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NAFTA UPDATE AND TRADE NEWS HIGHLIGHTS FROM MAY 2011 THROUGH JULY 2011

*Miranda Barton**

I. UNITED STATES AND MEXICO SIGN AGREEMENT ON TRUCKING AFTER SEVENTEEN YEARS OF DISPUTE

U.S. Transportation Secretary Ray LaHood and Mexican Secretary of Communication and Transportation Dionisio Arturo Pérez-Jácome Friscione signed a Memorandum of Understanding (MOU) on July 6, 2011, officially ending a seventeen-year dispute over cross-border trucking between the United States and Mexico.¹ The disagreement was the longest-running NAFTA dispute between the two nations.² The U.S. Department of Transportation (DOT) published the proposal in the Federal Register on April 13, 2011, along with a request for comments.³ On July 8, 2011, the DOT's Federal Motor Carrier Safety Administration (FMCSA) confirmed that the agency plans to proceed with the program.⁴

A. BACKGROUND

NAFTA called for international trucking between Mexico and the United States to begin in 1995, but the United States has refused to allow Mexican trucks to carry goods more than twenty-five miles past the U.S.-Mexico border.⁵ In 2001, Mexico won a ruling that allowed it to impose tariffs in retaliation for the U.S. prohibition, but it continued negotiations

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1. Rosella Brevetti, *DOT Not Expected to Make Wholesale Changes to Mexico Trucking Proposal*, 28 INT'L. TRADE REP. (BNA) 1143 (July, 7 2011).

2. *Id.*

3. *Id.*

4. Rosella Brevetti, *Draft Environmental Assessment Evaluates U.S.-Mexico Truck Pilot*, 28 INT'L. TRADE REP. (BNA) 1181 (July 14, 2011).

5. Thomas Black, *U.S. and Mexico Sign Pact to Resolve 15-Year Cross-Border Trucking Dispute*, BLOOMBERG, (July 6, 2011, 3:13 PM), <http://www.bloomberg.com/news/2011-07-06/u-s-and-mexico-sign-pact-to-resolve-15-year-cross-border-trucking-dispute.html>. The United States has cited safety concerns about Mexican trucks as the reason for its continued denial of the relevant provision of NAFTA. See Brevetti, *supra* note 1.

until the two nations agreed upon a pilot program in 2007.⁶ The pilot program lasted until 2009, when Congress halted funding of the program.⁷ Mexico then imposed retaliatory tariffs on approximately \$2.4 billion of U.S. goods shipped across the border since 2009.⁸

B. PROPOSAL

The FMCSA's July 8 notice stated that the program would proceed "once DOT's Inspector General completes a congressionally required report to Congress and the agency completes any follow up actions needed to address issues raised in the report."⁹ Under the terms of the program, "Mexican trucks must comply with all Federal Motor Vehicle Safety Standards and have monitoring systems to track hours on the road . . . [and] drivers must take drug tests that are analyzed in the U.S., hand over complete driving records, and prove their English-language skills."¹⁰ The monitoring systems are intended "to collect data on the safety performance of Mexican carriers . . . violation rates, and other metrics."¹¹

According to the Department of Transportation's proposal published in the Federal Register in July, Mexican carriers and drivers must "comply with all applicable U.S. laws and regulations, including those concerned with motor carrier safety, customs, immigration, vehicle registration and taxation, and fuel taxation."¹² After reviewing the responses from the call for public comments in the April Federal Register posting, the FMCSA stated that it will publish the results of the pre-authority safety audits (PASA) for each carrier in the Federal Register, although "it is not able to publish the results of the PASAs for all motor carriers that may ultimately apply to participate in the pilot program before it begins."¹³ The FMCSA also announced that a Draft Environmental Assessment, "evaluating potential environmental impacts from the implementation of" the program, is available.¹⁴

In return, Mexico cut the retaliatory tariffs by 50 percent on July 8, and will remove the remainder once the first Mexican carrier is authorized to transport goods in the United States.¹⁵ Mexico "reserved the right to reinstate the tariffs if" the proposal is not carried out according to the terms of the agreement.¹⁶ Currently, Mexican tariffs on products such as ap-

6. Binyamin Appelbaum, *U.S. and Mexico Sign Trucking Deal*, N. Y. TIMES, July 6, 2011, available at <http://www.nytimes.com/2011/07/07/business/us-and-mexico-sign-trucking-agreement.html?ref=binyaminappelbaum>.

7. See Brevetti, *supra* note 1; see also Brevetti, *supra* note 4.

8. Black, *supra* note 5.

9. Brevetti, *supra* note 4.

10. Black, *supra* note 5.

11. Brevetti, *supra* note 1.

12. *Id.*

13. Brevetti, *supra* note 4.

14. *Id.*

15. Brevetti, *supra* note 1.

16. Nacha Cattán & Rosella Brevetti, *Mexico Cuts Retaliatory Tariffs by 50 Percent as Part of Cross-Border Trucking Agreement*, 28 INT'L TRADE REP. (BNA) 1179 (July 14, 2011).

ples, pork products, and personal care goods range from 5 to 25 percent; these tariffs have been halved as of July 6, 2011, and “will disappear entirely within a few months when the program is fully implemented.”¹⁷

Mexican carriers may apply for an eighteen-month provisional permit now, and the first permits are expected to be awarded in August.¹⁸ Upon passing two inspections, the permits will be converted into permanent permission to transport goods cross-border.¹⁹ The first inspection will be within three months of the carriers’ beginning transport and the second inspection will be within fifteen months.²⁰ The application process will include “document checks of the company, its vehicles, and its drivers, including compliance with technical, security and environmental standards, with international license requirements and with cargo, driver and vehicular insurance requirements.”²¹ The Mexican truckers are allowed to transport goods to and from locations in the United States but not to operate from point to point within the country, in the same way that foreign airlines are restricted.²² The agreement, signed by President Barack Obama and President Felipe Calderón, will initially last for three years but is intended to be permanent.²³

C. RESPONSE

Industry observers predict a slow adoption for the program on the Mexican side, and resistance from some political groups in the United States. “Martin Rojas, American Trucking Association[’s] vice president for security and operations, and Karen Antebi, Embassy of Mexico economic counselor, Trade and NAFTA Office, agreed that Mexican carrier participation would be a challenge for the program.”²⁴ Antebi noted that Mexican carriers remember the cancellation of the pilot program from 2007, and will be reluctant to participate in another program that they view as uncertain.²⁵ There are also significant costs involved to operate in the United States for Mexican truckers, and those costs may prove to deter Mexican participation in the program as well.²⁶

U.S. growers are generally supportive of the program because of the reduction in tariffs on their products. Growers in the Pacific Northwest have especially supported the trucking program because of the severe effects of the tariffs on their exports to Mexico. When tariffs on potatoes went up to 20 percent in 2009, acreage in potatoes in the Northwest

17. *Id.*

18. Black, *supra* note 5.

19. *Id.*

20. Cattán, *supra* note 16.

21. *Id.*

22. Appelbaum, *supra* note 6.

23. Cattán, *supra* note 16; *see also* Oliver Patton, *Mexican Carriers Clears Audit for Cross-Border Trucking*, TRUCKINGINFO (Sep. 18, 2011), http://truckinginfo.com/news/news-print.asp?news_id=74683.

24. Brevetti, *supra* note 1.

25. *Id.*

26. *Id.*

dropped to levels not seen since the 1980s.²⁷ “In 2008, french-fry exports to Mexico from [Washington] state totaled \$40 million,” but that number fell to \$19 million in 2009.²⁸ After Mexico cut the tariff from twenty percent to five percent in 2010, french-fry exports grew slightly to \$22 million. Many growers say they will devote more acreage to potatoes this year because of the reduction in tariffs from the pilot program.²⁹

Fruit exports from the region have been significantly diminished as well. The Washington state apple industry lost millions of dollars in exports due to the tariffs from 2009 and 2010.³⁰ Mark Powers, from the Northwest Horticultural Council, estimates that “the combined negative impact of the tariffs on pear, cherry, and apricot exports from Washington and Oregon has been over \$30 million.”³¹

Not all U.S. groups are as supportive of the program. The Owner-Operator Independent Drivers Association filed a petition for review with the U.S. Court of Appeals for the D.C. Circuit almost immediately after the MOU signing.³² The “program will jeopardize the livelihoods of tens of thousands of U.S.-based small-business truckers and professional truck drivers and undermine the standard of living for the rest of the driver community,” said the executive vice president of the group, Todd Spencer.³³ The lawsuit asks the court to “enjoin, set-aside, suspend (in whole or in part), or determine the validity of the implementation of this program.”³⁴ The suit also alleges that the DOT’s proposed methods of implementation for the program are “arbitrary and capricious.”³⁵

The International Brotherhood of Teamsters is also a vocal opponent of the program. General President Jim Hoffa claims that the program, during a period of high unemployment and border violence, “is a shameful abandonment of the DOT’s duty to protect American citizens from harm and to spend American tax dollars responsibly.”³⁶ Political opponents of the proposal in Congress have said they would introduce legislation to cut financing for the program.³⁷ Representative Peter DeFazio (D - Or.) has introduced legislation limiting the trucking program.³⁸ DeFazio’s bill would “limit the use of Highway Trust Fund dollars to pay for the electronic on-board recorders for Mexican trucks.”³⁹ The on-board recorders are one of the requirements for Mexican carriers partici-

27. Paul Shukovsky, *Pacific Northwest Agricultural Sector Poised to Benefit from Mexico’s Cuts of Tariffs*, 28 INT’L TRADE REP (BNA) 1180 (July 14, 2011).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. Brevetti, *supra* note 4.

33. Appelbaum, *supra* note 6.

34. Brevetti, *supra* note 4.

35. *Id.*

36. Cattan, *supra* note 16.

37. Appelbaum, *supra* note 6.

38. Cattan, *supra* note 16.

39. *Id.*

pating in the program.⁴⁰

Despite the initial resistance from the U.S. trucking community, supporters of the trucking proposal say that it will “boost U.S. exports and create jobs here at home,” as well as “support economic development in both nations.”⁴¹ Business groups, such as the U.S. Chamber of Commerce, the Retail Industry Leaders Association, and the Emergency Committee for American Trade, have all welcomed the program.⁴² U.S. Trade Representative Ron Kirk lauded the program as having “the highest safety standards,” “not[ing] that Mexico is the second largest export market for U.S. manufacturers, farmers, ranchers, and small businesses,” and that the removal of the retaliatory tariffs on goods from these U.S. producers will only benefit the U.S. economy.⁴³

II. U.S. COMMERCE DEPARTMENT MUST RETURN UNLIQUIDATED DEPOSITS AFTER ANTIDUMPING AND COUNTERVAILING DUTY ORDERS INVALIDATED BY NAFTA PANEL

On April 19, 2011, the U.S. Federal Circuit ruled that the U.S. Department of Commerce (“Commerce”) must return unliquidated duty deposits that it was holding on previous shipments of Canadian wheat.⁴⁴ The Federal Circuit’s decision upheld a U.S. Court of International Trade decision that invalidated those duty orders.⁴⁵ The duty dispute stemmed from a 2003 U.S. Department of Commerce imposition of antidumping and countervailing duties on Canadian hard red spring wheat that was later overturned.⁴⁶

A. BACKGROUND

In 2003, Commerce determined that Canadian wheat had been dumped in the United States.⁴⁷ Hard red spring wheat from Canada was then subjected to an 8.86 percent antidumping duty and a 5.29 percent countervailing duty.⁴⁸ In 2004, the Canadian Wheat Board deposited the duties on shipments of its wheat to the United States, but appealed the Commerce decision to a NAFTA binational panel.⁴⁹ In 2005, that panel found in favor of the Canadian wheat producers, holding that there had been “no injury to U.S. producers by dumped and subsidized hard red

40. Appelbaum, *supra* note 6.

41. *Id.* (quoting Thomas J. Donohue, President of the U.S. Chamber of Commerce, and Ray LaHood, U.S. Secretary of Transportation).

42. Cattán, *supra* note 16.

43. *Id.*

44. Canadian Wheat Bd. v. United States, 641 F.3d 1344, 1348, 1351 (Fed. Cir.2011).

45. Rossella Brevetti, *Federal Circuit Says Commerce Must Refund Duty Deposits on Wheat After NAFTA Ruling*, 28 INT’L TRADE REP. (BNA) 701 (Apr. 28, 2011).

46. *Id.*

47. See Canadian Wheat Bd. v. United States, 580 F. Supp. 2d 1350, 1354 (Ct. Int’l Trade 2008).

48. *Id.* at 1355.

49. Canadian Wheat Bd., 641 F.3d at 1347 (2011).

spring wheat from Canada.”⁵⁰

Following the 2005 ruling, the U.S. Department of Commerce retained the antidumping duties from 2004 and 2005 “that had been deposited before the date of the NAFTA panel but were still unliquidated.”⁵¹ Although Commerce halted the duties effective January 2, 2006, the date that a NAFTA panel affirmed the finding, it determined that “‘revocation does not affect the liquidation of entries made prior to January 2, 2006’ and instructed Customs to liquidate those earlier entries ‘at the rate in effect at the time of entry.’”⁵² The Canadian wheat producers again filed suit to enjoin Commerce from retaining the unliquidated duties, this time in the Court of International Trade.⁵³ That court’s decision ordered that Commerce direct Customs to “liquidate all unliquidated entries of the Canadian wheat . . . ‘without regard to antidumping and countervailing duties,’ and . . . ‘refund . . . all antidumping and countervailing duty cash deposits on all unliquidated entries’ of the Canadian wheat.”⁵⁴ The Canadian Wheat Board then appealed to the U.S. Federal Circuit for enforcement of the decision.

B. THE FEDERAL CIRCUIT’S HOLDING

At the Federal Circuit, Commerce argued that the dispute was “an attempt to obtain judicial review of or to enforce a NAFTA panel decision” and therefore outside the jurisdiction of the U.S. federal courts.⁵⁵ The Federal Circuit found that it did have jurisdiction to review the determination because the determination was not a challenge to the NAFTA panel decision, but instead a challenge to the “action of Commerce” and “to the way Commerce implemented and carried out that decision.”⁵⁶ The Federal Circuit held that it therefore did have jurisdiction over the matter, then went on to criticize Commerce’s retention of the antidumping duties as “bizarre and unfair.”⁵⁷

The court noted that “after an antidumping duty order has been finally invalidated, Commerce thereafter would refuse to enforce it.”⁵⁸ Retention of the pre-2006 deposits effectively “treated [the duties deposited] as if the order were still valid,” despite the determinations of the NAFTA panel and the Court of International Trade.⁵⁹ The court equated refusal

50. Rossella Brevetti & Peter Menyasz, *NAFTA Panel Clears Way For Imports of Canadian Hard Red Spring Wheat*, 22 INT’L TRADE REP. (BNA) 2067 (Dec. 22, 2005).

51. Brevetti, *supra* note 45.

52. Canadian Wheat Bd., 641 F.3d at 1348 (2011) (quoting Revocation of Countervailing and Antidumping Duty Orders, 71 Fed. Reg. 8,275 (Dep’t of Commerce Feb. 16, 2006)).

53. *See* Canadian Wheat Bd. v. United States, 491 F.Supp.2d 1234, 1238 (Ct. Int’l Trade 2007); Canadian Wheat Bd., 580 F. Supp. 2d at 1353 (2008).

54. Canadian Wheat Bd., 641 F.3d at 1348 (2011).

55. *Id.*

56. *See id.* at 1350.

57. *See id.* at 1349.

58. *Id.*

59. *Id.*

to enforce the revocation of the duty order with continuing to enforce the duty as if the revocation had never occurred.⁶⁰

III. COMMISSION FOR ENVIRONMENTAL COOPERATION ANNUAL MEETING HELD IN MONTREAL

The three NAFTA countries met on June 22, 2011 for the annual meeting of the Commission for Environmental Cooperation (CEC). The CEC “oversees the environmental side agreement to the North American Free Trade Agreement, [and] currently [includes] U.S. Environmental Protection Agency Administrator Lisa Jackson, Canadian Environment Minister Peter Kent, and Mexican Secretary for Environment and Natural Resources Juan Rafael Elvira Quesada.”⁶¹ The agreement, signed at the same time as NAFTA, has been hailed as creating “an unprecedented level of tri-national environmental diplomacy and cooperation” among the three countries, but it has also been criticized as not having the necessary enforcement powers to implement the goals of the agreement.⁶² At the annual meeting, the three nations agreed to evaluate the enforcement mechanisms for the agreement, along with conducting other commission business.⁶³

The officials issued a joint statement that they expect the upcoming changes to the agreement to include more efficient review procedures.⁶⁴ A “comprehensive trilateral review” will take place this year, with improvements to the agreement to be introduced at the 2012 annual meeting.⁶⁵ Currently, the CEC Secretariat reviews complaints regarding the environmental agreement, and, if the Secretariat recommends, a “factual record” is developed with further investigation into the issue.⁶⁶ These findings by the commission do not include recommendations or conclusions by the fact finders and are not mandatory for the governments to implement.⁶⁷

The commission also approved funding for a new program, the North American Partnership for Environmental Community Action.⁶⁸ The new program will “provide grants to support community-based efforts to address environmental problems” and will issue a call for proposals, inviting North American communities to submit initiatives to achieve the goals of

60. *Id.*

61. Peter Menyasz, *North American Ministers to Review Process for Enforcing Side Agreement to NAFTA*, 28 INT'L TRADE REP. (BNA) 1090 (June 30, 2011).

62. See, e.g., KEVIN P. GALLAGHER, *NAFTA AND THE ENVIRONMENT: LESSONS FROM MEXICO AND BEYOND, THE FUTURE OF NORTH AMERICAN TRADE POLICY: LESSONS FROM NAFTA*, 61-63, 67, 69 (Pardee Center Task Force Report, Nov. 2009) available at <http://www.ase.tufts.edu/gdae/Pubs/rp/PardeeNAFTACH6GallagherEnvNov09.pdf>; see also Menyasz, *supra* note 59.

63. Menyasz, *supra* note 61.

64. *Id.*

65. *Id.* (The United States will serve as CEC chair for 2012. The 2012 annual meeting of the commission will be held in the United States).

66. *Id.*

67. *Id.*

68. *Id.*

the environmental agreement.⁶⁹ These projects should address one of the commission's priorities, which include "support for healthy communities and ecosystems, action to address climate change through transition to a low-carbon economy, and 'greening' of the three countries' economies."⁷⁰

Finally, the commission announced that the cooperative work program from 2011 will continue, with a focus on projects "to manage the risks posed by harmful chemicals, including identifying and tracking them in commerce, monitoring their impact on the environment and human health, and making available the most accurate information possible."⁷¹

69. *Id.*

70. *Id.*

71. *Id.*

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