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TRADE LAW MEMORANDUM

CANADA PARTLY WINS A ROUND IN THE SOFTWOOD CASE

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Canada lost on several fronts but managed to score at least one victory this week in a key WTO ruling in the Softwood Lumber saga.

While only the most intrepid trade observer can follow the ins and outs of these various WTO and NAFTA panels, the latest WTO ruling is important in that it clarifies dumping methodology -- and ultimately on how the anti-dumping duty rates are to be calculated.

The main issue in this particular case was the U.S. Commerce Department's use of "zeroing" in the calculation of dumping margins on Canadian softwood lumber.

While the decision could be appealed to the WTO Appellate Body by the U.S. government (aided by the fact that there was a dissenting opinion), its immediate impact could help move Canada-U.S. talks slightly forward to the ultimate negotiated solution.

CONCEPT OF ZEROING

The essence of "zeroing" in dumping calculations is to not give credit for exported goods that are not dumped -- by assigning them a zero value -- but assessing dumping margins

on the basis of those goods that are actually found to be dumped. While this sounds complex, it is fairly straightforward.

Let us say a total of 100 items are exported and 75 of them are not dumped because the export price is more than the normal value (“normal value” being the cost of producing the goods plus profit in the home market). These 75 exported items are priced fairly at \$100.00.

However, 25 of the 100 items are indeed dumped because they are priced for export at only \$50.00, below normal value.

In calculating the dumping margins for the 100 items under the zeroing concept, the 75 un-dumped items are assigned a value of zero. No credit is given for fairly-priced exports. The average dumping margin for the 100 items overall is then determined by averaging the margin for the 25 dumped items over all of the 100 exported goods.

Because a zero value and not a positive value is assigned to the undumped goods, it means that there will always be an average dumping margin of some amount for all 100 exports. When this average is applied over the total volume of 100 items, it also means dumping margins are applied to both dumped and undumped goods.

THE PANEL’S VIEWS

The WTO Panel explained what Commerce did in making its normal-value-versus-export-price comparisons this way:

“In the aggregation process, a value of ‘zero’ was attributed to those product comparisons where the weighted average export price was greater than the

weighted average normal value [i.e., goods that were not dumped]. DOC then aggregated the positive values from the individual product type comparisons, that is, those instances where the weighted average export price was lower than the weighted normal value [i.e., the dumped goods], and divided the result by the total value of exports, to arrive at a weighted average margin of dumping.” (emphasis added)

While there is a fair amount of verbiage here, what is described is a methodology that assesses the average weighted export price -- the net export selling price for Canadian softwood lumber -- by giving un-dumped product a zero value rather than a positive value based on the actual undumped export price.

Ruling against the U.S., the panel said that under the *Antidumping Agreement*, the Commerce Department was required to compare weighted average normal values of goods with the weighted average prices of all comparable export transactions, not just a select number. Zeroing is therefore inconsistent with WTO rules. The panel said the U.S. is required to recalculate the duties.

MINUTE EXAMINATION OF ACCOUNTING METHODS

There were a slew of other issues argued by Canada, a lot of these concerning alleged errors by Commerce in allocating financial expenses and SG&A costs in setting normal values for individual companies. Canada lost of each of these points.

Non-WTO experts may find it surprising to see the degree of examination by the panel of accounting methodologies employed by the Commerce Department, not only in general but also in respect of the dumping margins assigned to individual Canadian companies.

This illustrates just how minutely WTO panels will get into these matters to determine if the rules in the *Antidumping Agreement* are being properly applied. The long history of the softwood lumber case has made WTO panels quite expert in the application of Canadian and American generally accepted accounting principles.

IMPORTANCE OF PANEL RULING ON “DEFERENCE”

The zeroing part of this case was fairly clear-cut, in that what was looked at was a method judged against the wording in the *Antidumping Agreement*. On the cost-allocation aspect, however, the panel was dealing with more judgmental matters.

What the panel said is that, where there are legitimate judgment calls in applying accounting rules, the panel will tend to give the benefit of the doubt to the investigating agency. That may come as a disappointment to Canadian softwood exporters. But it seems consistent with the over-arching principal in the *Antidumping Agreement*.

Under WTO rules, panels are not to engage in a re-hashing of agency investigations but are to determine “whether the authorities’ establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective”.

If this standard is met, the decision will not be overturned, even if the panel might have reached a different conclusion than the agency concerned. That standard is pretty close to the standard applied in Canadian courts.

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