Will CAFTA Affect Immigration to the United States from Central America?

There are a variety of reasons for opposing or supporting free trade agreements (FTAs) like CAFTA. NumbersUSA, of course, is only focused on how they impact immigration levels. When the Singapore and Chile FTAs were submitted to Congress for approval and it was discovered that the United States Trade Representative (USTR) had included significant, explicit immigration provisions in them, many Members of Congress were furious -- especially those with jurisdiction over immigration policy. House Judiciary Committee Chairman Sensenbrenner (R-WI) extracted a promise from the USTR that no immigration provisions would be negotiated on any other bilateral or multilateral agreement, including the Doha Round of GATS.

In light of all this, we scoured carefully through CAFTA, when it became available, to ensure that it did not include any provisions dealing with immigration. In fact, the agreement does NOT include any explicit language about visas. It does, however, include language in chapters 10 and 11 that is virtually identical to the language in other FTAs that creates the expectation of a right of immigration.

CAFTA, like other recent FTAs, covers four "modes" of delivery of services between countries. The WTO defines them (and provides examples) as follows:

Mode 1. Cross border: the service itself crosses the border rather than the provider of the service (examples include internet services, e-learning programs, and remote management or marketing consulting);

Mode 2. Consumption abroad: the consumer travels across the border (examples include tourism and travel services, education of foreign students, and study tours);

Mode 3. Commercial presence: establishment of a subsidiary or branch office in the other country (examples include construction engineering to manage local infrastructure projects and distribution centers to ship or warehouse products to local markets; and

Mode 4. Movement of natural persons: the services supplier travels across the border (examples include actors, construction trade workers, coaches, and environmental consultants)

Chapter 10—Mode 3 Delivery of Services

Chapter 10 of CAFTA covers Mode 3 delivery. It is one of the only parts of the agreement that gives a right of action to an individual (the foreign investor) instead of to a government signatory to the FTA. Article 10.3 requires each party to "accord to investors of another party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory." The agreement goes on, in Article10.5, to say, "Each

Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security" (emphasis added).

Article 10.7 says that, "no Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization." The USTR acknowledges that this language refers to regulatory takings. The problem is that regulatory takings are to be judged under international law, not U.S. law. Similar language in NAFTA has been interpreted, under international law, to mean that an investor can challenge any government action *or inaction* that undermines "expected future profits." This interpretation has resulted in the U.S. government compensating Mexican investors for the costs of compliance with standard government regulations with which all domestic companies must comply. It would appear, then, that such an interpretation would allow a foreign investor under CAFTA to challenge U.S. immigration laws, for example, that limited the number of foreign workers he could import to work in his company, if such laws reduced his "expected future profits" by forcing him to pay higher wages to American workers. Under the terms of CAFTA, any such challenge would be decided either by a World Bank (under the ICSID Convention) or a United Nations (UNCITRAL) tribunal. If the investor won the challenge, he would be entitled to cash compensation, to be paid by U.S. taxpayers, which would put significant pressure on Congress to loosen our immigration laws in order to avoid future judgments.

Chapter 11—Mode 4 Delivery of Services

Chapter 11 of the agreement explicitly includes Mode 4 delivery, in which a national of one country provides services in the territory of another country. In Article 11.14, CAFTA defines "cross-border trade in services" or "cross-border supply of services" as "the supply of a service:

(a) from the territory of one Party into the territory of another Party [Mode 1];

(b) in the territory of one Party by a person of that Party to a person of another Party [Mode 2]; or

(c) by a national of a Party in the territory of another Party [Mode 4 (Mode 3 is left out here because it is covered in Chapter 10)]."

Article 11.14 defines a "service supplier" as "a person of a Party that seeks to supply or supplies a service." The footnote attached to this definition states that "for purposes of Articles 11.2 and 11.3, 'service suppliers' has the same meaning as 'services and service suppliers' in the GATS." Ways and Means Committee Chairman Bill Thomas stated clearly on the floor of the House of Representatives on June 16, 2005, that the "so-called GATS Mode 4" part of the services agreement being negotiated in the Doha Round involves "the temporary movement of business personnel" across borders. Rep. Clay Shaw, Chairman of the Trade Subcommittee of Ways and Means said during the same floor debate that, "the U.S. Trade Representative, as we have already heard, has long recognized that trade agreements are not the appropriate forum to negotiate provisions regarding *permanent* immigration" (emphasis added—permanent immigration has never been an issue in FTAs). Only three sentences later, Shaw warned, "let us not tie the hands of those

negotiating for the United States" by prohibiting them from negotiating immigration provisions. Even Ways and Means Ranking Member Mollohan made a clear reference to immigration being part of a standard FTA: "There are skills that we need in this country, and we have to be very careful about how we might impact our ability to access those skills" if the USTR is prohibited from negotiating Mode 4 movement of workers.

So, if the Mode 4 language in CAFTA has the same meaning as the Mode 4 language in GATS, according to the note in CAFTA, and the movement of workers across international borders is central to negotiations in GATS, it would seem that it would play some role in CAFTA, as well. At the very least, inclusion of this language would, as noted above, create an expectation such movement of workers. The one thing that is absolutely clear, though, is that CAFTA does not include any special visas to accommodate such movement, which creates a potential conflict.

The language in Paragraph 5 of Article 11.1 of CAFTA regarding access to domestic employment markets does not protect the United States from challenges of our immigration laws, either. It says: "This Chapter does not impose any obligation on a Party with respect to a national of another Party seeking access to its employment market, or employed on a permanent basis in its territory, and does not confer any right on that national with respect to that access or employment." While it may appear to be relevant to Mode 4 movement of workers, in fact, it is standard language found in past FTAs, including Singapore and Chile, which clearly include Mode 4 rights.[1] It clarifies that the agreement does not create any *individual* right of action. With a couple of limited and explicit exceptions (the foreign investor in Chapter 10 being one), the provisions of a free trade agreement are enforceable against a Party State only by another Party State. Thus, an individual denied a visa cannot challenge that denial under CAFTA.

Under the terms of CAFTA, this question of whether the United States would be violating the Mode 4 provisions if our immigration laws restricted the number of visas available to Mode 4 service suppliers from Central America would be resolved by a CAFTA international tribunal on which there would always be two 'judges' from other CAFTA nations and only one American. The USTR has assured Members of Congress that the August 5, 2004, "Understanding on Immigration Measures" would prevent any such challenge from succeeding. The fact that this side letter is signed by all Parties to CAFTA, however, does not necessarily mean that it is legally binding, if past experience is any indicator. And remember, once a Party decides to challenge U.S. immigration law, the majority-Central American tribunal would be the body deciding whether the letter was binding or not. It clearly is not within the four corners of the CAFTA agreement and so almost certainly would not have the same force as provisions in the agreement, including the Mode 4 provisions.

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[1] The relevant language in the Singapore and Chile Free Trade Agreements is: "This Chapter does not impose any obligation on a Party with respect to a national of the other Party seeking access to its employment market, or employed on a permanent basis in its territory, and does not confer any right on that national with respect to that access or employment." The language is identical in both agreements, and is found in Article 8.2.4 in the Singapore Free Trade Agreement and in Article 11.1.5 in the Chile Free Trade Agreement.

In fact, the very existence of the side letter would seem to indicate that the USTR had reason to fear that Congress would balk at CAFTA's potential impact on immigration. All but one of the Central American Parties to CAFTA are among the top 10 sending nations of illegal aliens to the United States, with El Salvador and Guatemala representing the second and third largest sending nations, respectively, and Honduras, Dominican Republic, and Nicaragua taking the seventh, eighth and ninth spots. Immigration clearly is an important issue to these countries. If the USTR was worried about immigration and the Central American governments were willing to give it up in exchange for the larger agreement, why not include the language from the side letter in the text of the agreement itself?

Indeed, the U.S. sugar industry and a bloc of House Members learned the hard way that side letters may not be binding. The side letter amending the rules of origin determining how many tons of sugar were allowed to be imported into the United States under NAFTA, though signed by all three countries, was not even included in the package sent to Mexico's Congress for approval. Mexico still insists it is not bound by the provisions in the letter and the United States has spent a decade in unsuccessful litigation.

Finally, in legal terminology, an "immigrant" is an alien lawfully admitted for permanent residence, so "immigration" refers to aliens coming to the country to remain permanently. Temporary workers, on the other hand are "nonimmigrants." It is not hard to imagine a Central American majority on one of the international CAFTA tribunals, or a member of the World Bank or UN tribunals from Chapter 10 parsing the side letter until it has no meaning at all.

Conclusion

There is one issue in CAFTA on which everyone agrees—there is nothing in the text of the agreement that would provide a single extra visa to the United States. However, by using language on Mode 3 and Mode 4 delivery of services that is identical or virtually identical to that in all recent FTAs, the USTR has allowed for the creation of an expectation of immigration. In other words, the foreign investors and service providers who read the agreement may easily believe that it will give them the right to enter the United States either to invest in a service providing company here or to go to work for a subsidiary from the home country.

The key question is: What will happen when these investors and service providers find that there are no visas (or limited visas) available for them? The investors will be able to challenge U.S. immigration law if they can convince a panel in either the World Bank or the UN that U.S. visa restrictions are reducing their "expected future profits," as defined under international law. The remedy, should the investor succeed, is U.S. taxpayer-funded cash compensation for lost/reduced profits.

The worker, on the other hand, would have to convince the government of one of the Parties to CAFTA to challenge U.S. visa law, since workers do not have individual rights under the agreement. If a Party government were willing to claim that U.S. visa law restricted Mode 4 movement of workers significantly, the challenge would go before a three-member international tribunal comprised of two Central

Americans and one American. This panel would determine whether the side letter on immigration was binding, and if not, whether the United States had a duty to permit Mode 4 movement under CAFTA. If the tribunal found for the other government, the United States would face trade sanctions.

The current USTR has assured Members of Congress that CAFTA does not impose "any obligation whatsoever on the United States regarding immigration." He and his entire staff may honestly believe that. The only thing that really matters under the terms of CAFTA, though, is if a majority of the members of the international tribunals who have final say believe that CAFTA imposes no immigration obligations. If we do not answer that question correctly, we could easily find ourselves with a new visa category for CAFTA nonimmigrants, created to head off the surge in challenges that undoubtedly would follow the first successful one.