The Future Of The U.S.-Canada Trade Relationship In Light Of The Election

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The United States and Canada enjoy a unique bilateral relationship. That relationship reflects a unique friendship, underpinned by shared geography, similar values, common interests, deep connections and powerful, multi-layered economic ties. The United States and Canada have both repeatedly confirmed their common commitment to strengthening the security of the border by working cooperatively to address threats early, facilitate trade, promote economic growth and jobs, integrate cross-border law enforcement, and bolster critical infrastructure and cybersecurity.

The recent election of Donald Trump creates uncertainty in the current trade and investment relationships between the United States and Canada. Although election promises don't always result in post-election action, given the conviction of President-elect Trump's promises and the anti-trade perspective of many of those who elected him, it can be expected that some action will be taken to further his international trade and investment promises.

Renegotiation of NAFTA

During the Presidential campaign, Mr. Trump declared that the North American Free Trade Agreement ("NAFTA") was a "disaster" that he would renegotiate or even abrogate. NAFTA has a termination clause that can be invoked upon six-month notice by the United States. It was within this context that Canada's Prime Minister, Justin Trudeau, unilaterally offered to renegotiate NAFTA just days after the election.

Since the Canada-United States Free Trade Agreement came into force in 1989 (followed by NAFTA in 1994), trade between the United States and Canada has more than tripled. It is currently estimated that nearly 9 million U.S. jobs depend on trade and investment with Canada, and approximately $2 billion worth of goods and services cross our borders each and every day.

Moreover, the labour mobility provisions of NAFTA have been used by companies on both sides of the border to facilitate the temporary entry of certain categories of workers, such as intra-company transferees and professionals. Today there are thousands of Canadians working in the United States, and thousands of Americans working in

Canada because of NAFTA. Changes to NAFTA could have significant impacts on business immigration between our two countries.

Because NAFTA is a trilateral agreement, any renegotiation must include the United States, Canada and Mexico. While Canada has already confirmed its willingness to renegotiate NAFTA, that offer was made without consulting Mexico. It remains to be seen whether all three signatories are willing to renegotiate the trade agreement, and if so, the extent to which those renegotiations will transform NAFTA as we know it.

This creates uncertainty for all businesses that conduct trade throughout all of North America. The renegotiation of NAFTA could have a material impact on all companies whose supply chain includes North American cross-border transactions. If your business conducts any North American international trade, it is recommended that you carefully monitor the renegotiation of NAFTA.

The Softwood Lumber Dispute

Separate from the complex prospect of renegotiating NAFTA, several important bilateral trade issues vex the U.S.-Canada relationship — most importantly, the brewing dispute over softwood lumber. The lumber dispute is the most immediate Canada-United States bilateral trade issue that will require the attention of President-elect Trump.

Historically, the United States has imposed tariffs on imports of softwood lumber, including Canadian softwood imports. Canada accounts for approximately one third of softwood lumber purchased in the United States. The dispute dates back to 1982, when the U.S. lumber industry urged the U.S. Department of Commerce (DOC) to impose countervailing duties on imports of softwood lumber from Canada. After two additional countervailing duty investigations by the DOC, the United States and Canada reached a five-year trade agreement known as the Softwood Lumber Agreement (SLA). Since that time, the SLA has undergone a variety of iterations. At the same time, the DOC imposed further subsidy and antidumping rates on certain Canadian lumber companies, and there have been appeals of DOC cases to both the World Trade Organization panel and a NAFTA panel.

The SLA expired on October 12th, 2015. While both the United States and Canada have publicly confirmed the intention to negotiate a new SLA, lengthy and complicated negotiations have so far not resulted in a new agreement.

In early March 2016, Canadian Prime Minister Justin Trudeau and U.S. President Barack Obama instructed their respective trade officials to explore all options for solving the trade dispute. In June 2016, they released a joint statement promising to reach a new agreement on the softwood lumber issue. The statement hinted that Canadian exports would be held at or below an agreed U.S. market share. As the softwood lumber industry is vital to the Canadian economy, Canada has also promised to raise the issue before the World Trade Organization if an agreement is not reached.

On October 12th of this year, the temporary tariff agreement expired allowing U.S. industry to file a new antidumping and countervailing duty case against Canadian lumber. U.S. Trade Representative Michael Forman and Canadian Trade Minister Chrystia Freeland continue to negotiate, yet pessimism has shadowed the negotiations. Many observers expect new U.S. cases to be filed imminently.

The softwood lumber dispute will likely be the first significant trade negotiation between Prime Minister Trudeau's cabinet and the Trump administration. Not only will that negotiation address the historically acrimonious softwood issue, but it will symbolically set the tone for other trade disputes in the future. This heightens the importance of the softwood negotiation.

Future Implications

In short, upcoming trade negotiations on a new SLA, as well as the broader renegotiation of NAFTA, will have implications for businesses throughout the United States and Canada. Those negotiations will likely highlight difficult legal, political and economic problems that need to be navigated. Given the strong friendship between the United States and Canada, we remain optimistic that solutions can be achieved. Nevertheless, these issues highlight how these trade disputes are rapidly evolving and that ongoing vigilance with respect to developments is the prudent course for those conducting business between the United States and Canada.

This bulletin is a collaboration between the international trade group at Borden Ladner Gervais LLP and Scott Maberry and Lisa Mays at Sheppard Mullin Richter & Hampton LLP.

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