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NAFTA UPDATE AND TRADE NEWS HIGHLIGHTS FROM NOVEMBER 2010 THROUGH JANUARY 2011

*Chad Bond**

I. JOINT STATEMENT FROM THE JANUARY 10, 2011 MEETING OF THE NAFTA FREE TRADE COMMISSION (FTC), IN MEXICO CITY, MEXICO

IN January, the representatives of the NAFTA Member States—Bruno Ferrari (Mexico’s Secretary of Economy), the Honorable Peter Van Loan (Canada’s Minister of International Trade), and Ambassador Ron Kirk (U.S. Trade Representative)—released a joint statement detailing the results of the January 10, 2011, NAFTA Free Trade Commission (FTC) meeting in Mexico City, Mexico.¹ Article 2001 of NAFTA provides for the purpose and activities of the FTC, which holds in relevant part:

2. The Commission shall:
 - (a) supervise the implementation of this Agreement;
 - (b) oversee its further elaboration;
 - (c) resolve disputes that may arise regarding its interpretation or application;
 - (d) supervise the work of all committees and working groups established under this Agreement, referred to in Annex 2001.2; and
 - (e) consider any other matter that may affect the operation of this Agreement.²

The FTC emphasized the benefits of NAFTA over the seventeen years of its implementation and noted that “[f]rom 1993 to 2009, trade among the NAFTA countries has more than doubled, from \$288 billion to \$701 billion. Each day the NAFTA countries conduct nearly \$1.9 billion in

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1. Press Release, Office of the U.S. Trade Representative, Joint Statement from the January 10, 2011 Meeting of the NAFTA Free Trade Comm’n (FTC), in Mex. City, Mex. (Jan. 10, 2011), *available at* <http://www.ustr.gov/about-us/press-office/press-releases/2011/january/joint-statement-january-10-2011-meeting-nafta-free> [hereinafter Press Release, Joint Statement].

2. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993), *available at* <http://www.nafta-sec-alena.org/en/view.aspx?x=343&mtpiID=153#A2001> [hereinafter NAFTA].

trilateral trade.”³ Among the issues that the FTC addressed were the reduction of transaction costs, the elimination of barriers to trade, and increased regulatory cooperation.⁴ One statement that the FTC made is relevant to recent cases: “We tasked relevant NAFTA committees, including the Committees on Standards-Related Measures and Sanitary and Phytosanitary Measures, to continue their work in this area and identify additional areas for cooperation.”⁵ This statement was likely due in part to the United States’ September 2010 request that the FTC “establish a dispute settlement panel regarding Mexico’s decision not to move its ‘dolphin safe’ labeling dispute from the World Trade Organization (WTO) to the NAFTA.”⁶ Furthermore, the FTC noted that an update to, and simplification of, the rules of origin will allow more goods to qualify for duty-free treatment and reduced transactional costs when those rules of origin accurately reflect patterns in sourcing and production.⁷ The FTC also announced that “the Working Group on Rules of Origin (WGRO) has reached preliminary agreement on a fourth set of changes to the NAFTA rules of origin. Annually, these goods are valued at approximately \$90 billion dollars.”⁸ Finally, the FTC emphasized the need to increase information available to small and medium-sized enterprises (SMEs) regarding export opportunities via publications such as *Opportunities for Small and Medium-Sized Enterprises in North America* and via websites like *SBDCGlobal.com*, an information exchange site.⁹ In closing, the FTC said:

We are committed to the successful conclusion of the WTO Doha Development Agenda. We urge all WTO Members to demonstrate renewed energy and directly engage immediately with each other in across-the-board give-and-take negotiations to put the Doha Development Agenda on a path toward a balanced and ambitious overall outcome that opens new markets and creates new trade flows.¹⁰

This aspirational statement was then followed the next month by a warning by the WTO Chief that time was running out for any breakthroughs in Doha talks and what was deemed to be “a disappointing round of talks Feb. 14-17 among senior officials from 11 key members representing the main Doha negotiating alliances—Argentina, Australia, Brazil, Canada, China, the European Union, India, Japan, Mauritius,

3. Press Release, Joint Statement, *supra* note 1.

4. *Id.*

5. *Id.*

6. Press Release, Office of the U.S. Trade Representative, U.S. Requests Dispute Settlement Panel in Tuna Dolphin NAFTA Choice of Forum Dispute (Sept. 24, 2011), available at <http://www.ustr.gov/about-us/press-office/press-releases/2010/september/united-states-requests-dispute-settlement-panel>; see generally Chad Bond, *NAFTA Update and Trade News Highlights from August 2010 through October 2010*, L. BUS. REV. AM. (forthcoming 2011) (giving a background on the U.S.-Mexico tuna-labeling dispute).

7. Press Release, Joint Statement, *supra* note 1.

8. *Id.*

9. *Id.*

10. *Id.*

South Africa, and the United States.”¹¹

II. COMMERCE PROPOSAL SEEKS TO END THE PRACTICE OF ZEROING IN ADMINISTRATIVE REVIEWS IN ANTIDUMPING CASES

On December 28, 2010, the U.S. Department of Commerce (Commerce) requested comments on a proposal that would likely end zeroing in administrative reviews in most cases—something that has brought praise from critics of zeroing such as foreign manufacturers as well as criticism from domestic manufacturing associations and U.S. lawmakers.¹² Commerce has acknowledged that WTO dispute settlement reports have been overwhelmingly hostile to the practice as being inconsistent with the United States’ WTO obligations and states that “[i]n response to these reports, the Department proposes modification of its methodologies, including changes to certain provisions of the Department’s regulations.”¹³

Commerce initially addressed the issue of zeroing in 2006, when it decided to implement the findings of WTO dispute settlement bodies by discontinuing its practice of zeroing in new and pending investigations.¹⁴ Thus, Commerce “will no longer make average-to-average comparisons . . . without providing offsets for non-dumped comparisons.”¹⁵ The public comments Commerce received in 2006 after it proposed eliminating zeroing in investigations provide a useful reference for the kind of public comments that are likely to be submitted in the current proposal to eliminate zeroing in administrative reviews:

Some commentors welcomed the Department’s proposal to permit offsets when making average-to-average comparisons, which would bring the Department’s methodology into conformity with U.S. international obligations . . . other commentors argue that the denial of offsets creates more accurate results, because it combats the phenomenon of masked dumping. According to these commentors, masked dumping occurs when import transactions which are sold at less than normal value are masked by those sold at prices greater than normal value. The U.S. Court of Appeals for the Federal Circuit, these commentors note, has upheld the denial of offsets on

11. Daniel Pruzin, *WTO Chief Warns Time Running Out For Breakthrough in Doha Talks*, 28 Int’l Trade Rep. (BNA) 298 (Feb. 24, 2011).

12. Rossella Brevetti, *Dumping: Commerce Proposal to Curb Zeroing Draws Response From 22 Lawmakers*, 28 Int’l Trade Rep. (BNA) 296 (Feb. 24, 2011).

13. *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings*, 75 Fed. Reg. 81,533 (Dec. 28, 2010) (proposed rule; proposed modification; request for comments), available at <http://www.federalregister.gov/articles/2010/12/28/2010-32632/anti-dumping-proceedings-calculation-of-the-weighted-average-dumping-margin-and-assessment-rate-in#p-3>.

14. *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During An Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77,722 (Dec. 17, 2006) (codified at 19 C.F.R. § 351.414 (2007)).

15. *Id.*

these grounds. These commentators argue that if the Department is to grant offsets, it should do so on the narrowest grounds possible.¹⁶

The elimination of zeroing in administrative reviews would result in a more uniform application of anti-dumping methodologies.¹⁷ The Consuming Industries Trade Action Coalition (CITAC) welcomed the change, “saying that Commerce has finally acted to remove a serious distortion from antidumping calculations” in most administrative reviews, though commentators have already noted that it is unclear “how frequently [Commerce] will invoke exceptions” and apply a zeroing methodology anyway.¹⁸

A group of twenty-two U.S. lawmakers, including Senators Sherrod Brown (D-Ohio) and Carl Levin (D-Mich.), ranking member of the House Ways and Means Committee, sent a letter to Commerce Secretary Gary Locke and U.S. Trade Representative Ron Kirk that expressed concerns with the proposed elimination of zeroing.¹⁹ The lawmakers argue that “[w]ith the zeroing decisions, the WTO’s Appellate Body overreached its mandate, jeopardizing U.S. interests and undermining confidence in the system.”²⁰ Groups that have submitted comments opposing the elimination of zeroing include the Coalition for Fair Lumber Imports, Alliance for American Manufacturing, and Florida Tomato Exchange and Florida Tomato Growers Exchange, which have “urged Commerce to withhold any modification of U.S. law, regulation, or practice until the WTO Doha negotiations are completed to minimize disruption to administration of U.S. law.”²¹ In that regard, Commerce officials have indicated that the United States “would continue to push for its right to use the criticized practice of ‘zeroing’ when calculating duties on dumped goods during the ongoing Doha round of trade talks.”²² Furthermore, the same official delineated between the Doha talks and current efforts to comply with WTO rulings by stating that “[t]he U.S. proposal to come into compliance with the WTO rulings in no way signals a change in the U.S. position in the Doha Rules negotiations with regard to zeroing.”²³ The Office of the U.S. Trade Representative reaffirmed this position when it indicated that it will negotiate for the reinstatement of the zeroing methodology in antidumping rules within the Doha round of trade talks, but as at least one commentator has noted, “with those talks having been stalled for some years and many other WTO members implacably

16. *Id.* at 77,223.

17. See Rossella Brevetti, *Dumping: Commerce AD Review Proposals Respond to WTO ‘Zeroing’ Findings*, 28 Int’l Trade Rep. (BNA) 6 (Jan. 6, 2011).

18. *Id.*

19. Brevetti, *supra* note 12.

20. *Id.*

21. *Id.*

22. Tom Barkley, *U.S. Proposes Changes to Comply With WTO Rulings*, WALL ST. J., Jan. 4, 2011, http://online.wsj.com/article/SB10001424052748704723104576062313168909094.html?mod=googlenews_wsj.

23. *Id.*

opposed to zeroing, Washington is likely to face an uphill struggle.”²⁴

III. THE UNITED STATES SUCCESSFULLY DEFENDS ANOTHER NAFTA CHAPTER 11 CLAIM

A. OVERVIEW

On January 12, 2011, a NAFTA tribunal rejected a Chapter 11 claim brought against the United States by a Canadian corporation, Grand River Enterprises Six Nations, Ltd., and others. The claim alleged damages in excess of \$600 million dollars because of measures—violating NAFTA investor protections—that were taken in response to the 1998 Master Settlement Agreement (MSA) between U.S. states and major tobacco companies.²⁵ The NAFTA Articles allegedly violated were those concerning national treatment, most-favored-nation treatment, better of national or most-favored-nation treatment, minimum standard of treatment under international law, and expropriation.²⁶

B. DISPOSITION OF THE CASE

“The United States maintained that Grand River Enterprises Six Nations, Ltd., Jerry Montour and Kenneth Hill did not have an investment in the United States and did not qualify for NAFTA Chapter Eleven investment protections,” and that any measures enacted as a result of the MSA were legitimate and reasonable measures with the aim of protecting public health and not violations of NAFTA provisions.²⁷ The tribunal agreed that “[t]he evidence did not establish that these Claimants had constituted an enterprise in the United States or engaged in other significant activities there satisfying the definition of investment in Article 1139 of NAFTA . . . [and necessary to] satisfy the jurisdictional requirements for a claim against another NAFTA party.”²⁸ But, the Tribunal did find that the jurisdictional requirements were met for the remaining claimant, Arthur Montour, who “created and carried on a substantial business in the United States, importing cigarettes manufactured by Grand River and distributing them to wholesalers and retail outlets on Indian reservations in the United States.”²⁹

Regarding the expropriation claim, the Tribunal found that Arthur Montour’s claim of expropriation of his investment in a business importing and distributing Grand River’s cigarettes failed, because “[a]n act of expropriation must involve ‘the investment of an investor,’ not part of an

24. Alan Beattie, *U.S. Moves to Defuse Trade Dispute*, *FIN. TIMES*, Jan. 4, 2011, <http://cachef.ft.com/cms/s/0/e95619f4-1835-11e0-88c9-00144feab49a.html#axzz1GF4llrv>.

25. Press Release, U.S. Dep’t of State, NAFTA Tribunal Rejects Grand River Claim (Jan. 15, 2011), available at <http://www.state.gov/r/pa/prs/ps/2011/01/154691.htm>.

26. *Id.*

27. See *Grand River Enters. Six Nations, Ltd. v. United States (Can. v. U.S.)*, Award, at ¶¶ 125-203 (NAFTA Arb. Trib. 2011), <http://www.state.gov/documents/organization/156820.pdf>.

28. *Id.* ¶ 5.

29. *Id.* ¶ 6.

investment. This is particularly so in these circumstances, involving an investment that remains under the investor's ownership and control and apparently prospered and grew throughout the period for which the Tribunal received evidence."³⁰ As to the claim concerning national or most-favored nation treatment, the Tribunal concluded that the measures in question did not prejudice Arthur Montour by subjecting him to "treatment less favorable than that accorded the appropriate domestic comparator."³¹ Finally, the Tribunal considered the claim of violation of minimum standard of treatment under international law and recognized that "[t]he language of Article 1105 does not state or suggest a blanket prohibition on discrimination against alien investors' investments, and one cannot assert such a rule under customary international law."³² Furthermore, "[t]he customary international law minimum standard of treatment is just that, a minimum standard . . . [and] is not meant to vary from state to state or investor to investor."³³ From the foregoing, the Tribunal concluded that Arthur Montour's treatment did not violate either NAFTA Article 1105 or customary international law.³⁴

The dismissal of this case by the Tribunal means that there has yet to be a successful NAFTA Chapter 11 claim against the United States, although there are five cases pending, while foreign investors had won nine cases against Canada and Mexico for damages totaling \$326.9 million as of November 2010.³⁵

IV. LONDON COURT OF INTERNATIONAL ARBITRATION (LCIA) TRIBUNAL SIDES WITH THE UNITED STATES IN SOFTWOOD LUMBER DISPUTE

The Softwood Lumber Agreement (SLA), which became effective in 2006, "provides for binding arbitration to resolve disputes between the United States and Canada regarding interpretation and implementation of the Agreement. Under the SLA, arbitration is conducted under the rules of the LCIA, and there is no appeal from the decision of the tribunal."³⁶ Additionally, "[u]nder the SLA, Canada agreed to impose export measures, including volume restraints and export charges, on Canadian exports of softwood lumber products to the United States . . . [and] to not

30. *Id.* ¶ 155.

31. *Id.* ¶ 171.

32. *Id.* ¶ 208.

33. *Id.* ¶ 214 (citing *Glamis Gold, Ltd. v. United States*, Award, at ¶ 615 (NAFTA Arb. Trib. 2009), available at http://ita.law.uvic.ca/documents/Glamis_Award_002.pdf).

34. *Id.* ¶ 7.

35. See *Table of NAFTA "Chapter 11" Foreign-State Cases and Claims*, PUBLIC CITIZEN, (Nov. 2010), http://www.citizen.org/documents/NAFTA_Investor_State_Chart_Nov_2010.pdf.

36. Press Release, Office of the U.S. Trade Representative, United States Wins Softwood Lumber Arbitration: Victory Will Help Workers and Firms in U.S. Softwood Lumber Industry (Jan. 21, 2011), available at <http://www.ustr.gov/about-us/press-office/press-releases/2011/january/united-states-wins-softwood-lumber-arbitration> [hereinafter SLA Press Release].

take action to circumvent or offset the commitments made in the Agreement.”³⁷ The arbitration concerned British Columbia’s practice of selling timber at prices below that provided for in SLA’s pricing system.³⁸ The United States contended that this circumvented export measures and provided benefits to softwood lumber producers in Canada to the detriment of those in the United States.³⁹ One U.S. industry group, which applauded the initiation of arbitration proceedings, asserts that the selling of improperly classified lumber since 2007 by the British Columbia Government has resulted in an “enormous increase in the amount of [minimum priced] timber [saving] BC Interior lumber producers hundreds of millions of dollars in fiber costs, compared to what they would have paid under the timber pricing system that was in place when the U.S.-Canada Softwood Lumber Agreement was signed.”⁴⁰ The Tribunal agreed with the United States that certain measures by Canada violated its obligations under the SLA and concluded that “Canada must impose, as an appropriate adjustment to compensate for the breach, additional charges on exports of softwood lumber to the United States originating in Quebec and Ontario.”⁴¹ These additional export taxes are expected to cost Canada \$59.4 million, and, if Canada fails to comply, the United States is permitted to place additional import duties on softwood lumber from Canada.⁴²

Despite the ruling by the LCIA, Canada’s Federal Trade Minister Peter Van Loan continues to insist that the SLA is still good for Canada, because it brings stability and predictability to the industry during those periods when lumber prices are low by limiting exports.⁴³ Additionally, Minister Van Loan noted that “the outcome could have been much worse. The United States was seeking nearly \$2-billion in penalties, but the court ruled that only some of the targeted programs are illegal.”⁴⁴ The Tribunal granted less compensation than that sought because it rejected the

U.S. argument that the remedy amount should reflect the dollar-for-dollar benefits the provincial programs conferred to Canadian softwood lumber producers. Instead, [the Tribunal] sided with Canada and ruled that the remedy should only seek to undo the extent to

37. *Id.*

38. *See id.*

39. *Id.*

40. Press Release, Coalition for Fair Lumber Imports, Coalition for Fair Lumber Imports Applauds U.S. Government Initiation of Arbitration Proceeding Against British Columbia Softwood Lumber Agreement Violations (Jan. 18, 2011), *available at* http://www.fairlumbercoalition.org/doc/press_release_01-18-11.pdf.

41. SLA Press Release, *supra* note 36.

42. *Id.*

43. Barrie McKenna, *Lumber Deal Still A Good One Despite New Arbitration Loss, Ottawa Says*, GLOBE & MAIL (Can.), Jan. 21, 2011, <http://www.theglobeandmail.com/report-on-business/canada-loses-round-in-softwood-lumber-spat/article1878820/>.

44. *Id.*

which the programs circumvented the SLA's export measures.⁴⁵

The president of the Quebec Forest Industry Council has stated that “[t]he Canadian government has indicated it intends to comply with the ruling and impose the additional export charges by the end of February [2011].”⁴⁶

45. *U.S. Prevails in Lumber Dispute with Canada, But Falls Short on Remedy*, 29 *INSIDE U.S. TRADE* 4, Jan. 28, 2011, available at 2011 WLNR 1763804.

46. *Id.*

Document

