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Via email: gillian.burnett@citt-tcce.gc.ca

Gillian Burnett
Secretary
Canadian International Trade Tribunal
333 Laurier Avenue West, 15th Floor
Ottawa, ON K1A 0G7

Dear Ms. Burnett:

Re: Proposals to Improve the CITT's Procedures during SIMA Inquiries

We are writing on behalf of the Canadian Bar Association's Commodity Tax, Customs and Trade Law Section (CBA Section) in response to the Canadian International Trade Tribunal's (CITT) three proposed procedural changes when conducting inquiries under the *Special Import Measures Act* (SIMA).

The CBA is a national association representing over 37,500 jurists, including lawyers, Québec notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

The CITT has suggested the addition of three teleconferences to be utilized at different stages of a SIMA inquiry to respond to stakeholder needs, reduce the burden on parties to the inquiry, minimize time and costs, and increase transparency and efficiency.

We generally support each of the three proposals. However, there are concerns that systematic pre-hearing conferences or hearings would not add any material value to a SIMA proceeding, would add significant costs to parties, and would yield modest results.

Proposal 1 – First Teleconference

The first teleconference would take place during preliminary injury inquiries (PI). It would focus on like goods/classes of goods and enable the Tribunal to make a definitive ruling on these issues at the end of the preliminary inquiry. This teleconference would respond to the CBA Section's interest in having the like goods/class of goods issues resolved before the final inquiry.

The CBA Section generally supports the Tribunal's first proposal. A teleconference during the PI stage dedicated to resolving the issue of like goods and whether there is more than one class of goods may improve the efficiency of the process. Resolving these issues before parties must file their evidence and briefs in the injury inquiry is desirable and should allow parties to focus their submissions in accordance with the directions provided by the Tribunal. However, this teleconference should only be held if required and should avoid unnecessarily increasing the cost and complexity of inquiries. For example, in cases where evidence and arguments made during the PI stage do not raise like goods or classes of goods issues, a teleconference should not be required. We would not expect a conference to be necessary in cases involving product definitions that have previously been considered by the Tribunal.

In cases where a teleconference is needed, the PI segment could serve as a necessary kick-off to the Tribunal's fact-finding efforts to secure relevant factual information or clarifications as early as possible. This would include product scope, like goods, classes of goods and related issues (marketing, end-use, channels of distribution, etc). This information, if tested, could inform the Tribunal's preliminary determination and potentially the remainder of any final inquiry. In this way the Tribunal's initiative would seek to accomplish the original objective as the staff conference of the United States International Trade Commission (USITC): to provide the Commission staff (without Commissioners present) with a venue to ask the parties all factual questions necessary to facilitate the Commission's analysis and research. This would be on the record and not require what might otherwise be *ex parte* communications with either side.

We recommend that the teleconference process be time limited on a fixed day. Whether parties should be required to file written submissions of classes of goods/like goods before or after the teleconference would depend on when the Tribunal holds the teleconference in the 90 day period.

Due to the importance of this issue under SIMA inquiries and because resolution of these issues requires both factual and legal determinations, the Tribunal should consider whether counsel and witnesses should be permitted to participate on the first teleconference. If permitted, witnesses should be in a position to answer questions responding to all factual issues above. We recommend that strict time allocations be given to the parties and that the Tribunal lead the questioning. Witnesses should be asked to swear or affirm prior to testifying at the teleconference. We urge proceeding cautiously, however, to ensure the process does not become unworkable.

Proposal 2 - Second Teleconference

The second teleconference would take place between the preliminary and final inquiries as consultations are undertaken on questionnaire design. Its purpose would be to provide a transparent and effective forum for parties and staff to exchange views prior to finalization of the questionnaires.

We generally believe that it is desirable to convene a teleconference to discuss the design of questionnaires. This teleconference should occur in both new inquiries and in expiry reviews.

We believe that a teleconference among counsel should take place only if there is some controversy about the scope of questions, timeframes, etc. For example, in the *Power Transformers*¹ case, a teleconference would have proved useful where all parties submitted a wide range of questionnaire changes.

¹ *Liquid Dielectric Transformers*, CITT Inquiry No. NQ-2012-001. www.citt-tcce.gc.ca/en/dumping/inquiry/findings/nq2m001_e

Given that staff currently speaks with counsel on an *ex parte* basis on questionnaire format, it would be preferable to have a more transparent process through the inclusive teleconference being proposed by the Tribunal.

Proposal 3 - Third Teleconference

The third teleconference would occur during the final inquiry, shortly after the Investigation Report (Staff Report) is distributed. Its purpose would be to facilitate early issue identification and the resolution of concerns with the Staff Report.

We generally support this proposal and agree that it is desirable to convene a teleconference to discuss the Staff Report shortly after it is issued and before briefs are due, to identify any concerns parties may have at an early stage. This teleconference is desirable in both new inquiries and expiry reviews.

There are, however, some concerns that the teleconference would coincide with the busy schedule of counsel who are trying to digest the report and prepare their case briefs.

The CBA Section is thankful for the opportunity to comment on the proposals to improve the CITT's procedure during SIMA inquiries. We hope these comments are helpful and would be pleased to provide any further support.

Yours truly,

(original signed by Noah Arshinoff for Cyndee Todgham-Cherniak)

Cyndee Todgham-Cherniak
Chair, Commodity Tax, Customs and Trade Law Section