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**TRADE LAW MEMORANDUM**

**COMMENTS ON THE NAFTA PANEL  
SOFTWOOD LUMBER DECISION**

14 August 2003

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**PERHAPS ANOTHER “QUALIFIED” WIN?**

As often happens in complex trade cases, it is difficult to pick a clear winner.

In yesterday’s NAFTA panel decision, Canada won some points, lost others. As did the United States.

I would not agree with the spin that it was a solid Canadian win or with the claim that the Panel said there was no subsidy because the Commerce Department failed to prove that the Canadian industry received a benefit from low stumpage rates.

The Panel did not say that.

**INADEQUATE ANALYSIS**

The Panel said that the Commerce Department didn’t apply the right benchmarks in measuring the amount of the stumpage benefit, as required under U.S. law. The ruling did

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not question that stumpage could be a subsidy. The issue was the method used to measure the amount of the benefit that was conferred.

The Panel said that under U.S. law, the Department had two choices. It had to use market benchmarks in Canada or, if these were lacking, it could use commercially available world market prices provided “it is reasonable to conclude that such price would be available to the country in question”.

In this case, the Panel found that the Department’s use of U.S. stumpage rates, adjusted somehow to take into account differences in the Canadian market, was not in accordance with these requirements.

The Department, the Panel said, “has not presented substantial evidence to support that market conditions in Canada and the United States are comparable, nor that its attempted adjustments adequately account for such conditions”.

It sent the matter back to Commerce to re-do its analysis.

It is true that the U.S. case was harmed by the finding that Commerce acted contrary to U.S. law in establishing benchmarks on the basis of U.S. market prices. But this was because U.S. prices were “adjusted inadequately to account for differences in Canadian market conditions”.

This means that Commerce can revise its calculations and adjustments and come back to the Panel with new measurements of the stumpage benefit, still showing a benefit but on the basis of revised data. It will be up to the Panel to decide if this is an acceptable response to its directions.

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So, on balance, then, this might be called an incremental victory for the Canadian parties. But the U.S. side won on a number of other important points as well. In fact, it is noteworthy how many points were decided in the U.S. favour.

So the decision is pretty much a split, much like the earlier WTO panel decision.

#### **PANEL JURISDICTION IS LIMITED**

It is critical to placing this decision in context to note that NAFTA panels can only remand matters back to a lower agency for re-consideration. The agencies then re-do their decisions on the basis of the remand order and report back to the panels within 60 days.

There is then allowance under the NAFTA for parties to challenge the agency's report as defective here and there and seek another Panel decision.

This case could go into a second or third round of remands and reports back by Commerce. It is far from over.

Under the NAFTA (a clear weakness in the agreement), these panels can only apply the national (i.e., U.S. or Canadian) judicial review standards used in the domestic courts. Judicial review is not the same as a full appeal. Judicial review allows considerable deference to expert agencies such as the Commerce Department.

As well, even if a NAFTA panel disagrees with the agency, if there was evidence to support that agency's decision and it was "sufficiently reasonable", it must be upheld, a

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point the Panel itself noted in the first part of its decision. NAFTA is not very strong here.

**WHERE DO WE GO NOW?**

Accepting that both the U.S. and the Canadian industry's will claim some measure of victory, the question is whether this decision will help get the parties back to the table to achieve a negotiated settlement. It probably will.

But, even with this incremental Canadian victory on the legal front, it is doubtful that this NAFTA Panel decision of itself has really altered the commercial and political advantages that seem to lie on the U.S. side in this very difficult and nasty dispute.

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**Notice: These Memoranda are prepared purely as information pieces of interest to clients and friends and are not intended to convey legal advice on any particular matter.**