



Trade Law Memo

Vol. 4, No. 1, January 2005

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2005 - The Year Ahead

In this abbreviated annual summary of trade issues in 2005, we believe the most direct influence on Canadian trade will be the exchange rate. The upward value of the Canadian dollar vis-à-vis the American greenback will have a much greater impact on Canadian trade this year than any of the various activities underway in the WTO, the NAFTA or other forums. That being said, here is our assessment of where things appear to be going on the trade front in 2005.

WTO Negotiating Slowdown

We expect the WTO negotiations in the so-called Doha Development Round in Geneva to pick up considerable speed in 2005, particularly on trade in services. However, we believe that full completion of the Round this year is unlikely. There will be a flurry of activity in the latter part of the year, with a formula cobbled together to save face and keep talks going into 2006.

The critical issue remains agriculture, both export subsidies and trade-distorting domestic support measures. Cutting these down are critical matters for Canadian farmers. The key to progress lies with the U.S. and the European Union. While there has been a tentative step in the right direction, reform of the Common Agriculture Policy and the willingness of the E.U. to make meaningful cuts to its programs is the key to unlocking the Doha Round process this year.

As we approach the next WTO summit in Hong Kong in December, renewed protests from NGOs,

now called Civil Society Organizations or “CSOs”, can be expected. The more serious and thoughtful CSOs are genuinely concerned about the WTO and its trade liberalization mandate, and the impact that the Doha Round might have on areas of Canadian domestic policy.

It could be that some of the protest steam generated at Seattle, Québec City and Cancun will have dissipated, but we can expect increasing CSO opposition to the Doha Round talks during the course of this year. For Canada, critics of the WTO will focus on the impact of new WTO rules on domestic exclusivity over public health, education, social policy and culture.

WTO Dispute Settlement Activity

While the WTO negotiating arm is bogged down, the judicial arm faces an active agenda in 2005. Numerous new complaints have been filed, many against the U.S. in a wide array of sectors by a variety of countries. Many old disputes also remain unresolved, even after final panel and Appellate Body determinations.

Tensions over unresolved disputes between the U.S. and the European Union will dominate the WTO agenda in 2005. Among the most significant are ongoing disagreements over the U.S. tax benefits to foreign sales corporations and over the E.U. ban on imports of hormone-treated beef. These high-profile cases will continue to put strains on the U.S.-Europe trade relationship and will impact the WTO agenda generally.

The Byrd Amendment - Another Friction Point

Tensions continue over the so-called “Byrd Amendment”, the U.S. law that allows dumping duties to be paid over to American industry. The law was struck down last year by a WTO panel but the U.S. Congress has not repealed the measure. Canada, along with other countries, has WTO-approved retaliation rights against the United States. This continues to be a fractious issue.

Some Positive Signs

Recognizing the need to avoid drawn-out and debilitating tit-for-tat trade litigation, the U.S. and the E.U. agreed in December to negotiate a settlement in their dispute over subsidies for large commercial aircraft now under development by Boeing and Airbus.

While Canada’s disputes with the U.S. will probably remain unresolved in 2005, the Canada-Brazil aircraft subsidies dispute could be settled as both governments seek to turn the page on this one and move on.

Difficulties Continue in Canada-U.S. Trade

As in previous annual forecasts, the softwood lumber dispute remains far and away the most important issue on Canada’s bilateral trade agenda. We expect that many of the legal challenges will run their course in 2005 but, even if the legal challenges end, the likelihood of a conclusion to the dispute is remote. Simple domestic politics in the U.S. trump the chances of settlement in 2005.

Recent comments by the U.S. Under Secretary of Commerce that the U.S. will not return duties collected on Canadian lumber exports, even though a NAFTA panel has ruled these were collected contrary to U.S. law, are unhelpful. We believe that this position is contrary to NAFTA obligations to give full force and effect to these panel rulings.

Borne of Canada’s frustration in the softwood lumber case, the Prime Minister has stated that Canada wants improvements in dispute settlement procedures under NAFTA so as to avoid long and drawn-out litigation. This appears to run up against

comments by the incoming Commerce Secretary who said there would be no watering down of U.S. trade laws.

Another major trade issue is the BSE or “mad cow” problem. Even with the discovery of a third BSE case, progress has been made recently, with the U.S. government announcing it would re-open the border to live Canadian cattle within 30 months of April 2005. This could lead to broader U.S. border openings in the remainder of the year.

While Canada is preoccupied with softwood lumber and BSE, Washington is focused on homeland security and ensuring that the Canada-U.S. border is secure. There has been remarkably good bilateral cooperation on this front with the implementation of the Smart Border Action Plan in 2003.

At the same time, the U.S. government remains uneasy over any Canadian initiatives that tend to make the border less secure. This includes Canada’s immigration and refugee laws and, indirectly, moves in Canada to legalize possession and use of marijuana. Such policies will continue to evoke U.S. pressures in 2005.

Free Trade of the Americas - Talks Stalled

We remain skeptical that major developments will take place in the FTAA in 2005. While there are potential gains for Canada in these talks, they seem to be bogged down in endless detail and quibbling. Moreover, Brazil, the key Latin American economy, remains cool to the FTAA idea.

Some positive signals were voiced at the recent World Economic Forum in Davos, Switzerland, indicating that Brazil and the U.S. may have bridged differences on the thorny issue of agricultural subsidies. However, we see significant hurdles in getting FTAA talks re-invigorated in the coming year.

Canada’s Market Access Priorities

Canadian trade policy may have been too diffuse under the Chrétien government. So far, the Martin government appears to have more focus. Parallel with its priority on more skilful stewardship of the U.S. relationship, the federal government seems bent on improving Canada’s trade and business relations with

a select number of large, dynamic economies such as Brazil, India and, importantly, China. Witness the Prime Minister's recent high-profile trip to China.

Another area of renewed attention is Europe. Canada recently agreed with the European Union on two important initiatives that, unfortunately, have not been given the attention they deserve.

The first is a voluntary framework for regulatory cooperation, signed last December, to help harmonize technical standards and business regulations to facilitate two-way trade. The second is a proposed Trade and Investment Enhancement Agreement, agreed in principle in March 2004, setting out a broad framework for future commercial relations to be elaborated further in 2005.

Canadian Trade Actions

While the WTO recently reported a decline in anti-dumping and countervailing duty actions, the trend was not fully mirrored in Canada. In 2004, there were five new dumping investigations launched by the Canada Border Service Agency, somewhat higher than the recent average of three or four per year.

On the other hand, the Canadian International Trade Tribunal rescinded no less than six existing orders under the sunset review provisions of the *Special Import Measures Act*. All of those reviews involved steel products.

Looking ahead to 2005, we believe that the Canadian trade dispute roster will be fairly busy, although we predict a slight decline in the number of primary investigations by the CBSA in 2005.

Canadian producers will remain concerned by the growing influx of low-priced imports from China. Much of that influx can be attributed to the low value of the Chinese yuan. However, exchange rates alone are not the only issue and there could be new trade complaints filed against China in 2005.

Canadian fastener producers succeeded in having dumping and countervailing duties applied against Chinese screws in January of this year. Canadian bicycle manufacturers recently filed a safeguard complaint against Chinese imports, alleging that Chinese products had caused market

disruption and seeking temporary trade relief against these imports. That case will be heard in 2005. The results could determine if other Canadian industries file similar requests.

Concluding Comments

It is impossible to adequately summarize major trade issues in a short paper. We have attempted to merely identify some trends for the coming year and would summarize the selected main issues in 2005 in this way:

The WTO will enter into an intense negotiating phase but will not likely reach a conclusion at the Hong Kong summit. Talks will spill over into 2006.

Canada will not be able to resolve the softwood lumber case with the U.S. given the strength of the U.S. lumber lobby. The year will probably end as it began, with the issue unsettled and as contentious as ever.

Canada will pursue a more focused trade policy in the coming year, with less emphasis on regional initiatives like the FTAA and more emphasis on the Canada-U.S. relationship, including the border, and on opening markets in selected emerging markets, such as China, Brazil and India.

International Trade Law Group

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