination of dumping with respect to only Turkey, Germany, and Chinese Taipei. Thereafter, but prior to the final determination, Algoma requested access to the CBSA's preliminary calculation worksheets disclosed to Erdemir, a Turkish producer (the "Calculation Worksheets"). The CBSA declined the request. Having collected additional information from interested parties during the final phase of its investigation, the CBSA ultimately terminated its

investigation in respect of the sole Turkish plate exporter (the "Final Determination"). Amongst its findings, the CBSA concluded that a PMS did not exist in the heavy plate market in Turkey.

The Applicant challenged the Final Determination on procedural fairness grounds relating to the CBSA's refusal to supply the Calculation Worksheets and argued that the CBSA's finding that a PMS did not exist was unreasonable.

Several of the Court's findings with respect to procedural fairness will be of interest to trade practitioners. First, the Court again confirmed that the decision under review comprises the Final Determination together with the confidential dumping memorandum, and the confidential PMS memorandum. Second, the CBSA's decision not to disclose the Calculation Worksheets to domestic producers will not entail a breach of procedural fairness, barring exceptional "special circumstances". Unfortunately, the Court did not explain what such "special circumstances" could be. Third, the fact that the Calculation Worksheets were not before the President of the CBSA is not a breach of procedural fairness. And fourth, the absence of the Calculation Worksheets in the statement of reasons does not render the decision unreasonable or entail a breach of procedural fairness.

Likewise, several of the court's findings affirming that the CBSA's PMS opinion was reasonable will be of interest to members of the trade bar. First, the FCA confirmed that it was not unreasonable for the CBSA in conducting the PMS analysis to consider only government support programs already assessed under its subsidy investigation. Second, in assessing "volatility" as a factor in the PMS analysis, the Court agreed that the object of analysis is not the existence of volatility itself, but rather the effect of that volatility on domestic prices. Third, the Court confirmed that the assessment of PMS must be undertaken both in respect of the country as a whole and in respect of individual exporters.

Read together, the decisions in *Plywood I* and *Algoma Steel* appear to shut the door on arguments that the CBSA breached procedural fairness by not disclosing calculation worksheets to interested members of the domestic industry. Likewise, these decisions provide some important guidance to practitioners on the approach to framing PMS allegations and suggest that PMS is an exceptional provision under the legislative framework.

DETERMINATIONS BY THE CBSA AND CITT UNDER THE SIMA

In this year's edition of the Review, we have included both a finding from the CITT and two notable re-investigation determinations from the CBSA due to their novel nature. As described below, the CBSA in 2023 made an affirmative determination of PMS (*Concrete Reinforcing Bar*) and made retroactive duty assessment (*Line Pipe 2*), each for the first time since legislative amendments introduced the concept into the *SIMA*. Also in 2023, the CITT made a finding (*Certain Wind Towers*) in which it exercised its discretion to exclude a region of Canada from

the application of anti-dumping duties, notable because the CITT usually exercises that discretion in a more targeted way to exclude products rather than regions.

By way of background, the CBSA and the CITT are the two core decision makers in Canada's bifurcated trade remedies regime. Under the *SIMA*, the CBSA is responsible for determinations on the occurrence of dumping whereas the CITT makes findings that remedial anti-dumping duties are justified. Briefly, dumping exists where domestic pricing (i.e., normal values) are above export prices. Given the possibility that normal values fluctuate over time, the CBSA periodically undertakes reviews to ensure the accuracy of benchmark prices, in a process known as "re-investigations" where the review targets all exporters from a particular country or "normal value reviews" where the review targets a specific exporter. The CBSA will subsequently apply these normal values to imports to determine any amount of anti-dumping duty.

Line Pipe 2 (LP2 2022 RI) (CBSA)

In July 2022, the CBSA initiated a re-investigation to update normal values and export prices, and to establish values for new exporters or new models for line pipe exported from South Korea. The CBSA's determination in this re-investigation led the CBSA to issue a retroactive duty assessment for only the second time in its history.

The re-investigation was, by all indications, relatively straightforward. In most cases, the CBSA was able to compare the export prices to normal values based on line pipe sold in the Korean market. Where particular producers did not have enough sales of line pipe domestically to allow a proper comparison, the CBSA constructed the normal value based on input costs and a reasonable amount for profit under paragraph 19(b) of the *SIMA* and paragraph 11(b)(i) of the *SIMR*.

However, in response to allegations made by the domestic industry that Korean exporters had not notified the CBSA that their normal values had changed as required, the CBSA undertook an additional and separate analysis to determine whether retroactive duty assessments were warranted. On April 28, 2023, the CBSA determined that certain exporters "did not notify the CBSA in a timely manner of changes to certain conditions as required and failed to adjust their selling prices accordingly." As a consequence, the CBSA retroactively assessed $6.1 million worth of duties on line pipe imports brought into Canada from Korea.

Like the determination in *Concrete Reinforcing Bar* discussed below, the CBSA did not provide in-depth reasoning in its public notice describing exactly why the duties had been assessed, other than to say that the Korean exporter had not provided notice of changes in market conditions in a reasonable amount of time. It is notable that trade remedies cases inherently involve large amounts of confidential information which impede full public discussions of reasons in public notices. Nonetheless, this case serves as an important reminder to exporters

of products subject to anti-dumping duties in Canada that their importer customers in Canada may face significant monetary penalties if they, as the exporter, fail to notify the CBSA that the amount that they are selling those goods for in their home market has changed in a timely manner.

Concrete Reinforcing Bar (RB1 2022 RI) (CBSA)

In September 2022, the CBSA initiated a re-investigation to update the normal values of producers of concrete reinforcing bar ("rebar") exported from Turkey. The CBSA found for the first time that a PMS existed in the exporting country during the POI that did not allow a proper comparison between domestic sales and export sales.

Partially agreeing with the domestic industry, the CBSA found that from January 2022 to the end of the POI, the participating Turkish exporters and the Turkish rebar market as a whole had experienced the effects of a PMS. Specifically, the CBSA found that the cost of the Russian-origin input material (steel billets) purchased by Turkish producers had been significantly depressed by economic sanctions imposed on Russia by other countries. It also found that the hyperinflationary environment within Turkey over the POI, together with corresponding devaluation of the Turkish lira and the lack of adjustments made to financial statements in accordance with international accounting practices, made it impossible to compare the export prices of Turkish producers to import prices. The CBSA further found that these PMS had a different impact on home market prices than the prices for products sold to Canada.

Having found the existence of a PMS, the CBSA implemented alternate methodologies for the calculation of normal values and export prices. Specifically, CBSA disregarded home market prices and instead determined cost-based normal values in accordance with paragraph 19(b) of the *SIMA*. Instead of using rebar profit information from India for the purpose of constructing the normal value based on ministerial specification under section 29 of the *SIMA*—as suggested by the domestic industry—the CBSA instead opted to use the percentage profit reported by Turkish exporters prior to the point at which the CBSA considered a PMS to exist.

While this decision undoubtedly is a milestone under Canada's trade remedies regime, the CBSA's Notice of Conclusion contained little in the way of rules or tests to guide parties when making or defending against PMS claims in the future. Indeed, despite its conclusions, the CBSA did not explain why hyperinflation, corresponding devaluation of the Turkish lira, and differences in Russian billet prices did not permit a proper comparison between exports and normal values. Trade lawyers will undoubtedly be keeping a close eye on the application of PMS under the CBSA's provisional duty regime moving forward.

As a postscript to this decision, the CBSA in November issued a Notice determining that retroactive assessments could be required in some cases to ensure compliance with the *SIMA*. It advised that it was issuing detailed adjustment statements to applicable importers. Were the

CBSA to issue retroactive duties, this would mark only the fourth time it had done so, although notably the third time in 2023 alone after having only done it once in 2018 (there also concerning rebar from Turkey).

Certain Wind Towers (NQ-2023-001) (CITT)

On December 1, 2023, the CITT found that dumped wind towers—one of the three major components of large electricity-generating windmills—imported from China injured the domestic industry and that anti-dumping duties should be levied. However, in a rare development, the CITT excluded Chinese-produced wind towers destined for any part of Canada west of the Ontario-Manitoba border from the application of anti-dumping duties.

The CITT injury analysis is of particular interest. First, the CITT found that the domestic industry had lost both sales and market share to dumped Chinese wind tower imports. In turn, lost sales and diminished market share adversely affected domestic production, profitability, employment and investments. However, the Tribunal also found that the dumped imports were not the sole cause of the injury sustained by the domestic industry. Demand over the POI was concentrated in Alberta, which was found to be difficult and expensive to supply from the domestic industry's production facilities in Quebec. Conversely, Chinese imports were delivered to this region on a more cost-effective basis. Agreeing with the Chinese exporters, the CITT found that the injury sustained by the domestic industry in the Western Canadian market was due to these logistical factors and not the dumping of wind towers from China.

The CITT thus held that the Canadian market to the west of Ontario should be excluded from the anti-dumping Finding. The CITT's test for regional exclusion is based on whether domestic producers have a reasonable prospect of competing in the market over which the exclusion is sought. Based on the same reasoning as in its injury analysis, the CITT determined that the transportation issues plaguing the domestic industry were unlikely to change in the near term. Accordingly, the CITT concluded that while the domestic industry had been injured by dumped Chinese wind towers, that injury was only suffered in markets to the east of the Ontario-Manitoba border. The CITT therefore excluded imports of Chinese wind towers from the Western Canadian market from its anti-dumping finding and from the application of duties for the next five years.

The decision in *Wind Towers* is significant in several regards. First, it marks the first instance in which the CITT has granted a regional exclusion in nearly 30 years. Typically, the Tribunal exercises its discretion only to exclude specific products that the domestic industry cannot make or cannot cause injury to the domestic industry. Second, *Wind Towers* highlights the importance of causation to the injury analysis, and demonstrates that the CITT may identify different causal effects in discrete regional markets. Finally, this decision serves as a reminder

to trade practitioners that they will be well served by assessing the existence of discrete regional markets in their case formulation.

THE CUSTOMS ACT

Four notable decisions pertaining to the *Customs Act* were issued this year, three of which involved judgments from the FCA. In *Erickson* and *Canadian Tire*—both statutory appeals on questions of law under subsection 68(1) of the *Customs Act*—the Court considered the appropriate tariff classification for imported products. In *Pier 1 Imports*, on the other hand, the FCA considered a concurrent application for judicial reviews and statutory appeal. Finally, the Federal Court in *Mazda* considered an application for judicial review of a decision by the CBSA denying claims for a refund of customs duties on defective imported vehicle parts and the application of the doctrine of legitimate expectations.

B. Erickson Manufacturing Ltd v Canada (Border Services Agency), 2023 FCA 37

In this statutory appeal pursuant to subsection 68(1) of the *Customs Act*, Erickson challenged a decision of the CITT regarding the appropriate tariff classification for various models of ratchet tie-down straps used to keep objects secure and stationary. The FCA dismissed the appeal.

Writing for the Court, Justice Woods considered whether the CITT erred in finding that the goods at issue are properly classified under heading 82.05 of Canada's Customs Tariff rather than headings 84.79 or 83.08. She addressed three issues: whether the CITT erred in applying an explanatory note to heading 84.79; whether the CITT erred in not following a previous decision in *Kinedyne Canada Limited v Canada (Border Serves Agency, President)*, AP-2012-058 and U.S. decisions that involved similar goods; and whether the CITT erred in finding that the goods are like a clamp.

On the first issue, the Court held that there was no inconsistency between the explanatory note and the heading 84.79. It therefore rejected the appellant's argument that the CITT had erred in relying on the explanatory note to conclude that heading 82.05 was more specific. Although the Court agreed that Rule 1—which provides that classification must initially be determined with reference only to the headings within a chapter—should be applied first, Woods J.A. held that Rule 1 did not foreclose the application of an explanatory note that addresses priority between heading 84.79 and headings in other Chapters.

Second, the FCA held that the CITT did not err in its treatment of authorities. The FCA affirmed that U.S. decisions are "worthy of considerations" but not binding on the CITT. As for the CITT's prior decision in *Kinedyne*, the FCA held that the CITT properly did not follow that decision; *Kinedyne* failed to consider which heading takes priority and did not justify why it considered

heading 84.79 first. Here, conversely, the FCA affirmed that the CITT properly considered the issue of priority amongst the headings.

Third, the Court held that the CITT did not err by concluding that the goods at issue were like a clamp. The appellant argued that the CITT erred—in assessing what makes an article like a clamp—by adopting the conclusions in prior decisions on this point without repeating the analysis. The FCA disagreed, finding that the CITT was entitled to rely on the earlier decisions for determining the meaning and essential characteristics of a good.

While it by no means breaks new ground in customs law, the FCA's decision in *Erickson* ultimately provides useful instruction on the interplay of Rule 1 and explanatory notes, and likewise gives practitioners a roadmap for relying on prior tariff classification decisions.

Canadian Tire Corporation Ltd v Canada (Border Services Agency), 2023 FCA 117

In a yet another decision dealing with straps, the FCA considered a statutory appeal pursuant to subsection 68(1) of the *Customs Act* regarding the appropriate tariff classification for marine winch straps. A marine winch strap is a textile strap attached to a forged metal hook that can be fastened to a load, and which allows the user to move the load by operation of a separately sold winch. The FCA dismissed the appeal.

Canadian Tire argued that the CITT had erred in finding that the goods were correctly classified under heading 63.07 rather than under heading 59.11, as the straps are in fact essentially articles of textile within the meaning of explanatory note (B). Writing for the Court, Justice De Montigny declined to consider whether the CITT had erred in applying a provision of the *Customs Tariff* on the grounds that such an inquiry involves a mixed question of fact and law and is therefore not properly before the Court in a statutory appeal under subsection 68(1) of the *Customs Act*.

The Court did however opine that the CITT had not committed errors in its interpretation of Legal Notes 7(b) or 8(a) to Section XI of Chapter 59. As regards the former, the FCA found that the CITT had adequately considered the note given its observations on the use of the winch used in conjunction with the goods at issue, and how such a winch was not "similar" to the machine described in the note. As for Legal Note 8(a), the Court likewise found that the CITT had adequately turned its mind to the note by finding that there was no evidence that would render that legal note inapplicable or irrelevant.

The FCA's decision in *Canadian Tire* serves as a reminder that the FCA jurisdiction on a statutory appeal under section 68(a) is limited to questions of law, and that the Court will decline to intervene where the appeal alleges an error in the application of a provision of the *Customs Tariff* to a set of facts.

Canada (Attorney General) v Pier 1 Imports (U.S.), Inc, 2023 FCA 209

In this concurrent statutory appeal pursuant to subsection 68(1) of the *Customs Act* and application for judicial review under section 18.1 of the *Federal Courts Act*, the Attorney General of Canada ("AGC") challenged a decision of the CITT regarding the appropriate calculation method for determining the value for duty ("VFD") of Pier 1's imports. Justice Boivin, for the Court, dismissed both the appeal and application, finding that the CITT made no reviewable error in the decision that a flexible application of the computed value method ("FCVM") should be used, and that the CITT did not breach procedural fairness by refusing to admit additional expert evidence.

As regards the first issue, the CITT found that the AGC had not raised an extricable error of law that would warrant the intervention on a statutory appeal limited to questions of law. The AGC had argued that the CITT has erred in applying a FCVM methodology to calculating VFD on the grounds that the CITT improperly rejected evidence on comparable sales to evidence, and therefore failed to account for this element in its subsection 52(2) equation. The FCA, however, found that the CITT engaged in a "detailed weighing of the evidence"—including requesting additional submissions—that had led it to concluded that the comparable sales did not capture like "business reality". Notwithstanding the AGC's submissions to the contrary, the FCA held that the appellant had not raised an error of law; it merely disagreed with the CITT's factual findings, which is not subject to intervention by the Court.

Justice Boivin likewise dismissed the AGC's argument that the CITT breached procedural fairness by declining to accept new evidence from the AGC following the decision. The AGC had argued that its new evidence on comparator evidence should have been admitted as it could not have known the case it had to meet prior to the CITT deciding what valuation method would be employed. The FCA rejected this argument. As a general rule, the FCA instructed that "A reviewing court has no basis to interfere in an administrative tribunal's decision not to admit any additional evidence after it has given ample opportunity to the parties to do so." It found that Pier 1's appeal indicated that the appropriate valuation method was FCVM, and that this was enough to give the AGC notice. The AGC had the opportunity to submit its own comparator evidence early in the process but made a tactical decision not to and could not invoke a breach of procedural fairness.

Finally, and of interest of practitioners of administrative law more generally, the Court addressed the issue of concurrent proceedings—appeal and judicial review—where the governing legislation limits an appeal to questions of law. Acknowledging the FCA's jurisprudence that parties can proceed with both concurrently (see e.g., *Canada (Attorney General) v Best Buy Canada Ltd*, 2021 FCA 161), Justice Boivin, noted that the "genuine issue is to what extent a judicial review application, which is by definition a discretionary remedy, should be filed concurrently with an appeal that has been expressly limited in scope." He noted that the duplication of proceedings has an adverse impact on judicial economy, and results in

overlap and repetition both in the written materials and in oral arguments. The Court therefore suggested adopting the Ontario Court of Appeal's approach to the issue in *Yatar v TD Insurance Meloche Monnex*, 2022 ONCA 446. Although judicial review would remain available in all instances, the reviewing court would be endowed with discretion over whether to entertain the concurrent application for judicial review if the statutory appeal will be sufficient to address the issue at hand.

Trade practitioners will be well served by monitoring a forthcoming decision of the Supreme Court of Canada on the issue of concurrent applications for judicial review and statutory appeals. A decision on this case, *Yatar* (mentioned above), is anticipated in the first half of 2024. Given the possibility that the permissive approach from *Best Buy* will be altered, practitioners should closely watch the outcome in *Yatar* to ensure they correctly frame their challenges to decisions of the CITT.

Mazda Canada Inc v Canada (Public Safety and Emergency Preparedness), 2023 FC 1238

In this application for judicial review, Mazda challenged a decision by the CBSA denying its claim for a refund of customs duties on defective imported vehicle parts. Justice Aylen dismissed the application for judicial review, finding that the decision was reasonable and that the CBSA did not breach Mazda's legitimate expectations in respect of the forms Mazda were required to be submitted.

In May 2018, Mazda filed a Blanket B2 Authorization Application ("Blanket Application") covering ten refunds for defective imported parts in accordance with subsection 76(1) of the *Customs Act*. The application made reference to Mazda's agreement with CBSA and the CRA that simplified the procedure for which defect goods refunds claims would be resolved. That agreement was terminated in early 2017. Over the next few months, the CBSA issued ten decisions refusing Mazda's refund applications. These decisions were subject to application for judicial review that were resolved on consent and Mazda's Blanket Application was returned for reconsideration in early 2021. CBSA and Mazda thereafter exchanged correspondence regarding the CBSA's request for supporting documentation over the ensuing year, namely as regards documentation—either in the requisite form or otherwise—that the defective parts had been destroyed. In May 2022, CBSA issued its final decision letter rejecting the Blanket Application, noting that Mazda had not supplied evidence that the parts had been disposed of (the "Final Decision").

Mazda argued that the Final Decision was unreasonable because it had supplied evidence of destruction of the defective parts, and that the CBSA had breached Mazda's legitimate expectations by requiring that it file the requisite form confirming disposal of the defective parts.

Justice Aylen dismissed Mazda's argument that it was unreasonable for CBSA to refuse to draw an inference that the parts had been destroyed. Despite being given repeated opportunities to do so, Mazda failed to provide evidence of disposal of the specific defective parts at issue and merely supplied generalized information on its policies and evidence of credits from the parent company. The CBSA had moreover accommodated Mazda by requesting either the requisite form or other evidence showing disposal of the defective parts. Given the evidence before the CBSA and that Mazda bears the burden of supplying the prescribed information to obtain a refund, the CBSA's decision declining the refund was reasonable.

Justice Aylen likewise rejected Mazda's argument that the Final Decision violated its legitimate expectations. Mazda argued that the agreement in place with Revenue Canada and the CBSA between 1996 and 2017 (the "1996 Agreement"), whereby Mazda was granted refunds without supplying the requisite form, had created a legitimate expectation that the Blanket Application would be refunded without having to supply the requisite forms. Justice Aylen identified several flaws with Mazda's argument, namely that there was no evidence that Mazda in fact held the expectation the 1996 Agreement still applied in submitting the Blanket Application; that there was no unambiguous representation that CBSA would continue to follow the 1996 Agreement; and that Mazda's responses to CBSA contained additional evidence confirms that it did not expect that the procedure under the 1996 Agreement would apply. Finally, Justice Aylen noted that even if Mazda could establish a legitimate expectation, it was provided with ample opportunities to address the gap in its evidence and therefore would not be entitled to further procedural remedies.

While highly fact-specific, the decision in *Mazda Canada* provides a useful reminder on the applicability of the doctrine of legitimate expectations as it might arise from an agreement between an importer and the CBSA and CRA, and clearly underlines that the importer bears the onus of satisfying the evidentiary requirements for obtaining a refund under the *Customs Act* notwithstanding the accommodations by the CBSA.

FREE TRADE AGREEMENT PANEL DECISIONS

In this year's edition of *Canadian Trade Law Year in Review* we summarize two state-to-state trade cases brought against Canada. The first was brought by New Zealand under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP") and the second by the United States under the Canada-United States-Mexico Agreement ("CUSMA"). As noted last year, the dispute between Canada and New Zealand was the first Chapter 28 state-to-state dispute heard by a Panel of the CPTPP.

Both disputes focused on Canada's dairy tariff rate quota ("TRQ") administration. Under both the CUSMA and the CPTPP, Canada applies preferential tariff rates for certain products up to a given volume of imports (with existing most-favoured-nation tariff rates applying to any

amount imported over that volume), and allocates access to only certain eligible applicants, including dairy processors. While the allocation mechanism is different under each agreement, both the United States and New Zealand alleged that Canada's TRQ system for dairy was overly restrictive in violation of the CUSMA and the CPTPP, respectively. New Zealand was successful on only two of its arguments in the CPTPP dispute; in the CUSMA dispute, the Panel majority rejected all claims put forward by the United States.

Canada – Dairy Tariff Rate Quota Allocation Measures (CDA-NZ-2022-28-01)

In last year's edition of Canadian *Trade Law Year in Review*, we noted that New Zealand had requested a Panel under the CPTPP challenging Canada's TRQ administration for dairy products. Specifically, the allocation system for dairy products from New Zealand created pools of TRQ allocation volumes that were set aside for "processors", "further processors", and "distributors." For some products, distributors were entirely excluded or restricted to only a small portion of the overall TRQ volume. New Zealand argued that this allocation methodology for dairy products imported into Canada was inconsistent with several Articles under Chapter 2 of the CPTPP.

The Panel held that Canada's allocation methodology violated Articles 2.30(1)(b) and 2.29(1) because Canada's methodology restricted *ab initio* allocations to processors and also restricted importers' ability to make full use of Canada's TRQ amounts. However, importantly, the Panel majority rejected the balance of New Zealand's arguments, including the arguments that Canada was not allowed to set additional eligibility requirements and conditions for TRQ allocation pursuant to Articles 2.30(1)(a) and 2.29(2)(a).

On the first allegation, the Panel agreed with New Zealand that Canada's practice of restricting several of its TRQs in a pool to "processors" and "further processors" was inconsistent with Article 2.30(1)(b),[1] which prohibits "limit[ing] access to an allocation to processors" (the "Processor Clause"). The core of the debate on this point turned on the meaning of the phrase "an allocation". Whereas New Zealand argued that the word "an" meant "any", Canada took the view that it meant "every". On Canada's interpretation, the Processor Clause merely prohibited the allocation of <u>every</u> quota portion to processors. As it found dictionary definitions unpersuasive, the Panel turned to further customary principles of treaty interpretation to find that Canada's definition of "an allocation" was not supported by the context, nor object and purpose of the CPTPP. The Panel was also not persuaded that the lack of the word "any" in the Processor Clause—when compared to the earlier producer clause—meant that parties were permitted to restrict processors' access to TRQs. Rather, the Panel found that Canada was prohibited from limiting *access* to *any* allocation to processors.

[1] Canada is bound to ensure that: "unless otherwise agreed, it does not allocate any portion of the quota to a producer group, condition access to an allocation on the purchase of domestic production or <u>limit access to an allocation to processors</u>." (emphasis added)

On the second allegation, the Panel agreed that Canada's TRQ allocation mechanism violated Article 2.29(1), which states "Each Party shall administer its TRQs in a manner that allows importers the opportunity to utilise TRQ quantities fully." The Panel determined that "TRQ quantities" referred to the entire TRQ amount agreed by Canada under the treaty, rather than only the quantities within each "pool" in Canada's allocation system. Likewise, it found that "utilize" in Article 2.29(1) referred to access by all importers to apply for TRQ allocations, rather than merely the use of an assigned allocation as had been argued by Canada. Having determined that Article 2.29(1) referred to the utilization of the entire TRQ amount, the Panel found that Canada's TRQ "pooled" allocation mechanism was inconsistent with Article 2.29(1) as it deprived importers of "the opportunity to utilise TRQ quantities fully."

Having found that certain portions of Canada's TRQ allocation methodology were inconsistent with the CPTPP, the Panel nonetheless considered New Zealand's additional claims.

One such claim was that Canada's eligibility requirements violated CPTPP Article 2.30(1)(a),[2] which the Panel rejected. Whereas New Zealand argued that compliant eligibility requirements were limited to those listed at paragraph 3(c) of Annex A of Canada's Tariff Schedule, Canada argued that the term "eligibility requirements" encompassed all potential requirements that a party would place on an import, whereas the eligibility referred to in Annex A represented only *minimum* requirements. The Panel was persuaded that the absence of a cross-reference in Annex A to Article 2.30(1)(a) favoured Canada's interpretation. Likewise, the Panel found that the text of the treaty provided leeway for individual Parties that chose to employ an allocation mechanism to craft their own eligibility requirements" subject to other provisions in the CPTPP, and that Article 2.30(1)(a) does *not* mean that Canada must open its dairy TRQs to all Canadian residents who are "active in the dairy sector" (as set out in Annex A) due to the absence of the word "any" or "every" before the word "eligible applicants".

Finally, the Panel majority rejected New Zealand's claim under Article 2.29(2)(a), which prohibits the introduction of new eligibility requirements on the utilisation of a TRQ. According to New Zealand, Canada's practice of limiting pools of TRQ volumes to "processors", "further processors", and "distributors" was a new eligibility requirement that ran contrary to Article 2.29(2)(a). For Canada, conversely, the phrase "utilization of the TRQ for importation of a good" meant that Article 2.29(2)(a) only applied to eligibility requirements on *products* that were imported only after the TRQs had been allocated. The Panel held that New Zealand's interpretation would be redundant with several other Articles, and noted that the use of the singular "eligibility requirement"—rather than the plural appearing in other Articles—suggested the requirement applies only within a single TRQ and therefore that Article 2.29(a) referred to limitations on eligibility only after the TRQ had been allocated.

[2] "In the event that access under a TRQ is subject to an allocation mechanism, each importing Party shall ensure that: (a) any person of a Party that fulfils the importing Party's eligibility requirements is able to apply and to be considered for a quota allocation under the TRQ".

The past two years of state-to-state trade disputes involving Canada have focused heavily on the interpretation of treaty provisions rather than on the facts underlying these claims. Indeed, it is interesting in this claim that there was no agreed-upon negotiating history of the Articles at issue. The Panel thus had no supporting documentation on which it could rely in interpreting the treaty, and instead resorted primarily to the plain meaning of the clause with reference to its context and the object and purpose of the treaty as a whole, in accordance with the *Vienna Convention on the Law of Treaties*. As trade disputes continue to get more complicated, international trade lawyers will be well served by familiarizing themselves with rules of treaty interpretation and reviewing instances of their application, such as this one, where the rules were diligently applied.

Canada – Dairy Tariff Rate Quota Allocation Measures 2023 (CDA-USA-2023-31-01) [*Dairy 2*]

Following the United States' success in the 2022 CUSMA dairy panel case ("*Dairy 1*"), Canada made certain amendments to its system for TRQ administration. The changes included adopting a market share approach for the allocation of quota.

Despite these adjustments, the United States in *Dairy 2* again contended that several aspects of Canada's dairy TRQ measures remained inconsistent with CUSMA, including by limiting allocations to dairy processors and by excluding retailers from eligibility for allocations. Unlike in *Dairy 1*, however, the majority of the Panel in *Dairy 2* sided with Canada on all counts and rejected each of the United States' allegations in turn.

First, the Panel dismissed the U.S. argument that Canada improperly limited eligibility to TRQ allocations to "processors", "further processors", and "distributors" in violation of Paragraph 3(c) of Section A of Canada's TRQ Appendix and CUSMA Article 3.A.2.6(a). The core of the disagreement between the Parties was whether the obligation that Canada "shall allocate its TRQs to eligible applicants"—with applicants being defined as those "active in the food or agriculture sector"—required Canada to provide a TRQ allocation to *every* applicant that was "active in the food or agriculture sector", such as retailers. The majority sided with Canada, finding that Paragraph 3(c) serves as a baseline threshold that requires Canada to provide allocations to applicants who are "active" in the relevant sector, but does not prevent Canada from adding additional eligibility requirements for receipt of TRQ allocations. Conversely, the dissenting opinion argued that the plain language of Paragraph 3(c) imposed an obligation on Canada to allocate TRQs to "eligible applicants" without qualification, relying on the restrictive word "shall" under Paragraph 3(c), the overall trade liberalizing "objective and purpose" of the CUSMA, and certain other articles of the CUSMA that only allow Parties to add additional *process*-related—not *substantive*—eligibility requirements.

The Panel likewise dismissed U.S. arguments regarding Article 3.A.2.6(a), which prohibits introducing new conditions, limits, or eligibility requirements on the utilization of a TRQ for importing agricultural goods outside of those mentioned in a Party's Annex. The United States argued that any limitations on those eligible for TRQs to processors, further processors, and distributors were new requirements that violated the Article. However, the Panel, applying rules of interpretation under the VCLT, concluded that Article 3.A.2.6(a) primarily applied to the process of importing goods themselves rather than to the status of allocation applicants, consequently finding that the Article did not apply to the measures in question.

The second group of arguments advanced by the United States pertained to Canada's market share allocation mechanism, which was argued to be in contravention of Articles 3.A.2.11(b), 3.A.2.11(c), 3.A.2.11(e), 3.A.2.4(b) and 3.A.2.10. For context, Canada determines market share using different measurements according to the applicant's category (*e.g.*, total volume of production in kilograms for processor applicants versus total volume of arm's-lengths sales in kilograms for distributor applicants). The TRQ allocation amount is based on a particular applicant's share of the total market activity (in kilograms) reported by all eligible applicants.

The United States claimed that this approach was inequitable and effectively limited allocations to processors, thereby breaching Article 3.A.2.11(b) which prohibits limitations on TRQ allocations to processors. However, the Panel concluded that Canada's market share allocation mechanism—with different market activity measurements applying to different applicant categories—did not violate Article 3.A.2.11(b) because it did not prevent distributors from receiving allocations and therefore did not "limit" allocations to processors.

This disagreement extended to Article 3.A.2.4(b), which obliges CUSMA Parties to establish fair and equitable procedures for administering TRQs. While the United States argued that this Article applied to criteria established for TRQ allocations, the Panel sided with Canada in holding that Article 3.A.2.4(b) did not apply to the criteria themselves but rather to the "process" for administering the TRQ, including, *e.g.*, how applications from eligible applicants were handled.

Additionally, the Panel dismissed U.S. arguments that Canada's TRQ administration contravened the CUSMA provisions dealing with commercially viable shipping quantities and equitable and transparent "methods" for TRQ allocations. Specifically, the United States alleged that Canada's market share methodology was not "equitable" and challenged Canada's practice of asking applicants to confirm acceptance allocation volumes below 20,000 tonnes, which the United States alleged would not be "commercially viable". The Panel found that Canada's practice was in fact a measure to *ensure* that its TRQ allocations would represent commercially viable quantities and found that the term "methods" at Article 3.A.2.11(e) referred to the *processes* used to provide allocations to applicants and not the criteria used for establishing TRQ allocations themselves.

Relatedly, the Panel dismissed the United States' arguments related to Article 3.A.2.10, which dictates that new importers meeting eligibility criteria must be eligible for allocation on a basis no less favorable than other eligible applicants. The United States contended that Canada's assessment of market share based on a 12-month reference period disadvantaged new importers. The Panel sided with Canada, stating that the provision in question only required equal access for eligible applicants regardless of whether or not they had imported dairy products in the past, and Canada's market share model applied uniformly across all such applicants (*i.e.*, prior importation was not a condition for receipt of allocation; all that was required in the 12-month reference period was eligible market activity).

The United States' third basket of arguments targeted Canada's TRQ allocation criteria, specifically the requirement that applicants demonstrate "activity regularly during the reference period and throughout/during the quota year." The United States argued that these criteria were unduly restrictive and arbitrary, violating Paragraph 3(c). The Panel, however, determined that the ordinary meaning of "active" was "participating or engaging in a specified sphere of activity, [especially] to a significant degree." It concluded, therefore, that requiring activity during both the 12-month reference period and the TRQ period satisfied this meaning of "active" in Paragraph 3(c), and that the potential existence of better systems of assessment was irrelevant to determining whether Canada's system met the obligations of Paragraph 3(c).

The final line of argument focused on Canada's mechanism for return and reallocation of unused TRQ allocations. Article 3.A.2.15 mandates a timely and transparent reallocation system, and the United States argued that Canada's process, assessed in the ninth month, was too late. The Panel found insufficient evidence to support this claim and considered the process timely. As for Article 3.A.2.6, the United States argued that Canada's system incentivized TRQ holders to sell progressively and return unused volumes without penalty. The Panel rejected this argument, stating that Canada's system allowed timely reallocation and did not restrict importers from using their TRQ volumes fully.

As demonstrated in our examination of state-to-state dispute settlement cases in the previous edition of *Canadian Trade Law Year in Review* and continuing into the current edition, complainants in state-to-state disputes may employ a strategy of presenting a multiplicity of claims, hoping that at least one "sticks" and effects the desired policy change from the defendant country. However, international trade lawyers should take note that this strategy does not appear to have worked for the United States in *Dairy 2*. Unlike the Panels in *Dairy 1* and in the CPTPP dispute discussed above, the Panel majority in *Dairy 2* addressed and rejected each of the 13 individual claims advanced by the United States. The sheer number of arguments advanced by the United States opened the door to the Panel expending judicial resources considering weaker arguments, which may have undermined the United States' overall position.

CONCLUDING REMARKS

This past year witnessed several blockbuster trade cases, particularly the two state-to-state challenges to Canada's TRQ administration. While the decisions from the Federal Court of Appeal and CBSA undoubtedly attracted less public attention, they nevertheless provide important developments in Canada's domestic trade remedies regime and are worthy of closer attention paid by trade law practitioners and their clients.

Going forward, we anticipate interesting developments in the trade law field in 2024, with a forthcoming decision from the FCA on the issue of the CBSA's approach to reliability testing, and several applications for judicial review dealing with delisting applications under the *Special Economic Measures Act*. Practitioners and interested parties will be well served by watching for regular updates to CLK's website tracking these developments as they occur. Finally, trade practitioners should monitor the forthcoming decision from the Supreme Court of Canada in *Ummugulsum Yatar v TD Insurance Meloche Monnex*, which will be instructive on the availability of concurrent statutory appeal and judicial review proceedings under both the *SIMA* and *Customs Act*.