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## NAFTA Update and Trade News Highlights from August 2011 through December 2011

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# NAFTA UPDATE AND TRADE NEWS HIGHLIGHTS FROM AUGUST 2011 THROUGH DECEMBER 2011

*Miranda Barton*

## I. UPDATE: U.S.-MEXICO TRUCKING PROGRAM GOES INTO EFFECT; TEAMSTERS FILE LAWSUIT OPPOSING PROGRAM

**M**EXICO suspended the last of its retaliatory tariffs on U.S. exports after the United States approved the first application of the NAFTA trucking pilot program.<sup>1</sup> The North American Free Trade Agreement (“NAFTA”) required international shipments to be phased in between the United States and Mexico beginning in 1995, but the United States had refused to allow Mexican trucks to carry goods more than twenty-five miles past the two countries’ border, citing safety concerns about the Mexican vehicles.<sup>2</sup> Over the past few years of the dispute, Mexico had imposed retaliatory tariffs (under the terms of NAFTA) of approximately \$2.4 billion on U.S. goods ranging from Christmas trees to apples and oranges.<sup>3</sup> Currently, one Mexican carrier is operating in the United States, with approximately ten carriers going through the application process.<sup>4</sup> Additionally, there are three U.S. trucking companies that have been granted permits to haul international cargo in Mexico.<sup>5</sup>

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1. Christopher Sherman, *Mexican Truck Is First in U.S. Under Delayed NAFTA Program*, MSNBC (Oct. 21, 2011), [http://www.msnbc.msn.com/id/44995603/ns/business-world\\_business/t/mexican-truck-first-us-under-delayed-nafta-program/#](http://www.msnbc.msn.com/id/44995603/ns/business-world_business/t/mexican-truck-first-us-under-delayed-nafta-program/#).
  2. Rosella Brevetti, *FMCSA Must Take More Steps Before Launch of NAFTA Pilot Program for Mexican Trucking*, INT’L TRADE DAILY, Sept. 9, 2011.
  3. Thomas Black, *U.S. and Mexico Sign Pact to Resolve 15-Year Cross-Border Trucking Dispute*, BLOOMBERG (July 6, 2011), <http://www.bloomberg.com/news/2011-07-06/u-s-and-mexico-sign-pact-to-resolve-15-year-cross-border-trucking-dispute.html>.
  4. William Cassidy, *FMCSA Launches U.S.-Mexico Trucking Program*, J. OF COMMERCE ONLINE (Oct. 14, 2011), <http://www.joc.com/regulation/fmcsa-launches-us-mexico-trucking-program>.
  5. *Id.*

A. DEPARTMENT OF TRANSPORTATION OFFICER OF THE INSPECTOR  
GENERAL REPORT

Department of Transportation (“DOT”) Secretary Ray LaHood reported on October 5 that the Federal Motor Carrier Safety Administration (“FMCSA”) fulfilled the requirements to allow Mexican trucks to carry goods beyond the twenty-five mile commercial zones under NAFTA’s original terms.<sup>6</sup> In September, the DOT Office of the Inspector General (“OIG”) announced the additional steps to be required of the FMCSA before the trucks would be allowed past the commercial zones, including proving compliance with requirements for drug and alcohol testing of drivers, hours of service, insurance, vehicle maintenance and inspections, and other driver qualifications.<sup>7</sup> At that time, the OIG held that the FMCSA had not fully addressed these issues, and the DOT ordered further investigation of the first trucking company to be granted a permit for cross-border operations, Grupo Behr de Baja California SA de CV (“Grupo Behr”).<sup>8</sup>

Legislation from 2007 places certain restrictions on the pilot program, including requiring the FMCSA to publish in the Federal Register, “comprehensive data and information on the [pre-authorization safety audits] conducted of motor carriers domiciled in Mexico that are granted authority to operate beyond the border commercial zones” and to provide an opportunity for public comment on the data.<sup>9</sup> The Owner-Operator Independent Drivers Association, Advocates for Highway and Auto Safety, and the International Brotherhood of Teamsters all filed objections to granting the Grupo Behr permit based on safety concerns regarding the carrier.<sup>10</sup> Another Mexican company, Transportes Olympic de Mexico S de RL de CV, was granted the second permit to cross the border.<sup>11</sup> The Owner-Operator International Drivers Association claimed that the individual who owns Transportes Olympic also owns two U.S. trucking companies that have “documented driver-fitness violations . . . [including] lack of fluency in English,” and the groups that objected to the Grupo

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6. Rosella Brevetti, *NAFTA: LaHood Tells Congress That FMCSA Has Met Requirements for Truck Program*, 28 INT’L TRADE REP. (BNA) 1664 (2011).

7. Brevetti, *supra* note 2. “The OIG report . . . identified five pre-implementation issues FMCSA needed to focus on: finalizing plans for how the agency will comply with requirements to conduct 50 percent of the pre-authorization safety audits (PAS) and compliance reviews in Mexico; issuing coordinated, site specific plans to ensure that pilot program drivers and trucks are inspected at the border; establishing a system to verify driver and trucker eligibility in the pilot program; issuing an implementation plan for using electronic monitoring devices in the pilot program; and, conducting pilot program training for inspection and enforcement personnel at the border and within the United States.” Brevetti, *supra* note 6.

8. Jeff Plungis, *First Mexican Trucking Permit Delayed by U.S. on Safety Concerns*, BLOOMBERG (Oct. 13, 2011), <http://www.bloomberg.com/news/2011-10-13/first-mexican-trucking-permit-delayed-by-u-s-on-safety-concerns.html>.

9. Rosella Brevetti, *DOT Seeks Comments on Safety Audit of Mexican Firm Applying for Trucking Pilot*, 28 INT’L TRADE REP. (BNA) 1508 (2011).

10. Plungis, *supra* note 8.

11. *Id.*

Behr permit also objected to the Transportes Olympic permit.<sup>12</sup>

LaHood's October report to Congress stated that the FMCSA had complied with all the necessary steps identified by the OIG report, and that FMCSA auditors will continue to work to ensure compliance during the safety audits.<sup>13</sup> FMCSA will work with the U.S. Customs and Border Protection and individual border states to monitor inspections and the whereabouts of participating vehicles by equipping them with mandatory GPS devices.<sup>14</sup> The agency has provided an eligibility verification system on its Query Central system, which allows FMCSA and state and local law enforcement officials to search the database for information on individual drivers and carriers.<sup>15</sup> FMCSA has also provided webinars for law enforcement staff regarding inspection and monitoring of participating vehicles, and has trained all of its auditors to conduct the pre-authorization safety audits and inspections.<sup>16</sup>

In October, just outside of Laredo, Texas, a Mexican truck owned by Transportes Olympic crossed into the United States on its way to Garland, Texas as the first participant of the international trucking initiative.<sup>17</sup> The owner of Transportes Olympic, Fernando Paez, asserted that the company "will demonstrate that we can operate safely and efficiently."<sup>18</sup> Mexico's secretary of the economy, Bruno Ferrari, said that the program would begin "a new state of competition, of prosperity, of regional integration."<sup>19</sup> But not all groups have been as supportive of the new program. On September 2, 2011, the International Brotherhood of Teamsters (the "Teamsters") filed a lawsuit in the Ninth Circuit (subsequently transferred to the D.C. Circuit) opposing the FMCSA pilot program.<sup>20</sup>

## B. OPPOSITION TO THE PROGRAM

The Teamsters and the Owner-Operator Independent Drivers Association have been vocal opponents of the trucking program, citing safety concerns. The initial lawsuit filed by the Teamsters in September claimed that the FMCSA pilot program violated the law in a multitude of ways, including:

- waiving a law that trucks must display certain proof that they meet federal safety standards;

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12. *Id.*

13. Brevetti, *supra* note 6.

14. *Id.*

15. *Id.*

16. *Id.*

17. Sherman, *supra* note 1.

18. *Id.*

19. *Id.*

20. See *NAFTA: Suit to Block Program That Opens Border to Mexican Trucks Amended in D.C. Circuit*, 28 INT'L TRADE REP. (BNA) 1946 (2011) [hereinafter *NAFTA: Suit to Block Program*].

- requiring the pilot program to achieve an equivalent level of safety given that Mexican drivers are not required to meet the same physical requirements as U.S. drivers;
- not requiring Mexico to provide simultaneous and comparable access to U.S. trucks given the limited availability of ultra-low sulfur diesel fuel in Mexico, and
- not ensuring the pilot program includes enough participants to be statistically valid, with only the best Mexican trucks participating and ultimately allowing FMCSA to justify letting any Mexican truck over the border in the future via the pilot program.<sup>21</sup>

The Teamsters have criticized the program's admission of Grupo Behr to the pilot program in light of the carrier's safety issues, and Grupo Behr has had its qualification in the program revoked due to ongoing issues with compliance.<sup>22</sup> Transportes Olympic continues to operate in the United States, and approximately ten other Mexican trucking companies are in the process of obtaining certification for the program.<sup>23</sup> Teamsters President James Hoffa has called the program "an attack on highway safety, an attack on American truckers and warehouse workers, an attack on border security and an attack on our environment."<sup>24</sup> The Teamsters' objections to the program also have supporters in Congress. For example, Representative Peter DeFazio, of Oregon, has criticized the FMCSA for moving forward with the program too quickly to adequately address safety concerns.<sup>25</sup>

Hoffa's group recently amended its lawsuit in the D.C. Circuit to include the Sierra Club as a plaintiff and added a complaint regarding violation of environmental protection laws to the lawsuit. Hoffa describes the participating carriers as operating "dangerous, dirty trucks" and objects to the program's current certification process and the safety requirements that it imposes on the Mexican carriers.<sup>26</sup> The Teamsters and environmental groups such as Sierra Club had previously questioned the environmental impact and standards of the program, both for trucks operating in the United States, as well as U.S. trucks operating in Mexico.<sup>27</sup>

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21. *Id.*

22. See Anne S. Ferro, *Pilot Project on NAFTA Trucking Provisions; Pre Authorization Safety Audits*, 76 FED. REG. 199 (Oct. 14, 2011) available at <http://www.gpo.gov/fdsys/pkg/FR-2011-10-14/html/2011-26687.htm>; see also NAFTA: Suit to Block Program, *supra* note 20.

23. Sherman, *supra* note 1.

24. NAFTA: Suit to Block Program, *supra* note 20; see also Press Release, Teamsters Int'l, Teamsters Sue to Close Border to Unsafe, Polluting Mexican Trucks (Nov. 23, 2011), available at <http://www.teamster.org/content/teamsters-sue-close-border-unsafe-polluting-mexican-trucks>.

25. DeFazio Hits FMCSA on Mexican Trucking Plan, Transport Topics (Sept. 21, 2011), <http://www.ttnews.com/articles/basetemplate.aspx?storyid=27644>.

26. NAFTA: Suit to Block Program, *supra* note 20; see also David Shepardson, *Teamsters Sue to Keep Mexican Trucks Out*, DETROIT NEWS, Nov. 24, 2011, at B7.

27. Press Release, Teamsters Int'l, Teamsters, Sierra Club: FMCSA Fails to Protect Environment from Mexican Trucks (Aug. 15, 2011), available at <http://www.teamster.org/content/teamsters-sierra-club-fmcsa-fails-protect-environment-mexican-trucks>.

The lawsuit remains pending in the D.C. Circuit.

## II. FREE TRADE AGREEMENTS SIGNED WITH COLOMBIA, PANAMA, AND SOUTH KOREA

On October 12, 2011, the U.S. House and Senate ratified free trade agreements with Colombia, Panama, and South Korea.<sup>28</sup> The three agreements have been pending since their original negotiation during the Bush administration, because of concerns regarding the auto industry and beef trade with South Korea, issues with worker rights protections in Colombia, and concerns about labor rights and tax transparency in Panama.<sup>29</sup> The Obama administration submitted the legislation for a vote on October 3, after substantial negotiations with the three countries regarding those areas of concern.<sup>30</sup> U.S. Trade Representative Ron Kirk attributed much of the three agreements' ultimate success to the administration's support, issuing a statement that "[t]his President has gotten trade policy right. These agreements, made better at the President's insistence, will strengthen and expand ties with strategic partners in Asia and Latin America . . . ."<sup>31</sup>

As part of the trade agreements, the administration's negotiators secured better access for U.S. automakers to the Korean auto market, improved trade union protection in Colombia, enhanced tax transparency in Panama, and encouraged better labor rights in both Colombia and Panama.<sup>32</sup> Critics claim these agreements are illusory, but the Office of the U.S. Trade Representative emphasizes that the agreements will be enforced only if the other nations meet these commitments.<sup>33</sup>

### A. U.S.-COLOMBIA TRADE PROMOTION AGREEMENT ("TPA")

The Office of the U.S. Trade Representative is currently gathering and translating materials from Colombia regarding its ratification and implementation of the TPA.<sup>34</sup> U.S. officials met with Colombian officials between November 8th and 9th of 2011 to continue the administrative progress in implementing the agreement.<sup>35</sup> Highlights of the agreement

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28. Len Bracken & Rosella Brevetti, *Bilateral Agreements: House, Senate Votes Clear Trade Deals; Korean President Previews Hill Address*, INT'L TRADE DAILY (BNA) 10 (Oct. 13, 2011).

29. *Id.*

30. *Id.*

31. Press Release, Office of the U. S. Trade Representative, Statement By U.S. Trade Representative Ron Kirk on Congressional Passage of Trade Agreements, Trade Adjustment Assistance and Key Preference Programs (Oct. 12, 2011), <http://www.ustr.gov/about-us/press-office/press-releases/2011/october/statement-us-trade-representative-ron-kirk-congres>.

32. *Id.*

33. *Id.*

34. Press Release, Office of the U. S. Trade Representative, Update on Implementation of Free Trade Agreements with Korea, Colombia, and Panama, (Dec. 5, 2011), <http://www.ustr.gov/about-us/press-office/press-releases/2011/december/update-implementation-free-trade-agreements-korea>.

35. *Id.*

include tariff reductions that are expected to expand exports of U.S. goods by more than \$1 billion (projected to increase the U.S. GDP by \$2.5 billion) as well as the removal of duties and tariffs on over eighty percent of U.S. exports of consumer, industrial, and farm products either immediately or phased out over the next few years.<sup>36</sup>

Proponents of the TPA note that Colombia has implemented a free trade agreement with Mercosur (Brazil, Argentina, Paraguay, and Uruguay) as well as one with Canada, and will likely sign free trade agreements with the European Union, South Korea, and possibly Japan.<sup>37</sup> These pending agreements could affect the tariffs faced by U.S. exporters if the United States did not have a free trade agreement with Colombia, with U.S. exporters being subject to an average tariff of nine percent, according to some estimates.<sup>38</sup> Coming to an agreement regarding the TPA earlier rather than later prevents these tariffs from taking effect and will protect the United States from imposition of later tariffs by subsequent trade agreements with other countries.

The Colombia trade agreement was considered by some to be the most controversial of the three trade accords due to the concerns regarding union repression in Colombia.<sup>39</sup> But the measure passed the House by a vote of 262 to 167 and the Senate by sixty-six to thirty-three.<sup>40</sup> The two nations provided assurances that “both parties commit to adopt and maintain in their laws and practice the five fundamental labor rights, as stated in the 1998 International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work.”<sup>41</sup> Those fundamental labor rights include the right to associate, the right to bargain collectively, the abolition of child labor and of forced labor, and the elimination of discrimination.<sup>42</sup> Under the Colombian Action Plan Related to Labor Rights, the country has

passed legislation criminalizing interference in the exercise of labor rights, secured legislation establishing a separate labor ministry, advanced by over two years severe fines for maintaining employment relationships that undermine worker rights, launched the doubling of its labor inspectorate, expanded and improved its protection programs for union members, and begun reforming the Prosecutor General’s procedures to more effectively prosecute cases of unionist homicides.<sup>43</sup>

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36. *Overview of the U.S.-Colombia Trade Agreement*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/uscolombiatpa/facts> (last visited Feb. 1, 2012).

37. *Id.*

38. *Id.*

39. Binyamin Appelbaum & Jennifer Steinhauer, *Congress Ends 5-Year Standoff on Trade Deals in Rare Accord*, N. Y. TIMES, Oct. 12, 2011.

40. *Id.*

41. *Overview of the U.S.-Colombia Trade Agreement*, *supra* note 36.

42. *Freedom of Association and the Effective Recognition of the Right to Collective Bargaining*, INT’L LABOUR ORG., <http://www.ilo.org/declaration/principles/freedomofassociation/lang—en/index.htm> (last visited Feb. 1, 2012).

43. *Overview of the U.S.-Colombia Trade Agreement*, *supra* note 36.

Proponents of the accord claimed that Colombia has made “great strides” in labor rights already and that the trade agreement will continue to incentivize these protections.<sup>44</sup> Despite the evidence of Colombia’s improvements in the area of worker protection, U.S. legislators and advocacy groups have still requested that the state of labor rights in the country be closely monitored.<sup>45</sup>

## B. KOREA-U.S. (“KORUS”) FREE TRADE AGREEMENT

On November 22, 2011, the Korean National Assembly approved the Korea-U.S. Free Trade Agreement.<sup>46</sup> Previously, the measure passed the U.S. House of Representatives by a vote of 278 to 151 and passed the U.S. Senate eighty-three votes to fifteen.<sup>47</sup> According to the U.S. International Trade Commission, the reduction of Korean tariffs and quotas on goods will add an estimated \$10 to \$12 billion to the annual U.S. GDP and around \$10 billion of merchandise exports to South Korea each year.<sup>48</sup> The agreement will “provide meaningful market access” to U.S. suppliers in almost all major service sectors.<sup>49</sup> After increased protection for U.S. automobile manufacturers was added to the KORUS free trade agreement, the South Korean agreement became less controversial than the Colombian agreement.<sup>50</sup>

KORUS will nearly eliminate duties on consumer and industrial products trade within five years, and will eliminate or phase out tariffs and quotas on various agricultural products.<sup>51</sup> The agreement also contains provisions regarding increased transparency and removal of nontariff barriers in the financial services and other professional services markets between the two countries.<sup>52</sup> U.S. suppliers will gain increased access to the Korean government procurement market, which proponents of the agreement believe will not only benefit the United States economically, but will also “solidify the two countries’ long-standing geostrategic alliance.”<sup>53</sup> The agreement is being held out as not just an economic affilia-

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44. Bracken & Brevetti, *supra* note 28.

45. *Id.* “Senate Finance International Trade Subcommittee Chairman Ron Wyden said during floor debate that the subcommittee will” be monitoring Colombia’s compliance with the labor rights provisions of its new legislation and of the free trade agreement. *Id.*

46. Press Release, Office of the U.S. Trade Representative, *supra* note 34.

47. Appelbaum & Steinhauer, *supra* note 39.

48. *U.S.-Korea Free Trade Agreement*, OFFICE OF THE U. S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta> (approved by Congress Oct. 12, 2011); *see also* Eric Martin & William McQuillen, *Congress Approves Biggest U.S. Trade Agreement Since 1994*, BLOOMBERG (Oct. 13, 2011), <http://www.bloomberg.com/news/2011-10-13/south-korea-colombia-panama-trade-pacts-reached-under-bush-pass-congress.html>.

49. *U.S.-Korea Free Trade Agreement*, *supra* note 48.

50. Appelbaum & Steinhauer, *supra* note 39; *see also* Bracken & Brevetti, *supra* note 28 (noting that the United Auto Workers union “lent its support after the Obama administration renegotiated the pact”).

51. *U.S.-Korea Free Trade Agreement*, *supra* note 48.

52. *Id.*

53. *Id.*

tion, but as a complement to the political alliances between the United States and South Korea and as a model for future cooperative measures with allies in the region. The Office of the U.S. Trade Representative characterizes the agreement as a “model for trade agreements” in Northern Asia.<sup>54</sup>

### C. U.S.-PANAMA TRADE PROMOTION AGREEMENT (“TPA”)

Officials from the Office of the U.S. Trade Representative are working with Panamanian officials in order to implement the agreement with Panama.<sup>55</sup> On October 12, 2011, the Trade Promotion Agreement passed the U.S. House by a vote of 300 to 129 and the Senate by a vote of seventy-seven to twenty-two.<sup>56</sup> U.S. officials traveled to Panama on November 8 and 9, 2011, for meetings regarding implementation.<sup>57</sup> Proponents of the TPA noted that Panama is no longer on the Organization of Economic Cooperation and Development’s list of countries where financial transparency is weak, although opponents claimed that the country was still “a tax haven.”<sup>58</sup> The agreement purports to resolve “a number of regulatory barriers to trade in agricultural goods” and to provide “better access to Panama’s services sector” to the United States than to other nations.<sup>59</sup>

Panama’s economy is one of the fastest-growing economies in Latin America; it expanded 6.2% during 2010 and expects similar growth for the next several years.<sup>60</sup> The agreement will eliminate tariffs and duties on U.S. exports to the country, which the U.S. Trade Representative says will “promote economic growth and expand trade between our two countries.”<sup>61</sup> For example, over eighty-seven percent of U.S. exports of consumer and industrial products to Panama will immediately have all duties and tariffs removed.<sup>62</sup> The Embassy of Panama issued a statement supporting the TPA, noting that Panama represents fifty-three percent of Central America’s buying power.<sup>63</sup>

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54. *Id.*

55. Press Release, Office of the U.S. Trade Representative, *supra* note 34.

56. Appelbaum & Steinhauer, *supra* note 39.

57. Press Release, Update on Implementation of Free Trade Agreements with Korea, Colombia, and Panama, *supra* note 34.

58. Bracken & Brevetti, *supra* note 28.

59. *Panama Trade Promotion Agreement*, OFFICE OF THE U. S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/free-trade-agreements/panama-tpa> (last visited Dec. 18, 2011).

60. *Id.*

61. *Benefits of the U.S.-Panama Trade Promotion Agreement*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, [http://www.whitehouse.gov/sites/default/files/panama\\_trade\\_agreement\\_benefits.pdf](http://www.whitehouse.gov/sites/default/files/panama_trade_agreement_benefits.pdf) (last visited Dec. 18, 2011).

62. *Id.*

63. Bracken & Brevetti, *supra* note 28.

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