Canadian International Trade Tribunal | Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

ANNUAL REPORT

FOR THE FISCAL YEAR ENDING MARCH 31, 2021

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The CITT provides Canadian and international businesses with access to fair, transparent and timely processes and adjudication.

June 30, 2021

Pursuant to Article 41 of the *Canadian International Trade Tribunal Act*, I am pleased to present the annual report outlining the activities, highlights and successes of the Tribunal for fiscal year 2020-2021, a year marked by unprecedented circumstances. Having taken over my new role on January 1 of this year, I am particularly honoured to share with you, on behalf of the Tribunal Members and its Secretariat, the accomplishments of an organization with a long-standing tradition of excellence in serving Canada's economic interests in compliance with the rule of law.

The Canadian International Trade Tribunal (CITT), along with all public institutions, was faced with the need to adjust rapidly to the new realities brought on by the pandemic. Taking stock, I am pleased to find that the Tribunal was able to carry on its mission of supporting international and Canadian rules governing trade. This would not have been possible but for the professionalism of the Members of the Tribunal and of all Secretariat employees – may each and every one of them find the expression of my heartfelt gratitude for the exceptional efforts they deployed over the last fifteen months.

The transition to a virtual work environment was greatly facilitated due to a certain number of initiatives put in place by the Tribunal in recent years. Among these, the gradual implementation of an electronic registry system started in March 2019, a priority initiative of my predecessor, Mr. Jean Bédard, was of vital assistance in adjusting to the new teleworking requirement. Mr. Bédard recognized that this element was key to achieving easier access to justice. Due to his informed leadership, the implementation of the electronic registry system was accelerated to ensure efficient continuity of operations.

As such, the cooperation of parties in Tribunal cases was exemplary. I would like to commend the members of the Tribunal's Consultative Committee, under the leadership of its president, Mr. Lawrence Herman, for their support; their wise counsel proved to be indispensable throughout this adjustment period. Faced with the impossibility of holding in-person hearings, the Tribunal quickly adapted to new practices and procedures to meet file processing deadlines. The Tribunal therefore held 14 virtual hearings during the fiscal year. By comparison, it held 35 in-person hearings and held no virtual hearings during fiscal year 2019-2020.

This report shows that the Tribunal's workload is maintained and even continues to grow year over year. As an illustration of this, the last fiscal year was marked by an unprecedented number of procurement complaints – 102 in 2020-2021, compared to 72 in 2019-2020. The large number of complaints filed by individuals and small and medium businesses speaks volumes about the Tribunal's reputation gained over the years when it comes to facilitated access to remedial action. The pages that follow

contain summaries of a few of the Tribunal's procurement decisions. It should be noted that a memorandum of understanding between the Tribunal and the Office of the Procurement Ombudsman, signed and entered into force on October 1, 2020, whose mandate complements the Tribunal's procurement mandate, has allowed a better screening of complaints received under this mandate.

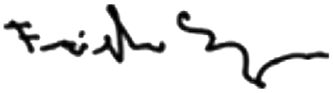
The trade remedies mandate remains without a doubt the Tribunal's best-known activity. Again, the Tribunal conducted many important inquiries during the past year with regard to injury caused to the Canadian industry due to dumping or subsidizing abroad. It should be noted that, increasingly, the Tribunal is called upon to examine new complaints from a broad range of industries – as demonstrated by inquiries into wheat gluten, upholstered seating or plywood panels.

Concerning appeals of tariff-related decisions, the Tribunal performance remained remarkable as all decisions were issued within 120 days following a hearing.

During the year, the Tribunal said goodbye to two long-time "family" members. Ms. Rose Ann Ritcey, Vice Chairperson of the Tribunal, retired in 2020 following a successful career in the public service, first at the Department of Finance, then at the Tribunal's Secretariat. She had been a member of the Tribunal since 2015.

I would also like to express my sincere appreciation to my predecessor, Mr. Jean Bédard, whose tenure ended on January 1 of this year. Mr. Bédard did an exceptional job first as member, since 2014, then as Chairperson of the Tribunal, starting in 2016. His efficient leadership, marked by great civility and thoroughness, is still an inspiration for the members of the Tribunal and of the Secretariat. He was able to steer the CITT to greater heights through numerous initiatives, notably the implementation of the electronic registry system mentioned above, the maintenance of a solid work relationship with the Administrative Tribunals Support Service of Canada and the establishment of long-lasting relationships with the Tribunal's counterparts worldwide. He will always be an example for us as we strive to maintain the reputation of excellence that he built for the CITT.

Sincerely,



Frédéric Seppey
Chairperson
Canadian International Trade Tribunal

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CHAPTER 1

SUMMARY

The Canadian International Trade Tribunal (CITT) is recognized, both here at home and on the international stage, as a centre of excellence in the fair and timely resolution of trade law matters. The Tribunal is a quasi-judicial body that provides Canadian and international businesses with access to fair, transparent and timely trade remedy inquiries (to inform the application of anti-dumping*, countervail* duties and safeguard* measures by the government in conformity with Canada's international trade obligations)[1], federal government procurement inquiries, and customs duties and excise tax appeals. At the request of the Government, the Tribunal provides advice in economic and tariff matters.

1. All terms featuring an asterisk are defined in the Glossary of Terms annexed to this report.

HISTORY OF THE TRIBUNAL

The Tribunal began operations on December 31, 1988, following the merger of the Tariff Board, the Canadian Import Tribunal and the Textile and Clothing Board. However, its history goes back to the time of Confederation and the Board of Customs, whose appellate mandate was transferred to the Tariff Board in 1931. In 1994, the Tribunal absorbed the Procurement Review Board. In 2014, the staff and budget of the Tribunal were transferred to the Administrative Tribunals Support Service of Canada (ATSSC).

1931 The Tariff Board was established to inquire into economic matters referred to it by the Minister of Finance. The appellate powers of the Board of Customs are also transferred to the Tariff Board.

1969 The Canadian Import Tribunal was established as the Anti-dumping Tribunal. Its name change reflected a broader mandate to conduct injury inquiries in both anti-dumping and countervailing duty proceedings under the *Special Import Measures Act* (*SIMA*), as well as in safeguard cases.

1970 The Tribunal's third predecessor, the Textile and Clothing Board, was formed in 1970 and inquired into safeguard complaints by the Canadian textile and apparel industries.

1994 The Tribunal absorbed the Procurement Review Board, extending the Tribunal's mandate to include inquiries into whether federal procurement processes have been carried out in accordance with Canada's domestic and international trade obligations.

2014 The Tribunal's staff and budget are transferred to the ATSSC.

TRADE REMEDY INQUIRIES

The Tribunal plays a significant role within Canada's trade remedy system. Under *SIMA*, the Tribunal determines whether the dumping* and subsidizing* of imported goods cause injury or threaten to cause injury to a domestic industry. The Tribunal issued 25 trade remedies decisions[2] and 1 safeguard exclusion decision during the fiscal year—compared to 20 the year before. These decisions related primarily to the steel sector, but also concerned products such as wheat gluten, plywood and upholstered domestic seating. Those decisions that are subject to statutory deadlines were issued within the applicable timelines.

2. "Trade remedies decisions" refers to preliminary inquiry (PI) determinations, final inquiry (NQ) findings, expiries (LE), expiry review (RR) and interim review (RD) orders, as well as other types of orders made pursuant to various processes provided for under *SIMA*.

PROCUREMENT INQUIRIES

During fiscal year 2020-2021, the Tribunal received a record number of complaints (102, compared to 72 the year before), pertaining to more than $1.7 billion in federal procurement. The Tribunal issued 88 decisions on whether to accept complaints for further inquiry. Of these decisions, a majority (46) led to the initiation of an inquiry. The Tribunal also issued final decisions on merit where complaints were accepted for inquiry. As a result, a total of 127 procurement decisions were issued in 2020-2021, compared to 89 the year before. All procurement review decisions were issued within legislated deadlines.

CUSTOMS AND EXCISE APPEALS

A total of 33 appeals were filed (32 under the *Customs Act* and 1 under *SIMA*) during the reporting period, and 1 extension of time request was received. The Tribunal issued 13 appeal decisions but did not issue any remand* decision under the *Customs Act*.

TRIBUNAL OPERATIONS UNDER COVID-19

On March 12, 2020, when the COVID-19 pandemic hit Canada, ATSSC staff had to relocate their offices at home. Tribunal members and Secretariat staff were forced to adapt very quickly to an unprecedented situation. This meant rapidly adopting technology allowing staff to pursue operations remotely, including adopting Microsoft Teams, upgrading WebEx, securing a secure telecommunications system, and adjusting many practices and procedures. The situation brought many challenges; the creativity and dedication of the Secretariat staff were instrumental in ensuring the Tribunal succeeded in delivering its mandates.

The fact that the Tribunal has been paperless since 2018 facilitated the adaptation to the drastic shift in work environment imposed by the lockdown. The Tribunal's E-registry pilot project has continued and in fact has been expanded during the year to allow for better integration with the Tribunal's case management system. Moreover, Secretariat staff held numerous training sessions to help the Tribunal's stakeholders become more familiar with its electronic tools, particularly the E-registry.

The pandemic also served as a great opportunity for the Tribunal to advance its transition towards electronic communications. Whereas previously the Tribunal sent paper mail to interested parties in Trade Remedies cases, the Tribunal now notifies interested parties of its proceedings mainly via e-mail, and this transition will continue in the coming year.

Lastly, the Tribunal had to adjust its practices and procedures to incorporate virtual meetings and develop new procedures for the transfer and handling of physical exhibits. Despite the numerous challenges this presented the Tribunal, it also brought many opportunities for conducting more efficient proceedings. As explained in the case summary for Inquiry No. NQ-2019-002 below, the Tribunal discovered and successfully addressed the many challenges that this brought forth.

CASELOAD

TABLE 1 – TRIBUNAL CASELOAD OVERVIEW[3]

	Cases Received					Total Decisions/Reports Issued				
	2020-2021	2019-2020	2018-2019	2017-2018	2016-2017	2020-2021	2019-2020	2018-2019	2017-2018	2016-2017
TRADE REMEDIES										
Injury inquiries*										
Preliminary (PI)	**7**	2	6	4	4	**7**	2	6	5	4
Final (NQ)	**5**	2	5	5	4	**3**	1	6	5	2
Public interest inquiries* (PB)										
Requests	**0**	0	0	0	0	**0**	0	0	0	0
Inquiries	**0**	0	0	0	0	**0**	0	0	0	0
Interim reviews* (RD)										
Request	**3**	2	1	1	3	**3**	2	2	2	0
Reviews	**0**	0	0	0	2	**1**	0	2	1	2
Expiry reviews*										
Expiries (LE)	**5**	5	9	5	2	**5**	6	8	6	1
Reviews (RR)	**5**	6	8	6	1	**6**	8	6	2	3
Safeguards*	**2**	2	1	0	0	**1**	3	0	0	0
Remanded* cases	**2**	1	0	1	0	**1**	0	0	1	0
TOTAL	**29**	**20**	**30**	**22**	**16**	**27**	**22**	**30**	**22**	**12**
PROCUREMENT (PR)										
Complaints received	**102**	72	69	67	70	**127**	125	128	124	137
Remanded cases	**0**	0	0	1	0	**0**	0	0	1	0
TOTAL[4]	**102**	**72**	**69**	**68**	**70**	**127**	**125**	**128**	**125**	**137**
APPEALS										
Extensions of time (EP)										
Customs Act	**1**	2	4	1	1	**1**	3	3	2	0
Excise Tax Act	**0**	0	0	0	0	**0**	0	0	0	0
TOTAL	**1**	**2**	**4**	**1**	**1**	**1**	**3**	**3**	**2**	**0**
APPEALS										
Customs Act (AP)	**32**	47	69	65	52	**12**	40	20	28	24
Excise Tax Act (AP)	**0**	0	0	2	0	**0**	0	0	0	0
Special Import Measures Act (EA)	**1**	10	1	1	0	**1**	0	0	0	1
Remanded cases	**1**	0	2	0	0	**0**	1	1	0	4
TOTAL	**34**	**57**	**72**	**68**	**52**	**13**	**41**	**21**	**28**	**29**

3. For a more in-depth look at statistics pertaining to the Tribunal's 2020-2021 caseload, please refer to the table at Annex B.
4. The totals correspond to the number of complaints received and the number of decisions pertaining to complaints accepted or not for inquiry, as well as decisions on merit, in a given year.

Several proceedings that the Tribunal undertakes under the Special Import Measures Act *are subject to strict statutory deadlines. The Tribunal has 60 days to conduct a preliminary injury inquiry and issue its determination. The Tribunal has 120 days to conduct a final injury inquiry and issue its finding. As well, the Tribunal must conduct expiry reviews and issue its orders within 160 days.*

The Tribunal's procurement inquiries are also subject to deadlines under the Canadian International Trade Tribunal Procurement Inquiry Regulations*. A procurement inquiry can take from 45 to 135 days, depending on the circumstances.*

PROJECTED TRIBUNAL CASELOAD

The Tribunal expects a trend increase in its caseload, especially for its dumping and subsidizing inquiries mandate, leading to one of the highest numbers of trade remedy proceedings the Tribunal has ever seen. This situation would add considerable pressure on Tribunal's members and Secretariat staff to ensure services delivery and compliance with legislated deadlines. Three main factors point in this direction:

- Historical data show a trend increase in the number of cases coming before the Tribunal (see Table 2 below). Particularly noticeable is the increase in the number of preliminary injury and injury investigations conducted this year.
- In its 2021 Budget, the Government signalled its intention to launch public consultations on measures to strengthen Canada's trade remedy system and to improve access for workers and small and medium-sized enterprises (SMEs). These changes, if implemented, may make it easier to bring forth trade remedies cases and further encourage the use of Canada's trade remedies mechanisms—leading to a rise in the average number of cases filed with the Tribunal each year.
- As well, anti-dumping and countervailing findings expire after five years, unless an expiry review is initiated to determine whether the measures remain necessary. The number of expiry reviews has gradually increased over a ten-year period, from an average of 3 reviews for the 2011-2016 period to 5 for the 2016-2021 period. There are now 27 antidumping and countervailing measures in force as of March 31, 2021, that will come up for review within the next 5 years. Other types of inquiries will also likely occur, such as interim reviews and public interest inquiries.

The Tribunal's caseload for its procurement inquiries mandate has also seen a trend increase over the years that has accelerated in the last year. As indicated in Table 3, the number of complaints received by the Tribunal in 2020-2021 was 55 percent higher than in 2011-2012, with the average number of complaints received during a five-year period having gone from 61 during the 2011-2016 period to 76 during the 2016-2021 period.

TABLE 2 – DUMPING AND SUBSIDIZING INQUIRIES FROM 2011 TO 2021

Fiscal Year	Decisions Issued Under Dumping and Subsidizing Inquiries[5]					
	Preliminary Injury Inquiries (PI)	Inquiries (NQ)	Expiries (LE)	Expiry Reviews (RR)	Interim Reviews (RD)	TOTAL Decisions Issued Under Dumping and Subsidizing Inquiries
2020-21	7	3	5	6	4	25
2019-20	2	1	6	8	2	19
2018-19	6	6	8	6	2	28
2017-18	5	5	6	2	2	20
2016-17	4	2	1	3	2	12
2015-16	2	4	3	3	0	12
2014-15	3	2	6	3	1	15
2013-14	4	4	4	5	7	24
2012-13	5	5	5	3	4	22
2011-12	3	1	2	2	5	13

TABLE 3 – PROCUREMENT INQUIRIES FROM 2011 TO 2021

Fiscal Year	Complaints Received
2020-21	102
2019-20	72
2018-19	69
2017-18	68
2016-17	70
2015-16	70
2014-15	69
2013-14	49
2012-13	53
2011-12	66

5. Please note that the numbers in this table represent the total number of cases handled by the Tribunal, namely the number of cases brought forward from the previous fiscal year combined with the number of cases received in the current fiscal year. Moreover, this table does not count safeguards and remanded cases.

CHAPTER 2

ORGANIZATION AND ACTIVITIES

The Tribunal is a quasi-judicial body that carries out its responsibilities in an independent and impartial manner. It reports to Parliament through the Minister of Finance. The Tribunal's strategic outcome is the fair, timely and transparent disposition of its cases.

HOW THE TRIBUNAL DOES ITS WORK

The Tribunal is a court of record and has, with regard to procedural matters necessary or proper for the due exercise of its jurisdiction, the powers, rights and privileges as are vested in a superior court. For instance, the Tribunal can subpoena witnesses and require parties to produce information. At the same time, however, the Tribunal carries out its proceedings as informally and expeditiously as the circumstances and considerations of fairness permit.

The Tribunal provides individuals and businesses with the opportunity to submit their evidence and views and to respond to other parties before it makes a final decision. Access to companies' confidential information is strictly controlled. Protecting confidential information against unauthorized disclosure is extremely important for the Tribunal.

Frequently, the Tribunal holds hearings to allow parties to call witnesses and explain their points of view and present arguments. Hearings are open to the public and are usually held at the Tribunal's headquarters in Ottawa, Ontario, but may be held elsewhere in Canada depending on the specific circumstances of a given case. Parties may also participate in electronic hearings (e.g. through videoconferencing technology). The Tribunal may also base its decisions solely on the written information filed before it or collected during the proceedings without an in-person hearing. Due to the COVID-19 pandemic, the Tribunal has not held any physical public hearings during the fiscal year but has continued hearing matters through electronic hearings (e.g. through videoconferencing technology) and by way of file hearings.

The Tribunal has little control over the volume and complexity of its workload and faces tight statutory deadlines for most of its cases. The Tribunal's website serves as a repository of all information relating to decisions and their accompanying statements of reasons.

The Tribunal receives case-related support services from staff of the CITT Secretariat of the Administrative Tribunals Support Service of Canada (ATSSC). The ATSSC also provides the Tribunal with corporate services, IT support and facilities.

MEMBERS OF THE TRIBUNAL

The Tribunal may be composed of up to seven full-time permanent members, including the Chairperson and a Vice-Chairperson. The Chairperson assigns cases to members and manages the Tribunal's work. Permanent members are appointed by the Governor in Council for a term of up to five years, which can be renewed once. Up to five temporary members may also be appointed. Members have a variety of educational backgrounds and experience.

Mr. Frédéric Seppey is the Chairperson of the Tribunal. He was appointed to this position on January 4, 2021, replacing Mr. Jean Bédard whose term ended on January 1, 2021. The other permanent members of the Tribunal as of March 31, 2021, were Ms. Susan Beaubien, Ms. Cheryl Beckett, Mr. Georges Bujold, Mr. Randy Heggart and Mr. Peter Burn. Mr. Serge Fréchette, a former permanent member, serves as a temporary member.

Last year also saw the departure of former Vice-Chairperson, Ms. Rose Ann Ritcey, after serving for a term of five years as a Tribunal member. As a result, for most of 2020-2021, the Tribunal has operated with only six permanent members and one temporary member. The Tribunal has nevertheless been able to carry its mission and to maintain its service standards despite this significant vacancy.

OUTREACH

The Tribunal's Advisory Committee provides recommendations to enhance the accessibility, fairness and transparency of the Tribunal's rules and procedures. It is made up of a cross-section of legal counsel, business associations and governmental officials. Members of the Tribunal met with the Advisory Committee four times during the year. Meetings were held in May, July, October 2020 and March 2021, and focused on how the Tribunal would operate in a COVID-19 environment while ensuring the safety of staff and parties. The Tribunal will continue working with the Advisory Committee to seek its stakeholders' input in its ongoing efforts to enhance fairness and accessibility for all parties, and to reduce costs for the parties appearing before the Tribunal, especially small- and medium-sized businesses.

CHAPTER 3
MANDATES

The Tribunal is mandated to act within five key areas:

1 Dumping and Subsidizing Injury Inquiries

To inquire into and decide whether dumped and/or subsidized imports have caused, or are threatening to cause, injury to a domestic industry pursuant to the *Special Import Measures Act* (*SIMA*).

2 Procurement Inquiries

To inquire into complaints by potential suppliers concerning procurement by the federal government and decide whether the federal government breached its obligations under certain trade agreements to which Canada is party.

3 Customs and Excise Appeals

To hear and decide appeals of decisions of the Canada Border Services Agency (CBSA) made under the *Customs Act* and *SIMA* and of the Minister of National Revenue made under the *Excise Tax Act*.

4 Economic and Tariff Inquiries

To inquire into and provide advice on such economic, trade and tariff issues as are referred to the Tribunal by the Governor in Council or the Minister of Finance.

5 Safeguard Inquiries

To inquire into complaints that increased imports are causing, or threatening to cause, serious injury to domestic producers and, as directed, make recommendations to the Government on an appropriate remedy.

MANDATE: DUMPING AND SUBSIDIZING INJURY INQUIRIES

Under *SIMA*, the CBSA may impose anti-dumping and countervailing duties if Canadian producers are injured by imports of goods into Canada:

- that have been sold at prices lower than prices in the home market or at prices lower than the cost of production (dumping), or
- that have benefited from certain types of government grants or other assistance (subsidizing).

The determination of the existence of dumping and subsidizing is the responsibility of the CBSA. The Tribunal determines whether such dumping or subsidizing has caused or is threatening to cause material injury to a domestic industry or has caused material retardation to the establishment of a domestic industry.

1) INJURY INQUIRIES

a. PRELIMINARY INJURY INQUIRIES (PI)

A Canadian producer or an association of Canadian producers begins the process of seeking relief from alleged injurious dumping or subsidizing by making a complaint to the CBSA. If the CBSA initiates a dumping or subsidizing investigation, the Tribunal initiates a preliminary injury inquiry under subsection 34(2) of *SIMA*. The Tribunal seeks to make all interested parties aware of the inquiry. It issues a notice of commencement of preliminary injury inquiry that is published in the *Canada Gazette* and notice of the commencement of the preliminary injury inquiry is provided to all known interested parties.

In a preliminary injury inquiry, the Tribunal determines whether the evidence discloses a reasonable indication that the dumping or subsidizing has caused injury or retardation, or is threatening to cause injury. The primary evidence is the information received from the CBSA and submissions from parties. The Tribunal seeks the views of parties on what are the like goods and which Canadian producers comprise the domestic industry. In most cases, it does not issue questionnaires or hold a public hearing at the preliminary injury inquiry stage. The Tribunal completes its inquiry and renders its determination within 60 days.

If the Tribunal finds that there is a reasonable indication that the dumping or subsidizing has caused injury or retardation, or is threatening to cause injury, it makes a determination to that effect, and the CBSA continues the dumping or subsidizing investigation.

If there is no reasonable indication that the dumping or subsidizing has caused injury or retardation, or is threatening to cause injury, the Tribunal terminates the inquiry, and the CBSA terminates the dumping or subsidizing investigation. The Tribunal issues reasons for its decision not later than 15 days after its determination.

The Tribunal completed seven preliminary injury inquiries in the fiscal year concerning six different products: heavy plate, concrete reinforcing bar, grinding media, decorative and other non-structural plywood, wheat gluten and upholstered domestic seating.

b. FINAL INJURY INQUIRIES (NQ)

If the CBSA makes a preliminary determination of dumping or subsidizing, the Tribunal commences a final injury inquiry pursuant to section 42 of *SIMA*. The CBSA may levy provisional duties on imports from the date of the preliminary determination. The CBSA continues its investigation until it makes a final determination of dumping or subsidizing.

As in a preliminary injury inquiry, the Tribunal seeks to make all interested parties aware of its inquiry. It issues a notice of commencement of inquiry that is published in the *Canada Gazette* and forwarded to all known interested parties.

In conducting final injury inquiries, the Tribunal requests information from interested parties, receives representations and holds public hearings. It asks Canadian producers, importers, purchasers, foreign producers and exporters to respond to questionnaires. Primarily on the basis of questionnaire responses, an investigation report is prepared, which is put on the case record and is made available to counsel and parties. Parties participating in the proceedings may present their own cases or may be represented by counsel. Confidential or business-sensitive information is protected in accordance with provisions of the *CITT Act* and is only available to counsel and experts who are granted access by the Tribunal.

The *Special Import Measures Regulations* prescribe factors that the Tribunal must consider in its determination of whether the dumping or subsidizing of goods has caused injury or retardation or is threatening to cause injury to a domestic industry. These factors include, among others, the volume of dumped or subsidized goods, the effects of the dumped or subsidized goods on prices and the impact of the dumped or subsidized goods on domestic production, sales, market share, profits, employment and utilization of domestic production capacity.

The Tribunal holds a public hearing about 90 days after the commencement of the inquiry, i.e. at or around the time when the CBSA has made a final determination of dumping or subsidizing. At the public hearing, Canadian producers attempt to persuade the Tribunal that the dumping or subsidizing of goods has caused injury or retardation or is threatening to cause injury to a domestic industry. Importers, foreign producers and exporters may challenge the Canadian producers' case.

After cross-examination by parties and questioning by the Tribunal, each side has an opportunity to respond to the other's case and to summarize its own. In some inquiries, the Tribunal calls witnesses who are knowledgeable of the industry and market in question. Parties may also seek the exclusion of certain goods from the scope of a Tribunal finding of injury or retardation or threat of injury.

The Tribunal must issue its finding within 120 days from the date of the preliminary determination of dumping or subsidizing issued by the CBSA. It has an additional 15 days to issue reasons supporting the finding. A Tribunal finding of injury or retardation or threat of injury to a domestic industry is required for the imposition of anti-dumping or countervailing duties by the CBSA. The finding remains in place for a maximum of five years.

Due to the COVID-19 pandemic, the Tribunal did not hold any public hearings as they were deemed unsafe. The Tribunal continued to hear *SIMA* matters during the fiscal year through a combination of videoconference and file hearings. A summary of such procedures applied to one of the Tribunal's cases (Inquiry No. NQ-2019-002) is included below. It is also worth noting that the Tribunal's hearing guidelines broadly reflect public health guidelines, procedures and recommendations established by the federal and provincial governments, and by other courts.

The Tribunal completed three final injury inquiries in the fiscal year concerning corrosion-resistant steel sheet, heavy plate and decorative and other non-structural plywood.

Three final injury inquiries were in progress at the end of the fiscal year: one inquiry concerning wheat gluten from Australia, Austria, Belgium, France, Germany and Lithuania, and two inquiries concerning concrete reinforcing bar from various countries.

2) EXPIRY REVIEWS

a. INITIATION OF EXPIRY REVIEWS (LE)

Subsection 76.03(1) of *SIMA* provides that a finding or order expires after five years, unless an expiry review has been initiated. Not later than two months before the expiry date of the finding or order, the Tribunal publishes a notice of expiry in the *Canada Gazette*. The notice invites persons and governments to submit their views on whether the order or finding should be reviewed and gives direction on the issues that should be addressed in the submissions. If the Tribunal determines that an expiry review is not warranted, it issues an order with reasons for its decision. Otherwise, it initiates an expiry review.

The Tribunal completed five expiries during the fiscal year concerning photovoltaic modules and laminates, certain whole potatoes, refined sugar, carbon and alloy steel line pipe and steel grating, and there was no expiry in progress at the end of the fiscal year.

b. EXPIRY REVIEWS (RR)

When the Tribunal initiates an expiry review of a finding or an order, it issues a notice of expiry review and notifies the CBSA of its decision. The notice of expiry review is published in the *Canada Gazette* and notice is provided to all known interested parties.

The purpose of an expiry review is to determine whether the imposition of anti-dumping or countervailing duties remains necessary. There are two phases in an expiry review. The first phase is the investigation by the CBSA to determine whether there is a likelihood of resumed or continued dumping or subsidizing if the finding or order expires. If the CBSA determines that such likelihood exists with respect to any of

the goods, the second phase is the Tribunal's inquiry into the likelihood of injury or retardation arising from the resumption or continuation of the dumping or subsidizing. If the CBSA determines that there is no likelihood of resumed dumping or subsidizing for any of the goods, the Tribunal does not consider those goods in its subsequent determination of the likelihood of injury and issues an order rescinding the order or finding with respect to those goods.

The Tribunal's procedures in expiry reviews are similar to those in final injury inquiries. Upon completion of an expiry review, the Tribunal issues an order with reasons, rescinding or continuing a finding or order, with or without amendment. If a finding or order is continued, it remains in force for a further five years, unless an interim review is initiated and the finding or order is rescinded. If the finding or order is rescinded, imports are no longer subject to anti-dumping or countervailing duties.

The Tribunal completed six expiry reviews in the fiscal year concerning carbon steel screws, concrete reinforcing bar, hot-rolled carbon steel plate and high-strength low-alloy steel plate, oil country tubular goods and photovoltaic modules and laminates, and there were four expiry reviews in progress at the end of the fiscal year concerning certain whole potatoes, refined sugar, carbon and alloy steel line pipe and steel grating.

3) PUBLIC INTEREST INQUIRIES (PB)

Following a finding of injury or threat of injury, the Tribunal notifies all interested parties that any submissions requesting a public interest inquiry must be filed within 45 days. The Tribunal may initiate, either after a request from an interested person or on its own initiative, a public interest inquiry following a positive finding, if it is of the opinion that there are reasonable grounds to consider that the imposition of all or part of the duties may not be in the public interest. If it is of this view, the Tribunal then conducts a public interest inquiry pursuant to section 45 of *SIMA*. The result of this inquiry may be a report to the Minister of Finance recommending that the duties be reduced and by how much.

The Tribunal did not conduct any public interest inquiries during the fiscal year.

4) INTERIM REVIEWS (RD)

The Tribunal may review its findings of injury or threat of injury or other related orders at any time, on its own initiative or at the request of the Minister of Finance, the CBSA or any other person or government (section 76.01 of *SIMA*). The Tribunal commences an interim review where one is warranted, and it then determines if the finding or order (or any aspect of it) should be rescinded or continued to its expiry date, with or without amendment.

An interim review may be warranted where there is a reasonable indication that new facts have arisen or that there has been a change in the circumstances that led to the finding or order. For example, since the finding or order, the domestic industry may have ceased production of like goods or foreign subsidies may have been terminated. An interim review may also be warranted where there are facts that, although in existence, were not emphasized during the related expiry review or inquiry and were not discoverable by the exercise of reasonable diligence at the time.

The Tribunal determined, in respect to two requests for interim review concerning carbon and alloy steel line pipe and gypsum board, that a review was not warranted. The Tribunal initiated an interim review in respect to one request concerning welded large diameter carbon and alloy steel line pipe, which remained ongoing at the end of the fiscal year. Furthermore, an additional request for an interim review, concerning refined sugar, remained under consideration at the end of the fiscal year.

5) SAMPLE OF NOTEWORTHY DECISIONS UNDER THE DUMPING AND SUBSIDIZING INJURY INQUIRIES MANDATE

The cases highlighted this year are centred around two themes. On the procedural side, operating during the COVID-19 pandemic caused the Tribunal to adapt some of its procedures in most of the *SIMA* inquiries and expiry reviews that proceeded before it. *Corrosion-resistant Steel Sheet*, Inquiry No. NQ-2019-002 (*COR II*), showcases these procedural decisions and the challenge of conducting an inquiry during a global pandemic. On the substantive side, several Tribunal decisions examined the question of cumulation in injury inquiries and expiry reviews where dumped and/or subsidized goods originate from multiple countries. These summaries have been prepared for general information purposes only.

Corrosion-resistant Steel Sheet – Inquiry No. NQ-2019-002

Following preliminary determinations of dumping and subsidizing made by the CBSA on March 20, 2020, with respect to certain corrosion-resistant steel sheet from Turkey, the United Arab Emirates and Vietnam (the subject goods), the Tribunal initiated this injury inquiry on March 23, 2020. As such, this inquiry was the first one conducted entirely in the period following the onset of the COVID-19 pandemic, the World Health Organization having declared the global outbreak a pandemic on March 11, 2020. During the inquiry, the Tribunal adapted certain procedures in light of ongoing COVID-19-related circumstances.

During the data gathering phase of the proceeding, some domestic producers, importers, purchasers or foreign producers of the subject goods who had been asked to complete Tribunal questionnaires reported difficulties in responding, due to lockdowns and work-from-home rules in force in Canada and elsewhere. Having regard to the circumstances faced by respondents and to allow for the best possible data to be collected, accommodations (such as additional time to fill questionnaires) were granted to a relatively higher number of questionnaire respondents than usual. An Investigation Report was ultimately prepared consistent with standard methodology.

In May 2020, due to the ongoing COVID-19 situation, the Tribunal advised parties that the public hearing for the inquiry, previously scheduled for June 15, 2020, would be cancelled and the matter would instead be heard by way of written submissions. The file hearing procedures, finalized with input from parties, afforded parties an opportunity to make further written representations following the filing of the traditional case briefs. Namely, all parties were given the opportunity to suggest questions with regard to the clarification of evidence submitted by another party. The Tribunal did not receive any such questions in this inquiry but issued its own questions. Once the Tribunal operationalized its videoconferencing system for the conduct of fully remote hearings, closing arguments were scheduled to be heard by way of videoconference. Similar hearing procedures were used in other proceedings under *SIMA*, as the Tribunal's *Practice Direction* cancelling in-person hearings remained in effect considering the continuing public health situation.

Inquiry No. NQ-2019-002 also followed an extraordinary extended schedule. In accordance with subsection 41(1) of *SIMA*, the CBSA's final determinations of dumping and subsidizing, or termination of its investigations, in respect of the subject goods were scheduled to be issued on June 18, 2020. In accordance with subsection 43(1), the Tribunal was scheduled to issue its finding on July 17, 2020. However, on June 18, 2020, the CBSA indicated that revisions to the schedule of its investigations were made in order to alleviate pressures on interested parties brought on by the COVID-19 pandemic. The CBSA's final decisions with respect to its dumping and subsidizing investigations were therefore rescheduled to October 16, 2020.

As a result, the Tribunal was compelled to extend its parallel injury inquiry beyond the 120 days envisioned in *SIMA*. The Tribunal consigned its procedural decisions to a formal order and reasons, issued on July 31, 2020. The Tribunal explained that subsection 43(1) of *SIMA* requires that an order or finding be made by the Tribunal with respect to the goods to which a final determination of the CBSA applies. The Tribunal reasoned that, in adopting subsection 43(1) of *SIMA*, which requires the Tribunal to issue its finding forthwith after the date of receipt of notice of a final CBSA determination of dumping or subsidizing, but in any event not later than 120 days after the date of receipt of notice of the CBSA's preliminary determination, Parliament did not envision the issuance of the Tribunal's finding in the absence of a final determination of dumping or subsidizing made by the CBSA. The Tribunal highlighted that, fundamentally, if the CBSA's investigations do not reveal the existence of dumping or subsidizing in respect to some or all of the goods, the Tribunal's inquiry into the possible existence of injury caused by that dumping or subsidizing loses its *raison d'être*. It would be an absurd interpretive effect to require the Tribunal to issue a finding in the absence of a final decision by the CBSA, as this would result in the Tribunal's finding being made on speculation and without proper factual basis. Therefore, the Tribunal indicated that it would issue its finding forthwith following the revised date of receipt of notice of the CBSA's final determination of dumping or subsidizing with respect to any of the subject goods.

On September 30, 2020, the Minister of Finance issued an *Order Respecting Time Limits Under the Special Import Measures Act* (*Time Limits Order*) pursuant to subsections 7(1) and (5) of the *Time Limits and Other Periods Act (COVID 19)*, which came into force on July 27, 2020. The *Time Limits Order* extended the time limit established by subsection 43(1) of *SIMA*, in the case of an investigation initiated under subsection 31(1) of *SIMA* on or before April 1, 2020. Accordingly, the deadline for a final determination pursuant to subsection 43(1) in this case was effectively extended to December 31, 2020.

Following receipt of the CBSA's final determination on October 16, 2020, the Tribunal held closing arguments by videoconference on October 23, 2020. The Tribunal issued its findings on November 16, 2020.

Carbon Steel Screws (RR-2019-002), Concrete Reinforcing Bar (RR-2019-003) and COR II (NQ-2019-002) – The issue of cumulation where goods are both dumped and subsidized

In the above-mentioned decisions, parties presented arguments to the Tribunal on the proper way to interpret cumulation provisions of *SIMA* and, in particular, whether the Tribunal should cumulatively assess the effects of subject goods from different countries in a single injury analysis where goods from some subject countries are not subject to the same type of unfair trade practice as goods from other subject countries. More specifically, at the heart of the Tribunal's decisions was the proper interpretation of subsections 42(3) and 76.03(11) of *SIMA*, which govern cumulation in injury inquiries and expiry reviews, respectively. The Tribunal addressed the important issue of the relevance of provisions of the World Trade Organization (WTO) Agreement on Subsidies and Countervailing Measures (ASCM) and Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (ADA), and WTO jurisprudence (notably the report of the Appellate Body *US – Carbon Steel (India)* [8 December 2014], WT/DS436/AB/R) in the interpretation of these provisions.

Carbon Steel Screws and *Concrete Reinforcing Bar* (*Rebar*) were expiry reviews involving subject goods from different countries that were dumped, while the subject goods from some of these countries were *also* subsidized. A specific question before the Tribunal in both cases was therefore whether, under subsection 76.03(11) of *SIMA*, the Tribunal should cumulatively assess goods from all countries, regardless of whether they were dumped only or both dumped and subsidized. In both cases, a majority of the panel took the view that it should not. In *Rebar*, the majority further indicated that in interpreting *SIMA*, the Tribunal should look to the international agreements that are the source of Canada's international obligations, and seek guidance from the WTO decisions that interpret the provisions of these agreements. The majority further concluded that the practice of cumulating the effects of goods from countries subject to anti-dumping duty investigations and countries subject to countervailing duty investigations was inconsistent with Canada's international obligations. The majority of the Tribunal concluded that the provisions of *SIMA* on this issue do not show an unambiguous contrary intent and, therefore, can and should be interpreted consistent with the requirements of the WTO agreements.

The Tribunal again considered the issue of cumulation in *COR II*. Here, the Tribunal was of the view that subsection 42(3) of *SIMA* is clear and unambiguous only to the extent that it mandates cumulation of the effects of dumped goods from more than one country (if certain preconditions of that provision are met). However, the Tribunal did not accept that subsection 42(3) clearly mandates the cumulation or cross-cumulation of the effects of dumped goods with those of goods that are subsidized. Rather, the Tribunal indicated that one interpretation that takes into account that part of the provision which is clear and unambiguous and would also be consistent with Canada's international obligations under the ASCM would require the Tribunal to conduct separate analyses of the effects of dumped goods from those of subsidized goods; an approach acknowledged by the Tribunal previously (e.g. in *Rebar*).
The Tribunal reiterated its view that, in choosing between possible interpretations permitted by the text, *SIMA* should be interpreted in a manner consistent with international obligations. Ultimately, the Tribunal found that a separate analysis with respect to the subsidized goods that remained subject to the inquiry was not practically feasible in this case, having regard to the arguments and evidence on the record, which did not address the manner in which the effects of the subsidized goods should be isolated from the effects of the dumped goods. The Tribunal indicated that it could consider this approach in the future.

MANDATE: PROCUREMENT INQUIRIES

Potential suppliers that believe that they may have been unfairly treated during a procurement solicitation covered by the Canada-United States-Mexico Agreement, the World Trade Organization (WTO) Agreement on Government Procurement, the Canada-Chile Free Trade Agreement, the Canada-Peru Free Trade Agreement, the Canada-Colombia Free Trade Agreement, the Canada-Panama Free Trade Agreement, the Canada-Honduras Free Trade Agreement, the Canada-Korea Free Trade Agreement, the Canada-European Union Comprehensive Economic and Trade Agreement, the Canadian Free Trade Agreement (CFTA), the Canada-Ukraine Free Trade Agreement or the Trans-Pacific Partnership may file a complaint with the Tribunal.

The relevant provisions of the *Canadian International Trade Tribunal Procurement Inquiry Regulations* (*Regulations*) allow a complainant to first make an attempt to resolve the issue with the government institution responsible for the procurement before filing a complaint.

The Tribunal's role is to determine whether the government institution followed the procurement procedures and other requirements specified in the applicable trade agreements.

When the Tribunal receives a complaint, it reviews it against the legislative criteria for filing. If there are deficiencies, the complainant is given an opportunity to correct them within the specified time limit. If the Tribunal decides to conduct an inquiry, the government institution is sent a formal notification of the complaint and a copy of the complaint itself. If the contract has been awarded, the government institution, in its acknowledgement of receipt of a complaint letter, provides the Tribunal with the name and address of the contract awardee. The Tribunal then sends a notification of the complaint to the contract awardee as a possible interested party. An official notice of the complaint is published in the *Canada Gazette*. If the contract in question has not been awarded, the Tribunal may order the government institution to postpone the award of any contract pending the disposition of the complaint by the Tribunal.

After receipt of its copy of the complaint, the relevant government institution files a response called the Government Institution Report. The complainant and any intervener are sent a copy of the response and given an opportunity to submit comments. Any comments received are forwarded to the government institution and other parties to the inquiry.

Copies of any other submissions or reports prepared during the inquiry are also circulated to all parties for their comments. Once this phase of the inquiry is completed, the Tribunal reviews the information on the record and decides if a public hearing is necessary or if the case can be decided on the basis of the information on the record.

The Tribunal then determines whether or not the complaint is valid. If it is, the Tribunal may make recommendations for remedies, such as re-tendering, re-evaluating or providing compensation to the complainant. The government institution, as well as all other parties and interested persons, is notified of the Tribunal's decision. Recommendations made by the Tribunal should, by statute, be implemented to the greatest extent possible. The Tribunal may also award reasonable costs to the complainant or the responding government institution depending on the nature, circumstances and outcome of the case.

SUMMARY OF PROCUREMENT ACTIVITIES

During the fiscal year, the Tribunal issued 88 decisions on whether to accept complaints for inquiry and 39 final decisions on complaints that were accepted for inquiry, for a total of 127 decisions. Nineteen cases were still in progress at the end of the fiscal year, five of which were still under consideration for being accepted for inquiry.

SAMPLE OF NOTEWORTHY DECISIONS UNDER THE PROCUREMENT INQUIRIES MANDATE

Newland Canada Corporation (PR-2019-054 and PR-2019-055) – Tribunal has jurisdiction abroad under the CFTA – Department of National Defence recognized its mistake in contract award – Complainant chose to litigate, not settle

This complaint concerned procurements by the Department of National Defence (DND) for the provision of hotel accommodations in Cologne, Germany, for Canadian Armed Forces members. Newland Canada Corporation (Newland) alleged that it should have been awarded the contracts, as it submitted the lowest-priced compliant bids. It also alleged that the hotel accommodations offered by the successful bidder in both instances did not meet the location requirements set out in the Request for Proposals and that its bids were therefore non-compliant. The Tribunal found that Newland's complaint was valid.

Importantly, the Tribunal examined the circumstances in which it has jurisdiction under the CFTA to examine certain procurements where the goods or services are delivered or performed abroad.

DND acknowledged, both in its correspondence with Newland prior to the filing of the complaints and in its submissions to the Tribunal that, due to errors in the evaluation of the bids, the contracts had been improperly awarded to compliant bidders with higher-priced bids. DND apologized to Newland for the errors and attempted to reach a reasonable settlement to cover its lost profits, but to no avail. Proceedings at the Tribunal began.

The outcome of these matters resulted in an award for compensation to Newland for the profits that it lost in not being awarded the contracts. That amount was inferior to an amount previously offered by DND to Newland during the unsuccessful settlement negotiations. The Tribunal did not award compensation where Newland was unable to substantiate various aspects of its lost profits claims.

The Tribunal also offered the parties the possibility of having a member of the Tribunal, who was not involved in the adjudication of the matter on its merits, available to preside over a settlement conference in order to help the parties achieve a negotiated settlement. However, the parties did not take the Tribunal up on this offer.

Marine International Dragage Inc. (PR-2020-023) – PWGSC allowed an unfair advantage

This complaint related to a procurement by the Department of Public Works and Government Services (PWGSC) for the removal of concrete structures located at the bottom of the Richelieu River, in Lacolle, Quebec. The Tribunal found that the complaint was valid.

Marine International Dragage Inc. (M.I.D.) claimed various improprieties in the conduct of the procurement process by PWGSC. The Tribunal found that PWGSC violated the principle of non-discrimination. The winning bidder benefited from an unfair advantage by conducting an inspection while under contract to provide a report leading up to the invitation to tender. PWGSC made use of some of the information and recommendations contained in that report when preparing the solicitation. Other bidders were not privy to that information. PWGSC allowed the winning bidder to remain in a privileged position to prepare a bid in response to the solicitation. PWGSC had an obligation to exclude the winning bidder from the tendering process, and to make sure it took measures that would place all of the potential suppliers on an equal footing, which it did not do. PWGSC violated various trade agreement obligations.

The Tribunal awarded compensation for lost profits to M.I.D.

University of Ottawa and Coding for Veterans (Joint Venture) (PR-2020-030) – Support of Joint Venture partners in Tribunal proceedings

This complaint concerned a Request for Proposal (RFP) issued by PWGSC on behalf of DND for a cyber operator training program. The University of Ottawa decided to withdraw the complaint and PWGSC filed a motion seeking an order to cease the inquiry. The motion was allowed.

The joint venture partners properly commenced the complaint but their common intent to pursue the matter ended during the proceedings. One party to the joint venture wanted to pursue the complaint, the other did not. The Tribunal ceased the inquiry for lack of a qualified and willing complainant. The Tribunal remarked that to the extent that one of the joint venture partners was denied its day in court, its recourse lies against its partner in the joint venture.

PricewaterhouseCoopers LLP (PR-2020-035) – Immigration and Refugee Board conducted improper evaluation

This complaint concerned an RFP issued by the Immigration and Refugee Board of Canada (IRB) for the provision of business consulting and change management services. The Tribunal found that the complaint was valid in part.

PricewaterhouseCoopers LLP (PwC) alleged that its bid was evaluated using undisclosed criteria and that certain information contained in its bid was not properly considered in the evaluation. PwC also alleged that its bid was not evaluated in accordance with the evaluation criteria stated in the RFP.

The Tribunal agreed that enough allegations had been demonstrated to call into question the procurement process. In particular, the evaluation documents indicated that the IRB prioritized and placed a premium on whether the project descriptions reflected experience within a particular context. More particularly, the evaluators appeared to be seeking bid content that reflected a problem or solution approach with a nexus to the IRB's operational challenges, as opposed to confirmation that the bidder had previously performed the type of tasks falling within the scope

of the three focus areas identified by the RFP. The bid evaluation documents indicated that the evaluators were looking for, or expecting, something more than confirmation of previous project experience. The second phase of the evaluation, a group consensus meeting, indicated that a higher threshold was being sought. The evaluation sheet emphasized that, for two criteria, "quality of evidence" was a factor, with this being assessed with reference to the features of "applicable, apposite, appropriate, suitable, fitting, pertinence, importance, materiality, applicability, significance, aptness, relativity", none of which were mentioned in the RFP as evaluation criteria or could be inferred from the RFP.

The Tribunal awarded PwC compensation for lost opportunity, and reasonable bid preparation costs.

Marine Recycling Corporation and Canadian Maritime Engineering Ltd. (PR-2020-038, PR-2020-044 and PR-2020-056) – Flawed evaluations

The solicitation concerned an RFP for the disposal of the former CCGS *W.E. Ricker* vessel, issued by PWGSC on behalf of the Department of Fisheries and Oceans. Three complaints were filed in respect of this RFP. The first complaint was filed by Marine Recycling Corporation (MRC) (PR-2020-038) and the two others by Canadian Maritime Engineering Ltd. (CME) (PR-2020-044 and PR-2020-056). The matters were consolidated. The Tribunal found that PWGSC improperly cancelled the awarded contract and retendered the requirement, and that various evaluation grounds of complaint were valid.

MRC alleged that PWGSC relied on undisclosed criteria in the evaluation of the bid, failed to apply published evaluation criteria and ignored vital information contained in the bid. Additionally, MRC alleged that PWGSC improperly cancelled the solicitation.

CME alleged that PWGSC improperly cancelled the awarded contract and in doing so breached its duty to award the contract to the winning bidder. Additionally, CME alleged that PWGSC disclosed information regarding CME's bid that would preclude CME from fairly competing in the next solicitation process. CME also alleged that PWGSC relied on undisclosed criteria in the evaluation of its bid, failed to apply published evaluation criteria, and ignored vital information contained in its bid.

The Tribunal recommended the re-evaluation of the bids in the initial solicitation according to specific instructions.

Construction Galipeau Inc. (PR-2020-039) – Bid delivery

This complaint concerned a Request for a Standing Offer issued by PWGSC for the provision of general contractor services in the municipalities of Québec and Les Escoumins. The Tribunal found that the complaint was valid in part.

Construction Galipeau Inc. (Galipeau) challenged the rejection of its bid by PWGSC. According to Galipeau, PWGSC should not have rejected its bid on the sole basis that it was submitted to the address indicated on the cover page of the solicitation documents rather than through Canada Post's epost Connect service, as specified elsewhere in the solicitation documents. Galipeau disputed that the winning bidder possessed the necessary certifications to carry out the work requested in the solicitation.

The Tribunal determined that both methods of bid delivery were provided for in the solicitation documents and recommended that Galipeau's bid be evaluated.

The Tribunal provided for indemnification scenarios based on the outcome of that evaluation vis-à-vis other bidders. The Tribunal also awarded Galipeau its reasonable bid preparation costs in the event that its bid was found not to be the lowest-priced proposal.

Weir-Jones Engineering Ltd. and Weir-Jones Engineering Consultants Ltd. (PR-2020-042) – Tribunal jurisdiction extends to matters involving procurement processes raising intellectual property issues

This matter concerned a procurement by PWGSC on behalf of the Department of Natural Resources for an earthquake early warning system. Weir-Jones Engineering Ltd. (Weir-Jones) alleged that the terms of the solicitation encourage other bidders to infringe or circumvent its intellectual property. The Tribunal found that the complaint was not valid.

This matter raised novel issues notably relating to the confidentiality of materials in proceedings before the Tribunal and the jurisdiction of the Tribunal to consider matters where intellectual property issues are involved as a basis of a violation of the rules set out in the trade agreements.

The Tribunal confirmed that its jurisdiction extends to matters of intellectual property law in the context of the public procurement process as envisaged under the trade agreements. The Tribunal asserted that it will not shy away from examining a purportedly flawed procurement process and found no reason in fact or law related to PWGSC's arguments relating to the intellectual property aspects of the solicitation to decide otherwise.

Having asserted its jurisdiction to decide the complaint on its merits, the Tribunal found, however, that Weir-Jones failed to demonstrate that the procurement would necessarily result in the infringement of its intellectual property rights. At most, some aspects of the procurement process could give rise to scenarios where intellectual property rights are affected, but those situations are speculative. The Tribunal found that the complaint was not valid.

SoftSim Technologies Inc. (PR-2019-053) – Allegation of vexatious complaint

This matter concerned an RFP issued by the Department of Foreign Affairs, Trade and Development for the provision of task-based informatics professional services. SoftSim Technologies Inc. alleged that the government institution had exhibited bias. The Tribunal found that the complaint was not valid.

The Tribunal had occasion to consider a request by the government institution to cease the inquiry on the grounds that the complaint was vexatious and an abuse of process. The Tribunal ultimately denied the request but awarded extra costs to the government institution on account of the complainant's conduct. The Tribunal warned that it would not tolerate similar behaviour in the future.

Vesta Health Systems Inc. (PR-2020-057) – National security exception – Pandemic-related procurement

This matter concerned a call for proposals issued by PWGSC for research and development of innovative solutions for Canada's response to the COVID-19 pandemic. Vesta Health Systems Inc. (Vesta) argued that its bid should have been considered compliant with the screening criteria for safety considerations.

After the Tribunal had decided to conduct an inquiry into the complaint, PWGSC filed a motion requesting that the Tribunal cease its inquiry. PWGSC submitted that it had invoked a national security exception (NSE) for all solicitations related to the Government of Canada's needs having to do with COVID-19, to which the solicitation at issue was related, and it argued that the NSE removed the Tribunal's jurisdiction to inquire into the complaint. Vesta opposed this motion, arguing that the NSE had not been properly invoked.

This was the first time that the Tribunal had opportunity to consider subsections 10(2) and (3) of the *Regulations* since they came into force in 2019.

The Tribunal decided to cease its inquiry under subsections 10(2) and 10(3) of the *Regulations*, as well as Article 801(b) of the CFTA. The Tribunal found that PWGSC had produced a letter which properly invoked the NSE, according to the requirements under subsection 10(3) of the *Regulations*. The letter predated the awarding of any contract resulting from the solicitation at issue, and it was signed by the appropriate official, i.e. the Assistant Deputy Minister of Procurement at PWGSC. Although the letter was conditional on the continued existence of the COVID-19 pandemic as per the World Health Organization, it was common knowledge that the pandemic was ongoing both at the time of the solicitation and at the time of the complaint. The solicitation in issue was aimed at responding to the COVID-19 pandemic, as the letter requires.

The Tribunal noted that its decision to cease this inquiry does not necessarily foreclose all avenues of recourse, as Vesta may have recourse to the courts and/or the Office of the Procurement Ombudsman as alternatives to the Tribunal.

Ocalink Technologies Inc. (PR-2020-062) – National security exception – Pandemic-related procurement

This complaint concerned a procurement by PWGSC for the Public Health Agency of Canada in collaboration with the Department of Industry for the provision of ventilators in response to the COVID-19 pandemic. Ocalink Technologies Inc. argued that the government institutions breached the duty of fairness and that their conduct raised a reasonable apprehension of bias The Tribunal dismissed the complaint for lack of jurisdiction.

PWGSC brought a motion to dismiss the complaint pursuant to subsections 10(2) and (3) of the *Regulations* on the grounds that a national security exception had been invoked to exclude the procurement from any applicable trade agreements and therefore remove the Tribunal's jurisdiction to conduct an inquiry.

Against this context, the Tribunal read the relevant trade agreement exception being invoked as pertaining to the protection of human life and health because the COVID-19 pandemic was a "Public Health Emergency of International Concern" mandated by the World Health Organization.

The Tribunal remarked that the 2019 amendments to the *Regulations* adopt into law a policy position that contrasts with recent WTO jurisprudence and Canada's own position before the WTO, and the current state of international law whereby a state seeking to invoke a national security exception must demonstrate the existence of a valid national security concern (e.g. matters involving a state's borders, its armed forces, its information technology infrastructure, or generally its sovereignty), and that any measure taken under the guise of the exception be truly necessary to protect the invoking state's security interests.

MANDATE: CUSTOMS AND EXCISE APPEALS

The Tribunal hears appeals from decisions of the Canada Border Services Agency (CBSA) under the *Customs Act* and the *Special Import Measures Act* (*SIMA*) or of the Minister of National Revenue under the *Excise Tax Act*. Appeals under the *Customs Act* relate to the origin, tariff classification, value for duty or marking of goods imported into Canada. Appeals under *SIMA* concern the application, to imported goods, of a Tribunal finding or order concerning dumping or subsidizing and the normal value, export price or amount of subsidy on imported goods, or may relate to a scope ruling as to whether certain goods are subject to an order of the Governor in Council imposing a countervailing duty, an injury finding made by the Tribunal or an undertaking. Under the *Excise Tax Act*, a person may appeal the Minister of National Revenue's decision on an assessment or determination of certain excise taxes.

The appeal process is set in motion when a written notice of appeal is filed with the Registrar of the Tribunal within the time limit specified in the act under which the appeal is made. Certain procedures and time constraints are imposed by law and by the *Canadian International Trade Tribunal Rules* (*Rules*); however, at the same time, the Tribunal strives to encourage a relatively informal, accessible, transparent and fair proceeding.

Under the *Rules*, the person launching the appeal (the appellant) has 60 days to submit to the Tribunal a document called a "brief". Generally, the brief states under which act the appeal is launched, gives a description of the goods in issue and an indication of the points at issue between the appellant and the Minister of National Revenue or the CBSA (the respondent), and states why the appellant believes that the respondent's decision is incorrect. A copy of the brief must also be given to the respondent.

The respondent must also comply with time limits and procedural requirements. Ordinarily, within 60 days after having received the appellant's brief, the respondent must file with the Tribunal a brief setting forth the respondent's position and provide a copy to the appellant. The Registrar of the Tribunal, when acknowledging receipt of the appeal, schedules a hearing date. Hearings are generally conducted in public. The Tribunal publishes a notice of the hearing in the *Canada Gazette* to allow other interested persons to attend. Depending on the act under which the appeal is filed, the complexity and potential significance of the matter at issue, appeals will be heard by a panel of one or three members. Persons may intervene in an appeal by filing a notice stating the nature of their interest in the appeal and indicating the reason for intervening and how they would assist the Tribunal in the resolution of the appeal.

HEARINGS

An individual may present a case before the Tribunal in person or be represented by counsel. The respondent is generally represented by counsel from the Department of Justice. In accordance with rule 25 of the *Rules*, appeals can be heard by way of a hearing at which the parties or their counsel appear before the Tribunal (whether in person or by way of videoconference) or by way of written submissions (file hearing).

Hearing procedures are designed to ensure that the appellant and the respondent are given a full opportunity to make their cases. They also enable the Tribunal to have the best information possible to make a decision. As in a court, the appellant and the respondent can call witnesses, and these witnesses are questioned under oath or affirmation by the opposing parties, as well as by Tribunal members. When all the evidence is gathered, parties may present arguments in support of their respective positions.

The Tribunal, on its own initiative or at the request of the appellant or the respondent, may decide to hold a hearing by way of written submissions. In that case, it publishes a notice in the *Canada Gazette* to allow other interested persons to participate.

Within 120 days of the hearing, the Tribunal endeavours to issue a decision on the matters in dispute, including the reasons for the decision. A decision and its reasons are usually issued much sooner.

If the appellant, the respondent or an intervener disagrees with the Tribunal's decision, the decision can be appealed on a question of law to the Federal Court of Appeal or, in the case of the *Excise Tax Act*, the Federal Court (where the case will be heard *de novo* by the court).

EXTENSIONS OF TIME

Under section 60.2 of the *Customs Act*, a person may apply to the Tribunal for an extension of time to file a request for a re-determination or a further re-determination with the CBSA. The Tribunal may grant such an application after the CBSA has refused an application under section 60.1 or when 90 days have elapsed after the application was made and the person has not been notified of the CBSA's decision. Under section 67.1, a person may apply to the Tribunal for an extension of time within which to file a notice of appeal with the Tribunal. During the fiscal year, the Tribunal issued one order under the *Customs Act*, granting an extension of time. There were no outstanding requests under the *Customs Act* at the end of the fiscal year.

Under section 81.32 of the *Excise Tax Act*, a person may apply to the Tribunal for an extension of time in which to serve a notice of objection with the Minister of National Revenue under section 81.15 or 81.17 or file a notice of appeal with the Tribunal under section 81.19. During the fiscal year, the Tribunal did not issue any orders granting or denying extensions of time under the *Excise Tax Act*. There was no extension of time request under the *Excise Tax Act* received during the fiscal year.

APPEALS RECEIVED, HEARD AND SCHEDULED

The Tribunal schedules hearings immediately upon receipt of a case. This practice is instrumental in preventing any backlog on the Tribunal's docket. It also ensures timely access to justice by parties.

During the fiscal year, the Tribunal received 34 appeals. Sixty-six appeal cases were outstanding at the end of the fiscal year. Of that number, 30 were in abeyance at the request of the parties. The remaining 36 matters were all actively progressing in accordance with normal case-management milestones towards their scheduled hearing dates.

Those numbers are typical of previous years, and continue to demonstrate the success of the Tribunal's active case management approach. Indeed, this year, as in previous years, approximately one third of cases on the Tribunal's docket are in abeyance at the request of parties – oftentimes because they are attempting to negotiate a settlement; another third will be decided by the Tribunal and therefore be removed from the Tribunal's docket; the final third are at various stages of active case management in their pre-hearing stage.

SAMPLE OF NOTEWORTHY DECISIONS UNDER THE CUSTOMS AND EXCISE APPEALS MANDATE

Ferrostaal Metals GmbH (EA-2019-001) – The CBSA properly applied updated normal values at the time of its re-determination

At issue was whether the normal values (NVs) applicable to the imported goods should have been those established during the CBSA's re-investigation, as determined by the CBSA, or those established during the CBSA's original investigation, as claimed by Ferrostaal Metals GmbH (Ferrostaal). The appeal was dismissed.

The Tribunal found that the CBSA correctly applied updated NVs in accordance with *SIMA* and CBSA policy. When the CBSA makes a re-determination, whether on its own initiative because a deemed determination was based on information that was incorrect at the time of accounting, or in response to a request made by an importer, it is normally in possession of more recently established NVs, as the re-determination is made some time after the goods were imported. This is especially so in cases where the re-determination is made pursuant to section 59 of *SIMA.* Newer NVs are likely to have been determined on the basis of information that is contemporaneous with the sale of the goods to the importer in Canada or, such as in this matter, on the basis of information that is more recent than that used to establish the NVs that were relied upon at the time of importation. Had the CBSA ignored these newer NVs in favour of the older ones, it would have disregarded the clear wording of the duty liability, NV and re-determination provisions of *SIMA*. Instead, the CBSA properly followed *SIMA* and Memoranda D14-1-8 and D14-1-3.

The Tribunal reiterated that questions of fairness of treatment or purported abuse of discretion by the CBSA are often irrelevant or moot in Tribunal *de novo* proceedings. They were in this matter.

Finally, the Tribunal remarked that it could not review a CBSA re-determination under paragraph 57(b) of *SIMA* or its decision to make such a re-determination instead of exercising its discretion to use subsection 12(2). Ferrostaal subsequently made a valid request for re-determination under subsection 58(1.1) of *SIMA*, and it was therefore entirely proper for the President to make a re-determination under section 59. The issue in this appeal pertained exclusively to the correctness of the President's re-determination, which the Tribunal upheld.

AMD Medicom Inc. (AP-2018-044) – All medical examination gloves do not automatically qualify for duty-free treatment

At issue was whether nitrile medical examination gloves were properly classified as "other gloves for all purposes", as determined by the CBSA, or as "protective gloves to be employed with protective suits in a noxious atmosphere", as claimed by AMD Medicom Inc. The appeal was dismissed.

The Tribunal found that all nitrate medical examination gloves do not automatically qualify for duty-free treatment as "protective gloves to be employed with protective suits in a noxious atmosphere". At a minimum, the Tribunal considers classification in this tariff item to require some evidence establishing the end users of the goods and how the goods are used in practice; failing this, such goods are to be classified as "other gloves for all purposes".

The Tribunal was satisfied that the goods in issue could be used with protective suits in a noxious atmosphere, but the appellant failed to show that its product was being purchased by anyone other than a mass-market retailer. The appellant also failed to show any sales by that retailer to any customers using protective suits in a noxious atmosphere, such as would be the case in hospitals or other medical environments.

Gamma Sales Inc. (AP-2017-029) – All sports headgear is not athletic headgear

At issue was whether snowmobile helmets were properly classified as "other safety headgear", as determined by the CBSA, or as "other protective headgear, athletic", as claimed by Gamma Sales Inc. The appeal was dismissed.

The Tribunal found that the snowmobile helmets in issue are "other safety headgear". The term "athletic" refers to a specific type of activity that does not encompass all sports. While an athletic activity is included within the broader term of sports, a sport is not necessarily an athletic activity. The Tribunal determined that "athletics" covers certain disciplines that are performed by individuals using their physical abilities alone, which do not include snowmobiling.

Importantly, the Tribunal had occasion in this matter to further the law on the proper classification of certain helmets for motorized sports as examined in *Motovan* (AP-2017-028).

Canac Immobilier Inc. (importing as Canac Marquis Grenier Ltée) (AP-2019-041) – The *Customs Tariff* has its logic. A planter with a light is a light; it is not a planter

At issue was whether LED Pots were properly classified as "other electric lamps and lighting fittings", as determined by the CBSA, or as "other tableware, kitchenware, other household articles and hygienic or toilet articles, of plastics", as claimed by Canac Immobilier Inc. The appeal was dismissed.

The Tribunal found that the LED Pots were lamps and lighting fittings. This case illustrates the logical organization of the *Custom Tariff* according to a progression of least manufactured goods to more complex ones in ascending numerical order. Often, parties will argue that a good is more "this" than "that" according to its functions or even its "essential character" (as the appellant did in this case, i.e. its good was more of a planter of Chapter 39, than a light of Chapter 94). To be sure, a good might appear to be classified in two chapters at first glance according to the

description provided in each. Nevertheless, instead of arguing that a good is more one thing than the other, parties ought not to lose sight of other established rules of paramountcy in customs classification.

One of those rules, in precedence, is as follows: when faced with two competing tariff classifications, if a note in the *Customs Tariff* excludes a good from a given chapter among competing chapters (say Chapter 1) from being classified in the other competing chapter (say Chapter 2), then the Tribunal is to first examine whether the good meets the description of Chapter 1; if it does, it is classified in that chapter (i.e. Chapter 1); if it does not, the goods are examined to see whether they meet the description of the other chapter (i.e. Chapter 2). To be sure, Chapter 2 might not provide an adequate description after all, and other chapters and rules might then have to be examined as well, but the process described above is the starting point in such an instance.

In this matter, to paraphrase a note in the *Customs Tariff*, when placed in front of two chapters that, at first glance, describe the product, a good of Chapter 94 cannot be classified in Chapter 39. These "exclusionary notes" are meant to decide which description is examined first when confronted with what would seemingly be a tie. As such, the Tribunal began its assessment of the goods to see if they met the description of Chapter 94. They did. They were therefore classified as such. This follows the logic of the organization of the *Customs Tariff* as described above, i.e. a planter with a light is more complex than a planter alone; it is logical that it be placed in a chapter higher in numerical order than the lesser of the complex first-glance descriptions.

Rona Inc. (AP-2018-010) – Glass bath screens are not safety glass or other glassware

At issue was whether glass bath screens were properly classified as "Other articles of Glass" as determined by the CBSA, or as "Safety glass, consisting of toughened (tempered) or laminated glass" or as "Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 70.10 or 70.18)", as claimed by Rona Inc. The appeal was dismissed.

The Tribunal found that the bath screens were correctly classified as "Other articles of Glass". As relatively straightforward as certain cases may seem at first glance, this matter is a prime example that illustrates the intertwined and often very complex analysis of facts and law that the Tribunal must undertake when faced with classifying even everyday goods.

Industry and certification body standards, expert testimony, tribunal precedent, and general principles of law are but a few materials that the Tribunal typically examines in discharging its mandates, chiefly when examining importers' claims in regard to the *Customs Tariff*.

N. Valente (AP-2019-037) – A kit of airsoft gun components is found to be a prohibited device

At issue was whether a kit of airsoft gun components was properly classified as a "replica firearm", as determined by the CBSA, the importation of which is prohibited. The appeal was dismissed.

The Tribunal found that the airsoft kit is a replica firearm and therefore is a prohibited device. In the course of discharging its mandate, the Tribunal regularly examines whether various goods, alleged to be "prohibited devices" have been properly refused entry into Canada. Among such "prohibited devices" are "replica firearms". The CBSA's decision in this matter was upheld because the good met the conditions set out in the *Criminal Code* and the *Customs Tariff*, i.e. examined as a whole, the goods constituted a "replica firearm" because they (i) were designed or intended to exactly resemble, or to resemble with near precision, a firearm; (ii) were not themselves a firearm; and (iii) were not designed or intended to exactly resemble, or to resemble with near precision, an antique firearm.

9029654 Canada Inc. dba Sofina Foods Inc. (AP-2019-038) – Tribunal has no jurisdiction where there is no decision or non-decision by the CBSA relating to origin, classification, value for duty or markings

This appeal concerned the unauthorized use of a certificate for duty relief issued pursuant to a federal program administered under provisions of the *Customs Tariff*. The CBSA requested a decision pursuant to rule 23.1 of the *Rules*. The CBSA's request was granted.

The Tribunal found that if Sofina Foods Inc. (Sofina) had recourse to seek redress against the CBSA, it was before the Courts, not the Tribunal. Sofina is the successor of a company that imported frozen chicken into Canada duty-free using a duties relief licence. Several years after the importations, the CBSA discovered that the licence did not belong to the importer and was used erroneously. The CBSA asked Sofina to correct the error. Sofina did not comply. The CBSA reassessed the importations. Moneys were paid by Sofina. Errors and corrections were made by the CBSA in its communications with Sofina. However, the Tribunal found that the authority under which the CBSA was acting, i.e. subsection 118(1) of the *Customs Act*, did not pertain to a matter giving rise to an appeal to the Tribunal.

This matter allowed the Tribunal to examine a series of cases developed by the Tribunal and the Federal Court of Appeal pertaining to "non-decisions", "implied decisions", and the authority and timing of corrections in cases of purported refusal to act or exercise jurisdiction by the CBSA.

Mazda Canada Inc. (AP-2020-006) – Tribunal has no jurisdiction where there is no decision or non-decision by the CBSA relating to origin, classification, value for duty, or markings

The matter pertained to a request for refund of duties for vehicle parts that were replaced under warranty. The CBSA had decided that the importer did not qualify for "refunds for defective goods" under subsection 76(1) of the *Customs Act*. The case did not involve a dispute as to tariff classification, value for duty, origin, or markings of imported goods. The Tribunal had no jurisdiction to review the CBSA's decision to reject Mazda's request for such refunds.



CHAPTER 4

SAFEGUARD REFERENCE

International trade rules allow Canada to temporarily restrict imports to allow Canadian producers to adapt to increased imports which cause or threaten to cause serious injury. These temporary measures are called safeguards. The Tribunal has the authority to inquire into safeguard complaints from Canadian producers, as well as safeguard references from the Government of Canada. Complaints from Canadian producers can cover imports from all countries (global safeguards) or just imports from countries with which Canada has signed a free trade agreement (bilateral safeguards). When directed by the Government, the Tribunal may also recommend appropriate remedies to offset the harmful effects of import surges.

On October 10, 2018, the Tribunal was directed by the *Order Referring to the Canadian International Trade Tribunal, for Inquiry into and Reporting on, the Matter of the Importation of Certain Steel Goods*, P.C. 2018-1275 to conduct a safeguard inquiry concerning the importation into Canada of certain steel goods. Following the issuance, on April 3, 2019, of the Tribunal's report to the Governor in Council, the Government of Canada implemented final safeguard measures on May 9, 2019, in the form of tariff rate quotas on imports of heavy plate and stainless steel wire other than goods originating in Korea, Panama, Peru, Colombia, Honduras, or countries whose goods are eligible for General Preferential Tariff treatment. These measures, adopted in the *Order Imposing a Surtax on the Importation of Certain Steel Goods*, SOR/2018-206 (*Surtax Order*), are scheduled to expire after October 24, 2021.

On May 9, 2019, the Tribunal was further directed by the *Order Referring to the Canadian International Trade Tribunal, for Inquiry into and Reporting on, the Matter of the Exclusion of Certain Steel Goods from the Order Imposing a Surtax on the Importation of Certain Steel Goods*, P.C. 2019-0476 (*Exclusions Inquiry Order*) to conduct inquiries, at specified six-month intervals, regarding exclusion requests concerning certain heavy plate and stainless steel wire which are subject to safeguard measures enacted in the *Surtax Order*.

During the fiscal year, the Tribunal conducted its third inquiry and submitted a report to the Governor in Council in response to the *Exclusions Inquiry Order*. The Tribunal issued its report on November 10, 2020. The Tribunal received one request for a product exclusion for certain stainless steel wire. Having considered the arguments and evidence of the parties to the proceeding, the Tribunal recommended that the exclusion request be denied.

On March 26, 2021, the Tribunal gave notice, pursuant to subsection 30.03(1) of the *CITT Act*, that the *Surtax Order* was scheduled to expire on October 24, 2021. As part of this notice, the Tribunal advised that any domestic producer of goods that are like or directly competitive with certain heavy plate and stainless steel wire that are subject to safeguard measures enacted in the *Surtax Order*, or any person or association acting on behalf of any such domestic producer, may, pursuant to subsection 30.04(1) of the *CITT Act*, file with the Tribunal a written request that an extension order be made under subsection 63(1) of the *Customs Tariff* because an order continues to be necessary to prevent or remedy serious injury to domestic producers of like or directly competitive goods. Having received no extension requests in respect of the *Surtax Order* by the specified deadline, the Tribunal gave notice, on April 15, 2021, that it would not commence an extension inquiry.

CHAPTER 5

JUDICIAL REVIEWS

JUDICIAL OR PANEL REVIEWS OF TRIBUNAL DECISIONS

Any person affected by Tribunal findings or orders under section 43, 44, 76.01, 76.02 or 76.03 of *SIMA* can apply for judicial review* by the Federal Court of Appeal on grounds of, for instance, denial of natural justice or error of law. Any person affected by Tribunal procurement findings and recommendations under the *CITT Act* can similarly request judicial review by the Federal Court of Appeal under sections 18.1 and 28 of the *Federal Courts Act*. Lastly, Tribunal orders and decisions made pursuant to the *Customs Act* can be appealed under that act to the Federal Court of Appeal or, under the *Excise Tax Act*, to the Federal Court.

Judicial Review of *SIMA* Cases

During the reporting period, applications for judicial review were brought forth before the Federal Court of Appeal in relation to Tribunal decisions in two *SIMA* proceedings: *Corrosion-resistant Steel Sheet* and *Decorative* and *Other Non-structural Plywood*.

Judicial Review of Procurement Cases

There were four Procurement decisions that were brought forth before the Federal Court of Appeal in the fiscal year: files No. PR-2020-004 (*J.A. Larue Inc. v. Department of Public Works and Government Services*), PR-2020-009/PR-2020-022 (*Falcon Environmental Inc. v. Department of Public Works and Government Services*), PR-2020-034 (*Falcon Environmental Inc. v. Department of Public Works and Government Services*) and PR-2020-082 (*Sigma Risk Management Inc.*).

Customs and Excise Tax decisions appealed to the Federal Court of Appeal

There were four Tribunal decisions under the Customs Appeals and Excise Tax mandate that were brought forth to the Federal Court of Appeal during the reporting period: files No. AP-2018-029 (*Atlantic Owl [PAS] Limited Partnership v. President of the Canada Border Services Agency*), EA-2019-003/EA-2019-004 (*2045662 Alberta Inc./Prairies Tubulars [2015 Inc.] v. President of the Canada Border Services Agency*), AP-2019-044 (*Costco Wholesale Canada Ltd. v. President of the Canada Border Services Agency*) and AP-2019-009 (*Keurig Canada Inc. v. President of the Canada Border Services Agency*).

Review by CUSMA Binational Panel

Tribunal findings or orders under sections 43, 44, 76.01, 76.02 and 76.03 of *SIMA* involving goods from the United States and Mexico may be reviewed by a binational panel established under CUSMA. *SIMA* implements the CUSMA Chapter 10 requirement for binational panel review of final determinations in relation to goods from the United States and Mexico. A binational panel review is triggered on application from an interested party and replaces judicial review before the Federal Court of Appeal. A binational panel may uphold the Tribunal decision under review, or remand it back to the Tribunal for a determination not inconsistent with the panel decision.

One new request concerning gypsum board from the United States was made for review by a binational panel, which was ongoing at the end of the fiscal year.

WTO Dispute Resolution

Governments that are members of the WTO may challenge the Government of Canada in respect of Tribunal injury findings or orders in dumping and countervailing duty cases before the WTO Dispute Settlement Body (DSB). This is initiated by intergovernmental consultations under the WTO Dispute Settlement Understanding.

During the last fiscal year, no Tribunal matters were before the DSB.

Annex A – Glossary

Anti-dumping Duties

Dumping occurs when the export price of goods is lower than their normal value, i.e. generally either the domestic selling price of comparable goods in the country of export, or the constructed cost of production of the goods exported to Canada. The application of anti-dumping duties is intended to offset the amount of dumping on imported goods and give to the goods produced in Canada an opportunity to compete fairly with the imported goods. Where the Canadian International Trade Tribunal (Tribunal) finds that the dumping of imports has caused or is threatening to cause material injury to a domestic industry, or has caused material retardation of the establishment of a domestic industry, the Canada Border Services Agency (CBSA) levies anti-dumping duties on subsequent imports of goods matching the description of the dumped goods.

Countervail Duties

The application of countervail duties is intended to offset the amount of subsidizing on imported goods and give to the goods produced in Canada an opportunity to compete fairly with the imported goods. Where the Tribunal finds that the subsidizing of imports has caused or is threatening to cause material injury to a domestic industry, or has caused material retardation of the establishment of a domestic industry, the CBSA levies countervailing duties on subsequent imports of goods matching the description of the subsidized goods.

Decision

The Tribunal can issue decisions in the context of most of its mandates, including on any matter that arises in the course of a proceeding.

In the case of appeals, decisions are made pursuant to the *Customs Act* (e.g. requests for re-determination of classification, calculation of the value for duty, origin of imports, importation of prohibited goods), the *Excise Tax Act* and the *Special Import Measures Act* (e.g. the application of duties on certain imports or the proper calculation of the margin of dumping or amount of subsidy).

In the case of its procurement mandate, decisions are made regarding whether to conduct an inquiry.

Determination

The Tribunal issues determinations in the context of its procurement mandate, when it determines whether complaints are valid in part or in their entirety, and recommends a remedy (when necessary), which can be in the form of complaint costs awarded to either the complainant or the government institution, or in the form of remedial action by the party concerned.

Dumping

Dumping occurs when the export price of goods is lower than their normal value, i.e. generally either the domestic selling price of comparable goods in the country of export, or the constructed cost of production of the goods exported to Canada.

Expiry Review (LE and RR)

Towards the end of the five-year period in which a finding or order is in force, the Tribunal issues a notice requesting views on whether the finding or order should be reviewed or allowed to expire. After considering any representation made, the Tribunal determines whether an expiry review is warranted and issues an order (LE).

The Tribunal's mandate in an expiry review is to determine whether the expiry of the finding or order is likely to result in injury to the domestic industry and then, accordingly, to make an order either continuing or rescinding the finding with or without amendment (RR). If the Tribunal has not initiated an expiry review by the end of the five-year period, the order or finding is deemed to have been rescinded.

Extension of Time

Time limits for various requirements (e.g. filing a complaint, filing documents, responding to request, complying with any applicable trade agreement) are specified in the Tribunal's rules and regulations, and can be specified in a Tribunal order. However, after considering all pertinent circumstances, the Tribunal may grant a request for the extension of a prescribed time limit, in writing.

Injury Inquiry (PI and NQ)

When the President of the Canada Customs and Revenue Agency initiates an investigation into alleged dumping or subsidizing of certain goods, the Tribunal receives notification and immediately begins the first phase of its injury inquiry (PI): to determine whether there is evidence that discloses a reasonable indication that the dumping or subsidizing by any exporting country has caused injury or retardation or is threatening to cause injury to the domestic industry.

If the President makes a preliminary determination of dumping or subsidizing with respect to the subject goods, the Tribunal then begins its second phase of the inquiry (NQ): to determine whether the dumping or subsidizing by any exporting country has caused injury or retardation or is threatening to cause injury to the domestic industry. If the President issues a final determination of dumping or subsidizing, the Tribunal issues its finding. If a remedial measure is needed, anti-dumping or countervailing duties are applied to the imports for an initial period of approximately five years.

Interim Review (RD)

The Tribunal may receive requests to conduct an interim review of an injury finding or order, or of any aspect of these, from the Minister of Finance, the President of the CBSA, or any other person or of any government, before the expiry of the five-year period in which a finding or order is in force. The Tribunal proceeds only if it decides that such a review is warranted.

Judicial Review

Occasionally, an application may be made to the Federal Court of Appeal to review and set aside a Tribunal finding or order. As a result, the Court may rescind a Tribunal finding or order concerning the subject goods, or any of those goods, and return the matter to the Tribunal for reconsideration. In such instances, the record of the case remains the same but additional submissions can be accepted.

Order

The Tribunal can issue orders in the context of most of its mandates. Certain orders serve to communicate case-related decisions, such as in the case expiry review orders or claims for costs in procurement cases, decisions on motions such as dismissing an appeal, while procedural orders can serve to order the granting an extension of time, the removal of exhibits from the record, the filing of documents, etc. In all cases, an order represents directions from the Tribunal regarding the enforcement of a decision it has made.

Public Interest Inquiry (PB)

Following an injury inquiry where the Tribunal has found injury or threat of injury, the Tribunal sometimes conducts a public interest inquiry further to a request received from an interested person, association or government, or on its own initiative, to determine if the imposition of anti-dumping or countervailing duties, or the imposition of such duties in the full amount provided by the *Special Import Measures Act*, would not or might not be in the public interest. If the Tribunal determines the public interest does not warrant a reduction or elimination of duties, it issues an Opinion to that effect. If it determines the public interest does warrant a reduction or elimination of duties, then it issues a report to the Governor in Council in which it recommends remedial measures.

Remand

Remand means “order back” or “send back”. A party displeased with a Tribunal decision ask the Federal Court of Appeal to overturn it. The Court can overturn that decision itself, or refer it back (“remand it”) to the CITT with or without instructions on how it should decide the matter again.

Safeguard

A safeguard inquiry is conducted by the Tribunal further to complaints received from Canadian producers who believe they are being seriously injured, or may be seriously injured, due to increased quantities of imports from other countries. The objective of such an inquiry is to determine whether injury or threat of injury exists and to recommend temporary remedial measures (safeguards) to allow producers to compete fairly.

The Tribunal may also conduct such an inquiry following receipt of an order from the Governor in Council of Canada (safeguard reference). This type of order is usually very specific as to the objectives of the inquiry.

Subsidizing

Subsidizing occurs when goods imported into Canada benefit from certain types of foreign government financial contributions.

ANNEX B – Tribunal Caseload

Overview—2020-2021

The first table below contains statistics pertaining to the Tribunal's caseload for 2020-2021. The second table contains statistics relating to other case-related activities in 2020-2021. These statistics illustrate the complexity and diversity of the cases considered by the Tribunal.

	Cases Brought Forward From Previous Fiscal Year	Cases Received in Fiscal Year	Total	Decisions to Initiate	Decisions Not to Initiate	Total Decisions/ Reports Issued	Cases With-drawn/ Closed	Cases Outstanding (March 31, 2021)
TRADE REMEDIES								
Injury inquiries[1]								
Preliminary (PI)	0	7	7	N/A	N/A	7	0	0
Final (NQ)	2	5	7	N/A	N/A	3	0	4
Public interest inquiries (PB)								
Requests	0	0	0	0	0	0	0	0
Inquiries	0	0	0	N/A	N/A	0	0	0
Interim reviews (RD)								
Requests	1	3	4	2	2	3	0	1
Reviews	0	0	0	N/A	N/A	1	0	1
Expiry reviews[2]								
Initiation (LE)	0	5	5	N/A	N/A	5	0	0
Reviews (RR)	5	5	10	N/A	N/A	6	0	4
Safeguards	0	2	2	N/A	N/A	1	0	1
Remanded cases[3]	1	2	3	N/A	N/A	1	0	2
TOTAL	**9**	**29**	**38**	**2**	**2**	**27**	**0**	**13**
PROCUREMENT (PR)								
Complaints received	4	102	106	46	42	N/A	13	5
Accepted for Inquiry	7	0	7	N/A	N/A	39	0	14
Remanded cases	0	0	0	N/A	N/A	0	N/A	0
TOTAL	**11**	**102**	**113**	**46**	**42**	**39**	**13**	**19**
APPEALS (AP)								
Extensions of time (EP)								
Customs Act	0	1	1	N/A	N/A	1	0	0
Excise Tax Act	0	0	0	N/A	N/A	0	0	0
TOTAL	**0**	**1**	**1**	**N/A**	**N/A**	**1**	**0**	**0**
Appeals								
Customs Act (AP)	58	32	90	N/A	N/A	12	23	55
Excise Tax Act (AP)	0	0	0	N/A	N/A	0	0	0
Special Import Measures Act (EA)	10	1	11	N/A	N/A	1	0	10
Remanded cases	0	1	1	N/A	N/A	0	0	1
TOTAL	**68**	**34**	**102**	**N/A**	**N/A**	**13**	**23**	**66**

1. With respect to inquiries, one of the two cases has been suspended as a result of the CBSA accepting undertakings from the exporters and will remain suspended for as long as the undertakings are in force.
2. With respect to expiries, "decisions to initiate" refer to decisions to initiate expiry reviews.
3. Where a single remand decision is issued in respect of multiple cases, it is accounted for as a single remanded case.

N/A = Not applicable

STATISTICS RELATING TO CASE ACTIVITIES IN 2020-2021

	Trade Remedy Activities	Procurement Review Activities	Appeals	TOTAL
Orders				
Disclosure orders	18	0	0	18
Cost award orders	N/A	10	N/A	10
Compensation orders	N/A	0	N/A	0
Production orders	0	1	0	1
Postponement of award orders	N/A	7	N/A	7
Rescission of postponement of award orders	N/A	2	N/A	2
Directions/administrative rulings				
Requests for information	128	0	0	128
Motions	2	6	2	10
Subpoenas	1	0	0	1
Other statistics				
Public hearing days	6	2	9	17
File hearings[1]	18	77	5	100
Witnesses	0	0	13	13
Participants	189	153	76	418
Questionnaire replies	433	0	0	433
Pages of official records[2]	324,035	92,501	15,596	432,132

1. A file hearing occurs where the Tribunal renders a decision on the basis of written submissions, without holding a public hearing.
2. Estimated.

N/A = Not applicable