

ARTICLE 1904
BINATIONAL PANEL REVIEW PURSUANT TO THE
NORTH AMERICAN FREE TRADE AGREEMENT

IN THE MATTER OF:

Certain Iodinated Contrast Media
Used for Radiographic Imaging, Secretariat File No.: CDA-USA-2000-1904-01
Originating in or Exported from the
United States of America (Including
the Commonwealth of Puerto Rico)

PANEL DECISION AND ORDER
ON REVIEW OF
THE DETERMINATION ON REMAND
OF THE
COMMISSIONER OF CUSTOMS AND REVENUE

May 26, 2003

Before: Mr. Brian E. McGill (Chair)
 Professor David J. Mullan
 Mr. Mark R. Sandstrom
 Professor Leon E. Trakman
 Ms. Shawna K. Vogel

On January 8, 2003, this Panel remanded to the Canada Customs and Revenue Agency ("CCRA") the antidumping duty margin determination for Nycomed Imaging A.S. Familiarity with that decision is assumed. The CCRA filed a Determination on Remand on February 24, 2003 in which the CCRA, again, rejected use of sections 15 and 19 of the *Special Import Measures Act* (RSC 1985, c.S-15, as amended) ("SIMA") under the facts of this case. Instead, the CCRA determined that resort to section 29 of SIMA was necessary. Section 29 provides that where the normal value or the export price cannot be determined as provided for in sections 15 to 28 of SIMA, then "the normal value or export price of the goods, as the case may be, shall be determined in such manner as the Minister specifies." SIMA section 29(1). Nycomed subsequently filed Submissions under Rule 73 on March 14, 2003, arguing, *inter alia*, that the grounds on which the CCRA based its determination not to use SIMA sections 15 or 19 were *post hoc* justifications which were not reflected in the original Statement of Reasons issued by the CCRA.

Nycomed misinterprets the Panel's refusal of *post hoc* rationalizations at the oral argument before the Panel to support the CCRA decisions. Once an investigation is remanded back to the CCRA for further consideration and analysis, the CCRA is free to re-examine the evidence and issue a new, reasoned determination. Indeed, elucidation of the agency's reasoning in making a decision is the precise reason for a remand to the agency. Unlike statements by counsel at a hearing, the Determination on Remand reflects the considered analysis of the agency and has the same weight as the original Statement of Reasons issued by the CCRA. *See* SIMA section 77.16(1); *see also* SIMA section 41.1 and 77.016(1).

In the Determination on Remand, based on confidential information of record including the Nycomed supply agreement, the CCRA found that section 15 could not be utilized to determine normal value because the transactions to be examined were outside the "ordinary course of trade." Determination on Remand at 7-9. Moreover, for similar confidential reasons, the CCRA determined that cost of production calculations central to a determination of normal value under section 19 could not be made for Nycomed. *Id.* at 11-13. The Panel reviewed the explication of the CCRA's findings and the basis therefore in the Determination on Remand, as well as the relevant confidential record. We believe the Determination on Remand provides a reasoned and sustainable explanation for the CCRA's findings.

Nycomed also challenged the substance of the CCRA's determination under section 29 of SIMA.

In explaining its determination under section 29, the CCRA states:

the export price of the subject goods was determined on the basis of the vendor's (Nycomed Imaging AS) selling price to the end-users (hospital buying groups) in Canada, determined at the Puerto Rico location. This export price was then compared with the normal value of the like goods, determined on the basis of the selected vendor's (Nycomed Inc.) selling price to the end users (hospital buying groups) in the United States, determined at the Memphis location. It is submitted that this methodology resulted in a fair comparison being made at the same level of trade.

CCRA Rule 73 Submissions at 12 (par. 41). We note that the issue is not whether the starting prices were at the same level of trade (*i.e.*, hospital buying groups),¹ but whether the CCRA made

¹The Determination on Remand states: "The starting point in determining the normal value of the like goods was the same starting point used in determining the export price of the subject goods, *i.e.* the first arms' length selling prices of the like goods to those hospital groups in the United States who purchased in comparable quantities as the

appropriate adjustments to bring the two starting prices back to the same position in the chain of distribution.² The CCRA states that it recognized that "normal value was not determined at the ex-factory point of shipment in Puerto Rico," but contends that its determination of normal value at Nycomed's Memphis warehouse location is properly "representative of the normal value of the like goods sold in the domestic market." *Id.* at 16. Nevertheless, the CCRA provides no justification for finding that Nycomed acquired, or took title to, the merchandise at its Memphis warehouse location rather than in Puerto Rico.

Similarly, the Determination on Remand does not point to any evidence that merchandise was treated any differently whether it was shipped to Canada from Puerto Rico or was shipped to the United States from Puerto Rico.³ Likewise, the CCRA Rule 73 Submissions do not provide any support for the decision to determine the export price as adjusted back to the Puerto Rico location but not to do so for normal value (and instead making the normal value determination with adjustments back to the Memphis location). *See* CCRA Rule 73 Submissions at 12-14. The failure of the CCRA to provide a reasoned analysis is particularly egregious because the CCRA was directed by the Panel to explain this methodological distinction. On the record and in the briefs, the CCRA decision on this issue appears purely arbitrary and the resulting antidumping duty margin appears to be artificial.⁴

hospital groups in Canada." Determination on Remand at 16.

²*See e.g.*, Special Import Measures Regulations section 9 (Substitution of Trade Level) discussing the purchasers' level of trade.

³As stated by the CCRA: "Any references made to 'Nycomed Imaging AS, in Norway' in the DOR, the Brief of the Investigating Authority, the various Statement of Reasons and the Administrative Record, refer solely to the physical location of Nycomed Imaging AS. It does not pertain to where the sales were made or where title to the goods passes." CCRA Rule 73 Submission at 5 (par. 17).

⁴The CCRA has not indicated that its determination was intended to sanction Nycomed for any uncooperativeness in the investigation.

The CCRA argues that "Article 2.4 of the *WTO Anti-dumping Agreement* does not state that the comparison must be made at the ex-factory level." CCRA Rule 73 Submission at 12-13 (par. 42). Nevertheless, the CCRA also admits that Article 2.4 requires that a "fair comparison shall be made between the export price and normal value." *Id.* quoting Article 2.4. The CCRA correctly indicates that the Panel must take its direction from SIMA and not the WTO Agreement, but SIMA appears to be in accord with the WTO Agreement in this regard. For example, SIMA section 15 provides that normal value is to be determined "at the place from which the goods were shipped directly to Canada" SIMA section 15(e). The parallel provision for export price likewise refers to the deduction of "all costs, charges and expenses resulting from the exportation of the goods, or arising from their shipment, from the place described in paragraph 15(e)." SIMA section 24(a)(iii).

The CCRA methodological authority under section 29 is broad and the CCRA's approach to determining margins under section 29 may vary greatly from case to case. Nevertheless, once it has selected a methodology, the CCRA must apply the methodology in a fair manner. The Panel required the CCRA to explain why it failed to deduct movement and insurance charges from Puerto Rico to Memphis on the normal value side of the equation, when it deducted such charges from Puerto Rico to Canada on the export price side of the comparison. Such explanation was necessary because the CCRA failed to establish the Memphis location as the proper end point in its methodological approach to expense adjustments. CCRA has not addressed the question in both the Determination on Remand and the CCRA's Rule 73 Submissions. The Panel can only conclude that the CCRA cannot, or will not, explain this

difference in treatment of shipment costs despite the opportunity to do so. The CCRA certainly possesses great discretion in making its determinations under section 29. Nevertheless, the exercise of discretion cannot be arbitrary⁵ and the CCRA's decisions must be supported by reasoned analysis. Accordingly, the Panel cannot uphold the CCRA's Determination on Remand in this regard and orders that the CCRA deduct freight, insurance and other shipments costs from Puerto Rico to Memphis in its normal value calculations under section 29 or provide an explanation as to why movement costs were not deducted when such costs were deducted in determining export price.

Nycomed has asserted that, as well as an adjustment for freight, insurance and other shipment costs, there should be a deduction for profit in establishing the normal value of domestic sales. While recognizing that profit is a typical adjustment in margin calculations, the Panel also accepts that there may be a rational explanation for the CCRA not making that adjustment in this case. This might be inferred from the CCRA's other findings (especially those relating to whether the first domestic sale of the goods in the United States were in "the ordinary course of trade"). Nonetheless, the CCRA should have dealt with this issue explicitly as part of its response to the Panel's directions. It did not do so. Therefore, the Panel also remands the treatment of profit for reconsideration and requires the CCRA to either deduct the profit on the first domestic sale of the goods in the United States or explain why a deduction for profit was not necessary to achieve a fair comparison of prices for the purposes of section 29.

⁵ Tyco at para. 52 of its brief supporting the response of the CCRA to the remand asserts that the appropriate standard of review is that of patent unreasonableness and that, on the basis of that standard, this Panel should not again interfere with a highly discretionary judgment on the part of the CCRA under section 29. However, deference of this kind must be earned and our principal concern here is with whether the CCRA has in fact provided reasons for not adjusting the price back to the goods point of origin in Puerto Rico as required by the Panel's directions.

Conclusion

Accordingly, the Panel cannot uphold the CCRA's Determination on Remand. The Panel again remands the section 29 calculations to the CCRA to: (a) either deduct movement costs back to Puerto Rico in determining normal value or provide an explanation as to why movement costs were not deducted when such costs were deducted in determining export price; and (b) either deduct the profit on the first domestic sale of the goods in the United States or explain why a deduction for profit was not necessary to achieve a fair comparison of prices for the purposes of section 29. The remand determination shall be made within 30 days.

Signed in the Original by:

Brian E. McGill (Chair)
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Issued on the 26th day of May 2003.