Penn State International Law Review

Volume 11
Number 3 *Dickinson Journal of International Law*

Article 3

5-1-1993

The Dickinson School of Law NAFTA Symposium - The North American Free Trade Agreement: Engaged To Be Engaged?

John A. Maher

The Dickinson School of Law NAFTA Symposium — The North American Free Trade Agreement: Engaged To Be Engaged?

John A. Maher*

I compliment *The Dickinson Journal of International Law* and The Dickinson International Law Society for luring sophisticates to address you concerning The North American Free Trade Agreement. As for me, a decided non-sophisticate, I fear that NAFTA is being simultaneously oversold and undersold.

The brochure announcing the program referred to formation of the World's largest common market. There are several snares, psychological and linguistic, implicit in the term "common market."

I don't refer to the obvious fact that it ignores the People's Republic of China. Rather I refer first to the fact that the idiom of some graybeards — such as the speaker — tends to use the term "common market" to refer to the European Community. Those of us who followed working groups that led up to signature of the 1958 Treaty of Rome fell long ago into the habit of short-handing the then EEC as "the common market." This, of course, incorrectly ignored other similar phenomena such as the earlier BeNeLux and the later LAFTA. Be patient with greybeards as we labor to improve our idiom. I confess the early EEC and later EC never claimed and couldn't claim exclusive rights to "common market" and I promise to endeavor to use the term only generically.

However, there is a tendency, in American propaganda attending agreement in principle upon NAFTA, to compare — sub silentio — NAFTA with EC. Otherwise, there is no point to trumpeting the

* John A. Maher, Professor of Law at and former Dean of The Dickinson School of Law, has practiced and taught enterprise organization, antitrust, private international law and securities regulation. He holds LL.B and LL.M (Trade Regulation) degrees from N.Y.U. and now, serves in select committees of the Maritime Law Association and the N.Y. State Bar Association's International Law Section. He has chaired the Pennsylvania Bar Association's Corporation Banking & Business Law Section and Association of American Law Schools' Maritime Law Section. During his days as a practitioner, he was involved in transactions in Canada, France, Great Britain, Italy, Romania and Slovenia. Recently having served as a member of an ABA (CEELI) task group that wrote investment company recommendations for Bulgaria, he is now involved in a similar project for Ukraine.

fact that the three initial NAFTA nations embrace 360 million resident consumers. "Economics of scale" doesn't say it all. NAFTA is, or should be, for small businesses as well as large. Obviously, the comparison is with the EC 12's 340 million. We must not be beguiled by the contrast. Use of the term "common market" to suggest equivalency of EC and NAFTA is deceptive. EC differs dramatically from the embryonic NAFTA and an embryonic EC differed from NAFTA.

I do not refer to the fact that EC is a "customs union" whereas NAFTA would establish a free trade area. I do not refer to the numbers game when, tomorrow or the day after, Austria and some other EFTA nations will effectively join the Club.

Rather, I point to the fact that the Treaty of Rome itself contemplated creation of what amounted to an Executive — for that is what is implicit in the Commission and in the evolved post held by M. Delors. The Rome Treaty dealt with various issues in very particularized and sometimes specific terms. It was aimed at developing more efficient industrial engines rather than merely minimizing official tariff and non-tariff barriers. Witness, for example, articles 85, 86 and 87 of the Rome Treaty as they not only established a transnational philosophic approach to anti-cartelism (or, in the U.S. usage, antitrust) but particularized substantive rules of decision for anti-cartel prosecutions and a mechanism for executive dispensations from the rules. Witness the Rome Treaty's provision of affirmative defenses, sounding in anti-cartelism, to antidumping complaints. Witness the EC Commission's calculated avoidance of emulating the U.S.A.'s Parker v. Brown trap. That, in effect, invites states to frustrate national competition policy. There is no potency for, say, Italy to immunize private merchants from article 85 whereas there is every potency for California to mandate conduct ordinarily offensive to the Sherman Antitrust Act.

What of NAFTA and anti-cartelism? It speaks to good will and to coordination.

Lest we fall prey to the easy comparisons with EC, I think it useful to look eastward. It is said that the Single Market Program of the European Community is the most significant economic and political event to occur in Europe in the second half of the twentieth century. The Program is affecting the way business is done worldwide, whether or not a given enterprise does business within EC. Someday, this may be true of NAFTA but mark you well that there is no proposal for a transnational NAFTA Executive; no proposal for a transnational bureaucracy; no proposal for a transnational parliament of even the weak EC variety.

What I see in NAFTA is something about which first year stu-

dents are warned: a whole series of promises to promise, given color and substance by provisions necessitating repeated visits to three parliaments — and subsequent administrative elaborations — in a context in which one nation's constitution seemingly provides against entrepreneurs of the other two nations becoming involved in mineral exploitation or railway management. EC has taken great strides toward being a single marketplace dedicated to fair competition but, at this juncture, NAFTA has no such pretension. It looks to minimizing tariff and non-tariff barriers, to protecting intellectual property but it does not say "let free market forces play."

A principal root of today's EC is a customs union arrived at in the 1958 Treaty of Rome. Other roots were the BeNeLux combination, the Coal & Steel Community and EurAtom. The Treaty of Rome looked to creating a "common market" by eliminating various factors that distorted competition. Implicit in the Treaty was creation of the EC Commission destined to serve not only as administrative heart of the market but as regulator in terms of generating and enforcing various rules such as those implementing the anti-cartel theme. Before and after 1986 signature of the Single European Act, there has been significant evolution toward a harmonization of various of the member nations' procedural and substantive rules in particulars intended in order to accommodate not only marketing of goods and services within the community but also easing financial transactions. Quite apart from strides to harmonize "company laws" and capital flow regulation, there has been considerable progress in eliminating non-tariff barriers by standardizing technical controls in terms of chemicals, food stuffs, pharmaceuticals, etc. [This has been aided by several non-governmental organizations (NGOs) including the European Committee for Stabilization (CEN), Committee for Electro-Technical Standardization (CENELEC) and the TeleCommunications Standards Institute (ETSI).] EC has gone further and is going further. Quite ignoring the troubled ECU medium of international settlements and the on-again, off-again progress toward a common currency, EC has done and will do many other things well beyond constituting a mere customs union cum free trade zone.

EC even affects the way corporate lawyers — and not just those resident in Europe — think. Thus, EC has developed what some call a new form of business entity — an intra- community partnership of at least two persons residing in at least two member states which is regarded as an entity for purposes of contracting. This entity, the European Economic Interest Grouping (EEIG) is not all that unfamiliar conceptually to common lawyers of Canada, the UK and the U.S.A. Those of you who have studied Enterprise Organization might well conclude that EEIG is nothing more nor less than the

association contemplated by section 6 of the Uniform Partnership Act but for demands that at least two "partners" must be residents of two differing EC nations and that certain filings are needful. In a similar vain, practitioners will be affected by the fact that EC is developing a community-wide corporation law.

Students of American Constitutional history easily can associate the themes underlying the Treaty of Rome and subsequent events with themes at play during the Annapolis and Philadelphia conventions that led the Constitution of the United States of America as originally adopted.

Look to the invitations to the Annapolis and Philadelphia conventions. Compare them with the expressions of Schuman, DeGaspari, Spaak and Adenauer.

Some but not all of these themes are involved in the NAFTA initiative.

The key to NAFTA is somewhat free trade among the North American nations — and such other nations as wish to join but are not black-balled by a member. Implicit in this is discrimination against non-members.

Yet, from the perspective of a citizen of the United States, there is no sense that NAFTA must succeed lest we three nations fall prey to avaricious sovereigns of other continents. There is no theme to the effect that we three nations must eliminate potencies for perpetuation of something akin to the more or less constant continental warfare that had few protracted respites from the time of the break up of the Roman Empire through 1945.

Those who conceived of the Treaty of Rome were primarily citizens of continental survivors of almost two millennia of warfare. The U.K., not fully involved in all of the wars of all of those years, did not join EC for many a year.

Think, what is this NAFTA? I like to think of it as a common sense arrangement among three nations having common geo-political concerns all too rarely addressed in a collective fashion.

We three nations share a continent permitting easy land transportation.

We three nations have easy water transport to Asia and Europe.

We three nations are parts of both the Pacific Rim phenomenon and of classic Atlantic trade patterns.

We three nations have atmospheric pools and water resources in common.

We three nations have not always lived in peace but we have not been involved in constant warfare. It is something like 130 years since the United States arguably tolerated, and then contained, the Fenian invasion of Upper Canada thereby giving impetus to the Brit-

ish North America Act. It is just shy of 80 years since American forces occupied Vera Cruz. Monuments, in Mexican cities, to the Vera Cruz casualties are still fresh as are the flowers gracing monuments in smaller cities. Yet, I am happy to report, there also is a memory among educated folk in Mexico of a U.S.A. president sympathetic to liberation of Mexico from a yoke only symbolized by Maximillian.

Our three nations have not had parallel developments. Mexico has a formal constitutional system not dramatically unlike the U.S.A. but what of P.R.I. domination of Mexico's central government?

I think it difficult to avoid the fact that much of Canada and the United States of America fully share a common culture. The same is not true of Mexico and the U.S.A., whether or not one focuses on the P.R.I. or Mexico's long standing love-hate relationship with the Roman Catholic Church. American and Canadian similarities, except in forms of government and conduct of courts, are such that one wonders whether or not there has become one Canadian-American nation (less, only possibly, Quebec) with some sixty-odd centers of power. Most assuredly, the North American Association of Securities Administrators (NAASA), in which the Canadian Provinces and territories as well as the states and D.C. fully participate, gives mute testimony. I hasten to say Mexico is a NAASA member.

The border between the U.S.A. and Mexico, once a line wrought variously by negotiation and warfare, is no longer sharply defined except on maps. Much of it is lost in a vaguely recognized zone. Oh, it is easy enough to mark the borders between San Diego and Tiajuana, the two Nogales, Ciudad Juarez and El Paso, Matamoros and Brownsville but are those municipally-centered borders any more significant than the one between Detroit and Windsor? If they are, what then of the proposition that five-sixths of the length of the 2,000 mile Mexican-American border is scrub desert through the roughest parts of which some folk wander nonchalantly from one side of an only presumed line to the other? Does this porosity differ from much of the U.S.A.-Canada border?

Not at all. What difference there is lies in the compulsion for some Mexicans to seek out the higher wages of Canada and the U.S.A. while, currently, some Canadian enterprises move to the U.S.A.

Pundits say that Mexico is elated with NAFTA, Canada is despondent about NAFTA and the U.S.A. is confused about it. Some Americans project the near-term export of many jobs to Mexico at no cost to it. Other Americans say that the inevitable long-term ef-

fect will be to increase Mexican wage rates and thereby lessen pressure for emigration. Both may be correct. But, it is folly to say there is no cost to Mexico.

What of the 500,000 Mexicans now employed by 1700 maquiladoras along the border? Those maquiladoras bring in nearly a third of Mexico's foreign-exchange earnings. Why do they exist? Well, purely and simply, wages for comparable functions in Mexico run something like forty percent of those in the U.S.A. and it just makes good sense for many U.S. companies to put labor intensive operations on one side of the border and capital intensive operations on the other, paying U.S. import duty on only value added. And, this is just what has happened. All sorts of those 1700 maquiladoras have complementary U.S.A.-based functions — warehousing operations and operations involving very expensive labor-saving tools — just miles away north of the border. Indeed, this is almost a common arrangement. Won't those 500,000 jobs be put up for grabs by NAFTA? Of course they will, at great political risk to the P.R.I., Mexico's ruling party.

I do not suggest that a free market will ignore specialization of functions in the long term.

I merely suggest, in a fairly near term, that there will no longer be much magic for U.S. firms in locating "just across the border" for which reason we can anticipate that, when NAFTA is broadly effective to the extent that U.S. operators see virtues in locating in Mexican regions much further south of the border, they will do so. When this happens, Mexico will experience problems involving dislocation of workers south from the border. So, Mexico too will pay a price sounding in social discontent just as Canada has paid a price as various of its smaller but effective companies have relocated to the U.S.A.

I am long overdue in reaching one of my assignments: an overview of NAFTA less its labor and diplomatically ground-breaking environmental aspects. They will be covered by our friends from Washington.

It is a given that Canada and Mexico are our first and third largest trading partners. It also is a given that we and Canada have been members of GATT (that is, the General Agreement on Trade and Tariffs) for many years whereas Mexico is a fairly recent adherent to GATT.

Mexico spends seventy percent of its import dollars on U.S. goods. In this context, Mexico has surpassed Japan as our second largest market for manufactured goods. The U.S. Department of Commerce insists that exports to Mexico support approximately 600,000 jobs within the United States.

I think it fair to say that President Salinas has turned Mexico away from across-the-board protectionist attitudes and all but formal allegiance to centralized national state planning. Tonight is not the occasion to debate the whyness of Mexico's turn from its Import Substitution Industrialization program.

We, as citizens of the United States, must be more sensitive to the fact that many folk in Ontario and in Mexico think that we are a colossus so focused on Europe and Asia that we are cavalier about our closest neighbors. It goes without saying that we, as citizens of the United States, must respect the fact that the Mexican Constitution provides against foreign domination of certain natural and man-made resources. More than that, we must understand why that came to pass. But Mexican sophisticates must understand that, before a truly common market can eventuate, there must be a transition from insulating Mexican mineral exploitation. How can we long have a market in which Mexican capital can derive nourishment from mineral exploitation in Canada and the U.S.A. without reciprocity?

Note that NAFTA started in a bilateral negotiation between Presidents Bush and Salinas. They gracefully acceded to Prime Minister Mulroney's request that Canada be included. Were I Prime Minister Mulroney, I would have made the very same request. Purely and simply, Canada could not afford to be absent from a bargaining table at which the advantages implicit in the 1989 CFTA (Canadian Free Trade Agreement) could be prejudiced. It is sad to see that Mulroney's vision is part-and-parcel of his downfall as some Canadians attribute all short-term economic woes to CFTA and project worse from NAFTA.

It is time to speak to what are the key provisions of NAFTA excluding, of course, labor and environmental issues.

I. Tariffs

Looking to tariffs, all tariffs among the three nations are to be dropped pursuant to several different time tables understandably relating to varying sensitivities in the three nations. About half of all Mexican tariffs will be eliminated immediately upon effective date of the agreement, currently targeted at January 1, 1994 but definitely put at risk by unsurprising lobbying in the U.S.A. Stateside critics of NAFTA tend to ignore this. Almost all other tariffs will be eliminated in five to ten years, with equal annual reductions being the norm. Tariffs on some highly sensitive products (e.g., corn, beans and raw sugar) will be phased out across fifteen years.

CFTA included similar arrangements but there is a great difference. The current level of Mexico's tariffs are, generally speaking,

more than two-and-one-half times the U.S. tariff rates for which reason elimination of Mexican tariffs will be a definite boon to U.S. exporters.

II. Rules of Origin

Looking to rules of origin so important to free trade zones large and small, it is easy to say that NAFTA provides that preferential tariff treatments will be available to goods if their labor and materials content is predominantly from the U.S.A., Canada and Mexico. What if there are components from other nations? Generally speaking, the magic line will be sixty or sixty-five percent of transaction value, or fifty percent of net cost, but such value lines are not the exclusive criteria. Happily, NAFTA article 465 provides a de minimis provision absent from CFTA. But, as the short experience with Canada demonstrates, rules of origin are very tricky indeed. One need only to look at the annex to NAFTA to appreciate how much paper has been and will be devoted to rules of origin ab initio. Thus, Annex 401.1, amplifying a fifty-two-word article 401(b), is 166 pages!

Much more paper is to come.

III. Customs Administration

Customs administration will be simplified — we hope.

That was one of the objectives with our Canadian agreement but it led to an unlovely scenario in which the Canadian customs people have one set of rules for — let's say — rules of origin and the U.S. customs people have quite another. Each set purports to be implementing the CFTA.

IV. Technical Standards

In NAFTA, the high contracting parties affirm their GATT commitments not to use technical standards for goods (including sanitary/physical standards for animal, plant and other ingestible products) as disguised non-tariff restrictions on trade. The parties also have agreed to work toward compatibility of federally developed standards related to safety, health, environmental and consumer protection. Beware that word "federally."

Each nation promises to provide both national treatment and most-favored-nation treatment with respect to standards- related measures but each nation is free to choose the level of protection it deems appropriate.

Rather than mandate any particular substantive standards, these sections of NAFTA are primarily concerned with procedural

guarantees. As Mr. Mickey Kantor apparently has failed to note, each of us has promised to have a transparent or open system for establishing standards with advance public notice, opportunity to comment, publication of final standards and central information points.

Were I a Mexican entrepreneur, I'd worry about the recently reasserted role of the States of the U.S.A. in food and drug regulation. California's Proposition 65 can spread to other products and to other States. I say the same thing of Sonora & Chihuahua, Alberta & Sask.

Looking to government procurement, always a sore thumb, NAFTA covers procurements of a specified dollar value thresholds by specified federal-level departments and agencies as well as by certain federally-owned enterprises.

NAFTA does not guarantee that particular government contracts or procurements will be awarded to NAFTA bidders but it does aim to provide procedural safeguards. As in the standards area, each nation promises national treatment or most favored nation treatment to NAFTA enterprises. Each of us have agreed to have an open and competitive bidding process with a bid protest system that allows suppliers to challenge awards and procedures. Again, what of the States and Provinces?

V. Intellectual Property

Interestingly, NAFTA has gone beyond CFTA in that there is explicit provision for intellectual property rights. Our Canadian brethren are not too pleased by this. U.S. technology companies are delighted. They have regarded Mexico as a haven for folks not too respectful of proprietary rights in ethical drugs and other items of commerce. NAFTA provides specific standards for protection for patents, copyrights, trademarks and trade secrets that exceed those in most existing bi-lateral and multilateral agreements to which the U.S.A. is party. NAFTA contemplates a generation of detailed provisions governing intellectual property enforcement both internally and at the border. But, what of access to Mexican courts to implement the NAFTA aspirations? Are the "rights" worth much without an assured private cause of action?

We can recall that, in the original analysis, GATT was unconcerned with services.

The NAFTA nations agree to provide national or most favored nation treatment to each others' service providers with certain exceptions implicit in constitutional restraints or very strong public sentiments. Thus, while we must recognize that President Salinas has overseen the privatization of various Mexican organizations such as

airlines and telephone service, we also must recognize the ordinary Mexican's sensitivity concerning railways.

VI. Specific Services

Interestingly, the nations have made a number of commitments concerning specific service industries. This includes the right of licensed attorneys to practice as "foreign legal consultants."

In financial services, the agreement will open the banking securities and insurance sectors in Mexico to U.S. investment after a ten-year transition period.

To the degree that exceptions are allowed, transparent regulations are evoked.

What are the exclusions? Well, the U.S.A. regards intra- national maritime services as peculiarly sensitive. The Jones Act lives, presumably courtesy of the steel industry and unions or a "reserve fleet" strategy or, more likely, the latter fronting for the former. Canada considers its social services and cultural industries are sensitive. Mexico's Constitutional sensitivities run to mineral and rail transport as well as to the mineral exploitation alluded to earlier.

VII. Investment

Looking to investment, NAFTA promises the better of national or most favored nations treatment as well as no restrictions on transfer or repatriation of profits or capital paybacks.

NAFTA goes beyond CFTA in offering investors the option of taking money damage disputes with the host government to an international arbitral panel. As with the services section, the investment chapter is subject to various reservations and exceptions based on existing laws and sensitive sectors.

VIII. Disputes (General)

Looking to dispute settlement generally, disputes under NAFTA (except investor v. state disputes) are to be handled in a manner similar to that contemplated by CFTA. There is a combination of government-to-government consultation mechanisms and arbitration-type panels with special procedures evoked for anti-dumping and countervailing duty cases. In addition, the NAFTA nations promise to enforce commercial arbitral agreements and awards as well as to establish an advisory committee to encourage the use of alternative dispute settlement mechanisms for commercial disputes. Will bureaucrats react in real time?

NAFTA contemplates that there will be a commission or several commissions to resolve various issues and to assist in the evolu-

tion of the relationship. However, I see no evidence that there will be a strong executive.

IX. Anti-competitive Practices

Similarly, in terms of vigorous prosecution of allegedly anti-competitive practices, I see no great promise.

To be sure, there are provisions which indicate that the nations will chat and collaborate but, in reality, there is no assurance that U.S. citizens will have much relief in Mexican courts if PEMEX throws its weight around in Mexico. Canada, of course, had an anti-trust law before the U.S.A. and there is an anti-combines bureau that has a formal liaison with the U.S. Antitrust Division. Others are more qualified to remark on Mexico's new anti-cartelism statute and Competition Commission. There is a practice yet to be implemented. The explicit difference between "absolute" and "relative" monopolistic practices is praiseworthy. But, let it be said that one must doubt that the new Commission will be unconscious of P.R.I. imperatives.

What, then, if a U.S. or Canadian nails PEMEX in a Canadian or U.S. court? Remember, it is a U.S. conceit that our Sherman Act runs "overseas" and only considerations of comity dampen rigorous justice in U.S. courts. Assuming that nothing more is done, will NAFTA's expressions sympathetic to fair competition relieve U.S. courts of their concern for comity vis-a-vis Mexico?

X. Summary

I think it inescapable that we have naught but an agreement to agree. I have not spoken to specialized labor and environmental negotiations. If there is to be a NAFTA, whether or not a truly free market immediately eventuates, leadership is indispensable but not now all that obvious.