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NAFTA UPDATE AND TRADE NEWS HIGHLIGHTS FOR SPRING 2012

*Sarah Bridges**

I. THE UNITED STATES AND COLOMBIA ENTER INTO A TRADE AGREEMENT THAT WILL ELIMINATE TARIFFS ON U.S. EXPORTS

ON May 15, 2012, the United States and Colombia entered into a long-anticipated agreement to promote inter-country trade; a move the White House believes will bolster the American economy and keep the United States in the running as Colombia undertakes similar agreements with countries world-wide.¹ While U.S. labor unions, concerned about jobs being exported to Colombia and the country's union-busting violence, protested the deal, the White House insists that the trade agreement will boost U.S. exports and increase the GDP substantially.²

A. THE AGREEMENT

The trade agreement, announced in early 2012 by President Barack Obama and Colombian President Juan Manuel Santos, makes substantial changes to the current tariff rates between the two countries.³ In addition, it addresses workers' rights issues in Colombia that have been a road block to President Obama sending the Agreement to Congress.⁴

The Agreement begins by immediately dropping tariffs on eighty percent of all U.S. consumer and industrial exports to Colombia, and phases out the remaining tariffs on such products over the next ten years.⁵ Tariffs have been dropped on farming and agricultural products, and the re-

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1. ONDCP Staff, *U.S.-Colombia Trade Agreement Takes Effect Today*, WHITE HOUSE (May 15, 2012, 2:23 PM), <http://www.whitehouse.gov/blog/2012/05/15/us-colombia-trade-agreement-takes-effect-today>; *Overview of the U.S.-Colombia Trade Agreement*, OFF. U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/us-colombiatpa/facts> (last visited May 18, 2012).
2. ONDCP Staff, *supra* note 1; Dan Molinski, *Free-Trade Deal Begins Between Colombia, U.S.*, WALL ST. J. (May 15, 2012, 6:05 PM), <http://online.wsj.com/article/SB10001424052702304371504577406632596723786.html>.
3. ONDCP Staff, *supra* note 1.
4. *Labor in the U.S.-Colombia Trade Promotion Agreement*, OFF. U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/uscolombiatpa/labor> (last visited May 18, 2012).
5. *Overview of the U.S.-Colombia Trade Agreement*, *supra* note 1.

maintaining half will be duty-free within fifteen years.⁶ The tariff schedules found within the Agreement contain specific product-by-product rates, and provide a means for altering them, should it become necessary, to promote local stability in products produced by both countries.⁷ The Agreement also provides for plans to open the Colombian service market; meaning that the service industry, valued somewhere between \$166 million and \$180 million (USD), will become available for development by U.S. service providers.⁸

Beyond changing the tariff schedules of the two countries and opening service markets to the United States, the Agreement provides for the protection of Colombian workers' rights, based on the 2007 agreement between the U.S. President and Congress to incorporate high labor standards into any trade agreements the United States seeks to make.⁹ Before the Agreement, President Obama's concerns with violence aimed at Colombian labor unions and the country's failure to address those concerns kept the United States wary of interaction with Colombia.¹⁰ As such, the Agreement provides for the hiring of 480 labor inspectors over the next four years.¹¹ It also calls for Colombia to set up a new system, both by toll-free phone call and via the Internet, for workers to report complaints of labor rights violations, and establish criminal penalties for failure to comply with labor guidelines.¹²

Several additional chapters of the Agreement extend beyond the realm of tariffs and labor controls. The Agreement expands protection for intellectual property rights; provides for advancements in e-commerce and telecommunications; pledges enforcements of environmental guidelines; and affords a means for dispute settlement.¹³

B. THE EFFECTS

With tariffs on U.S. exports to Colombia reaching above fourteen percent in the past, the removal of this substantial barrier is anticipated to have sweeping effects on both countries.¹⁴ This is especially true in light of Colombia and the United States' symbiotic import and export needs; grains, for example, are a large U.S. export and Colombian import, while fruit travels north from Colombia to U.S. consumers.¹⁵ Similarly, cotton

6. *Id.*

7. Colombia Free Trade Agreement, U.S.-Colom., Nov. 22, 2006, art. 2.3, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text> (last visited May 18, 2012).

8. ONDCP Staff, *supra* note 1; Colombia Free Trade Agreement, *supra* note 7, at art. 11.1.

9. *Labor in the U.S.-Colombia Trade Promotion Agreement*, *supra* note 4.

10. *Id.*

11. *Colombian Action Plan Related to Labor Rights*, OFF. U.S. TRADE REPRESENTATIVE (Apr. 7, 2011), http://www.ustr.gov/webfm_send/2787.

12. *Id.*

13. Colombia Free Trade Agreement, *supra* note 7.

14. *Overview of the U.S.-Colombia Trade Agreement*, *supra* note 1.

15. *Id.*

and yarn sent to Colombia return to the United States in the form of textiles and apparel.¹⁶ Removing the massive restrictions on tariffs coming from the United States, which is Colombia's largest exporter,¹⁷ is expected to bring the U.S. gross domestic product up by \$2.5 billion, a shift the White House claims could add thousands of U.S. jobs.¹⁸

The Agreement also stabilizes the U.S. position among this emerging economy's allied trade partners. Colombia entered into trade agreements with other South American countries in 2009, Canada in 2011, and expects to soon conclude an agreement with the European Union before moving on to align itself with countries in Asia.¹⁹ These agreements have similar tariff-dropping effects, making the timeliness of the Agreement's implementation crucial to establishing trade patterns; had U.S. exports continued to suffer tariff rates between seven and fourteen percent while other nations shipped to Colombia for free, American products would have been quickly elbowed-out for their less expensive counterparts.²⁰

Secondary effects are expected to flow from this bipartisan-supported agreement. It is expected to help Colombia battle the illegal crops flowing from its borders by creating legitimate opportunities for its own citizens, which some believe will help stifle the influx of illegal drugs into American communities.²¹ Additionally, as small and minority businesses are the primary exporters of goods to foreign markets, the Agreement could increase opportunities for America's small businesses and minorities.²²

II. PRESIDENT OBAMA SIGNS EXECUTIVE ORDER PROMOTING INTERNATIONAL REGULATORY COOPERATION

At the onset of May, President Obama issued Executive Order 13609 to Promote International Regulatory Cooperation, an order aimed at promoting American exports, creating jobs for American workers, and boosting the economy through reducing regulatory differences between the United States and its trading partners.²³ The Order comes as an expansion to Order 13563, "Improving Regulation and Regulatory Re-

16. *Id.*

17. Christopher Blaha & Julie Anglin, *U.S.-Colombia Trade Promotion Agreement Now in Force!*, U.S. DEP'T COM. (May 15, 2012, 3:00 PM), <http://www.commerce.gov/blog/2012/05/15/us-colombia-trade-promotion-agreement-now-force>.

18. *Overview of the U.S.-Colombia Trade Agreement*, *supra* note 1.

19. *Id.*

20. *Id.*

21. ONDCP Staff, *supra* note 1.

22. *Leaders Applaud Announcement of U.S.-Colombia Trade Promotion Agreement Entry into Force*, OFF. U.S. TRADE REPRESENTATIVE (Apr. 18, 2012, 7:53 AM), <http://www.ustr.gov/about-us/press-office/blog/Leaders%20Applaud%20Announcement%20of%20U.S.-Colombia%20Trade%20Promotion%20Agreement%20Entry>.

23. Cass Sunstein, *Reducing Red Tape: Regulatory Reform Goes International*, WHITE HOUSE (May 1, 2012, 11:09 AM), <http://www.whitehouse.gov/blog/2012/05/01/reducing-red-tape-regulatory-reform-goes-international>; *OMB's Cass Sunstein An-*

view,” which contained President Obama’s directives for a twenty-first century regulatory system.²⁴

A. THE ORDER

The Order is based on the reality that today’s economy is a global one in which goods cross national borders, often multiple times, subjecting them to multiple regulatory requirements, before reaching their consumers.²⁵ Meeting these different regulations can be costly and time-consuming, and reducing them could be the equivalent to removing vast barriers to U.S. producers reaching past U.S. borders, where ninety-five percent of the world’s consumers lie.²⁶ The Order also comes in response to a request from a number of regulatory organizations, including the Federal Trade Commission, the Food and Drug Administration, and the Environmental Protection Agency, for advice on increasing contact with the private international sector.²⁷

The Order provides that the Regulatory Working Group established by a previous executive order continue to serve as a forum to discuss and promote the interaction between governmental agencies and international trade and examine possible strategies for regulatory control, particularly on emerging technologies.²⁸ The Order also requires federal agencies to consider, in the case of significant international issues, the regulatory approaches taken by foreign governments.²⁹ Federal agencies reviewing their rules under this order are to “promote accountability and transparency and prevent unnecessary costs.”³⁰ In all, the White House views this as a plan to “eliminate or prevent the creation of unnecessary regulatory differences that adversely affect cross-border trade; to streamline regulatory requirements; and to promote greater certainty for the general public and businesses, particularly small- and medium-sized enterprises, in the regulation of food, pharmaceuticals, nanotechnology, and other areas.”³¹

nounces EO at U.S. Chamber of Commerce Event, ANSI (May 4, 2012), http://www.ansi.org/news_publications/news_story.aspx?menuid=7&articleid=3238.

24. Sunstein, *supra* note 23.

25. *Id.*

26. Press Release, U.S. Chamber of Commerce, U.S. Chamber Welcomes Exec. Order on Int’l Regulatory Cooperation (May 1, 2012), *available at* <http://www.uschamber.com/press/releases/2012/may/us-chamber-welcomes-executive-order-international-regulatory-cooperation>.

27. *OMB’s Cass Sunstein Announces EO at U.S. Chamber of Commerce Event*, *supra* note 23.

28. Exec. Order No. 13,609, 77 Fed. Reg. 26,413 (May 1, 2012); Andrew Zajac, *Obama Order Urges Rule Review to Boost U.S. Company Trade*, BLOOMBERG (May 1, 2012), <http://www.businessweek.com/news/2012-05-01/obama-order-urges-rule-review-to-boost-u-dot-s-dot-company-trade>.

29. Exec. Order No. 13,609, 77 Fed. Reg. at 26,414.

30. Zajac, *supra* note 28 (internal quotation marks omitted).

31. Sunstein, *supra* note 23.

B. CRITICISM

The Order has been met by applause from some and skepticism from others. The U.S. Chamber of Commerce, for example, cheers this “landmark” order as one that recognizes that “good regulatory policy supports good trade policy.”³² The executive director for Johns Hopkins University’s Center for Transatlantic Relations called the Order an effort to free up resources so internationally-oriented entities could focus their energies on “more troubling areas.”³³ Still, some see the Order as ineffective, calling the attempt at regulatory cooperation a “smokescreen for deregulation” of public interest and consumer protections.³⁴ Others see the Order as a move to cater to big business and a waste of time, particularly considering the number of “workplace safety, food safety, consumer product safety and environmental protections that have been under review at the Office of Management and Budget for months, and in some cases, years.”³⁵

Some, however, are able to find a middle ground in the Order, including John Hardy, president of the Coalition for Employment Through Exports, who said that while the Order was not “earth-shattering” and would not have an immediate impact on trade, it was still a “recognition of the role international trade is playing in the economy.”³⁶ Under this view, the possible effects of ironing out some minor regulatory differences and focusing on trade areas where regulations are lax will be revealed in time.³⁷

III. THE BINATIONAL PANEL AFFIRMS THE DEPARTMENT OF COMMERCE’S ANTIDUMPING ADMINISTRATIVE REVIEW REGARDING CARBON AND CERTAIN ALLOY STEEL WIRE ROD FROM CANADA

On May 11, 2012, the binational panel (the Panel) issued its decision reviewing the 2005/2006 antidumping administrative review made by the U.S. Department of Commerce (Commerce), respecting Carbon and Certain Alloy Steel Wire Rod from Canada, NAFTA Secretariat File Number USA-CDA-2008-1904-02. The Panel affirmed the holding of Commerce—that Ivaco had made international sales below its commodities’ normal value—in part and remanded in part, only to have Com-

32. Press Release, U.S. Chamber of Commerce, *supra* note 26.

33. Zajac, *supra* note 28 (internal quotation marks omitted).

34. Sean Moloney, *Obama Seeks to Promote “International Regulatory Cooperation.”* PENN L. (May 2, 2012), <http://www.law.upenn.edu/blogs/regblog/2012/05/02-moloney-international.html> (internal quotation marks omitted).

35. Amit Narang, *Obama’s “Regulatory Cooperation” Executive Order is a Smokescreen for Deregulation*, PUBLIC CITIZEN (May 1, 2012), <http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=3597>.

36. Zajac, *supra* note 28 (internal quotation marks omitted).

37. *Id.*

merce explain its methodology in reviewing Ivaco, as it had in similar cases.³⁸

A. BACKGROUND

In “2002, Commerce issued an antidumping duty order on carbon and certain alloy steel wire rod from Canada.”³⁹ Four years later, it gave notice of an opportunity for others to request that it perform an administrative review of that antidumping order, and several entities petitioned Commerce to review Complainant Ivaco’s sales for the applicable period of review.⁴⁰

In its review, Commerce found that the sales made by Ivaco were made below normal value.⁴¹ A hearing was held in 2008 before Commerce, and the determination that carbon and certain alloy steel wire rod were being sold at less than fair market value was affirmed.⁴² The review at hand followed, with Ivaco asserting that (1) “Commerce’s decision to set the dumping margins for sales with negative margins to zero [(zeroing)] is not in accordance with the law,” and (2) “Commerce’s decision that there was only one pertinent level of trade during the period of review is unsupported by the . . . evidence.”⁴³

B. THE BINATIONAL PANEL’S HOLDING

1. *Standard of Review*

The Panel first evaluated the standard of review to be used in Chapter 19 NAFTA cases. The Panel applies the standard of review and general legal principles of the courts of the country of the investigative authority it is reviewing.⁴⁴ In this case, the Panel hears cases under the precedent, substantive law, and standard of review as the U.S. Court of International Trade.⁴⁵ As such, the standard of review requires the Panel to determine whether the decision was in accordance with the law and supported by substantial evidence based on the entire record, but no more information than is found in the record.⁴⁶ The Panel also defers to the interpretation made by an administrative agency, if reasonable.⁴⁷

38. NAFTA Secretariat, *Binational Panel Review of Carbon and Certain Alloy Steel Wire Rod from Canada*, Secretariat File No. USA-CDA-2008-1904-02, 34-35 (May 11, 2012), available at <http://registry.nafta-sec-alena.org/cmdocuments/505741b9-3e12-4a3b-ad83-73989c8639dc.pdf> [hereinafter *Binational Panel Review*].

39. *Id.* at 3.

40. *Id.* at 3-4.

41. *Id.* at 4.

42. *Id.*

43. *Id.* at 4-5.

44. *Id.* at 5.

45. *Id.*

46. *Id.* at 6.

47. *Id.* at 9.

2. *Exhaustion of Administrative Remedies and Waiver of Argument*

The Panel then proceeded to evaluate a threshold procedural issue concerning zeroing—whether Ivaco exhausted its administrative remedies before seeking review by the Panel, and whether Ivaco waived its argument regarding disparate treatment at trial.⁴⁸ In finding that the doctrine of exhaustion of administrative remedies did not preclude Ivaco from arguing its zeroing issue, the Panel first emphasized the importance of the use of administrative agencies to create records for trial courts and use the expertise in their respective fields before other trial courts hear the matter.⁴⁹ Exhaustion of administrative remedies serves the purpose of saving judicial resources and aiding judicial review, but is discretionary in most cases, unless a statute states otherwise.⁵⁰

The federal antidumping statute requires litigants to exhaust administrative remedies, when appropriate.⁵¹ To exhaust one's administrative remedies in this case, a party must include, in its brief before Commerce, all the arguments it wishes to make before the Panel.⁵² The argument made by Ivaco regarding disparate treatment, discussed below, was not offered in its case brief before Commerce. The Panel, however, determined that Ivaco did not intentionally ignore the argument as it was not aware of the argument due to a lack of judicial precedent.⁵³ The Panel further determined that because there was an intervening judicial decision, after the decision below and pending appeal that made the complainant's argument available, it fell under an exception to the general rule that a failure to include the current argument at trial amounts to a failure to exhaust administrative remedies.⁵⁴

The Panel also commented on the doctrine of waiver. "Waiver applies when a party either raises an issue for the first time on appeal or raises the issue after briefing."⁵⁵ But, so long as the general issue is before the Panel, the Panel will hear sub-issues or more specific parts of the general issue.⁵⁶ The Panel found that Ivaco's complaint was sufficiently broad on the issue of zeroing to incorporate its disparate treatment argument.⁵⁷

3. *The Substantive Issues*

The remainder of the case revolved around the Panel's evaluation of Ivaco's arguments that zeroing by Commerce is impermissible. Ivaco's claim relied on a statement similar to a statutory construction called Charming Betsy, which provides that an act of Congress should not be

48. *Id.* at 11.

49. *Id.* at 15.

50. *Id.*

51. 28 U.S.C. § 2637(d) (2011).

52. *Binational Panel Review*, *supra* note 38, at 16.

53. *Id.*

54. *Id.* at 17.

55. *Id.* at 21.

56. *Id.*

57. *Id.* at 22.

construed to violate the laws of other nations if any other interpretation of that statute exists.⁵⁸ The Panel evaluated the method of zeroing that Commerce had used in calculating Ivaco's antidumping duties and, looking to the Supreme Court and Federal Circuit for precedent, determined that zeroing was a "longstanding and judicially-approved methodology."⁵⁹ Lastly, the Panel determined that Commerce's method of determining that Ivaco only traded on one pertinent level at the time it was being reviewed was "explicit, detailed, and reasoned," such that it "met the burden of reasoned explanation" and its determination should not be overturned.⁶⁰

58. *Id.* at 23.

59. *Id.* at 28-30.

60. *Id.* at 50.

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