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Nathania Ustun

Julia Webster

Jesse Goldman

Jacob Mantle

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Canada

NATHANIA USTUN, JULIA WEBSTER, JESSE GOLDMAN,
JACOB MANTLE*

This article reviews significant legal developments in the Canadian Special Import Measures Act during 2018.

I. 2018 Special Import Measures Act Amendments

The *Special Import Measures Act* (SIMA) is Canada's principal trade remedy legislation, which along with the *Special Import Measures Regulations* (SIMR) legislates on the application of anti-dumping and countervailing measures to goods imported into Canada. On April 26, 2018, significant amendments came into force (the "SIMA Amendments").¹ The SIMA Amendments introduced two noteworthy additions to the SIMA that intended to align Canada's legislation more closely with the United States: "scope proceedings" and "anti-circumvention proceedings."²

II. Scope Proceedings

The legislative provisions for scope proceedings are set out in sections sixty-three to seventy of the SIMA. They provide authority for the Canada Border Services Agency (CBSA) to rule on whether specific goods fall within a product description of an anti-dumping or countervailing measure currently in force, to consider if goods originate in a country named in an order or finding and, accordingly, and to determine whether SIMA duties apply. Importantly, scope proceedings are not a process used to obtain exclusions for goods subject to existing anti-dumping or countervailing duty orders. Rather, the Canadian International Trade Tribunal (CITT) conducts product exclusion proceedings with respect to injury inquiries and reviews under the SIMA.³

Section sixty-three of the SIMA allows any interested person to apply to the President of the CBSA for a scope ruling with respect to any goods. The

* Nathania Ustun is the committee editor. The authors are Jesse Goldman, Julia Webster, and Jacob Mantle.

1. *See generally* Special Import Measures Act, R.S.C. 1985, c S-15 (Can.).

2. *Id.*

3. *Id.* §§ 42, 76.01, 76.03; *See also Guidelines to Making Requests for Product Exclusions*, CAN. INT'L TRADE TRIBUNAL 1 (May 20, 2014), http://www.citt.gc.ca/en/g_excl_e.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

process will take 150 to 255 days from the date the CBSA receives the application to rendering a decision.⁴

Within thirty days of receipt of an application, the CBSA President must determine whether the request should be rejected or if a scope proceeding should be initiated.⁵ The CBSA President may reject the application for a number of reasons. Those reasons include: “if the application is incomplete;” if there is already an active “scope ruling that applies to the goods” outlined in the application; and if “the goods . . . have not been produced” by the application date or “the application is frivolous, vexatious or made in bad faith.”⁶

The CBSA President has discretion to initiate a scope proceeding with respect to any goods at any time.⁷ The CBSA provides notice to the applicant, the government of the country of export, the exporter, the importer, and any domestic producers; the CBSA may also issue requests for information. The CBSA has 120 days to render a decision.⁸ A CBSA “scope proceeding” is a formal administrative process with the applicant and domestic industry entitled to participate. The CBSA will publish a “Statement of Essential Facts,” a public report that includes a summary of facts and a preliminary assessment as to whether the goods fall within the product description of the measure at issue.⁹ Interested parties may then submit written arguments in response.¹⁰

In making its determination, the CBSA will consider, amongst other things, the CITT’s reasons for the order or finding; the physical characteristics of the goods; and any relevant decisions of the CITT, the Federal Court of Appeal (FCA), the Supreme Court of Canada (SCC), or a bi-national panel.¹¹ All rulings take effect on the day they are made unless the CBSA President specifies otherwise.¹² All rulings are published and are binding on the CBSA.¹³ There is a statutory right of appeal to the CITT within ninety days of the ruling date.¹⁴ Rulings may be applied retroactively by the CBSA for up to two years.¹⁵

4. *Scope Proceedings*, CAN. BORDER SERV. AGENCY, <https://www.cbsa-asfc.gc.ca/sima-lmsi/sp-pp-eng.html> (last modified Oct. 24, 2018).

5. Special Import Measures Act § 63(2).

6. See Special Import Measures Regulations, SOR/84-927 § 54.2-3 (Can.).

7. Special Import Measures Act § 64.

8. *Id.* § 66(1). This period may be extended to 210 days. *Id.* § 66(2); Special Import Measures Regulations § 54.4.

9. Special Import Measures Act § 74(1).

10. *Scope Proceedings*, *supra* note 4.

11. Special Import Measures Act § 66(1); Special Import Measures Regulations § 54.6(a)-(b).

12. Special Import Measures Act § 66(4).

13. *Id.* § 69.

14. *Id.* § 61(1.1).

15. *Id.* § 70(1).

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2019]

CANADA 497

Scope rulings may be reviewed “to give effect to a decision of the CITT, FCA or SCC” or under prescribed circumstances.¹⁶ A review will result in a confirmation, amendment, or revocation of the ruling.¹⁷

The first scope proceeding by application was initiated by the CBSA on July 26, 2018, regarding Fabricated Industrial Steel Components (FISC) from China, South Korea, and Spain.¹⁸ On November 23, 2018, the CBSA issued its decision.¹⁹ The second scope proceeding was initiated by way of application on October 26, 2018, regarding certain aluminum extrusions from the People’s Republic of China.²⁰

III. Anti-Circumvention Proceedings

Circumvention occurs when a trade practice is changed to avoid liability for SIMA duties.²¹ Sections seventy-one to seventy-six of the SIMA set out the legislative provisions for anti-circumvention proceeding. They afford the CBSA authority to investigate whether certain imported goods are circumventing existing anti-dumping or countervailing measures. If there is a finding of circumvention, the CITT will immediately amend the existing measure to ensure that duties apply to the goods at issue.

To make a finding of circumvention, three elements must be present: (1) a change in a trade pattern after the initiation of a dumping or subsidy investigation; (2) “a prescribed activity is occurring and imports of the goods to which that prescribed activity applies” undermine the effect of a CITT order or finding; and (3) “the principal cause of the change . . . is the imposition of [SIMA] duties.”²² The SIMR sets out factors that the CBSA President may consider when determining whether anti-circumvention occurred. These factors consider whether there has been: “any change in the volume of imports into Canada of goods” subject to antidumping or countervailing duties; “any change in the volume of imports into Canada of goods in respect of which circumvention may be occurring;” “any change in the volume of imports” of like goods or parts or components of like goods,

16. Scope Proceedings, *supra* note 4.

17. Special Import Measures Act §§ 67(3), 75.5(2).

18. *The CBSA Launches Scope Proceeding on Certain Fabricated Industrial Steel Components*, CAN. BORDER SERV. AGENCY (July 26, 2018, 12:00 PM), <https://www.newswire.ca/news-releases/the-cbsa-launches-scope-proceeding-on-certain-fabricated-industrial-steel-components-689243561.html>.

19. *Certain Fabricated Industrial Steel Components*, CAN. BORDER SERV. AGENCY (Nov. 23, 2018), <https://www.cbsa-asfc.gc.ca/sima-lmsi/sp-pp/fisc2018/fisc2018-nr-eng.html>.

20. *Certain Aluminum Extrusions*, CAN. BORDER SERV. AGENCY (Oct. 26, 2018), <https://www.cbsa-asfc.gc.ca/sima-lmsi/sp-pp/ae2018/ae2018-ni-eng.html>.

21. *Anti-circumvention Investigations Conducted Pursuant to the Special Import Measures Act*, CAN. BORDER SERV. AGENCY, <https://www.cbsa-asfc.gc.ca/sima-lmsi/ac-eng.html> (last modified Apr. 26, 2018).

22. Special Import Measures Act, R.S.C. 1985, c S-15 § 71 (Can.); *see also* Special Import Measures Regulations, SOR/84-927 §§ 57.12(a)–(c), 57.15–.16 (Can.) (describing prescribed activities, factors regarding undermining remedial effects, and factors regarding determining the principal cause of a change in trade pattern).

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

498 THE YEAR IN REVIEW

[VOL. 53

from a country subject to anti-dumping or countervailing duties into a country where the goods are exported to Canada or listed as originating; and “any other relevant factor.”²³

A circumvention investigation into a specific exporter or country is self-initiated by the President of the CBSA or as a result of a written complaint.²⁴ A notice of initiation is provided to “the importer, the exporter, the government of the exporting country, the domestic producers and the complainant, if any,” and will specify the CBSA’s “reasons for initiating the investigation.”²⁵ Requests for information are also sent to importers, exporters, vendors, foreign producers, and domestic producers (of like goods). The CBSA President will publish a statement of essential facts, which includes a summary of facts and a preliminary assessment of whether there is a “reasonable indication of circumvention.”²⁶ Interested parties may respond by submitting written argument.

An investigation may be terminated prior to issuing a statement of essential facts if the goods subject to the investigation fall within the product description of existing anti-dumping or countervailing measures. This termination is a deemed scope ruling.²⁷

The CBSA President shall rule on the investigation within 180 days of initiation, and the CITT shall make an order amending the order or finding.²⁸ The decision will specify “the goods to which it applies . . . [and] the exporters and the exporting countries to which it applies.”²⁹ The CITT does not have jurisdiction to inquire into the matter or hear from interested parties. Its jurisdiction is limited to amending its finding or order as soon as possible. All anti-circumvention decisions are subject to judicial review by the Federal Court of Appeal.³⁰

Anti-circumvention decisions may be subject to interim review when the circumstances on which a circumvention decision was made have changed.³¹ Interim reviews will result in rescinding the decision or confirming it—with or without amendments.

23. Special Import Measures Regulations § 57.11.

24. Special Import Measures Act § 72(1)–(2).

25. *Id.* § 73(1).

26. *Id.* § 74(1).

27. *Id.* § 75(1), (4).

28. *Id.* §§ 75.1(1), 75.3. In prescribed circumstances, the President may also extend the time period to 240 days. *Id.* §§ 75.2(1); Special Import Measures Regulations, SOR/84-927 §§ 57.2 (Can.).

29. Special Import Measures Act § 75.1(3).

30. *Id.* § 96.1(1)(c.2).

31. *Id.* § 75.4(1).