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Canadian International Trade Law Year in Review, 2022

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In this inaugural edition of the *Canadian International Trade Law Year in Review*, the team at CLK Canada has reviewed a set of 12 judicial decisions from 2022 that will be of interest to trade practitioners. These cases consist of decisions of Canada's Federal Courts reviewing findings of the Canadian International Trade Tribunal ("CITT"), decisions from CUSMA panels pursuant to either Chapter 10 or Chapter 31, and a decision from the Alberta Court of King's Bench dealing with Canada's sanctions regime. These decisions are divided according to their subject area, with this year's review covering the regulatory regimes governed by the *Special Import Measures Act*, the *Customs Act*, and the *Special Economic Measures Act*. This review is intended to provide practitioners and interested parties alike with a reference guide for jurisprudential developments across Canadian international trade law.

THE *SPECIAL IMPORT MEASURES ACT*

Two decisions from the Federal Court of Appeal ("FCA") pertaining to the trade remedies regime under the *Special Import Measures Act*, R.S.C. 1985, c. S-15 ("*SIMA*") were published in 2022. Practitioners and interested parties will also note that a pair of cases dealing with the meaning of a "particular market situation" and the scope of disclosure by the CBSA were also heard in late 2022—*Canadian Hardwood Plywood And Veneer Associations et al v Attorney General of Canada et al.*, A-52-21 & *Algoma Steel Inc. v Attorney General of Canada et al*, A-39-21—those decisions had not yet been released as of the date of this publication.

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Algoma Tubes Inc. v. Canada (Attorney General), 2022 FCA 89

Algoma Tubes sought judicial review of the CBSA's refusal to reopen the administrative record during a review of a past dumping determination requested by the Minister of Finance pursuant to section 76.1 of the *SIMA*. Justice Stratas dismissed Algoma's application for judicial review because he found that the CBSA's decision was reasonable and that there was no breach of procedural fairness.

The background to this proceeding is important to understand the implications of this decision. In 2014 and 2015, the CBSA made affirmative findings of dumping for the targeted countries in two separate antidumping investigations: one involving *Oil Country Tubular Goods* from Turkey and the other involving *Heavy Steel Plate* from Korea. At that time, subsection 41(1) of the *SIMA* directed the CBSA to make its determination of dumping by determining whether the country-wide margin of dumping was significant (*i.e.*, above 2%). The CBSA was not permitted at that time to terminate the dumping investigation with respect to individual exporters under subsection 41(1), even if those exporters were found to have been dumping at insignificant margins (*i.e.*, less than 2%). In 2017, the World Trade Organization Dispute Settlement Body ("DSB") adopted a Panel report ruling that this formulation of subsection 41(1) was contrary to international trade rules and required Canada to allow individual exporters with insignificant dumping margins to be released from coverage of the order. In light of this WTO ruling, Canada amended subsection 41(1) to allow for an examination of individual exporter dumping margins and the Minister of Finance requested under section 76.1 of the *SIMA* that the CBSA review its 2014 and 2015 determinations of dumping in light of the DSB's ruling.

The domestic industry in both cases asked the CBSA to reopen the administrative record and apply new rules that did not exist at the time of the 2014 and 2015 dumping determinations but had been added to the *Special Import Measures Act* since that time. The CBSA refused to do either and the domestic industry applied for judicial review.

In dismissing the application, Justice Stratas disagreed that the President should have reopened the evidentiary record of the original final determination and applied the new methodologies. In his view, section 76.1 expressly authorizes the Minister to request reviews of only parts of a determination and only to the extent necessary to comply with DSB rulings. Under the Minister's request, the President was neither required nor authorized to review the final determinations of dumping for individual exporters not identified by the Minister, or examine other issues. In the FCA's words, "recalculating margins of dumping or conducting a *de novo* investigation would have been unreasonable because it would have gone beyond the scope of the section 76.1 review and the Minister's request, reasonably construed."

Algoma argued that transitional provisions of the *SIMA* operated to require the CBSA to conduct its review using the new methodologies. However, the FCA held that transitional provisions do not change the limited-purpose nature of section 76.1 and transform it into something closer to a "full reconsideration provision." Justice Stratas further reasoned that because "the

specification of the margin of dumping for an exporter and the ultimate final determination decision are distinct, severable steps in the decision-making process" under the original version of subsection 41(1), a section 76.1 review can permissibly focus on one of these steps and not the other, particularly if the DSB ruling relates to only one of the two.

This decision highlights that reviews under section 76.1 can reasonably be limited in scope to focus only on the parts of original determinations that were the subject of DSB rulings. In such circumstances, the President may be permitted to review original determinations without taking the additional steps of updating the evidentiary record or recalculating margins of dumping for individual exporters.

Prairies Tubulars (2015) Inc. v. Canada (Border Services Agency), 2022 FCA 92

In the latest proceeding in this long-running dispute over *SIMA* duty assessment between Prairie Tubulars and the CBSA, Justice Locke dismissed an appeal from a decision of Ahmed J. of the Federal Court in which he dismissed a constitutional challenge to portions of the *SIMA*. At the Federal Court and again on appeal, Prairie Tubular argued that the requirement under the *SIMA* that it pay assessed duties before being able to appeal the assessment to the CITT (the "Appeal Payment Provisions") violated the right of access to the courts contained in sections 96 to 101 of the *Constitution Act, 1867* (U.K.) and deprived it of a fair hearing contrary to subsection 1(a) of the *Canadian Bill of Rights*.

The FCA dismissed Prairie Tubular's arguments in their entirety. Justice Locke agreed with Ahmed J. that the appellants had failed to establish that the Appeal Payment Provisions caused Prairie Tubular undue hardship, as required under the framework from *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 for assessing whether court fees are unconstitutional. The appellants were therefore not deprived of access to a court contrary to sections 96-101 of the *Constitution Act, 1867*, and the FCA declined to comment on whether the Appeal Payment Provisions *per se* violate the *Constitution Act, 1867*.

On the second ground of appeal, the FCA affirmed the lower court's decision that Prairie Tubular did not have standing to claim a breach of the *Bill of Rights*. In finding the absence of a serious justiciable issue for the purpose of the test for public interest standing, Justice Locke confirmed that subsection 1(a) of the *Bill of Rights* "does not create a self-standing right to a fair hearing where the law does not otherwise allow for an adjudicative process." Likewise, he rejected the appellant's argument that the *Bill of Rights* should be given "substantive teeth" by creating a "quasi-constitutionally protected access to statutorily created federal tribunals" analogous to that which exists under s. 96 of the *Constitution Act, 1867*. There was, in the Court's view, simply no compelling reason to import substance into the due process guarantees of the *Bill of Rights*.

Prairie Tubular has sought leave to appeal to the Supreme Court of Canada, with the decision on leave pending.

THE *CUSTOMS ACT*

2022 was an active year for disputes relating to *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp) ("*Customs Act*") before Canada's Federal Courts. As practitioners will no doubt be aware, customs law is an ever-developing area of the law that is inseparable from trade policy. The select cases that we have summarized below provide essential information to trade practitioners and interested parties, from the interpretation of headings under the *Customs Tariff*, S.C. 1997, c. 36 ("*Customs Tariff*") to the circumstances in which a party is able to bring a customs dispute directly to the Federal Court.

Michaels of Canada, ULC v Canada (Attorney General), 2022 FC 1498

In this judicial review of a CBSA determination, the issue was whether the claimant could bring its application for judicial review directly to the Federal Court without first appealing the CBSA's decision to the CITT.

The Applicant, Michaels of Canada ("Michaels"), received a Final Report from the CBSA informing it that the value for duty reported for transactions dating back to 2018 was incorrect due to a change to the license agreement with its parent company. The Final Report departed from a National Customs Ruling ("NCR") obtained by Michaels from the CBSA in 2006, which stated that certain licensing fees would not be taken into account in calculating value for duty. Though it had issued its Final Report, the CBSA has not yet issued a Detailed Adjustment Statement ("DAS"), which is the document that would have legally obliged Michaels to correct the value reported for certain transactions. Nonetheless, Michaels brought an application to the Federal Court alleging that the CBSA had made an unreasonable decision by not taking the NCR into account.

Justice Fuhrer made two helpful findings that may provide guidance to lawyers dealing with customs re-determinations. First, the judge found that the line between a Final Report and a DAS are blurred. Indeed, while the Attorney General argued that the DAS was legally the moment of decision-making as no one was bound by the CBSA's Final Report, Michaels noted that the Final Report gave it "reason to believe" that its value for duty declarations were incorrect thereby obliging it to correct those adjustments under s. 32.2 of the *Customs Act*. Judice Fuhrer noted she was "sympathetic to" this argument and the Attorney General conceded it would likely need to be addressed by the court "at some point". However, in dismissing the application for judicial review, Justice Fuhrer found that unless the CITT will "categorically" not consider a particular issue in a customs appeal, the proper avenue of review

is requesting redetermination from the President of the CBSA and then appealing the President's findings to the CITT.

Keurig Canada Inc. v. Canada (Border Services Agency), 2022 FCA 100

Keurig Canada Inc. ("Keurig") appealed a CITT decision concerning the tariff classification of certain brewing systems imported by Keurig in December 2014. The FCA dismissed the appeal finding.

The CBSA classified the goods under tariff item number 8516.71.10 as "coffee makers", whereas Keurig argued that they should have been classified as under tariff item number 8516.79.90 as "other electro-thermic appliances" because they could make beverages other than just coffee.

Justice Pelletier found that the CITT erred in finding that the "or" in "subheading 8516.71 - - Coffee or tea makers" was disjunctive because the choice between the two possibilities of goods took place at the tariff item level, rather than at the subheading level. In effect, Justice Pelletier emphasized that the subheading level "simply indicates the types of goods covered by the subheading" which, in this case, included **both** coffee and tea makers. However, Justice Pelletier found that this distinction was irrelevant to the interpretive exercise because "goods are not classified as a *subheading*, they are classified as a *tariff item*."[emphasis in original]

Turning to the question of the interpretation of tariff item 8516.71.10, Justice Pelletier noted the FCA's past judgement in *Partylite Gifts Ltd. v. Canada (Customs & Revenue Agency)*, 2005 FCA 157 in which the Court determined that the CITT could "classify a good with multiple uses based on, among other things, the use for which it was designed." The FCA further remarked on the CITT decision in *Philips Saeco*, AP-2013-019 and AP-2013-020 (CITT), in which an espresso machine with multiple uses was classified as a "coffee maker". Noting these cases, along with an examination of the General Rules for the Interpretation of the Harmonized System, Justice Pelletier observed that "[t]ariff items should not be interpreted so restrictively as to lead to no goods actually falling within the interpretation." Finding that the classification of the brewing systems could be determined with reference to Rule 1 alone, the FCA rejected Keurig's argument that "coffee makers" should make only coffee and nothing else and upheld the CITT's classification.

This decision reaffirms the FCA's prior case law that goods with multiple uses can be classified under tariff items based on their primary use. Indeed, in *obiter*, Justice Pelletier noted that the General Rules "demonstrate that it is not only when a heading, subheading, or tariff item uses the word "primary" (or similar) that the CITT can consider the primary use." As such, this case reinforces the principle that tariff items should not be interpreted so strictly as to undermine the purpose of the Harmonized System.

Canada (Border Services Agency) v. Danson Décor Inc., 2022 FCA 205

In *Danson Décor*, Justice De Montigny dismissed an appeal from a tariff classification decision of the CITT pertaining to riverbed rocks that are polished by tumbling and are used for decorative purposes. Following a compliance audit by the CBSA pursuant to section 59 of the *Customs Act*, the CBSA determined that the goods should be classified under tariff heading 6802.99.00 ("other worked monumental or building stone (except slate) and articles thereof, other than goods of heading 68.01") rather than 25.17 ("pebbles (…) of a kind commonly used for concrete aggregates for road metalling or for railway or other ballast"), and retroactively adjusted the duties on several years of shipments. Danson successfully appealed to the CITT, with the Tribunal determining that the goods at issue were "stone" that had not been subject to "processing beyond" what was permitted by Chapter 25 of the Schedule to the *Customs Tariff* ("Schedule"), and likewise that they had not been converted to "worked stones" subject to inclusion within Chapter 68 of the Schedule.

Two errors were raised by the CBSA on appeal before the FCA. *First,* the CBSA argued that the CITT failed to properly interpret heading 25.17 because the CITT did not consider the full text of the heading to Chapter 25 of the Schedule, which provides that the rocks be "of a kind commonly used for concrete aggregates, for road metaling or for railway or other ballast". In the result, FCA upheld the CITT's decision finding first that the CBSA was event barred from raising this argument because it did not argue the issue before the CITT and, in any event, second that the phrase "of a kind commonly used" appearing in heading 25.17 did not require the goods at issue to fall into those usage categories. Given that the subject goods *prima facie* fell within the title of Chapter 25 and in the absence of evidence that the goods could not be used in the listed usage categories, the FCA agreed that the CITT had arrived at the correct classification.

Second, the CBSA argued that the CITT erred in its interpretation of the types of processing permitted under Chapter 25 in finding that "polishing" was permitted. Specifically, the CBSA argued that the omission of "polishing" from the processes listed under Chapter 25 meant that it was not a permitted processing under that heading, and moreover that the CITT erred in rejecting the testimony of a metallurgical engineer on the basis that geology was the most relevant scientific discipline. The FCA rejected the CBSA's arguments in their entirety. Justice De Montigny affirmed that the Court did not have jurisdiction to review the weighing of evidence by the CITT due to the limited grounds of appeal under the *Customs Act*, and therefore declined to intervene with the CITT's decision regarding the relevance of the expert's testimony. He further found that the CITT had not erred in finding that "polishing" was a process within the activities permitted under Chapter 25 of the Schedule. Despite some shortcomings in the CITT's analysis, Justice De Montigny agreed that the processes listed at Chapter 25 of the Schedule were qualitatively different from the processes that exclude goods from Chapter 25, and that "polishing" more properly fell into the former category. Likewise, he agreed that the alternative heading under which the goods could be classified—heading

68.02—plainly did not apply to the goods at issue, on account of a lack of a specialized human activity turning them into "worked monumental stone".

Danson Décor serves as a useful roadmap to trade practitioners for the proper approach to tariff classification. Likewise, the decision provides a clear application of the analysis used to determine the existence of an extricable question of law, and sets down a series of markers with respect to questions or matters that will not be considered on statutory appeals limited to questions of law.

Atlantic Owl (PAS) Limited Partnership v. Canada (Border Services Agency), 2022 FCA 214

In an eight-paragraph decision rendered from the bench, the FCA dismissed an appeal from a finding of the CITT that it did not have jurisdiction to consider an appeal from a decision of the CBSA denying a request for a refund of excess duties related to an erroneous tariff classification of two remotely operated vehicles ("ROVs"). Justice Boivin affirmed that in the absence of a separate tariff classification determination for these ROVs upon their entry into Canada—they had been erroneously declared and accounted for by the appellant together with the vessel transporting them—there had been no decision by the CBSA on the ROVs under section 60 of the *Customs Act*. There was, therefore, no basis on which the CITT could grant a refund of duties for the ROVs pursuant to paragraph 74(1)(e) of the *Customs Act*.

This decision reminds trade practitioners to exercise care when declaring and accounting for goods, as review under the statutory regime will be available only for the goods that have been subject to a determination by the CBSA. The FCA reminds all prospective importers that the self-reporting scheme under the *Customs Act* is "designed carefully" and must therefore "be given its literal effect" despite any potentially harsh consequences.

THE *SPECIAL ECONOMIC MEASURES ACT*

Canada's sanctions regime got unprecedented attention in 2022 because the Government of Canada imposed extensive sanctions against both Russian and Belarussian individuals and entities in response to Russia's invasion of Ukraine in March 2022, Iranian individuals and entities in response to mass protests late in the year, and Haitian officials in response to their ongoing support for criminal gangs that foment violence and insecurity. The year was likewise marked with meaningful legislative amendments to Canada's sanctions regimes, most notably the creation of a Ministerial power to apply for the forfeiture of property belonging to or controlled by persons sanctioned under the *Special Economic Measures Act*, S.C. 1992, c. 17 ("*SEMA*"). That said, developments in the courts were decidedly more limited, with only one reported decision involving sanctions being issued in 2022. That said, the dramatic expansion

of the sanctions regime in this past year suggests that more litigation will be inevitable, and will therefore remain an interesting space in the coming months and years.

Angophora Holdings Limited v Ovsyankin, 2022 ABKB 711

In what appears to be the first decision addressing Canada's economic sanctions against Russia, the Alberta Court of Kings Bench denied an application by a judgement debtor—Mr. Ovsyankin—to stay a recognition and enforcement order ("REO") forcing the sale of property situated in Alberta in satisfaction of an arbitral award issued in favour of Angophora Holdings, a subsidiary to a listed entity on Schedule 1 of the *Special Economic Measures (Russia) Regulations*, SOR/2014-58 ("*Russia Regulations*").

Justice Romaine made several material findings that will assist in the interpretation of Canadian sanctions legislation. First, she found that the property at issue was subject to regulation under the *Russia Regulations*. Notwithstanding that Mr. Ovsyankin retained legal title, the property was "controlled by or on behalf of a designated person" because the creditor to the arbitral award—Angophora Holdings—had obtained a REO that prescribed the property's disposal and therefore controlled it.

Second, she held that Angophora became "a person in Canada" for the purpose of the *Russia Regulations* by the mere fact that it sought enforcement of the arbitral award in Canada.

Third, Justice Romaine undertook an assessment of whether Angophora Holdings was controlled by a designated person, Gazprombank. In the absence of a definition of "control" in the *SEMA* or the *Russia Regulations*, she considered the definitions of control in analogous sanctions legislation in the U.S., U.K. and E.U. Applying the various indicia of control identified—and particularly noting Gazprombank's 50% ownership stake in Angophora Holdings met the U.S. threshold for control—she found sufficient evidence to conclude that there was a strong *prima facie* case that Angophora Holdings was functionally controlled by a sanctioned entity.

Despite finding a strong *prima facie* case of control, however, Justice Romaine declined to award the stay as the remaining two factors on the test for granting a stay were not satisfied. Given that Mr. Ovsyankin had exhausted all recourse against the arbitral award and the REO, the Court deemed that granting a stay would delay the enforcement rather than preclude irreparable harm. Second, Justice Romaine found—in *obiter*—that allowing a judgment debtor with no further recourse to rely on the sanctions regime to delay a sale under a valid REO would be contrary to the public interest.

In closing, Justice Romaine considered the implications of her finding of a strong *prima facie* case of control by a designated entity for the enforcement of the REO. She opined that while the forced sale of the property in question pursuant to the REO would not be a breach of the *Russia Regulations*, the subsequent disbursement of the proceeds of the sale could in turn entail

exposure under the sanctions regime. She agreed that while the sanctions regime cannot be manipulated by debtors to avoid their obligations, it may, nevertheless, "impede a litigant's access to the proceeds of the enforcement process."

While *Angophora* provides the first judicial consideration of "control" under the *SEMA*—albeit in obiter—definite guidance from Courts and Global Affairs Canada on key terms in Canada's sanction regime remains in short supply.

CUSMA Panel Decisions

This past year was also a pivotal year for the *Canada-USA-Mexico Agreement* ("CUSMA"), with the publication of the first four decisions in Chapter 10 and 31 disputes under the agreement. Although the CUSMA remains in its infancy, early panel reports unsurprisingly show that the CUSMA dispute settlement mechanisms remain steeped in precedent from the NAFTA and conscious of political considerations. We have summarized three of these reports, below.

Certain Gypsum Board, CDA-USA-2020-10.12-01

In the first binational panel review proceeding pursuant to Chapter 10 of the CUSMA, the Panel upheld an interim review order made by the CITT in 2020 by applying a reasonableness standard of review to the CITT's decision.

By way of background, the CITT determined in 2017 that dumped gypsum board from the United States had caused injury to the Canadian industry in the provinces of British Columbia, Alberta, Saskatchewan, Manitoba, the Yukon and the Northwest Territories, and recommended that duties be applied to American-produced gypsum board imports into these provinces. The decision to apply these duties to what the Tribunal referred to as the "Western Canadian market" was made pursuant to a finding that those provinces constituted a regional market pursuant to subsection 2(1.1) of the *SIMA*, which requires a finding that all or almost all of the production in the region be sold in the region and that the region is not supplied to a substantial degree by Canadian production outside of the region.

Following a reconfiguration of domestic trade flows caused by the imposition of antidumping duties, a domestic producer of gypsum board with production facilities outside of Western Canada—CGC inc.—requested that the CITT perform an interim review of its 2017 decision. CGC alleged that there was no longer a Western Canadian market because the Western Canadian Market was at that point supplied to a significant degree by production in Eastern Canada. On October 22, 2020, CITT found that there had been no structural change to the existence of a regional market, finding that the flows into Western Canada were caused by the imposition of antidumping duties. The CITT held that the existence of a regional market in an

interim review is properly ascertained by assessing whether there would be a regional market *in the absence of* the anti-dumping duties, as those duties were temporary in nature and did not signal a permanent change in the state of the market.

CGC inc. appealed the CITT's interim review decision to a binational panel pursuant to Article 10.2 of the CUSMA, challenging the CITT's interpretation of regional market under subsection 2(1.1) of the *SIMA*. In its decision of June 24, 2022, the Panel determined that, pursuant to Article 10.8 of the CUSMA and in accordance with *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, the CITT's interim review decision should be reviewed on a standard of reasonableness. Applying an assessment grounded in Article 31 of the Vienna Convention on the Law of Treaties, the Panel determined that there was no basis in the text, context and purpose of s. 2(1.1) of the *SIMA*, nor in the evidence before the Tribunal, to find that the CITT's conclusion on the continued existence of a regional market was unreasonable. In this regard, the Panel found that the CITT is an "expert body operating in a specialized area" and that while its decisions were not immune from review, the Panel felt that the CITT's decision had "adequately applied its expertise to the question before it with due sensitivity to the nature of the statutory scheme". The Panel therefore upheld the CITT's decision.

Irrespective of the complicated trajectory and factual background of this case, the Panel properly applied the standard of review analysis under Canadian law as set out in *Vavilov*. By engaging in the requisite reasonableness review grounded in deference, this decision provides at least some preliminary reassurance about the capacity of future CUSMA panels to apply Canadian standards of review in Chapter 10 disputes.

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

The first state-to-state dispute resolution Panel composed under the CUSMA was tasked with determining, among other things, whether a measure adopted by a party while the NAFTA was still in force could still lead to a breach of provisions of the CUSMA. This case is essential reading for practitioners examining the effect of the adoption of the CUSMA on the domestic laws and policy decisions of Canada, the United States and Mexico.

In November of 2017, the United States International Trade Commission ("USITC") determined that crystalline silicon photovoltaic cell ("CSPV") products were being imported into the United States at a rate sufficient to warrant safeguard protection. However, the USITC also found that CSPV products imported from Canada did not comprise a "substantial share" of the total imports from other countries, and also that imports from Canada had not "contributed importantly" to the serious injury caused by these imports. According to Article 10.2.1 of the CUSMA, this meant that the safeguard measures should not have been extended to Canada. Nonetheless, on January 23, 2018, the President of the United States issued Proclamation 9693 which imposed safeguard measures on Canadian CSPV products.

On July 23, 2018, Canada requested consultations under the NAFTA, but did not request the establishment of a Panel. On October 10, 2020, the President of the United States issued an additional proclamation increasing the safeguard tariff rate from 15 percent to 18 percent. By that time the CUSMA had entered into force, and on June 21, 2021, Canada requested the establishment of a Panel in accordance with the CUSMA alleging, among other things, that the United States had violated CUSMA Article 10.2.1 by refusing to exempt Canada from CSPV safeguard measures.

In its rebuttal, the United States argued that its CSPV measures were adopted when the NAFTA was in force, and Canada had already opted not to complain about them under the NAFTA. According to the United States, the Panel therefore did not have jurisdiction to hear Canada's case because the CUSMA is a separate treaty. Canada countered by arguing that the CUSMA was simply a continuation of NAFTA, and that claims arising when NAFTA was still in force should be able to be brought before a panel of the CUSMA in any event. Canada also claimed that the CSPV safeguards constituted a *continuing* measure, meaning that the United States was in perpetual violation of the CUSMA each time it placed safeguard duties on imports.

On the issue of jurisdiction, the Panel first determined that the CUSMA was not a continuation of the NAFTA except where the CUSMA specifically so stated, because while the parties included NAFTA-continuing language in certain Articles of the CUSMA, they did not extend this language to the entire treaty. However, the Panel agreed with Canada that the United States' CSPV safeguards were not frozen in time at the time they were adopted. Invoking the United Nations' International Law Commission Commentaries, the Panel found that the time at which the United States chose to adopt the measure was irrelevant to its analysis, because the measure was *continuing*. According to the Panel, what mattered was whether the measure, as it existed at the time of the dispute, was compliant with the CUSMA. As such, the Panel found that it had the jurisdiction to hear Canada's claim.

Having found that it had jurisdiction over the dispute, Panel conducted a *de novo* analysis of whether Canadian imports of CSPV products over the period examined by the USITC constituted "substantial share" of the total imports from other countries, or whether they "contributed importantly" to the injury sustained by the United States. The Panel concurred with the USITC and answered both questions in the negative, therefore finding that the United States had violated Article 10.2.1 of the CUSMA.

Trade law practitioners will be reassured by this Panel's reasoning that measures adopted prior to the expiry of the NAFTA are not necessarily barred from scrutiny under the CUSMA. Although the CUSMA is a treaty entirely distinct from the NAFTA, the CUSMA has not inaugurated a clean slate. Counsel advising state Parties will therefore need to remain vigilant and ensure that any measuring continuing since the time of the NAFTA comply with obligations under the CUSMA.

Canada – Dairy TRQ Allocation Measures, CDA-USA-2021-32-010

In a highly publicised dispute extending back to December 9, 2020, a State-to-State Dispute Settlement Panel composed under Chapter 31 of the CUSMA determined that Canada's allocation of dairy tariff rate quotas was inconsistent with Article 3.A.2.11(b) of the CUSMA. Canada's dairy sector has since been under fire from both the United States and New Zealand from continued allegations that its Tariff Rate Quota ("TRQ") measures violate the CUSMA and the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* ("CPTPP"), respectively. The decision provides interesting insight into international treaty interpretation, and will no doubt inform the way future panels interpret the CUSMA.

Under the CUSMA, Canada maintains TRQs on imports of 14 different dairy products. Prior to the dispute, Canada reserved between 80 and 85 percent of allocable volume under these TRQs for processors and between 10 and 20 percent for further processors. In some instances (e.g. industrial cheeses) Canada reserved up to 100% of the allocable volume for processors and further processors cumulatively. The United States alleged that this quota allocation mechanism contravened, *inter alia*, Article 3.A.2.11(b) of the CUSMA (the "Processor Clause") by limiting access to these pools of allocable volumes to processors or further processors. According to the United States, the Processor Clause of the CUSMA does not allow parties to "confine" or "restrict" any of its TRQ volumes for allocation to processors alone. In contrast, Canada argued that the pools did not violate Canada's obligations under Article 3.A.2.11(b) because non-processor entities (i.e., distributors) received allocations under the TRQs.

Resolving the matter required the Panel to parse the treaty language of Article 3.A.2.11(b) under the *Vienna Convention on the Law of Treaties* ("VCLT") given that, in principle, the provision could be read either way. The Panel considered each component of Article 31.1 of the VCLT—ordinary meaning, context, and object and purpose of the treaty—and likewise separately employed the *effet utile* doctrine and the absurdity rule as unique heads of analysis within its reasons. Ultimately, the Panel concluded that the ordinary meaning of the processor clause supported the United States' interpretation, and that Canada was therefore not permitted to limit "any" allocable volumes by way of processors-specific reserved pools.

The Panel likewise rejected arguments made by Canada under Article 32 of the VCLT concerning the negotiating history of the provision to the effect that Canada did not and would not have agreed to the U.S. interpretation, given Canada's existing practice and measures under other trade agreements. Of note, the Panel noted that Canada's other TRQ measures implemented under other trade agreements were of limited value in assessing the common intention of both parties, given that the United States is party to none of the other treaties invoked as evidence by Canada (*e.g.*, the CPTPP and the CETA). Similarly, the Panel found that affidavit evidence from Canada's Chief Agricultural Negotiator that he communicated Canada's interpretation of the Processor Clause to the United States during negotiations did not assist in the determination of the common intention of the parties under Article 32 of the VCLT. The

Panel reasoned that there was no evidence supporting the fact that this communication was made, and, in any event, the communication did not provide a specific interpretation of the Processor Clause and therefore would not have been evidence of specific meaning of Article 3.A.2.11(b).

Based on its interpretation of the Processor Clause, the Panel found that, while Canada's use of an allocation mechanism itself was not objectionable, Canada's processor-specific pools of reserved TRQ allocation volumes violated CUSMA Article 3.A.2.11(b).

In an interesting invocation of judicial economy, the Panel also declined to rule on the United States' remaining claims, finding that "it [was] enough that Canada's current practice of reserving TRQ pools for processors is inconsistent with Article 3.A.2.11(b)."

On May 16, 2022, Canada amended its dairy TRQ regime. On January 31, 2023, the United States requested that a new panel be composed in a second CUSMA dairy dispute against Canada, alleging issues with Canada's newly amended TRQ allocation mechanism. Similarly, on November 7, 2022, New Zealand requested that a panel be composed in the first ever State-to-State dispute settlement proceeding under the CPTPP against Canada, alleging, among other things, that Canada's TRQ allocation mechanism under that Agreement violated Canada's obligations under the CPTPP.

United States – Automotive Rules of Origin, USA-MEX-CDA-2022-31-01

In yet another highly anticipated decision, a binational Panel composed under Chapter 31 of the CUSMA found that the United States' interpretation and application of the rules of origin used to determine whether passenger vehicles and light trucks qualify for duty-free preferential tariff treatment under CUSMA violated Article 4.5 of CUSMA and Article 3 of the Autos Appendix to the CUSMA.

For some products, including passenger vehicles and light trucks, the product must contain a sufficient level of "regional value content" ("RVC") to qualify for duty-free preferential treatment under CUSMA. The calculation of RVC is used to ensure that a minimum level of North American content and labour is included in the production of the product. One of the primary focuses in the renegotiation of CUSMA was to increase the minimum North American content needed to produce vehicles that would qualify for duty-free treatment. In addition to increasing the minimum RVC needed for the finished vehicle, CUSMA also requires that for a vehicle to qualify for the duty-free treatment, certain listed "core parts" of the vehicle also must be "originating" under CUSMA. There are several alternative methodologies under CUSMA that can be used to determine whether these "core parts" are originating.

The heart of the dispute was a disagreement about the methodology by which automotive producers determine the RVC for passenger vehicles or light trucks. Once a "core part" is found

to be originating, the key question was then whether the automotive producer could consider 100% of the value of the core part to be North American content in calculating the finished vehicle's RVC, notwithstanding the fact that in truth only a lesser percentage of the value of the core part was from North America. The United States argued that if the originating status of a core part was determined under one of the alternative methodologies provided in CUSMA, only the true value of the North American content in the core part could be used in the RVC calculation for the vehicle. Conversely, Canada and Mexico argued that once a core part is considered to be "originating" regardless of the methodology used, 100% of the value of that part can be counted as North American content for the vehicle in the RVC calculation. Canada and Mexico's interpretation is known as "rolling up" the value of the originating core parts into the RVC of the vehicle.

In its final report issued on December 14, 2022, the Panel sided with the Complainants on all issues. On the whole, the Panel showed itself unmoved by policy arguments advanced by the United States that the interpretation advanced by the Complainants would weaken North American supply chains and instead applied a rigorous analysis based in the text and context of the CUSMA. The Panel recognized that the alternative methodologies could be more advantageous to producers by permitting a higher value of non-originating materials ("VNM") in vehicles nonetheless found to be originating. Nevertheless, it found that there was no basis in the text or context of the agreement to conclude that RVC as determined under one of those alternative methodologies could not be rolled up in the vehicle RVC calculation where the core parts are found to be originating. In arriving at this conclusion, the Panel sided agreed with the Complainants that the word "originating" as it appeared at Article 3.7 should be given the same meaning throughout the rest of the Autos Annex.

The Panel likewise considered the claim brought by Mexico that the United States violated the Autos Appendix by imposing a requirement in the Alternate Staging Request approval letters sent to producers that they calculate core part and vehicle RVCs in keeping with the U.S. interpretation of Article 3 discussed above.

While the decision itself will undoubtedly delight Canada's and Mexico's industry, trade practitioners with clients in the autos sector should be on the look-out for the means by which the United States brings its measures into compliance with the CUSMA. Alternatively, in the event that the United States declined to alter its measures to conform to the Panel's ruling and Canada and Mexico institute retaliatory actions, trade practitioners should be ready to guide their clients through the implications of any such retaliatory measures.

TREATIES & STATUTORY INTERPRETATION

Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association, 2022 SCC 30

Amidst this decision otherwise pertaining to the *Copyright Act*, Justice Rowe writing for the majority provides guidance on the proper use of an international treaty in interpreting related enabling domestic legislation. As a preliminary matter, a treaty "should" be considered in the interpretation of its domestic implementing legislation, and the treaty is properly considered at the "context" stage of statutory interpretation. Justice Rowe adds that textual ambiguity is not a prerequisite to considering the treaty in interpreting the legislation. In turn, where the legislation implements the treaty without qualification, the legislation must be interpreted in a manner that is consistent with Canada's obligations under the treaty. However, where legislation is "less explicit" about the extent to which it implements the treaty, it should be interpreted so as to comply with Canada's treaty obligations insofar as it does not contradict legislative intent. On this last point, Justice Rowe provides a clear reaffirmation of Canada's dualist structure: he confirms that while a treaty may be relevant in the interpretation of its enabling statute, it "cannot overwhelm clear legislative intent. The court's task is to interpret what the legislature (federally and provincially) has enacted and not subordinate this to what the federal executive has agreed to internationally."

While the Court in *SOCAM* did not break new ground, it provided a clear reaffirmation that legislative intent may override treaty obligations, and likewise provided practitioners with a useful and streamlined roadmap for deploying international treaties as a tool of statutory interpretation.

CONCLUDING REMARKS

2022 witnessed the first decisions under chapters 10 and 31 of the CUSMA and extensive developments in the sanctions space. As noted throughout this review, CLK is monitoring—and involved in—a number of forthcoming developments in 2023 across the trade law field. Practitioners and interested parties will be well served by watching for regular updates to CLK's website tracking these developments as they occur.