

MCMILLAN LLP'S CUSMA DISPUTE SETTLEMENT SCOREBOARD

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Introduction

The Canada-United States-Mexico Agreement (“**CUSMA**”) [1] entered into force on July 1, 2020, replacing the two and a half decade-old North American Free Trade Agreement (“**NAFTA**”).

Despite remaining one of the largest and deepest trade relationships in the world, [2] various prominent trade disputes have arisen between Canada, Mexico and the United States under the CUSMA.

We are pleased to introduce the “[McMillan LLP CUSMA Dispute Settlement Scoreboard](#)”, which provides overview and analysis of ongoing and concluded CUSMA disputes. The Scoreboard keeps a running tally of who has scored “points” in dispute settlement under CUSMA.

The Scoreboard provides the views of McMillan LLP International Trade Group. Points are granted based on which side ultimately prevailed in the dispute (ie, the country whose position the decision-maker ultimately favoured), in conjunction with the decision's broader impact. [3]

The views expressed through this Scoreboard are those of the authors, and do not necessarily represent those of the firm more broadly, nor does this constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

Background on the relevant dispute settlement mechanisms contained in the CUSMA [4] can be found in the pages following the Scoreboard.

The Score

As of April 6, 2023, sixteen disputes have been initiated under CUSMA and four have been decided by panels. [5] The score stands at United States: 1, Canada: 3, Mexico: 1. Click on the expandable table below for more information and analysis on each dispute. McMillan LLP will update this resource as information on CUSMA disputes becomes available.

CUSMA TOTAL Score		Canada	Mexico	U.S.A.
	Wins	3	1	1
	Losses	1	-	2
	Total Disputes	14	5	16

Chapter 31 (General Dispute Settlement) Disputes

Dairy TRQ Allocation Measures (CDAUSA- 2021-31-01)

The United States challenged Canada's dairy tariff rate quota ("TRQs") allocation under several CUSMA provisions, including Article 3.A.2.11(b), which prohibits allocating a portion of a quota to processors.

Dispute

Complaining Party: United States
 Responding Party: Canada

Timeline

Panel Request: May 25, 2021
 Final Report: December 20, 2021
 Total Length of Panel Proceedings: 209 days

Result

The Panel found that Canada's practice of reserving access to 85 to 100% of its 14 dairy TRQs exclusively to processors and further processors was inconsistent with Canada's obligations under CUSMA. Canada announced new dairy TRQ allocation and administration policies on May 16, 2022, which ended the use of processor-specific TRQ pools. However, Canada's dairy TRQ allocation policies have come under fire again in a new US-initiated dispute under CUSMA chapter 31 (see below).

Point to: United States

Crystalline Silicon Photovoltaic Cells Safeguard Measure (USA-CDA-2021-31-01)

Canada challenged the United States' application of safeguards on solar products from Canada as a violation of, among other provisions, Article 10.2.1. That obligation prevents the application of safeguards to a Party unless imports from that Party "account for a substantial share of total imports" and "contribute importantly to

the serious injury.”

Dispute

Complaining Party: Canada
Responding Party: United States

Timeline

Panel Request: June 21, 2021
Final Report: February 15, 2022
Total Length of Panel Proceedings: 239 days

Result

The Panel found that the United States’ imposition of a safeguard tariff on Canadian solar products violated its commitments under Article 10.2.1 and 2.4.2 of CUSMA. On July 8, 2022, the United States and Canada agreed to a resolution under which the US suspended the application of solar safeguards to Canadian CSPV products, effective retroactively to February 1, 2022.

Point to: Canada

Automotive Parts and Vehicles – Rules of Origin

Mexico challenged the United States’ approach to determining regional value content for certain vehicles under CUSMA’s rules of origin (Article 4.2). It argued that regional value content should include 100% of the value of “core parts” that are found to be originating in a CUSMA Party, even when part of the value of the core part does not originate in a CUSMA Party. Canada joined Mexico in the dispute.

Dispute

Complaining Party: Mexico (joined by Canada)
Responding Party: United States

Timeline

Panel Request: January 6 2022
Final Report: December 14 2022
Total Length of Panel Proceedings: 342 days

Result

The panel held in favour of Mexico and Canada, clarifying that the entire value of originating core parts could be included in the regional value content calculation for the vehicle. The US, Mexico and Canada have 45 days from the date of the decision to reach a resolution, and for the US to bring itself into conformity with CUSMA. Alternatively, if the US does not bring itself into conformity, Canada and Mexico could legally retaliate against the US, and could target its automotive sector.

Point to: Mexico and Canada

Dairy TRQ Allocation Measures 2023

The United States has again challenged Canada's dairy TRQ allocation policies, alleging that Canada has breached its CUSMA obligations by making certain types of importers ineligible to apply for a dairy TRQ allocation, unfairly limiting eligible applicants and their allocation based on their market share, and restricting importers' ability to utilize their TRQ quantities fully by requiring them to return unused allocations four months prior to the end of the year.

Dispute

Complaining Party: United States

Responding Party: Canada

Timeline

Panel Request: –

Final Report: –

Total Length of Panel Proceedings: –

Result

Dispute ongoing.

Point to: –

Mexico Energy

Canada and the United States allege that 2021 amendments to Mexico's energy laws prioritize electricity produced by Mexico's state-owned entities over electricity produced by private producers in the dispatch of electricity to Mexico's electricity grid. They allege that this is in violation of CUSMA's non-discrimination obligation (Article 2.3), among other provisions.

Dispute

Complaining Party: Canada and United States
 Responding Party: Mexico

Timeline

Panel Request: –
 Final Report: –
 Total Length of Panel Proceedings: –

Result

Dispute ongoing.

Point to: –

Chapter 31 (Dispute Settlement) Total Score

	Canada	Mexico	U.S.A.
Wins	2	1	1
Losses	1	–	2
Total Disputes	5	2	5

Chapter 10 (Trade Remedies Binational Panel Review)

Gypsum Board (CDA-USA-2020-10.12.01)

The complainant (CGC Inc.) challenged the Canadian International Trade Tribunal’s decision not to conduct an interim review of its 2017 injury determination with respect to gypsum board. It argued that the test the CITT applied to find a “regional market” was erroneous.

Dispute

Importing Party: Canada
 Other Involved Party: United States

Timeline

Panel Request: November 26 2020
 Final Report: June 14 2022
 Total Length of Panel Proceedings: 565 days

Result

The Panel upheld the CITT's decision not to conduct an interim review under the reasonableness standard.

Point to: Canada

Softwood Lumber CVD AR (USA-CDA-2020-10.12-01)

The complainants, a group that includes the Government of Canada, several Canadian provinces, lumber associations and producers, challenge the US Department of Commerce's final CVD determination in the first administrative review in *Certain Softwood Lumber Products from Canada*.

Dispute

Importing Party: United States

Other Involved Party: Canada

Timeline

Panel Request: December 10, 2020

Result

Dispute ongoing.

Softwood Lumber AD AR (USA-CDA-2020-10.12-02)

The complainants challenge the US Department of Commerce's final AD determination in the first administrative review in *Certain Softwood Lumber Products from Canada*. Canada, one complainant, challenges (1) Commerce's application of the "differential pricing methodology" to determine the method of calculating weighted-average dumping margins, and (2) Commerce's use of "zeroing" in its comparison methodologies.

Dispute

Importing Party: United States

Other Involved Party: Canada

Timeline

Panel Request: December 22, 2020

Result

Dispute ongoing.

Carbon and Certain Alloy Steel Wire Rod AD AR (USA-MEX-2021-10.12-01)

The complaint alleges that the US Department of Commerce's final AD determination in the administrative review of the AD order in Carbon and Certain Alloy Steel Wire Rod from Mexico is unsupported by substantial evidence on the record or otherwise not in accordance with law. Specifically, Deacero argues that the Department of Commerce incorrectly accounted for s. 232 national security tariffs on steel and the United States' commitments to Mexico in its determination of anti-dumping duties.

Dispute

Importing Party: United States
Other Involved Party: Mexico

Timeline

Panel Request: September 17, 2021

Result

Dispute ongoing.

Steel Concrete Reinforcing Bar AD AR (USAMEX-2021-10.12-02)

The complainant (Deacero) challenges the US Department of Commerce's final AD determination in the administrative review of *Steel Concrete Reinforcing Bar From Mexico*. It argues that Commerce incorrectly accounted for s. 232 national security tariffs on steel and the United States' commitments to Mexico in its determination of anti-dumping duties.

Dispute

Importing Party: United States
Other Involved Party: Mexico

Timeline

Panel Request: October 8, 2021

Result

Dispute ongoing.

Softwood Lumber CVD AR2 (USA-CDA-2021-10.12-03)

The complainants challenge the US Department of Commerce's final CVD determination in the second

administrative review of *Certain Softwood Lumber Products from Canada*.

Dispute

Importing Party: United States
Other Involved Party: Canada

Timeline

Panel Request: December 28, 2021

Result

Dispute ongoing.

Softwood Lumber AD AR2 (USA-CDA-2021-10.12-04)

The complainants challenge the US Department of Commerce's final AD determination in the second administrative review of *Certain Softwood Lumber Products from Canada*.

Dispute

Importing Party: United States
Other Involved Party: Canada

Timeline

Panel Request: December 28, 2021

Result

Dispute ongoing.

Large Diameter Welded Pipe AD AR (USA-CDA-2022-10.12-01)

The complainants argue that the Department of Commerce incorrectly calculated Evraz's revenue when determining antidumping duty margins in the administrative review of the AD order in Large Diameter Welded Pipe from Canada.

Dispute

Importing Party: United States
Other Involved Party: Canada

Timeline

Panel Request: March 4, 2022

Final Report: n/a (terminated December 9, 2022)
Total Length of Panel Proceedings: 280 days

Result

The parties consented to terminate proceedings pursuant to Rule 75(2) of the USMCA Rules of Procedure for Article 10.12 (Binational Panel Review).

Softwood Lumber CVD AR3 (USA-CDA-2022-10.12-03)

The complainants allege that the US Department of Commerce's final CVD determination in the third administrative review of the AD order in Certain Softwood Lumber Products from Canada is unsupported by substantial evidence on the record or otherwise not in accordance with law. For example, complainants argue that Commerce's use of Nova Scotia as a benchmark for other provinces is unfounded, as are its findings with regard to specific grant and incentive programs.

Dispute

Importing Party: United States
Other Involved Party: Canada

Timeline

Panel Request: September 8, 2022
Final Report: –
Total Length of Panel Proceedings: –

Result

Dispute ongoing.

Softwood Lumber AD AR3 (USA-CDA-2022-10.12-02)

The complainants allege that the US Department of Commerce's final AD determination in the third administrative review of the AD order in Certain Softwood Lumber Products from Canada is unsupported by substantial evidence on the record or otherwise not in accordance with law. This includes, for example, Commerce's use of certain methods for calculating the margin of dumping, which the complainants argue was flawed.

Dispute

Importing Party: United States

Other Involved Party:

Canada

Timeline

Panel Request:

September 8, 2022

Final Report:

–

Total Length of Panel Proceedings:

–

Result

Dispute ongoing.

Large Diameter Welded Pipe AD AR2 (USA-CDA-2022-10.12-UNDEFINED)

Dispute

Importing Party:

United States

Other Involved Party:

Canada

Timeline

Panel Request:

–

Final Report:

–

Total Length of Panel Proceedings:

–

Result

Dispute ongoing.

Chapter 10 (Trade Remedies Binational Panel Review) Total Score

	Canada	Mexico	U.S.A.
Wins	1	–	–
Losses	–	–	–
Total Disputes	9	2	11

Chapter 14 (Investor-State Dispute Settlement) Disputes

Finley Resources et al. v. Mexico (ICSID Case No. ARB/21/25)

The claimants entered into several oilfield service contracts with Petroleos Mexicanos (“Pemex”), Mexico’s state-

owned oil company. They allege that Pemex breached those contracts, leading to litigation that either had to be abandoned or was wrongly decided in favour of Pemex. The claimants also allege that Mexico compromised with and paid similarly situated Mexican oilfield service companies. The claims are brought under the national treatment (Article 14.4) and minimum standard of treatment (Article 14.6) obligations of USMCA, in addition to comparable NAFTA obligations.

Dispute

Claimants: Finley Resources, Inc. (US), MWS Management, Inc. (US), Prize Permanent Holdings, LLC (US)
 Respondent: Mexico

Timeline

Notice of Arbitration: March 25, 2021
 Final Report: –
 Total Length of Panel Proceedings: –

Result

Dispute ongoing.

Chapter 14 (Investor-State Dispute Settlement) Total Score

	Canada	Mexico	U.S.A.
Wins	–	–	–
Losses	–	–	–
Total Disputes	–	1	–

[1][ps2id id='1' target=''] Known in the United States as the United States–Mexico–Canada Agreement (“**USMCA**”)

[2][ps2id id='2' target=''] The value of international trade between Canada, Mexico and the United States was over USD \$ 1.1 trillion in merchandise in 2019

[3][ps2id id='3' target=''] For example, if a country launches a dispute against another with 10 unique claims, and that country is successful in only one of those 10, it is entirely possible that the Scoreboard would accord the point to the defending party (especially if the only claim on which the complaining party was successful was minor or of less important).

[4][ps2id id='4' target=''] These are Chapter 10, Trade Remedies Binational Panel Review; Chapter 14,

Investor-State Dispute Settlement as between Mexico and the United States; and Chapter 31, General Dispute Settlement.

[5][ps2id id='5' target=''] This does not include disputes that continue under NAFTA, which we have excluded from the Scoreboard.

by [William Pellerin](#) and [Philip Kariam](#)

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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