Recent Developments in NAFTA

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I. INTRODUCTION

Canada and the United States have recently made two important decisions that relate to the North American Free Trade Agreement (NAFTA): Canada's Department of Finance passed an amendment to liberalize the rules of origin under NAFTA, and the United States and Canada signed an equivalency agreement that allows each country to recognize the other's certification for organic products. A NAFTA arbitration panel also reached an important decision to dismiss a Canadian company's claim against the United States; the panel's decision is significant because it serves as an indication that global investment and environmental protection interests can co-exist. This update will address these events as well as discuss recent happenings relating to the Mexican cross-border trucking program.

II. AMENDMENTS TO NAFTA LIBERALIZE RULES OF ORIGIN REQUIREMENTS

On June 10, 2009, Canada's Department of Finance (the Department) officially published an order amending the Canadian Customs Tariff. The amendment was created "to implement the agreed liberalization of rules of origin" under NAFTA with regard to "chenille fabric containing artificial staple fibers that are unavailable in commercial quantities from North American producers." The Department issued a regulatory impact analysis statement explaining that the amendment was adopted in order to expand access to duty-free textiles that cannot be obtained from North American production. According to the Department, the expanded access serves as a benefit to both American and Canadian manufacturers. The amendment earned important support from the Canadian Home Furnishings Alliance and from the former Canadian Textiles Institute.

The Department additionally ordered an amendment to the Schedule to the Customs Tariff in order to remove custom duties on:

2. Id.
3. Id.
4. Id.
5. Id.
hexamethylene tetramine; certain cotton yams used to manufacture certain towels; certain woven fabrics used in knee linings for trousers; certain woven fabrics used to manufacture dresses, skirts, vests, blouses, tops and scarves; certain viscose rayon yarn used to manufacture mattress ticking; certain nylon staple fibers used to manufacture footwear; certain narrow woven 'hook and loop' pile fabrics; and certain three-and four layer woven and knit fabrics used to manufacture recreational outerwear.6

According to the Department, there was no opposition to the proposed removal of the duties on these items.7 It estimated that the change in annual revenues to the Canadian government due to the removal of the duties would total around $727,000.8

III. CANADA & UNITED STATES RECOGNIZE EACH OTHER'S ORGANIC PRODUCT CERTIFICATIONS

U.S. Deputy Agriculture Secretary Kathleen Merrigan announced on June 17th that the United States and Canada had agreed to a “first-of-its kind equivalency agreement” that required the countries to recognize each other’s certification for organic products.9 Under the agreement, organic farmers and food processors could sell their products with organic labels in either country so long as they were certified by either the USDA’s National Organic Program or the Canada Organic Product Regulation.10 “Both the USDA Organic seal and the Canada Organic Biologique logo may be used on certified products.”11 According to Merrigan, the agreement “is an important first step toward global harmonization of organic standards.”12

IV. GLAMIS GOLD ARBITRATION ACTION DISMISSED

A claim brought by Canadian mining company Glamis Gold Ltd. (Glamis) was unanimously rejected and dismissed by a NAFTA arbitration panel on June 9th.13 The company’s $50 million international arbitration claim alleged that the United States committed an act of expropriation without compensation by adopting certain measures relating to land reclamation.14 Glamis blamed certain environmental requirements adopted by California for making its proposed open-pit gold mine economically infeasible and destroying its investment.15 Glamis claimed

6. Id.
7. Id.
8. Id.
10. Id.
11. Id.
12. Id.
14. Id.
15. Id.
that this, along with the United States Department of the Interior's alleged delay of the project, was a violation of NAFTA Chapter 11. Under Chapter 11, investors from countries belonging to NAFTA are given “direct access to dispute settlement before an arbitration tribunal” if they believe their rights were violated. Glamis focused its claims on Article 1110, asserting that the United States expropriated its investment, and Article 1105, asserting that the United States did not grant its investment “treatment in accordance with international law, including fair and equitable treatment and full protection and security” as required under NAFTA.

The panel found that the actions of the United States “were supported by legitimate public policy goals and did not violate the minimum standard of treatment of the NAFTA or constitute an expropriation of Glamis’ investment.” Therefore, the panel dismissed Glamis’ claim and required it to pay two-thirds of the cost of the arbitration. The panels’ decision was generally well received and viewed as indicative of the fact that global investment and environmental protection did not have to be mutually exclusive. But several organizations, including Earthjustice, Earthworks, Public Citizen, and Sierra Club, felt the decision did nothing to remedy serious perceived problems with NAFTA. They asserted that as written, NAFTA allows foreign investors the right to attack certain domestic health and environmental laws. According to the organizations, the fact that Glamis’s claim could even be brought at all is an indication that the trade agreement must be altered.

V. UPDATES ON THE CANCELLATION OF THE MEXICAN TRUCKING PILOT PROGRAM

A. CHALLENGING THE TARIFFS

United States Representative Brad Sherman recently brought attention to the sanctions, in the form of tariffs, that Mexico has imposed on over $2.4 billion of U.S. exports. The sanctions were created in response to the cancellation of the Mexican truck pilot program. Though the Mexican government has stated that the sanctions would generate around $427 million in revenue to offset the approximately $500 million lost by Mexican truckers, Public Citizen estimated that the amount lost by Mexico is

16. Id.
17. Id.
18. Id.
19. Id.
20. Id.
21. Id.
22. Id.
23. Id.
24. Id.
26. Id.
actually only between $69 million and $227.6 million. Sherman argued that the sanctions could, therefore, be viewed as "manifestly excessive."

Sherman requested information regarding the cost impact of the tariffs on U.S. producers compared with the losses that Mexico would actually suffer as a result of the cancellation of the pilot program. He also requested information about a possible "NAFTA sanctions-level challenge." According to NAFTA Article 2019(3), at the request of a disputing party the NAFTA Commission can put together a panel to establish "whether the level of benefits suspended by a NAFTA party is manifestly excessive."

B. New Alliance Pushing for Resolution

United States manufacturers and companies are also taking an interest in the tariffs imposed by Mexico. Over 150 U.S. organizations have formed an entity called the Alliance to Keep U.S. Jobs (the Alliance). The Alliance was formed in reaction to the tariffs imposed by Mexico after the termination of the trucking pilot program. It is composed of industries affected by the retaliatory tariffs. The Alliance has started pressing the Obama administration to resolve the trucking dispute with Mexico because of fears that its members are being put at a competitive disadvantage compared to countries with no tariff imposed on their products. The disadvantage, coupled with the poor economy, has led many in the Alliance to also fear that their companies may be forced to reduce their workforces.

VI. Pending Proposal

The Obama administration has not been inactive. The White House has a pending proposal for a new cross-border trucking program according to Ray LaHood, the Secretary of the Department of Transportation. The Department of Transportation was given the task of developing the new program and worked with lawmakers to ensure that those with concerns about the pilot program would be satisfied. The Department is currently waiting for the White House's approval for the proposal to go back to Capitol Hill in order to discuss the new proposal with

27. Id.
28. Id.
29. Id.
30. Id.
31. Id.
32. Rossella Brevetti, Transportation: New Alliance Vows to Press Administration, Congress to Resolve Mexican Truck Dispute, 26 INT'L TRADE REP. 1039 (2009).
33. Id.
34. Id.
35. Id.
36. Id.
38. Id.
LaHood stated that the new proposal “addresses driver safety, truck safety, and how to measure whether a driver has complied with hour of service requirement” and should be “enough to satisfy the members of Congress.”

VII. CONCLUSION

Though some do not believe NAFTA has been beneficial for the countries involved, Canada’s passage of the amendment to liberalize rules of origin regarding certain textiles and the organic certification equivalency agreement between Canada and the United States show important progress that has been achieved because of NAFTA. The recent decision to dismiss Glamis’s claim by a NAFTA arbitration panel has also served to silence some critics of NAFTA who claim that the Agreement restricts countries from passing environmental protection regulations. Though it is unclear how the new cross-border trucking program will operate, many hope that this too will show the potential benefits of NAFTA.

39. Id.
40. Id.