

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

September 23, 2003

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

On June 25, 2003, the Canada Customs and Revenue Agency (CCRA) filed its Determination on Remand in response to this Panel's Decision and Order of May 26, 2003. A Challenge to the Determination on Remand was subsequently filed by Nycomed Amersham Canada, Ltd., Nycomed, Inc., and Nycomed Imaging AS (pursuant to NAFTA Rule 73). The Challenge alleged that the CCRA's decision violated the principle of "price comparability" embodied in the Special Import Measures Act and the WTO Antidumping Agreement by failing to make deductions for certain freight expenses and profit.

In this Panel's prior opinion, the CCRA's resort to a determination of normal value under SIMA Section 29 was affirmed. Nevertheless, Nycomed asserts that the CCRA's failure to make deductions for purported freight expenses and internal profit resulted in a Section 29 calculation that was unfair because normal value was calculated from a different shipment point than export price even though the merchandise sold into the continental United States and Canada originated from the same manufacturing facility.

In making its Section 29 determination, the CCRA sought, as a basis for its normal value calculations, an arm's-length transaction in the United States. Based on an analysis of data which is confidential, the CCRA "deemed" Nycomed, Inc. to be the exporter and determined normal value using an ex-Memphis warehouse price from Nycomed, Inc. Once it had made that selection, the CCRA responded that adjustment of normal value to reflect transportation from the manufacturing facility in Puerto Rico was not required because the transfer to Nycomed, Inc. from the manufacturing facility was not the transaction used as the basis for the normal value calculations. It also asserted that the same analysis applies to any profit component that might theoretically be appurtenant to the transfer to Nycomed, Inc.

This Panel is obliged to accord considerable deference to the exercise of the discretion created by Section 29. Given that, whether judged by the standard of unreasonableness or patent unreasonableness, this Panel finds no basis for interfering with the CCRA's decision to deem

Nycomed Inc. to be the exporter and to fix the normal value by reference to Nycomed Inc.'s ex-Memphis warehouse price charged to domestic consumers. More particularly, it is this Panel's finding that it was neither patently unreasonable nor unreasonable for the CCRA to have concluded that the use of this methodology adequately reflected in these particular circumstances the principle of price comparability for normal value and export price comparisons. Nycomed has not met the heavy burden of establishing that the only reasonable or rational way of protecting the principle of price comparability in this instance required an adjustment for freight and profit.

For these reasons, and based on an analysis of all the submissions filed herein, the CCRA's Determination on Remand is affirmed. The Panel directs the Canadian Secretary of the NAFTA Secretariat to issue a Notice of Final Panel Action pursuant to Rule 77 of the *Rules of Procedure for Article 1904 Binational Panel Reviews*.

Signed in the Original by:

Brian E. McGill (Chair)
Brian E. McGill (Chair)

David J. Mullan
David J. Mullan

Mark R. Sandstrom
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Leon E. Trakman
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Issued on the 23rd day of September 2003.