

A photograph of three small flags on a black stand. From left to right, the flags are the Mexican national flag (green, white, and red with the national coat of arms), the United States flag (stars and stripes), and the Canadian national flag (red and white with a red maple leaf). The flags are mounted on gold-colored poles. A semi-transparent white banner is overlaid across the middle of the image, containing the title and author information.

NAFTA AND YOU

By Ignacio Pinto-Leon

The North American Free Trade Agreement (NAFTA) is a regional agreement among the governments of Canada, Mexico, and the United States that provides the legal framework to implement a free trade area—one of the biggest in the world by the size of its members' combined population and gross domestic product—within the territory of the three countries.

NAFTA creates new business opportunities for business people and—directly and indirectly—for the lawyers serving them, including solo and small firm attorneys. Before NAFTA, such legal services were traditionally reserved to big and midsize law firms, but now law firms of all sizes are getting business derived from the Canada–Mexico–United States trade and investment. Because NAFTA has provided new and increased business opportunities to big, medium, and small goods and service traders and investors, it is relevant not only to big and midsize firms, but also to the small firms and sole practitioners that may serve these traders and investors.

Overview of NAFTA

NAFTA entered into force on January 1, 1994, and gradually eliminated most of the tariff and non-tariff barriers to trade among its members, more than tripling cross-border movement of goods and services. Of the three NAFTA countries, Mexico changed the most after signing: Whereas NAFTA merely superseded and expanded the then-in-force Canada–United States Free Trade Agreement, it gave Mexico a new partnership with two financial giants. Mexico was coming from a planned economy with a market restricted to imports and foreign investment, and it had begun to transition gradually into an open market economy starting in the mid-1980s.

NAFTA is not an economical and political union as the European Union. Each North American country keeps its own currency; the Agreement does not provide for free flow of persons; and there are not trinational representative bodies such as the European Parliament.

The free trade area among Canada, Mexico,

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and the United States is an example of enhanced competitiveness and openness owing to globalization. Globalization is neither good nor bad, but it is surely inescapable.

Structure of NAFTA

NAFTA covers a variety of areas relevant to international trade and investment in a comprehensive fashion:

- National treatment and market access for goods/tariff reduction
- Rules of origin
- Customs procedures/certification of origin
- Energy and basic petrochemicals (with heavy reservations by Mexico in exploration, production, and investment on these key areas, in accordance with its constitutionally mandated state monopoly in place after 1938)
- Agriculture and sanitary and phytosanitary measures
- Investment (including a dispute-resolution mechanism for claims by investors against member states)
- Financial services
- Intellectual property
- Review and dispute settlement in anti-dumping and countervailing duty matters

NAFTA also includes two side agreements on environmental and labor standards.

What Has NAFTA Done in 17 Years?

NAFTA has been a commercial success. According to data from the Office of the U.S. Trade Representative, NAFTA links 444 million people producing \$17 trillion worth of goods and services. U.S. goods and services trade with NAFTA totaled \$1.1 trillion in 2008 (for more, see www.ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta). Exports totaled \$482 billion; imports totaled \$596 billion. The U.S. goods and services trade deficit with NAFTA was \$114 billion in 2008. U.S. foreign direct investment (FDI) in NAFTA countries was \$322.9 billion in 2008; NAFTA countries' FDI in the United States was \$229.8 billion.

NAFTA Downsides?

Some observers love NAFTA, some hate it, but the vast majority are indifferent. NAFTA has been criticized in all three countries of the free trade area; invariably, a particular group in one country will allege that the other two nations

NAFTA continues to create professional opportunities for solos and small law firms.

are obtaining the benefits of NAFTA while its own country bears the negative effects.

For example, Canadian and U.S. workers protested the migration of manufacturing jobs to Mexico; farmers in Mexico regularly complain about the elimination of agriculture tariffs and diminution of subsidies from the Mexican government; Canadian ecologist groups have denounced threats to the Canadian water supply and ecosystem; U.S. groups have succeeded in blocking access by Mexican trucks to U.S. highways, arguing safety and pollution concerns, openly defying NAFTA provisions.

Some of these complaints reflect the effects of a global economy, not necessarily of NAFTA's implementation: Agricultural problems in Mexico can very well be linked to imports of agricultural products from other areas of the world (for example, corn and wheat from Africa and Asia); in the case of Canadian and U.S. workers' complaints described above, lost manufacturing jobs probably migrated to China—not Mexico.

Critics frequently attack Mexico's heavy reservations on exploration for, production of, and investment in energy and basic petrochemicals. But Mexico's constitution explicitly mandates a state monopoly in these areas. The Mexican public is hyper-sensitive to the issue, mixing a complex combination of na-

tionalism, sovereignty, and history; privatizing the sector—or even allowing much-needed private partnerships with state-owned *Petróleos Mexicanos* (Pemex, Mexico's oil and gas company) and *Comisión Federal de Electricidad* (CFE, Mexico's electric company)—would likely result in controversy and come with a high electoral cost to any Mexican politician proposing such measures.

Beyond its critics and shortcomings, NAFTA's success should be considered in light of its purposes as stated in Article 102: NAFTA has succeeded in increasing commercial trade among its members. It is not a deeper union or the remedy for all inequities.

Current State of NAFTA

The level of trade and investment among Canada, Mexico, and the United States follows the economic mood of the countries—NAFTA is by no means immune to crisis and recession. Nowadays the tide is low, as are the economies of North America, but no doubt it will rise again in sync with the financial indicators of its members, as it has done in the past.

One topic deliberately left out from NAFTA is the free flow of people among the free trade area. Mexico is very different in composition than the other two NAFTA countries; in my opinion, Canada and the United States are unwilling—at least at this point—to draft a modification to the Agreement to provide for open borders within the free trade area.

Likewise, the issue of Mexico's position on energy and basic petrochemicals is probably going to remain as it is, until the Mexican Constitution is amended to allow private production and investment.

NAFTA Opportunities for Solos and Small Law Firms

Before NAFTA, trade and investment among Canada, Mexico, and the United States was conducted mostly by big corporations. Generally, big law firms cater to such corporations, and, consequently, smaller firms and sole practitioners were not getting much of the legal work derived from international business among North Americans.

After NAFTA, more mid- and small-

RESOURCES

- **NAFTA Claims** (www.naftaclaims.com): A website with information on all reported investor-state NAFTA disputes, including legal documents.
- **NAFTA Research Guide by Duke Law** (www.law.duke.edu/lib/researchguides/nafta): A good website with links to the text of the agreement, background information, dispute resolution, legislation and legislative history, and Internet sources.
- **NAFTA Resources at the University of Texas at Austin** (<http://lanic.utexas.edu/la/mexico/nafta/index.html>): This site includes documents and publications as well as academic and trade resources.
- **NAFTA Secretariat** (www.nafta-sec-alena.org): The official web page of the Secretariat of NAFTA, which administers the mechanisms specified under NAFTA to resolve trade disputes among national industries and/or governments of the free trade area.
- **Understanding NAFTA** (www.naftaworks.org): A website in plain English explaining NAFTA, its benefits and downsides, and pending issues.

size Canadian, Mexican, and American players began to trade and invest in the region. Solos and small law firms frequently represent such players, either for inbound or outbound transactions or for dispute resolution; their participation as counsel has grown accordingly.

Some NAFTA areas have a direct impact on the practice of law in North America, whereas some others have an indirect impact.

Direct Impact

Intellectual property. NAFTA expanded the protection of copyright, trademarks, patents, and trade secrets afforded by Mexico before 1994. NAFTA members agreed to comply with the Geneva Convention, Berne Convention, Paris Convention, and UPOV Convention. This was an important development for Mexico, which previously had not been on par with the United States or Canada in its protection of intellectual property.

Immigration law. NAFTA provides for temporary entry to businesspersons of one of its member states seeking to engage in a business activity in one of the two other member states in a profession set out in one of the NAFTA Appendixes. The United States created visa designation TN specifically to allow certain Canadian and Mexican professionals to enter temporarily to work in the United States for a U.S. enterprise or entity; similarly, Canada issues NAFTA work permits to Mexicans and U.S. citizens seeking to work temporarily in Canada.

Foreign investment. Chapter 11 provides for a series of principles to investors: most-favored-nation treatment, national treatment, and minimum standard of treatment according to international law. But Chapter 11 also sets up a settlement mechanism via arbitration for disputes among private investors from different NAFTA countries.

Indirect Impact

Franchises. U.S. and Canadian franchises in Mexico have multiplied since NAFTA. Likewise—although in smaller number—Mexican franchises have also ventured into U.S. and Canadian territory, mainly to cater to the Latino population there. Franchise law will likely continue being

an area positively impacted by the free trade agreement.

Maquiladoras. Many American and Canadian companies have decided to assemble and manufacture goods in Mexico under a *maquiladora* program. A *maquiladora* is an operation for the production of goods in Mexico whereby raw materials and equipment are temporarily imported to Mexico for subsequent export to foreign markets—mainly the United States. The origin of the word comes from the Spanish word *maquila*, which was the small portion of wheat, grain, or oil kept by millers for processing grain.

U.S. exports. In 2010 the federal government of the United States launched the National Export Initiative with the goal of doubling exports within the next two years. It is likely that a significant part of the added export will land in Canada or Mexico. If that happens, legal work opportunities for U.S. lawyers should increase as well.

A Special Note on Chapter 11: Investment

Before NAFTA, investment among the three North American nations was dealt with via bilateral investment treaties (BITs). NAFTA addressed this issue directly in Chapter 11.

The dispute-resolution mechanism for investment claims, noted above, is probably the most innovative feature of NAFTA; it gives investors from Canada, Mexico, or the United States an opportunity to arbitrate their claims under NAFTA directly, without the intervention of the national government of the investor. This direct access to arbitration tribunals has allowed creativeness on the part of plaintiffs, many of whom have claimed breach of fair and equitable treatment under international law by the host country against the foreign investor. For example, in *Loewen Group v. United States* (June 26, 2003), a Canadian funeral conglomerate operating in the United States claimed such a breach by a Mississippi state court, imputed to the U.S. federal government. The strategy has produced diverse results.

This settlement mechanism has its share of critics: some take issue with the alleged lack of transparency in the

dispute-resolution process for investors' claims—even though the NAFTA countries have agreed since July 31, 2001, to make available to the public all documents submitted to, or issued by, a Chapter 11 tribunal. The critique would be more accurately aimed at arbitration proceedings outside NAFTA, where secrecy is the norm.

Critics also emphasize the absence of an institution within the NAFTA framework to administer Chapter 11 arbitrations and to solve the problems arising from those proceedings—but ad hoc arbitration proceedings (those administered outside the traditional arbitration institutions) also offer their own advantages, and all three NAFTA members would honor an arbitral award emanated from a Chapter 11 arbitration tribunal.

Finally, some critics complain that, by consenting to arbitral tribunals, Canada, Mexico, and the United States have diminished their sovereignty—yet consent in advance to the submission of a claim to arbitration (NAFTA Article 1122.1) was done exercising that sovereignty, and it benefits investors from each NAFTA member by granting a clear path for access to justice in a speedy and relatively inexpensively fashion; further, sovereignty cannot be understood as an absolute value but in a global context, where states must interact and cooperate.

Conclusion

NAFTA created and continues to create professional opportunities to solos and small law firms representing mid- and small-size Canadian, Mexican, and American traders and investors in North America, both for inbound or outbound transactions and for dispute resolution. These opportunities will continue growing in the same measure that the economies of the NAFTA countries recoup from the recent economic downturn.

Intellectual property, immigration, foreign investment, international trade, franchising, *maquiladoras*, and dispute resolution are areas impacted by NAFTA.

The burden is on us, solos and small firm practitioners, to be aware of these opportunities to better serve our clients and to expand our practices. **GPSOLO**