

# RECENT DEVELOPMENTS IN NAFTA LAW

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## I. INTRODUCTION

CHAPTER 19 of the North American Free Trade Agreement (NAFTA) provides an alternative forum for judicial review of antidumping and countervailing duty determinations.<sup>1</sup> As provided in article 1904(2), the petitioning foreign entity may choose to appeal to a NAFTA Binational Panel as an alternative to seeking judicial review from the Court of International Trade.<sup>2</sup> The Binational panel is comprised of five citizens from the United States, Mexico, and Canada whose purpose is to decide whether the previous disputed determination conforms to the antidumping or countervailing duty laws of the determining country.<sup>3</sup> This article will first give a brief overview of the NAFTA Binational Panel's decisions from February 2009 to April 2009. It will also discuss the United State's potential violation of NAFTA arising out of the Obama administration's repeal of Former President Bush's Mexican trucking pilot program and Mexico's response to the repeal.

## II. IN THE MATTER OF CERTAIN SOFTWOOD LUMBER PRODUCTS FROM CANADA

On May 22, 2002, the U.S. Department of Commerce imposed a countervailing duty order to effectively bar the importation of certain Canadian Softwood Lumber.<sup>4</sup> This was contested by the government of Canada but it was determined that the duty order should remain in effect.<sup>5</sup> The Commerce Department completed two administrative reviews, commenced two other reviews, and conducted several additional company-specific reviews. Despite this, the government of Canada, several

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1. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 605, 683. [hereinafter NAFTA].

2. *Id.*

3. *Id.* at 687.

4. Article 1904 Binational Panel Review, *Certain Softwood Lumber Products From Canada; Final Results of Countervailing Duty Administrative Review and Rescission of Certain Company-Specific Reviews (the "Final Results")*. Secretariat File No. USA-CDA-2005-1904-01 (Jan. 30, 2009), available at <http://registry.nafta-sec-alena.org/cmdocuments/35e148ef-82a8-4eaa-b71b-4803d93ff43f.pdf>.

5. *Certain Softwood Lumber Products From Canada: Final Affirmative Countervailing Duty Determination*, File No. USA-CDA-2002-1904-03, 71 Fed. Reg. 14,683 (Mar. 17, 2006), available at [http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA\\_Chapter\\_19/USA/ua02035e.pdf](http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_19/USA/ua02035e.pdf).

provinces of Canada, and a number of Canadian lumber entities sought review by a binational panel pursuant to Chapter 19.<sup>6</sup>

The parties were able to reach a settlement when the Softwood Lumber Agreement of 2006 (SLA 2006) was passed on September 12, 2006.<sup>7</sup> The Agreement required that any litigation involving the countervailing duty order be settled, leading the Department of Commerce to respond by rescinding the duty order all together.<sup>8</sup> Upon revocation, all of the administrative proceedings relating to the countervailing duty order were dismissed.<sup>9</sup> The Department of Commerce liquidated all entries subject to the duty order, refunded all cash deposits back to the importers and then brought a motion to dismiss before the Panel.<sup>10</sup> The sole opposition to the motion was Gorman Bros. Ltd. (Gorman).<sup>11</sup>

Gorman opposed the motion to dismiss, believing that if expedited review had been granted, it would have received a zero rate determination and been placed on the Annex 10 list of the SLA 2006.<sup>12</sup> Being placed on the list would have enabled Gorman to have certain products excluded from the Export Measures of the SLA 2006.<sup>13</sup> Gorman therefore sought to have the Panel evaluate the Commerce Department's decision to not complete the expedited review and requested, as his remedy, to be given what the final results of the expedited review would likely have been.<sup>14</sup>

The Panel, however, is only able to review "final antidumping and countervailing determinations," and so found that when the Department of Commerce rescinded the administrative proceedings and revoked the countervailing duty order, the Panel no longer had jurisdiction to give relief in this matter.<sup>15</sup> It was determined that even if the Panel had jurisdiction, the matter had become moot when the Department of Commerce rescinded the administrative proceedings.<sup>16</sup> The matter was declared moot because the issues that would have been heard in the administrative review were no longer pending and no party was at risk of being affected by a final determination.<sup>17</sup>

Finally, the panel's jurisdiction to remand would not have given Gorman an effective remedy.<sup>18</sup> The Panel does not have the authority to order the Commerce Department to engage in some action and has no jurisdiction to review the SLA or place Gorman on the SLA's Annex 10 list: essentially the remedies that Gorman sought.<sup>19</sup> Therefore, the Panel

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6. Binational Panel Review, *supra* note 4.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

granted the Department of Commerce's Motion to Dismiss.<sup>20</sup>

### III. MEXICAN TRUCKING PILOT PROGRAM

When NAFTA was enacted in 1994, a provision granting Mexican truckers full access the United States was negotiated but never put into effect.<sup>21</sup> This was because the International Brotherhood of Teamsters and U.S. lawmakers had concerns regarding the safety of the Mexican trucks.<sup>22</sup> A NAFTA panel evaluated the situation and determined that the United States was in violation of NAFTA in their refusal to allow access to the Mexican trucks.<sup>23</sup> The panel held that the United States could put safety requirements on the trucks and prevent certain companies from driving their trucks in the United States, but could not prevent access all together.<sup>24</sup>

In response to this, the Bush administration created a pilot trucking program. The program began in 2007 and was designed to allow certain Mexican trucks to drive into the United States for one year.<sup>25</sup> The pilot program allowed trucks from Mexico to deliver international freight past the twenty-five mile border zones that had been previously established in exchange for Mexico permitting U.S. trucks to make deliveries into Mexico.<sup>26</sup>

The pilot program was intended to show that Mexican trucks driving in the United States would be able to comply with U.S. safety regulations.<sup>27</sup> According to Mexican Economy Secretary, Gerardo Ruiz Mateos, the program did just that. He stated that over 46,000 trucks crossed over the border and drove in the United States under the pilot program without any major incidents, a feat that he felt indicated that the Mexican trucks could live up to the U.S. standards.<sup>28</sup>

#### A. CUTTING FUNDING TO THE TRUCKING PROGRAM

President Obama signed the \$410 billion omnibus spending bill on March 10 that slashed funding to the program. The bill prohibited funds being used to "implement, continue, promote, or in any way permit" the

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20. *Id.*

21. Ioan Grillo & Jane Winebrenner, *Transportation: Mexico to Retaliate for Omnibus Truck Ban; Administration Seeks New Bill For Program*, Int'l Trade Rep. (BNA), 26 ITR 370 (Mar. 19, 2009) [hereinafter *Mexico to Retaliate*].

22. *Id.*

23. Rossella Brevetti & Ioan Grillo, *NAFTA: U.S. Wants to Have Mexican Truck Proposal Ready by Obama's Mid-April Trip*, Int'l Trade Rep. (BNA), 26 ITR 424 (Mar. 26, 2009) [hereinafter *U.S. Wants to Have Mexican Truck Proposal Ready*].

24. *Id.*

25. *Mexico to Retaliate*, *supra* note 21.

26. Jonathan Nicholson, *Transportation: House Passes FY '09 Omnibus Spending Bill Containing Mexican Trucks, Cuba Provisions*, Int'l Trade Rep. (BNA), 26 ITR 328 (Mar. 5, 2009).

27. Rossella Brevetti, *NAFTA: Key GOP House Members Urge Obama to Develop New Mexican Truck Program*, Int'l Trade Rep. (BNA), 26 ITR 425 (Mar. 26, 2009) [hereinafter *Key GOP House Members Urge Obama*].

28. *Mexico to Retaliate*, *supra* note 21.

Bush Pilot Program from continuing.<sup>29</sup> This effectively stopped Mexican trucks from operating beyond the twenty-five mile commercial zones and ended the program aimed at complying with NAFTA.<sup>30</sup> According to two members of the House of Representatives, Dave Camp (R-Mich.) and Kevin Brady (R-Texas), terminating this pilot program in fact violated the U.S. NAFTA obligations.<sup>31</sup>

In response to the cancellation of the pilot program, Mexico increased duties on \$2.4 billion worth of U.S. exports including “key products like fruit, vegetables, nuts, wine, home appliances, consumer products, and paper.”<sup>32</sup> The tariffs on approximately ninety U.S. goods took effect on March 19.<sup>33</sup> The goods were specifically chosen to hit a broad range of producers from the United States with a minimum impact on poor Mexicans.<sup>34</sup> The results have not been positive for the United States. The increased duties have effectively made U.S. exports less competitive in Mexico and have the potential to close off the Mexican market completely too many exports.<sup>35</sup>

Ruiz Mateos argued that Mexico first tried to resolve this dispute over the Mexican trucks through NAFTA panels but were finally forced to take measures to increase duties.<sup>36</sup> He explained that from Mexico’s perspective, “the United States is mistaken, protectionist[,] and clearly violating the treaty [NAFTA]” in order to protect its own transportation industry.<sup>37</sup> Arturo Sarukhan, the Mexican ambassador to the United States, agreed with Mateos saying that cancelling the program was not actually about the safety of U.S. roads but was instead about protectionism.<sup>38</sup> He argued that the Bush pilot program had already addressed the safety concerns so current lawmakers were just “moving the goalposts” by asking for more.<sup>39</sup> The President of the National Chamber of Cargo Transport, Jorge Cardenas also declared that suspending the program was merely protectionist on the part of the United States.<sup>40</sup> He felt this was a major step back from recent progress, which he saw evidenced by the many Mexican trucking companies who had invested in U.S. built trucks in order to be able to take part in the pilot program.<sup>41</sup>

Article 2019, paragraph 1 of NAFTA is cited as Mexico’s legal rationale for the tariffs.<sup>42</sup> This article establishes that once a panel has decided one of the parties to the treaty is acting inconsistently with NAFTA,

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29. *Id.*

30. *U.S. Wants to Have Mexican Truck Proposal Ready, supra* note 23.

31. *Key GOP House Members Urge Obama, supra* note 27.

32. *Id.*

33. *Id.*

34. *Mexico to Retaliate, supra* note 21.

35. *Key GOP House Members Urge Obama, supra* note 27.

36. *Mexico to Retaliate, supra* note 21.

37. *Id.*

38. *U.S. Wants to Have Mexican Truck Proposal Ready, supra* note 23.

39. *Id.*

40. *Mexico to Retaliate, supra* note 21.

41. *Id.*

42. *Id.*

the disputing parties have thirty days after the report is issued to come to a resolution that satisfies both of them.<sup>43</sup> If they cannot, the party who brought the complaint “may suspend the application to the Party complained against of benefits of equivalent effect until such time as they have reached agreement on a resolution of the dispute.”<sup>44</sup> Mexico claims that they have not arrived at a mutually satisfactory agreement regarding cross border transportation with the United States and so they are entitled to suspend benefits in the form of creating tariffs.<sup>45</sup> According to Mateos, Mexico will eliminate the tariffs immediately if the trucking pilot program is renewed allowing free transit.<sup>46</sup>

#### B. OBAMA ADMINISTRATION’S RESPONSE TO THE MEXICO TARIFFS

According to White House Press Secretary Robert Gibbs, the Obama administration is looking into new legislation that will both alleviate the concerns of Congress and also meet the United State’s NAFTA obligations.<sup>47</sup> A force compiled of the Department of Transportation, the Department of State, and various leaders of Congress and Mexican official has been working to create legislation that will do just that.<sup>48</sup>

Many groups feel that quick action must be taken. The American Farm Bureau Federation (AFBF) urged Obama to find a quick solution and get rid of any possible causes for Mexico to halt trade with the United States.<sup>49</sup> AFBF President Bob Stallman said action must be taken quickly or Mexico’s tariffs will affect millions of dollars worth of products and prolong the negative impact the tariffs have on U.S. exports.<sup>50</sup>

Members of the House of Representatives wrote to President Obama encouraging him to create a program that would make it possible to determine the safety records of the truck drivers.<sup>51</sup> A new program would address the safety concerns of Congress and also eliminate Mexico’s a reason for retaliation and the tariffs.<sup>52</sup> This in turn would eliminate some of the hardship placed on workers during the economic down turn and help the U.S. economy to recover by increasing exports.<sup>53</sup>

But not everyone sees the situation that way. Teamsters Union General President Jim Hoffa has criticized Mexico’s tariffs and insisted that Mexican trucks not be allowed to participate in cross border transportation until the United States is sure that Mexican truck drivers “would be able to make sure its drivers and trucks are safe enough to use” without

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43. NAFTA, *supra* note 1, at 697.

44. *Id.*

45. *Mexico to Retaliate*, *supra* note 21.

46. *U.S. Wants to Have Mexican Truck Proposal Ready*, *supra* note 23.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Key GOP House Members Urge Obama*, *supra* note 27.

52. *Id.*

53. *Id.*

endangering U.S. citizens and other drivers.<sup>54</sup> In the meantime, the tariffs remain as Mexico waits to see what the United States decides. But according to Ambassador Sarukhan, Mexico is willing to continue to work cooperatively with the United States to find a solution and make sure the United States complies with all NAFTA obligations.<sup>55</sup>

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54. *U.S. Wants to Have Mexican Truck Proposal Ready*, *supra* note 23.

55. *Id.*