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TRADE LAW MEMORANDUM

A SERIES OF LEGAL VICTORIES – WHITHER NOW?

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A set of important international panel decisions, three of them issued this week, appear to have vindicated Canada's policy of challenging, on every available legal ground, U.S. trade measures imposed against Canadian imports of softwood lumber and wheat.

The legal "victories" announced by the new International Trade Department over the last few days entail:

- a NAFTA panel decision on August 31st ordering the U.S. International Trade Commission to revoke its findings on Canadian lumber because there was no evidence of a threat of injury to U.S. producers;
- a decision by the WTO confirming that Canada can retaliate against the so-called Byrd Amendment, which provides for anti-dumping duties collected by the U.S. Treasury to be disbursed to U.S. petitioners;
- a decision by the WTO Appellate Body on August 30th that the Canadian Wheat Board does not act contrary to WTO rules on State Trading Enterprises as a

“single desk” seller of wheat in international markets for the benefit of Canadian farmers;

- finally, a decision of the Appellate Body earlier in August confirming that the calculation of anti-dumping duties on Canadian softwood lumber by the U.S. Commerce Department (using the so-called “zeroing” formula) contravened WTO rules.

There are several levels on which the collective impact of these decisions can be analyzed. On one level, they can be said to support the value of the rule of law and of the international dispute settlement system, that system being largely devised and promoted by American trade policy experts themselves. Even if the judicial mills do grind slowly, these cases show that perseverance can ultimately pay off.

On another level, some can justifiably argue that these recent decisions also demonstrate strategic wisdom -- in the Softwood Lumber case particularly -- of the Canadian government doggedly pursuing every conceivable international legal option, while at the same time proceeding down the negotiating track in an effort to find a political solution.

The final level of analysis, and perhaps of most long-term interest, is that these decisions illustrate that U.S. trade agencies have been seriously out of step with international legal requirements. Why, one might ask, has the U.S. decisively lost on important issues in such high-profile trade cases against Canada at the WTO and in the NAFTA?

The most damning of these could be yesterday’s NAFTA panel decision in the Softwood Lumber case. The panel, in exasperation, said it was futile to remand the matter to the U.S. International Trade Commission yet again, given the Commission’s continued refusal to abide by previous panel remands. Instead, in an exceptional move, it ordered the Commission to revoke its finding against Canadian lumber imports because the

evidence simply did not support its decision that there was a threat of injury to U.S. industry.

An experienced American member of the panel, in a separate opinion, agreed that the Commission's refusal to accept previous panel instructions was unacceptable and to let this happen again, he said, "would be to allow the Chapter 19 process to become a mockery and an exercise in futility". He therefore agreed that the only avenue open to the panel was to specifically instruct the ITC to rescind its finding.

When one recognizes that the very high threshold for successful reviews by NAFTA panels, requiring nothing less than demonstrably egregious errors of law or fact for appellants to succeed, one appreciates the extent of the defects found by the panel in the Commission's reasons.

Some might cynically retort that these legal decisions are not really that decisive because the U.S. government can use a variety of means to challenge the outcomes and, at the end of the day, refuse to implement the findings. That argument, however, assumes that the United States would chose to thwart the international legal process that that country itself has largely designed and promoted.

Developments over the next few months on the follow-through to each of these four cases will be interesting to watch.

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