

CLIENT ALERT

February 28, 2018

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INTERNATIONAL TRADE

SOFTWOOD LUMBER UPDATE: WTO AFFIRMS US METHODOLOGY IN DETERMINING THE BENEFIT ATTRIBUTABLE TO LOG EXPORT RESTRICTIONS IN INDONESIA PAPER AS A COUNTERVAILABLE SUBSIDY

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Canada's efforts to defend its controversial restrictions on the export of logs from British Columbia (LERs) took a recent blow, as a World Trade Organization (WTO) panel affirmed the United States Department of Commerce's (DoC) methodology in calculating the countervailing duties (CVDs) on coated paper from Indonesia on account of Indonesia's log export ban.¹ Under US domestic trade policy, DoC has historically and consistently treated export restrictions on inputs as financial contributions that confer a benefit to the end product.

In its decision to impose CVDs in *Indonesia Paper*, the DoC found that (a) through Indonesia's prohibition on log exports, it directed its harvesting companies to provide logs to pulp and paper companies at low or suppressed domestic prices (i.e. a financial contribution), and (b) to measure the benefit conferred by the export ban, it compared the domestic price paid by the paper company for logs to a benchmark price based on world prices. Although the issue of financial contribution was not before the WTO, the WTO panel found no error with the US methodology for calculating the benefit attributable to Indonesia's log export restrictions. There was no appeal.

With its ongoing war on foreign subsidies, the US will no doubt feel further emboldened by this recent WTO win. As of late, the legality of Canadian LERs has become somewhat of a cause célèbre in the world of subsidies, with the US targeting Canadian LERs in its high-profile softwood lumber dispute, but also in respect of Canadian exports of uncoated groundwood paper and supercalendered paper. As expected, Canada reacted to this onslaught by appealing the individual CVD determinations, and all of these determinations, except those in *Uncoated Groundwood Paper*², are now before panels established under Chapter 19 of the NAFTA and/or the WTO. And the stakes are high with annual Canadian exports of lumber and paper ranging in the billions of dollars.

Of note, in January 2018, Canada also filed an "as such" systemic WTO challenge of how the US administers its trade remedy laws – including its practice of treating export restrictions as a countervailable subsidy. At the moment, the WTO has a severe shortage of Appellate Body members and a growing backlog of cases. Therefore, as it relates specifically to Canadian LERs, further WTO/NAFTA jurisprudence on this issue will most certainly be decided sooner under the NAFTA with the Chapter 19 panel in the current Softwood Lumber CVD challenge scheduled to hear the matter and render a decision later this year... that is, as long as there is a NAFTA. So stay tuned.

For a review of the US treatment of BC LERs as subsidies in the current Canada-US Softwood Lumber dispute, see our Alert: [Canada-U.S. Softwood Lumber Dispute: What's Changed? B.C. Log Export Restrictions \(LERS\) And NAFTA Implications.](#)

¹ *US-Coated Paper (Indonesia)* DS 491, adopted on January 23, 2018.

² The Final CVD Determination in *Uncoated Groundwood Paper* (C-122-862) will be issued in late May 2018, after which it is expected that Canada will appeal the LER issue to the WTO or under Chapter 19 of the NAFTA, or both.

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